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Lawless Policy
TARP as Congressional Failure

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Executive Summary

The U.S. Constitution vests all the "legislative powers" it grants in Congress. The Supreme Court allows Congress to delegate some authority to executive officials provided an "intelligible principle" guides such transfers. Congress quickly wrote and enacted the Emergency Economic Stabilization Act of 2008 in response to a financial crisis. The law authorized the secretary of the Treasury to spend up to $700 billion purchasing troubled mortgage assets or any financial instrument in order to attain 13 different goals. Most of these goals lacked any concrete meaning, and Congress did not establish any priorities among them. As a result, Congress lost control of the implementation of the law and unconstitutionally delegated its powers to the Treasury secretary. Congress also failed in the case of EESA to meet its constitutional obligations to deliberate, to check the other branches of government, or to be accountable to the American people. The implementation of EESA showed Congress to be largely irrelevant to policymaking by the Treasury secretary. These failures of Congress indicate that the current Supreme Court doctrine validating delegation of legislative powers should be revised to protect the rule of law and separation of powers.

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The story of EESA is a story of congressional failures.

Introduction

The Emergency Economic Stabilization Act of 2008 created the Troubled Assets Relief Program, which is authorized to spend up to $700 billion buying financial instruments from banks and other institutions. Congress considered, wrote, and enacted EESA in nine days in the early fall of 2008. Those days passed in an atmosphere of crisis —if not panic. A few weeks earlier, the federal government had seized Fannie Mae and Freddie Mac, two government-sponsored enterprises tied to home mortgages, after weeks of speculation that the two might fail. Two weeks prior to passing the law, Lehman Brothers investment bank failed because of losses on mortgage securities, and Merrill Lynch, the nation's largest brokerage, accepted a merger with Bank of America to avoid bankruptcy. A day later, federal officials took control of American International Group, a global insurance firm threatened by credit default swaps tied to mortgage investments. On September 25, as Congress considered EESA, the nation's largest savings and loan association, Washington Mutual Bank, collapsed and was sold by federal regulators to JP Morgan Chase.[1]

In confronting this crisis, the executive branch and the Federal Reserve acted on its own authority up to a point. Yet by mid-September, the Federal Reserve chairman concluded that Congress should be involved to authorize additional spending to militate against the crisis.[2] Bernanke believed the Fed was "already doing all that it can with the powers we have" and in any case, history showed that "all parts of government" needed to be at work to successfully resolve a financial crisis.[3] Later, addressing President Bush, Bernanke stated that Treasury, not the Fed, should be dispensing funding and that would require congressional approval.[4] That they sought authorization for TARP shows that Federal Reserve officials and members of the executive branch were operating at what they took to be the limits of their authority. The evidence does not suggest either Fed or Treasury officials knowingly acted *ultra vires* in combating the crisis.[5] They sought legitimacy for their actions through law.

Unfortunately, the story of EESA is a story of congressional failures.[6] The U.S. Constitution establishes a government of delegated and divided powers. Congress is a separate branch that should check and balance the other branches to limit government. The Framers also hoped Congress would deliberate about laws rather than simply follow the passions of the moment. Finally, the Constitution gave the legislature the power to make laws. The first section of the first Article of the U.S. Constitution vests "all legislative powers" in Congress. These powers cannot be transferred to any other person or body. The Constitution empowers Congress to make law but not to make legislators.[7] As the Supreme Court has acknowledged, "the system of government ordained by the Constitution mandates that Congress generally cannot delegate its legislative power to another Branch."[8]

This stricture notwithstanding, Congress has frequently granted power to the executive branch or independent agencies. The Supreme Court has validated such grants, provided Congress lays down "by legislative act an intelligible principle to which the person or body [exercising delegated authority] is directed to conform."[9] This nondelegation doctrine led to the Supreme Court overturning part of the New Deal legislative program which, in turn, actuated a presidential threat to the judiciary and subsequently a more compliant judiciary.[10] Consequently, for much of the time since the New Deal, "the courts have failed to overturn even egregious instances of standardless delegation."[11] It remains true, however, that the nondelegation doctrine and the "intelligible principle" test have not been overturned and remain good law.

In the so-called *Benzene Case*,[12] Justice William Rehnquist explicated the nondelegation doctrine. First, he argued the doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress,

the branch of our Government most responsive to the popular will." Second, Congress must provide an intelligible principle "to guide the exercise of the delegated discretion." Third, such a principle provides the judiciary with "ascertainable standards" to assess the validity of a delegation."[13]

I focus here on the first part of Rehnquist's analysis. Congress can choose the ends and the means of public policy. Of the two, the ends would be more important since the goals of a policy should determine its means. The goals of a policy would also be essential to administrators as a guide to exercise delegated discretion and to judges as a means of assessing the validity of the grant of power. Congressional control over the goals of a policy thus advances the rule of law.

Rehnquist notes the importance of Congress, the branch closest to the popular will, in making important policy choices. Congress, and the voters who elect its members, are interested in and as capable as anyone else of choosing among such goals and the general values they embody.[14] In this way, congressional determination of the goals of policies serves democratic values.

Rehnquist's analysis implies that if Congress is to make the "important choices" for policy, it should determine tradeoffs among goals and the values they embody.[15] If Congress stipulates a hierarchy of ends for a policy, both those who implement the law (agency personnel) and those who enforce the law (judges) would have a foundation to assess the constitutionality of a delegation. If Congress simply sets out the ends of policy and assigns no priorities among them, neither the holder of discretion nor a court would have a guide to implementing or assessing the law. Moreover, in this latter case, Congress could not be said to have made the important choices affecting a policy. The choice might be made by the recipient of a delegated power to the detriment of both the rule of law and popular control of government.

The first section of this analysis will show how Congress failed to fulfill these constitutional obligations prior to passing EESA. The second section will examine how its failure to legislate deprived Congress of influence over the implementation of EESA. The concluding section explores the implications of this case study for Congress and for constitutional doctrine.

Enacting TARP

What should we have expected from Congress regarding the financial crisis of 2008? Article I of the Constitution vests "all legislative powers" in Congress. We should expect Congress to exercise those powers rather than delegate them to others. Congress is one branch of American government, a part of a system of checks and balances designed to limit political power and its abuses. We should expect Congress to check and limit the other branches of government. Congress is also meant to be a deliberative institution that carefully considers its legislative duties. Finally, Congress is part of a republican government and thus should be accountable to the people of the United States. On each of these counts, Congress came up short with regard to EESA.

We should expect Congress to check and limit the other branches of government.

The Rule of Law

The EESA authorizes the secretary of the Treasury to "establish the Troubled Asset Relief Program (or 'TARP') to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the secretary, and in accordance with this Act and the policies and procedures developed and published by the secretary."[16] It defines "troubled assets" as "residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial-market stability" and "any other financial

instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial-market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress."[17]

Congress stipulates that the secretary may purchase any mortgage asset or any financial instrument that promotes financial-market stability.[18] The section of the law defining "troubled assets" places two insignificant constraints on the secretary's discretion. The secretary is told to consult with the Fed chairman before purchasing financial instruments not related to mortgages. This admonition cannot be enforced; it is more advice than law. The second constraint requires the secretary to transmit his reasons for buying nonmortgage instruments to the appropriate congressional committees. Here Congress is trying to control their newly empowered agent. The secretary is required to inform the legislature of his decisions about troubled assets after the fact.[19] EESA does not say what Congress might do after receiving this information; it is assumed that disclosure to the legislature in itself constrains the power of the secretary.

This section also marks the first appearance of a goal for the policy and thus of Congress's attempt to state an "intelligible principle" to guide the secretary. The secretary's goals in purchasing assets will be:

- "promoting financial-market stability"
- protecting "home values, college funds, retirement accounts, and life savings"
- preserving "home ownership"
- promoting "jobs and economic growth"
- maximizing "overall returns to the taxpayers of the United States"[20]

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Some of these purposes show up again in Section 103, entitled "Considerations." In carrying out the law, this section admonishes the secretary to take into consideration, in addition to the purposes of the law already stated, the following goals:

- minimizing the national debt
- keeping families in their homes
- stabilizing communities
- efficiency of spending
- avoiding several kinds of discrimination in determining which firms are eligible to participate in TARP
- subsidizing firms "serving low- and moderate-income populations and other underserved communities" that were harmed by the collapse of Freddie Mac or Fannie Mae[21]
- stabilizing counties and cities[22]

Finally, at another place, Congress sets out a final goal:

- prevent unjust enrichment of financial institutions[23]

The law offers a baker's dozen of intelligible principles to guide the spending of $700 billion dollars by the secretary of the Treasury. Many of these "intelligible principles" are little more than slogans—lacking any concrete indications of what they might mean or how they might constrain the secretary. Two of the goals, however, have concrete directions.

The final goal—preventing unjust enrichment of financial institutions—comes closest to serving as a useful guide to the secretary. The secretary is directed to "take such steps as may be necessary to prevent unjust enrichment of financial institutions participating in a program established under this section, including by preventing the sale of a troubled asset to the secretary at a higher price than what the seller paid to purchase the asset." Congress then exempts purchases from some institutions from this rule.[24] The secretary decides what "steps" will be taken to enforce this rule. But in buying troubled assets, the secretary may not pay more for them than the seller did. That stipulation constrains the secretary's discretion, albeit in a minimal way.

The law also offers some specific guidance about the fifth goal, maximizing the return for taxpayers. The law specifies that the secretary should receive in exchange for buying

a troubled asset a warrant to buy common or preferred nonvoting shares (if the firm in question has securities traded on a national exchange). Other firms would give the federal government stock or a senior debt instrument. The secretary would receive such stock or debt "to provide for reasonable participation by the secretary, for the benefit of taxpayers, in equity appreciation in the case of a warrant or other equity security, or a reasonable interest rate premium, in the case of a debt instrument." Judging what is reasonable remains the job of the secretary, who both sets the price to exercise a warrant and determines exceptions to these rules.[25]

Had Congress set a single goal or "intelligible principle" for EESA, the courts or a congressional committee would have been better placed to oversee and control executive discretion in implementing the law. Yet in EESA, as in many laws, Congress set out multiple goals. Congress did not attempt to establish any hierarchy among the 13 goals in EESA. Perhaps promoting financial-market stability merits pride of place over the others, but that is just a guess; the legislation does not establish that priority. Perhaps "considerations" are not purposes and thus should occupy lesser weight in the secretary's judgment, but that is also a guess. Two of the purposes of the law are listed among its considerations; perhaps a consideration is a purpose by another name. (Promoting financial-market stability is mentioned second among the considerations, which may suggest it ranks behind maximizing returns for taxpayers.) The secretary has a list of goals, and the authority to purchase assets. He has no guidance from Congress on how to weigh goals when tradeoffs must be made. From that list of goals and his own judgment about tradeoffs, the secretary must concoct an intelligible principle for making decisions— a principle he alone will formulate. In that regard, he is exercising the power to make laws, a power the Constitution reserves to the Congress. In EESA, Congress enacted goals aplenty, but they provide at best the raw materials of an "intelligible principle." Those goals, however, could not guide implementation of the law nor serve as a proper standard for evaluating the delegation of power and resources in the law. The raw materials of a intelligible principle were not enough to preserve the rule of law or separation of powers in this case.

Neither Check nor Balance

The Framers of the U.S. Constitution sought to both empower and to constrain the federal government. Voters would enforce one kind of restraint on political power, but the ballot alone was not adequate to the task. Hence, the power of the federal government would be divided among its various branches or "departments." Those who administered each branch should have "the necessary constitutional means, and personal motives, to resist encroachments of the others."[26] Each branch should be expected to resist the efforts of other branches to gradually concentrate power. Congress thus had an affirmative obligation under the American system to resist any efforts by the executive branch to engross its own powers. This might be called Congress's structural obligation in the American system.

Treasury Secretary Paulson initially proposed allowing his office to purchase "mortgage-related assets" in order to enhance market stability and protect the taxpayer. In the proposal, the secretary was also charged with regular reporting to Congress about his use of the authority. The secretary's actions would be exempt from judicial review.[27] Congress did not simply rubber-stamp Secretary Paulson's original TARP proposal; congressional leaders were concerned about the proposal's grant of power to the Department of the Treasury and the Federal Reserve. Yet, despite these concerns, Congress failed to check the executive in the final law.

This failure to check the executive branch is most clear in the exercise of authority that should be dear to the legislative branch: spending public money. The law limits the secretary's authority to purchase troubled assets to $250 billion. However, that ceiling

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may be broached if *the president* certifies that it need be; the new limit will be $350 billion. Thereafter, if the president "transmits to the Congress a written report detailing the plan of the Secretary" to buy more troubled assets beyond the $350 billion, the secretary may do so unless Congress agrees to a joint resolution disapproving of the plan.[28]

The law offers an illusion of congressional oversight and control over the spending of the $700 billion. Where Secretary Paulson had originally wished to spend the entire sum, Congress broke up the $700 billion into three tranches. The second and third tranche appear to require additional decisions to go forward with spending. In fact, the president need only certify the need for the second tranche and file a plan for spending the third tranche. It is up to Congress to stop the spending of the third tranche by passing a joint resolution of disapproval within 15 days. Even if both houses of Congress passed a joint resolution of disapproval, the president would have to sign it; if he refused to sign, Congress would have to override his veto.[29] The executive who requested the money was unlikely to agree to a resolution precluding his request. Congress could thus only stop the release of the third tranche if two-thirds of both houses agreed to override the president. Even a Republican president would likely maintain enough support to sustain his veto of a resolution of disapproval. In sum, Congress was passive regarding the crucial question of spending public money on TARP. And EESA sets out nothing more than an illusion of legislative control of public spending —an illusion spun by Congress itself.

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Congressional weakness here becomes clear if we consider the path not taken. Congress could have stipulated that the third tranche could only be spent after a joint resolution of approval by both chambers. The result would be something more like the government foreseen by James Madison. The executive would get part of the powers it sought, but Congress would participate in a meaningful way in the ongoing project. By requiring a positive affirmation on the final tranche, Congress would also have bought time to investigate the need for the TARP program and the success or failure of the initial spending. Instead, Congress put on itself the burden of proof to stop the spending and the program.

Congress made a show of resisting the initial proposal, but in fact, EESA actually grants more power to the secretary than Paulson's original bill. The first draft proposed giving the secretary the power to purchase only "mortgage-related assets from any financial institution having its headquarters in the United States."[30] EESA, as noted earlier, gives the secretary the power to buy both mortgage-related assets and "any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial-market stability." Paulson went to Congress asking for a broad power to buy one kind of asset and came back with the authority to buy "any financial instrument." Congress did, as noted earlier, require the secretary to obtain warrants for future purchases of assets and to not buy assets at a higher price than the seller paid for them initially. On the whole, however, Congress empowered rather than constrained the secretary.

Deliberation

In a representative democracy, the legislature should refine the voice of the people, leading to legislation that serves the public good.[31] Deliberation by the legislature—developing alternatives, collecting and evaluating information, weighing consequences and refining bills—offers a means to that end. The Constitution itself promotes deliberation. A law must pass both houses of Congress and be signed by the president. Members of Congress are accountable to different constituencies and are elected to varied terms. The institutional design fosters a lawmaking process that moves slowly, especially in response to public sentiment, and encompasses many interests

and viewpoints.[32] Congress deliberated poorly before passing TARP.

It will be said that Congress had to act quickly on EESA. To have deliberated would have been to risk the welfare of the nation. Certainly the Bush administration pushed hard for Congress to act quickly on the EESA. On September 16, the Reserve Primary Fund, a $65 billion money market fund, reported that its customer accounts had fallen to 97 cents on the dollar largely because of the decline of its investments in Lehman securities.[33] Administration officials feared a run on money market funds as part of a general banking panic.[34] Chairman Bernanke and Treasury Secretary Paulson quickly went to Congress with a bailout plan for the financial sector in hand. Bernanke told members on the evening of Thursday, September 18: "If we don't do this, we may not have an economy on Monday."[35] His presentation to the House and Senate leaders on Thursday evening reflected his fear and fostered theirs. A contemporary news report conveys the tenor of the meeting:

> We are facing a financial crisis on multiple fronts, the Fed chairman said. Despite our actions over the past several months, investors are still losing confidence. There's a run on the money-market funds. The last two big investment banks are under siege. The situation is severe, he said, and the Fed is out of tools. If the problem isn't corrected, the United States could enter a deep multi-year recession akin to Sweden or Japan in the early 1990s. *We are headed for the worst financial crisis in the nation's history*. We're talking about a matter of days.[36] [emphasis added]

The next day the chairman of the Federal Reserve told House Republicans on a conference call: "If we don't get this, it will be nothing short of a disaster for our markets."[37]

In the end, Congress accepted Bernanke's demand for rapid action and concocted and passed EESA within two weeks. It did so because members accepted the administration's view that a bill must be passed quickly or the nation faced an economic calamity. Not everyone in Congress agreed. Some compared the administration's warnings that the economy would collapse unless Congress moved the bill to warnings they received regarding the invasion of Iraq. Rep. Gene Taylor (D-MS) asked, "Where have I heard this before? 'The Iraqis have weapons of mass destruction, and they're ready to use them.' I'm in no rush to do this."[38] Prominent Republicans also questioned the rush to judgment. Mike Pence (R-IN) remarked: "This is going way too fast. The American people don't want Congress to make haste with the financial recovery legislation; they want us to make sense." Sen. Richard Shelby (R-AL) argued for a different path: "Congress must immediately undertake a comprehensive, public examination of the problem and alternative solutions rather than swiftly pass the current plan with minimal changes or discussion. We owe the American taxpayer no less."[39] Some experts doubted the need for quick action. Alan Blinder, an economist at Princeton University, remarked, "I totally disagree that this needs to be done this week. It's more important to get it right." A petition organized by the economist John Cochrane of the University of Chicago also criticized Congress for moving quickly without allowing more time for debate.[40] Allan Meltzer, an economist at Carnegie Mellon, was blunter about the demand for speed: "This is scare tactics to try to do something that's in the private but not the public interest. It's terrible."[41] Those members of Congress and experts did not prevail. But their views make it clear that Congress had plausible reason to deliberate in late September on EESA and chose instead to rush to judgment.

Consider the four ways Congress failed to deliberate regarding this matter:

Alternatives. Congress identified and considered three alternatives (apart from the status quo) to deal with troubled assets. Secretary of the Treasury Hank Paulson proposed the first alternative in a bill that ran 849 words—

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approximately two book pages. It delegated considerable discretion to the Secretary of the Treasury to deal with the problem.[42] The second alternative appeared to be quite different from Paulson's original proposal. It comprised over 18,000 words and contained language that appeared to constrain the secretary's judgment. That version was rejected by the House of Representatives on September 29, 2008. The third version of TARP was identical to the second version, save for an additional title increasing the sum covered by Federal Deposit Insurance and a small change related to the pay of the Special Inspector General.[43]

Each of these measures proposed to give members of the executive branch broad powers to purchase troubled assets. These measures agree about what should be done about the bailout and did not represent alternatives for policymakers. Beyond that agreement, the three proposals seemed to be of two kinds: one that granted broad authority to the secretary of the Treasury and another (comprising the congressional bills) that constrained that authority. In fact, as shown earlier, this appearance was deceiving. Paulson's version appears to have imposed more constraint as to means on the secretary than the other two versions of EESA. In any case, the language in the second and third versions that appeared to limit the secretary's discretion actually put few constraints on him.[44] Congress sought to add rules on executive compensation and spending on foreclosures.[45] The second and third versions added several conditions to the law: an oversight board appointed by Congress, limits on executive compensation at firms receiving funding, and warrants that give the government stock in banks.[46] In sum, Congress considered only one alternative (buying troubled assets), which took two forms.[47] As we shall see, Congress had little capacity to enact its limited goals concerning executive compensation and foreclosures.

Experts of different political outlooks proposed alternatives that fundamentally differed from the Treasury plan. Some argued that the federal government should offer loans to banks with their troubled mortgage debt serving as collateral. Others argued the government should act as a well-endowed hedge fund that purchased higher quality mortgage securities and other bank assets.[48] Liberals argued that the federal government should restructure mortgages to preclude foreclosures and support the housing market. Conservatives called for a temporary cut in the capital gains tax and suspending accounting rules in order to direct funds to capital markets.[49] Each of these alternatives was proposed by individuals or organizations from the broad mainstream of American politics. Congress did not consider any of these proposals in any depth prior to enacting TARP.

Information. Members of Congress collect information in several ways. They hear from constituents and from groups whose interests bear on their reelection. Staff members and congressional agencies provide research and findings. Congress also holds hearings by specialized committees and subcommittees to learn more about issues or bills. Debates in committees or on the floor of the House or Senate may also provide some members with new information about an issue. During the process of enacting EESA, members of Congress received a great deal of information from their constituents, information that indicated widespread opposition to the bill prior to September 29 and more support thereafter.[50] More reliable measures, like surveys, suggested that the public was ambivalent about the bailout.[51] Congress largely ignored the formal process of eliciting information about troubled assets and policy alternatives. Congress held two days of committee hearings, one on each side of Capitol Hill. Even these limited hearings provided limited information. Fed Chairman Ben Bernanke's testimony to the Senate Banking Committee was nine paragraphs long.[52] Paulson and Bernanke were the main sources of information to congressional leaders. Congress also debated the versions of TARP on seven different days, one day for each $100 billion authorized for spending by the law.[53] The policy

committees of both parties did issue reports on the bill to inform members; these reports, however, appear to be largely summaries of the provisions of the bill.[54]

Consequences. Congress did not try very hard to estimate the *policy* consequences of TARP. Members assumed that affirming the status quo would lead to an economic catastrophe, an outcome they had learned about from the secretary of the Treasury and the chairman of the Federal Reserve System. Congress delegated the task of estimating the consequences of the actual bill to the secretary of the Treasury, who was expected, in part, to deliberate with the chairman of the Federal Reserve to determine how buying particular troubled assets might affect a multitude of goals or some tradeoff among them. Congress presumably struggled hard to estimate the political consequences of voting for or against the bill. The politics of the situation appeared to pose a choice between an oncoming economic catastrophe and an electorate enraged by bailing out banks. This stark choice hardly contributed to sensible deliberation about public spending.

Refinement. Deliberation includes refining provisions of a law by carefully drafting a bill.[55] Congress did add a few conditions to Secretary Paulson's initial proposal as noted earlier. The final law shows little effort at draftsmanship. The Secretary is given the power to buy two kinds of financial instruments, the first being a proper subset of the second. Much of the second version of the bill adds "considerations" and other verbiage that have little practical import. Congress and the Bush administration drafted TARP in no more than nine days: two weekends and a single workweek. The lack of refinement seems a consequence of the failure of deliberation.

Congress did a poor job of deliberating regarding EESA. Its leadership deferred to leaders of the executive branch and failed to show a seemly skepticism about the bailout. In the end, Congress resorted to less seemly methods to pass the law. After the initial rejection of EESA, congressional leaders purchased the necessary votes for passage by offering funding for projects favored by members who had voted "no" earlier. In other words, the leaders bought the passage of EESA by wasting perhaps $150 billion on what were essentially bribes.[56] Vote-buying, not deliberation, brought victory on October 3.

Failure of Accountability

One purpose of EESA was providing public accountability for the purchase of troubled assets.[57] Congress seemed responsive to the electorate in both votes on EESA. The first vote taken on September 29 failed in the House of Representatives. Afterwards, members of both parties said prior to the first vote "those who voted 'no' had encountered too much hostility for the bill among their constituents, and were worried that a vote in favor would be political suicide."[58] The same day of the negative vote, the Dow Jones Industrial Average dropped 778 points. Public opinion seemed to shift thereafter: "Congressional offices reported a shift in angry calls from constituents, with some now demanding that lawmakers take some corrective action—a distinct change from the outpouring of public opposition that contributed to the defeat of the plan."[59] Four days after the rejection, Congress passed EESA.

Yet there is more to accountability in a republic than simply enacting what the people want, especially in a moment of crisis and near panic. Voters should be able to hold Congress responsible for legislating and apportion credit or blame in a later election.

It would be difficult to hold Congress accountable for the bailout under TARP. By identifying many goals for the law, members of Congress could always blame a shortcoming on the incompetence of the secretary of the Treasury.[60] If financial markets did not stabilize, the secretary could be blamed for not achieving a goal of the law. If financial markets stabilized but taxpayers resented the costs, members could note that the law had demanded protection for taxpayers. And so

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on. In a sense, the responsibility for the success or failure of the law had gone to the secretary—along with the vast power delegated by Congress. The secretary (and the executive branch) more generally appeared willing to accept this responsibility. In contrast, Congress wished to avoid being blamed for what might go wrong in a difficult project undertaken a month before a national election.

Voters might enforce some accountability on the executive branch which is, after all, headed by an elected official. But the incumbent in 2008 was not running for reelection. His successor might well run in 2012. By then, the TARP program would likely be a minor factor in a presidential race. In 2009 and 2010, the public would find it hard to follow the work of the technocrats at Treasury on a complicated matter like the bank bailout. Congressional delegation of power attenuated accountability over TARP.

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For its part, Congress defined accountability as oversight of delegated authority. One of the main instigators of TARP, Sen. Christopher Dodd said, as the bill was being written: "We need to offer some assurance to the American taxpayer that Congress is watching. One of the things that got us into this mess was the lack of accountability and the lack of oversight that was occurring, and I don't think we want to repeat those mistakes with a program of this magnitude."[61] EESA created a Financial Stability Oversight Board charged with reviewing the policies of the secretary.[62] Members demanded and obtained an oversight board for the program.[63]

The Financial Stability Oversight Board comprised the secretary of the Treasury, the chairman of the Fed, the director of the Federal Housing Finance Agency, the chairman of the Securities Exchange Commission, and the secretary of Housing and Urban Development.[64] This group is a curious choice to oversee the implementation of EESA on behalf of Congress acting as representatives of the American people. Two of the members, the secretary and the Fed chairman, were formulating and implementing the policies that would be reviewed. The chairman of the Securities and Exchange Commission was involved at times with policymaking, though not at crucial points. The director of the Federal Housing Finance Agency regulated Fannie Mae and Freddie Mac. The HUD secretary oversees public housing and related policies. This group might have served as a broadly informed discussion and policymaking group. (In fact, it did not, since actual policymaking fell to a group of four senior officials, including Bernanke.)[65] But it could hardly provide independent oversight to policymaking and implementation undertaken by its members.

The Congressional Oversight Panel created by EESA consisted of five members appointed by the leaders of both parties in Congress. They were charged with issuing reports evaluating the secretary's use of authority granted under the law; the impact of troubled asset purchases on the financial markets and financial institutions; whether the information gleaned by transactions had contributed to market transparency; and—as a catchall—"the effectiveness of foreclosure mitigation efforts, and the effectiveness of the program from the standpoint of minimizing long-term costs to the taxpayers and maximizing the benefits for taxpayers."[66] The other agent of oversight—the Special Inspector General—was empowered "to conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets by the Secretary of the Treasury under any program established by the Secretary" under the authority delegated by the law.[67]

In the EESA, Congress authorized a large sum to be spent by the secretary of the Treasury, at his discretion, to achieve a multitude of ill-defined and conflicting goals. Congress hoped to compensate for its failure as a legislature by appointing three panels to oversee the secretary and to guard against possible criminal conduct. Such oversight may be better than none at all, but Congress might have written a law with clear goals and priorities, a law that would guide and constrain the executive branch—thereby laying a foundation of political accountability. In-

stead, Congress largely said to the executive branch: "Here is a problem, deal with it."[68] Having done that, how well did Congress follow up in overseeing the exercise of authority that had been delegated to the secretary of the Treasury?

Implementation

The enactment of EESA did little to foster confidence in capital markets. Both the Dow Jones Industrial Average and the broader S&P 500 Index dropped 22 percent in the first eight days of October 2008. Overseas markets experienced similar drops.[69] Shortly after the bailout bill passed in the United States, British officials announced plans to directly buy equity stakes in some of their troubled banks.[70] By October 11, eight days after EESA passed, the *New York Times* reported that the Bush administration had dropped the plan to buy troubled assets in favor of buying equity in banks. "We can use the taxpayer's money more effectively and efficiently, get more for the taxpayer's dollar, if we develop a standardized program to buy equity in financial institutions," Treasury Secretary Paulson said.[71] Later, Treasury would emphasize that credit market conditions had become much worse while Congress passed EESA and in the week thereafter. Secretary Paulson and Chairman Bernanke decided "the fastest, most direct way was to increase capital in the system by buying equity in healthy banks of all sizes. Illiquid asset purchases, in contrast, require much longer to execute."[72]

As we saw, the discussions prior to passing EESA assumed that the secretary of the Treasury would use his new authority to purchase troubled assets. Paulson's change of policy did not violate EESA, an indication of the breath of the delegated authority given by Congress to Treasury. Indeed, EESA allowed the secretary to purchase "any financial instrument" that might, in his view, contribute to market stability. Paulson's quick switch to re-capitalizing banks confirms the unchecked discretion given to the executive branch. As Sen. Jack Reed later said, "We [Congress] authorized the program but the specific beneficiaries, the specific details were worked out by Treasury."[73]

The switch to recapitalization opened up new possibilities for spending the $700 billion authorized by EESA. Congress had imposed few restraints on spending the money. If the Treasury secretary had discretion to buy bank shares, why not funds for other troubled businesses? After all, the secretary was authorized to buy "any other financial instrument . . . to promote market stability" provided he consulted with the Fed chief and informed Congress. Advocates were soon pressuring Treasury to stretch TARP over insurance companies, transit agencies, and auto companies.[74] In late October, two troubled auto companies—General Motors and Chrysler—began pressing their case for subsidies from the U.S. government, initially to attract private investors to a merger of the two. EESA would be a source for the subsidies. Treasury initially resisted. A Treasury spokeswoman said such funds "should be focused on financial institutions."[75] But Congress had not debated recapitalization either, and shares in the car companies (or their financial services subsidiaries) were certainly financial instruments. The language of EESA did not preclude bailing out auto companies. For a time, the Treasury secretary prevented the government from taking this path.

The floundering automakers persisted. They and members from Michigan argued that TARP money should go to the financial arms of the automakers who would, in turn, provide credit for purchasing cars, thereby reviving the industry. The *New York Times* reported that the Bush White House "indicated some agreement with this argument.[76] Soon related businesses joined the argument. The chairwoman of the National Automobile Dealers Association proclaimed, "A well-capitalized, financially sound dealer network is essential to the success of every automobile manufacturer. Any government intervention should include provisions to preserve the viability of dealers."[77] EESA had been in force for a month.

The enactment of EESA did little to foster confidence in capital markets.

Congress had not considered bailing out the auto companies while passing EESA. The authority it did grant, however, proved to be broad enough to fund this bailout.

The separation of powers and a Senate rule acted as a brake on the bailout of the auto companies for a time. The House was willing to enact the bailout. To allocate the money to the automakers, however, Congress would have to overcome a filibuster in the Senate. The votes were not there in the middle of November, largely because many GOP senators opposed the bailout.[78]

In early December, the auto industry as a whole announced its worst month in sales in 26 years. General Motors reported it would become insolvent soon without federal subsidies; its November sales had fallen over 40 percent from a year earlier. The Speaker of the House, Nancy Pelosi, said that bankruptcy was out of the question for the automakers and that a deal for support would be forthcoming.[79] In mid-December, Pelosi proved to be correct. The Bush administration announced that part of the EESA money would subsidize two failing auto manufacturers, General Motors and Chrysler. Both would sign emergency loan agreements with Treasury and then immediately have access to $4 billion. General Motors could then lay claim to over $9 billion more in January and February of 2009, if Congress released the final tranche of EESA funding.[80] At this point, the term "any financial instrument" included both shares in an auto financing company and loans to General Motors and Chrysler.[81] Congress had not considered bailing out the auto companies while passing EESA. The authority it did grant, however, proved to be broad enough to fund this bailout.

Meanwhile, as the auto companies slowly won their battle, Treasury announced another effort to stabilize the financial markets. In late November, this time the government provided a backstop for assets owned by Citigroup to prevent its failure. The plan opened the possibility of $290 billion in losses for taxpayers.[82] The new plan involved a portfolio of troubled assets at Citigroup. The bank would take first $29 billion of losses in the portfolio on its own. After that, various agencies of the United States government will absorb 90 percent of any additional losses.[83]

By the end of November 2008, the Treasury department had embraced three different bailouts under EESA: the original troubled assets model, the recapitalization of banks, and the asset guarantee for Citibank. The Bush administration itself was well on the way to a fourth model in the bailout plan for General Motors and Chrysler. The executive made use of the wide discretion offered by EESA.

Unlike the Treasury, Congress did little about its goals of limiting executive compensation and reducing foreclosures. By mid-October, Treasury had come up with guidelines on executive compensation. Banks that received public money "will have to follow some general rules on paying their top five executives. They will be restricted from offering golden parachutes, as rich severance packages are called, and they will have to pay more taxes if an individual's compensation exceeds $500,000." Barney Frank was quoted as saying the plan did not go far enough.[84] Congress did nothing to act on his dissatisfaction.

Similarly, in late November, it was reported that "Treasury and Fed officials are under intense pressure from Congress to spend money on reducing foreclosures," the other goal set by Congress for the law.[85] Inside Treasury, however, it appeared that whatever was being said, Congress did not really wish to spend money on preventing foreclosures because "members understood the poor optics of having the government write checks when some would find their way into the hands of 'irresponsible homeowners.'"[86]

Both of these congressional concerns continued to fester even if Congress cared more about executive compensation. Both concerns could have been addressed initially if Congress had written a law that actually guided the implementation of EESA. Congress could have specifically required both compensation guidelines and spending to assist the indebted. Of course, had Congress actually written a clear law, they would have had to establish compensation guidelines (and run the risk of making the crisis worse) or spend directly on

preventing foreclosure (and run the risk of being blamed for wasting tax dollars on speculators). The EESA delegation allowed Congress to have its cake and eat it too. They could complain about Treasury's obstinacy (thereby claiming credit for wanting to help) while avoiding any concrete actions and attendant risks.

A pre-existing congressional oversight unit, the General Accountability Office, moved quickly. A few days after the law passed, GAO had put together a 20-member team to oversee the actions of Treasury under EESA.[87] But GAO was the exception. Most oversight bodies moved slowly. By late November, a federal prosecutor from New York, Neil M. Barofsky, had been nominated to be special inspector general for TARP, but he had not been confirmed.[88] The oversight panel began weakly. Congress did not appoint all its members until November 14. The panel first met on November 26, more than seven weeks after EESA passed in Congress. In early December, the panel had only had a few briefings with Treasury officials; the panel's head noted that she and its other members "were still in the early stages of their research." Elizabeth Warren, the head of the panel and a Harvard professor of law, testified about the difficulties faced by Congress and the panel. She noted that lawmakers "have just been stunned by these economic and financial developments. There wasn't time even to develop a coherent list of questions to ask Treasury about what it's doing and what it plans to do—and whether either of those are likely to address what's going wrong. Our role is to make sure that the right questions are asked as early as possible." The first report of the oversight panel thus laid out "the central questions that Treasury should be addressing as it spends the taxpayers' money." Warren also said the panel would be advising Congress on policy oversight, not procedural oversight.[89] But it was not until early December that the panel was planning to set standards for evaluating Treasury's work. Meanwhile, for two months Treasury Department officials had been making policy and spending hundreds of millions of dollars without an intelligible principle or coherent set of goals from Congress. In fact, by early December most of the money Treasury would spend on banks on TARP had already been committed.[90]

On December 2, 2008, GAO reported on the program of capital injections into banks. Their first recommendation was "work with the bank regulators to establish a systematic means of determining and reporting in a timely manner whether financial institutions' activities are generally consistent with the purposes of [recapitalizing the banks] and help ensure an appropriate level of accountability and transparency." The second recommendation was to "develop a means to ensure that institutions participating in CPP [the capital injection program] comply with key program requirements (e.g., executive compensation, dividend payments, and the repurchase of stock)."[91]

Just over a week later, the Congressional Oversight Panel issued its first report. It began by noting the dire economic circumstances and reporting that the federal government had spent $1,900 for each American family under EESA. But the report offered nothing about how Treasury had spent over $200 billion. Instead, as Elizabeth Warren had promised, the panel laid out three major questions for its work: "who got the [TARP] money, what have they done with it, how has it helped the country, and how has it helped ordinary people?"[92] These questions were followed by 10 questions, which yielded, in turn, more questions. In all, the panel posed over 40 questions for the TARP program.[93] The panel did not stop there: the pages posing these questions were followed by 21 pages of narrative and analysis explicating issues related to TARP. These pages mark the first time any part of the legislative branch had publicly posed difficult questions about the program and the future plans of Treasury officials.

The panel's analysis is revealing. Among the questions posed was: "What is the scope of Treasury's statutory authority?"[94] If Congress had actually provided Treasury with an intelligible principle to carry out EESA, why would

The EESA delegation allowed Congress to have its cake and eat it too.

The oversight panel's question suggests the specification of the executive's authority is not at all apparent from the law.

Congress's own panel be querying Treasury about the limits of its authority under the law? If the guidance had been set out in the law, the panel (and the public) could have answered the question by consulting the law. Instead, the oversight panel's question suggests the specification of the executive's authority is not at all apparent from the law. A second report asked Treasury whether its authority covered "other businesses, such as commercial real estate, manufacturers of consumer products, and other businesses not directly involved in financial services."[95] The panel's questions indicate both the extent of EESA's delegation to the executive and the lack of control exercised by Congress from the start.

On December 10, the House Financial Services committee held hearings on how Treasury was implementing the bailout. Echoing the GAO report, members insisted that Treasury monitor what banks did with the federal money that they received. Members also demand that Treasury tie more strings to that capital to make sure it would be used to provide credit to homeowners, small businesses, and consumers. And they demanded that Treasury develop a plan to prevent foreclosures.

Congress also tried to get some leverage over the bailout. Representative Frank warned Treasury officials that Congress was unlikely to approve the next $350 billion installment in the overall $700 billion bailout program unless it was convinced the Treasury was effectively measuring the lending by participating banks. Neil Kashkari, the interim secretary of the Treasury for financial stability at Treasury, agreed to a request from lawmakers that he summon bank executives to explain how they are using federal money. He also argued that Treasury's action had produced market stability. However, Kashkari maintained that imposing foreclosure conditions on banks receiving capital might keep them out of the bailout and be counterproductive.[96]

In winter, as in fall, Treasury focused on market stability. The primacy Treasury accorded market stability may be seen in their response to the first report of the oversight panel. The panel had asked for Treasury's strategy in implementing EESA. The department responded by mentioning three purposes: market stability, preventing foreclosures, and protecting taxpayers. The next sentence, however, mentions only one purpose: "The measures taken by Treasury under the Emergency Economic Stabilization Act are part of a comprehensive strategy by Treasury and the federal regulators since the onset of the crisis to stabilize the financial system and housing markets, and strengthen our financial institutions."[97] Market stability was an essential means, in Treasury's view, to all other goals, not least "helping American families."[98] In a sense, little had changed from October to December. Congress had many goals in mind for the bailout and little willingness or ability to make Treasury pursue its purposes. Congress had added a great deal of language in EESA about its goals and concerns. But the law itself had done little to change Treasury's undertaking.

The second report of the oversight panel noted that Treasury did not respond to most of the questions posed by its first report. The panel could see no "evidence that Treasury has used TARP funds to support the housing market by avoiding preventable foreclosures." It also cast doubt on the propriety of the policies pursued by Treasury, especially the shift from buying troubled assets for recapitalization. The panel argued that Treasury should set up metrics to measure the effects of their policy. Indeed, its report made it clear that Congress would be dependent on Treasury for the data and analysis assessing the effects of the agency's activity, if Treasury undertook such an evaluation. The panel also found many of Treasury's responses irrelevant to TARP: the favorable policy consequences cited by Treasury did not come from spending EESA money. Throughout the second report the panel indicated a strong preference for foreclosure relief and concluded that this policy goal had received little attention from Treasury.[99]

The panel asserted that Congress had clearly intended for Treasury to focus on foreclo-

sure relief. Indeed, it was one of the 13 goals mentioned in the law. As we have seen, however, whether "foreclosure relief" actually mattered is open to question. Moreover, if Treasury was correct that imposing foreclosure conditions on share purchases would undermine the goal of fostering market stability, then there was an unavoidable tradeoff among the goals in the legislation, and Congress had provided no guidance in making that tradeoff. Within its broad delegation of authority, Treasury could legitimately make a choice between stability and foreclosure relief without violating EESA. The panel was reading its own (and perhaps Congress's) preferred tradeoff back into the law, but EESA is just a list of goals, not a guide for choice in implementation, and certainly not a standard the oversight panel could enforce.

By early 2009, Congress seemed willing to become more active. Treasury had used up the first half of the bailout authority. It then delayed asking for more. Meanwhile, Representative Frank was at work drafting a bill to require the Treasury to spend money on reducing foreclosures and mortgage rates. It would have required the new administration to develop a plan by March 15 to use at least $40 billion of the $350 billion to prevent home foreclosures.[100] Frank's fellow Democrats wanted tougher caps on executive compensation and more pressure on the bailed-out banks to lend.[101] Both moves seemed to reflect a more assertive Congress, but both also bespoke prior failures. Congress had done little to constrain the executive in the first two months of the bailout. The COP's work in December had not elicited a serious response from Treasury, much less a change in policy. Treasury had selected a goal and a means to that end; Congress and its panel complained—to little effect.

Obama's economic team set about persuading lawmakers that the new administration would make better use of the bailout money than the Bush administration had.[102] The outgoing president, on behalf of the incoming one, asked Congress to release the remainder of the TARP funds. Treasury argued that the banks needed more money. Obama's advisers believed that denying the next tranche of funding might jeopardize the stability of the banking system. Lawrence Summers, Obama's leading economic adviser, promised to devote $50 billion to $100 billion "to a sweeping effort to address the foreclosure crisis." He also promised to have greater transparency about capital injections; to measure the effects of federal spending on overall lending; to set conditions, including limits on executive compensation; and to focus on increasing the flow of credit. As Summers worked with Congress, the Federal Reserve chairman made it clear that most of the remaining $350 billion would have to go to the continued task of stabilizing the banks if they were to renew lending at normal levels. On January 15, 2009, the Senate narrowly defeated a resolution disapproving the release of the remaining funds. The victory came after a week of intense advocacy by the Senate leadership.[103] The House later passed a resolution of disapproval, an impotent move given the earlier Senate vote.[104]

Had Congress received much in exchange for releasing the third tranche of money? *Congressional Quarterly* provided a concise summary of Congress's weak bargaining position over the remaining funds:

> Even if the Senate had passed the measure and the House had followed suit, there was little chance that it actually would have halted the release of the second half of the funds. Joint resolutions must be signed by the president to take effect, and Obama had vowed to veto it.

No one believed a Democratic Senate would greet an incoming Democratic president with a legislative defeat.[105] Thus, the Obama administration had little reason to make more than cosmetic compromises with the legislature. Summers's letter set out conditions that were general enough to be compatible with continuing discretion by Treasury in the use of TARP funds.

EESA is just a list of goals, not a guide for choice in implementation.

Treasury's inaction on foreclosure allowed members of Congress to complain about foreclosures while doing nothing in reality about them.

Barney Frank succeeded in getting the House to pass HR 384, which set conditions for the second half of the bailout money, including foreclosure mitigation and conditions related to housing, minorities, and small business. The bill, passed as an amendment, also allowed retroactive application of restrictions on executive compensation to firms that had already received bailout money.[106] Frank's new bill suffered from some of the same problems plaguing EESA. Even if Frank's bill had passed the Senate, Treasury would still have had significant discretion. Yet the bill did set out two specific conditions: it prohibits firms receiving TARP money from giving bonuses to its 25 most highly compensated employees,[107] and it also directs Treasury to quickly commit between $40 billion and $100 billion "for the purposes of foreclosure mitigation."[108] Frank was attempting to write Summers's promises into law. The Senate referred the bill to the Finance Committee, where it languished without action.

In late January, reports of large bonuses at some firms excited political passions. The Obama administration vowed to curb the bonuses and to reduce compensation at the banks.[109] The new president announced in early February that firms receiving assistance could pay no more than $500,000 annually to executives; no bonuses would be permitted.[110] The House Financial Services Committee held hearings focused on questioning the heads of several banks that had received public support. Some accounts suggested the hearings were less populist in tone than might have been expected, given all that had happened. Rep. Barney Frank recognized that the bankers were crucial to overcoming the economic problems of the nation, and most members focused on renewing lending.[111]

A policy on foreclosure, however, remained off the administration's agenda. Frank complained, "The secretary said the administration would present details of their foreclosure reduction plan in a few weeks, which is too much time."[112] Congress had complained for some time about putting foreclosure into the bill. Now with a new administration, nothing seemed to be happening. It is difficult to interpret the non-action on foreclosure. Congress may have been happy to be deprived of the chance to vote on foreclosure relief for the reason indicated earlier—taxpayers might not appreciate rewarding speculation. On the other hand, many Democrats in Congress wanted to take up the cause of "the victims of the banks." Treasury's inaction on foreclosure allowed members of Congress to complain about foreclosures while doing nothing in reality about them.

Congress apparently did care more about executive compensation than foreclosure relief. The difference in concern may be rooted in votes. Foreclosure relief would run the risk of alienating taxpayers—a large group of voters. Limiting bankers' pay might alienate bankers who received public money, and perhaps, their shareholders; in total, these two groups comprised few voters. Congress soon acted on its frustration about pay. The stimulus bill of mid-February proscribed cash bonuses and almost all other incentive compensation for the five most senior officers and the 20 highest-paid executives at firms that were receiving funds from TARP. The restrictions were similar to those announced by the Obama administration, but they were expected to apply to more people and to reduce bonuses more than the administration's plan. Leaders of these firms could not receive bonuses larger than one-third of their annual salary. Any bonus would have to come as restricted stock which could not be liquefied until the TARP payments had been repaid. Senate Democrats took this step despite opposition from the Obama administration. Obama's economic advisers argued that the restrictions would drive needed talent out of the firms in question just as they were required to deal with the continuing financial crisis. The advisers also predicted that the restrictions might encourage the affected firms to pay back government money to avoid such regulations.[113]

In fact, by early March, some banks already wished to repay the TARP money. Bank officials were concerned that Congress or the administration could, at any time, set

new conditions for having received TARP money. Some of the conditions—like modifying mortgage contracts or delaying evictions—might be popular but could force the banks "to take steps that could lead to greater losses."[114]

The struggle over bonuses reached its zenith in mid-March. The federal government had supported AIG, which had lost enormous sums of money because of credit default swaps. The firm had contracts with executives that called for large bonuses in late 2008 and in March of 2009. When the latter round of payments became known, a public outcry followed to the point that the new president was called upon to instruct the Treasury secretary to cut off future bonuses.[115] As the furor built over the bonuses, Congress acted. Democratic House leaders in Congress proposed a bill to impose a 90 percent tax on bonuses paid out since January 1 by any company that had accepted more than $5 billion in government bailout funds. Senate leaders had proposed a 35 percent tax on recipients of the AIG bonuses, and a 35 percent tax on the company.[116] The House would eventually pass a tax bill intended to confiscate the bonuses.[117] The bill then moved the Senate's Finance Committee where its progress stopped.

Later developments contravened the "resurgent Congress" theme. The House Finance Committee approved a bill prohibiting any firm receiving TARP funding from paying "unreasonable or excessive" compensation. The concrete meaning of "unreasonable or excessive" was left to federal banking regulators.[118] The House, in the end, delegated away its populist fury. About the same time, the same committee rejected an amendment by Republican Jeb Hensarling of Texas to change language in a bill to *require*, rather than permit, the EESA inspector general to review the Treasury secretary's use of authority under TARP to minimize negative effects on taxpayers.[119]

As Congress acted out an illusion of high political drama, the Congressional Oversight Panel continued its ineffectual struggle with the executive branch. The panel's February report argued that Treasury had paid too much for the assets purchased under TARP; its valuation of various capital injections and the support given to AIG and Citigroup indicated that Treasury paid about 44 percent more for the relevant warrants than they were worth.[120] Until this point, the panel had asked questions about Treasury's actions. Now they were becoming more assertive in questioning the wisdom of Treasury's decisions. The February report also indicated that Treasury had not provided additional information sought in both earlier reports by the panel. Secretary Geithner was queried again and a report on his answers was promised for March.[121] Treasury replied in late February. The panel found little satisfaction: "Treasury left many questions unanswered." The panel "must insist that Treasury address outstanding questions from previous oversight reports." Another letter had been posted to the Treasury secretary; the next report would update the panel's one-way correspondence with the executive branch.[122] The questions for which the March letter sought answers had been posed over three months earlier.

The next report of the panel would again note that Treasury had never really responded to the panel's initial question about its strategy. Finally giving up getting direct answers from Treasury, the panel relied in large part on Treasury officials' public statements to discern the answer to its question about strategy.[123] It is difficult to avoid the conclusion that Treasury was ignoring the panel and that panel members could do little to increase their influence over the program. Instead, their April report offers a general policy analysis of the options and possible consequences of Treasury's work. The report is interesting, but it is a profession of impotence about changing the policy in question through oversight.[124] The May effort by the panel reported more promises of a "complete response" from Treasury, along with 10,000 pages of undigested documents that were keeping staff busy.[125]

In late March, Treasury offered another iteration of TARP called the Public-Private

As Congress acted out an illusion of high political drama, the Congressional Oversight Panel continued its ineffectual struggle with the executive branch.

Investment Program. It sought to lend money to private investors to buy up toxic assets. (It had proven to be too expensive, Geithner said, for the government to buy the assets outright per the original EESA plan.) Most of this debt (85 percent) would be insured by the FDIC. However, the FDIC has, in its charter, a "provision clearly limits its ability to borrow, guarantee, or take on obligations of more than $30 billion."[126] The PPIP might involve obligations of $1 trillion. The FDIC got around the charter by counting only losses as liabilities for purposes of the provision. The agency and its accountants then projected no losses from the loans. Hence, the terms of the charter could be met and the loans guaranteed. All of this happened without any oversight or influence from Congress, even though taxpayers will be stuck with the liabilities if the program does not work as promised.[127] The program eventually began in early July and was expected to be much smaller than originally announced, involving $50 billion rather than $1 trillion.[128]

On the surface, Congress appeared to be out of the action in 2009 apart from amending the stimulus bill to enact pay caps. Treasury made policy, and some members of Congress complained but did little apart from the executive compensation caps. Yet Congress was active. As TARP went forward, members of Congress did what they do well: provide constituent service. In late January 2009, the *Wall Street Journal* reported that several members, including lawmakers from Ohio and Alabama, had sought to steer bailout funds to banks in their states. Five banks in Alabama received funding, an outcome reflecting the status of their representatives, both of whom were ranking members on the relevant committees in both chambers. State officials in Arizona, dismayed by their lack of TARP money, vowed to take up the advocacy game. In Ohio, an initial refusal to bail out a Cleveland bank led to a political brouhaha that apparently influenced funding decisions at Treasury; Ohio banks later received over $7 billion. Barney Frank admitted that he had written a provision into EESA to help a bank from Massachusetts. He also said that he had later spoke to regulators to urge that the bank be considered for a capital injection. Frank argued he had been "very public" about his support for the bank. He saw no problem with Treasury posting a log of communications with members of Congress. Lawmakers wanted voters, he continued, to know about such efforts.[129] This conclusion need not be limited to particular cases reported in the media. A more systematic study of the effects of political influences on capital injections discovered that congressional representation, as well as a bank's presence on the board of the Federal Reserve, was strongly correlated with receiving TARP money.[130]

A study of the effects of political influences on capital injections discovered that congressional representation, as well as a bank's presence on the board of the Federal Reserve, was strongly correlated with receiving TARP money.

Conclusion

By mid-April, Goldman Sachs had returned to profitability and planned to raise private capital to pay back the $10 billion received from the government and exit the TARP program. Leaving the program would free the firm from government controls that came with the money, not least the limits on executive compensation.[131] Goldman Sachs was not the only bank hoping to get out of TARP. By June 17, 2009, recipients had repaid $70 billion of capital purchases by the government.[132] During the spring and summer of 2009, several banks repaid sums to the Treasury and bought back the relevant warrants. As a result, the Treasury realized a reasonable return on investment from these banks. This did not mean the entire program would turn a profit. It did suggest the possibility that the bank portion of EESA could show a positive return.[133] A part of this outcome may be credited to Congress. The congressional version of EESA differed from the initial Paulson proposal by requiring Treasury to receive a warrant in exchange for public investment in a bank.[134] The auto companies, in contrast, had received over $70 billion from the government. CBO estimated that $40 billion of the first $55 billion represented lost value.[135] As of June 2009, the banks appeared to be a better outlay than the car

companies. Both cost less than the $150 to $175 billion spent to procure congressional votes in favor of EESA on October 3, 2008.[136]

In hindsight, the original bill proposed by Treasury Secretary Paulson would have been superior in some ways to the EESA. Paulson's proposal suffered from at least one severe defect: it attempted to preclude judicial review of the Treasury secretary's action. However, his initial proposal had two advantages. Paulson proposed delegating less authority than the EESA had proposed: he sought only the power to buy "mortgage-related assets." It is possible, although by no means certain, that had Paulson's proposal become law, Congress would have had to amend it to empower the Secretary to capitalize the banks or to subsidize the auto companies, which would have required more deliberation about those policies from Congress. Finally, the money wasted buying votes to enact EESA would presumably have been saved had Paulson's bill rapidly become law.

This alternative scenario posits a hypothetical Congress willing to take joint responsibility with the executive for dealing with the financial crisis. EESA, however, has multiple goals and weak congressional control over the authorized sums. As noted several times in this account, Congress tried rather hard to avoid responsibility for the consequences of EESA. Responsibility fell, as we saw, to Treasury and the Federal Reserve. Both had an attenuated relation to the voters through the president that appointed them.

The enactment and implementation of EESA showed how far Congress has come from the centrality accorded the legislature in the Constitution and in republican theory. It is not just, as one commentator put it, that Congress "with its howls of rage, its chaotic, episodic reaction to the crisis, and its shameless playing to the crowds" was out of control.[137] Congress showed itself to be a bit player in a multi-hundred billion dollar drama that appeared to implicate the economic future of the nation. Throughout the TARP saga, Congress had two priorities: limits on executive compensation and funding to preclude foreclosures.[138] Treasury resisted the limits on executive compensation until Congress passed limits on bonuses as part of the stimulus bill in February. Congress also eventually goaded the administration into setting aside $50 billion for foreclosure mitigation. By mid-June 2009, CBO reported that none of this money had been disbursed.[139] The congressional panel set up to oversee the TARP program started late and was ignored by Treasury. It is hard to argue that the oversight panel had any influence at all on the implementation of the policy for a year after its passage.

We might summarize the TARP story as follows. Fed and Treasury officials diagnosed a financial panic and responded within the limits of their powers as they saw them. Secretary Paulson then proposed that Congress allocate $700 billion to be used to "promote market stability" while protecting the taxpayer. Congress appeared to resist and enacted a law that set out many more goals for EESA. Afterwards, Treasury and the Fed spent much of the allocation "promoting market stability." In that sense, Treasury and the Fed simply acted on Paulson's original proposal. Congress did not affect the telling of this tale; the story we have was written by the Federal Reserve and the Department of the Treasury. Justice Rehnquist stated in the *Benzene* case that Congress should make the "important choices" about policy. In the case of EESA, Congress made no important choices about the policy. That failure by Congress arose from its defective grant of power to the executive in this case.

The Supreme Court demands that delegations of congressional authority be accompanied by an intelligible principle to constrain executive discretion. Such a principle supposedly preserves congressional control over lawmaking, the separation of powers, and the rule of law. In this case, Congress specified 13 goals or intelligible principles for EESA. What Congress did not do was assign priorities to its many goals for EESA. The tradeoffs among goals and values were delegated to the executive along with money and power.

In hindsight, the original bill proposed by Treasury secretary Paulson would have been superior in some ways to the EESA.

The TARP case casts a harsh light on Congress.

Congress did become involved in policymaking beyond granting plenary power to the executive to buy assets. Members fought hard to ensure that banks in their districts received their due share of the bailout money. Congress's policymaking, in sum, involved the normal distributive politics of the pork barrel rather than policies seeking a more general good. Congress also sought to impose limits on executive compensation in firms funded by the bailout. As we saw, Congress did amend legislation to enact such limits. A year after the bailouts, however, the relevant federal official was still seeking to apply such limits. In general, the policy seems more a response to public anger about bailouts than a serious effort to make public policy.

The TARP case casts a harsh light on Congress. The institution intended shape and control federal policymaking was weak and helpless in the face of a crisis. It transferred its powers to the executive with little constraint on their exercise. Members sought, above all, to avoid responsibility for economic problems a month before an election. The executive, in contrast, was willing to assume power in the crisis along with the concomitant and attenuated responsibility of acting. Not surprisingly, Congress's goals for TARP were ignored with impunity by the executive. The Framers sought to both separate and balance powers. In the TARP case, power was neither separated nor balanced. The executive held a unified authority that was unchecked.

How might we restore the constitutional balance? Not much may be expected of Congress based on what happened with EESA. Congressional leaders and members showed no desire to meet their institutional obligations to deliberate, to check the executive, or to properly legislate. Congress avoided its obligations because members wished to avoid hard choices that might alienate some voters.[140] In contrast, the executive and the head of the Federal Reserve initially showed more respect for the Constitution and for Congress than members of Congress did for their own institution. In any case, it is not the job of the executive to help Congress meet its institutional obligations. The courts have that task.

Chief Justice Rehnquist's opinion in the *Benzene* case provides a legal foundation for renewed scrutiny of congressional delegations of power. The Supreme Court has long demanded that Congress set out an intelligible principle to guide grants of power to the executive. That demand, however, has often required little more than setting out a goal or goals for the policy. Congress should be required to do better as suggested by Rehnquist's opinion. Each grant of power to carry out a law should contain an intelligible principle that indicates the hierarchy of goals and values served by the law. By establishing that hierarchy, Congress would make the most important choices regarding the law. An intelligible principle of this kind would also be workable. It would inform the discretion of those who carry out the law and the judges who pass on its validity in implementation. Congress would also, of course, have the power to specify the means to reach its goals and values. This concept of an intelligible principle would ensure that Congress fulfilled its constitutional obligation to legislate (and not delegate power), thereby affirming the rule of law.

In EESA, Congress did not set out an intelligible principle. Instead, Congress set out an unordered plethora of goals and gave the executive plenary power to buy any asset to achieve these unspecified ends. Inevitably, the Treasury secretary made the important choices regarding the federal government's response to the financial crisis. The courts could hardly fault Treasury for doing so; judges had little guidance to assess Treasury's performance. Indeed, Congress itself had no clear basis to oversee the implementation of EESA. Having failed to meet its constitutional obligations to legislate, Congress could hardly complain of having no leverage over the policy outcomes. The Supreme Court should have precluded all this by requiring Congress to fashion an intelligible principle that resolved the conflict of values at stake in this situation.

Had Congress or the Court taken the Constitution seriously, the government re-

sponse to the financial crisis would have been different. Congress could have begun and ended its work with the original Paulson proposal. As noted earlier, that proposal set out two goals (market stability and taxpayer protection), rather than 13 goals. It would have been easier for Congress to fashion an "intelligible principle" for a law with two goals. Congress could have stipulated that the primary goal of the bill was restoring market stability. It could also have constrained pursuit of that goal by establishing a Special Prosecutor for fraud and by setting out an overall spending limit. Congress could also have required that Treasury only buy troubled assets to the point that the probable losses to taxpayers from economic contraction equaled the probable losses from purchasing assets. With that principle in law, Treasury could then make judgments at the margin about purchases. Congress, in turn, would have had a standard by which to exercise oversight of Treasury's work. Congress would have retained, as Rehnquist demanded, the most important choices regarding the policy.

Congress could have added additional goals like foreclosure relief or "justice" (i.e., limiting executive compensation). Had they tried to do so, members would have had to consider how Treasury should make tradeoffs between these goals and market stability or taxpayer protection. As we saw, Treasury officials apparently subordinated limiting compensation to the goal of market stability. Congress might have made the same decision or not. Under the U.S. Constitution, however, that decision belonged to Congress, not the executive. This path not taken under the guidance of a real "intelligible principle" would have had another advantage. Given greater clarity about ends and means, Congress and the informed public might have been better placed to assess the consequences of the bill.[141]

Even those who support the politics pursued by the executive under EESA should be alarmed by Congress's institutional decline as revealed in this episode. The facts of this case suggest that, in a crisis, our republican constitution has given way to unified technocratic power obscured by empty rituals of legislation and oversight.[142] Absent a reform and revival of the Court's intelligible principle test, we will have more TARP laws that diminish congressional authority, blur the separation of powers, and undermine the rule of law.[143]

Notes

1. Thomas J. Billitteri, "Financial Bailout." *CQ Researcher* 18, no. 37 (October 24, 2008): 865–88, http://library.cqpress.com/cqpac/cqresrre2008102400, p. 878. Phillip Swagel provides a view of the developing crisis from inside the Treasury Department. See Swagel, "The Financial Crisis: An Inside View," *Brookings Papers on Economic Activity*, Spring 2009, Conference Draft.

2. James B. Stewart, "Eight Days: The Battle to Save the American Financial System," *New Yorker*, September 21, 2009, p. 73.

3. Ibid., p. 75.

4. Ibid., p. 76.

5. It is a separate question whether the officials actually had such authority. Subsequent to the crisis, no court has ruled that they did not.

6. Congress failed in other ways. The United States Constitution sets up a government of defined, enumerated, and limited powers. If the people do not grant a power in the Constitution, the federal government may not legitimately exercise it. The Constitution does not grant federal officials the power to buy "troubled assets" or to "become a gargantuan mortgage broker." EESA is not a law "necessary and proper" for carrying out any enumerated powers. Judging by the meaning of the Constitution, Congress did not have the power to enact EESA, and the law is unconstitutional. See Gary Lawson, "Burying the Constitution under a TARP," Boston University School of Law Working Paper no. 09-3.

7. John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: Mentor Books, New American Library, 1965), section 141. "Fourthly, The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others."

8. *Mistretta v. United States* 488 U.S. 361 (1989) 730.

9. *J. W. Hampton Jr. and Co. v. United States*, 276 U.S. 394, 409 (1928). See also *Mistretta v. United States*, 730–31.

10. The cases were *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Company*, 298 U.S. 238 (1936).

11. David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946–1999* (Tuscaloosa, AL: University of Alabama Press, 2000), p. 28.

12. *Industrial Union Department, AFL-CIO v. American Petroleum Institute* 448 U.S. 607 (1980). The case involved judicial evaluation of government regulation of occupational exposure to benzene. Ibid., p. 611.

13. Ibid., pp. 685–86.

14. Don K. Price, *America's Unwritten Constitution: Science, Religion, and Political Responsibility* (Cambridge, MA: Harvard University Press, 1985), p. 141. Price implies that while members of the Congress and the public are not experts about technical matters—the means to reach ends—they are competent about choosing ends—in part because such choices are not a matter of expertise.

15. Ibid., p. 143. See Price's discussion of the importance of "conflicts among competing goods."

16. Emergency Economic Stabilization Act of 2008 (hereafter EESA), Sec. 101 (a)(1).

17. EESA, Sec. 3.

18. Since the second category (any financial instrument) comprises the first category (mortgage instruments), the first is logically redundant.

19. Other sections of the law also require disclosure: "The Secretary is required to publish guidelines for TARP, which must include Mechanisms for purchasing troubled assets; Methods for pricing and valuing troubled assets; Procedures for selecting asset managers; Criteria for identifying troubled assets for purchase." EESA, Sec. 101 (d).

20. EESA, Sec. 2. Later, the law stipulates that after five years, "the Director of the Office of Management and Budget, in consultation with the Director of the Congressional Budget Office, shall submit a report to the Congress on the net amount within the Troubled Asset Relief Program under this Act. In any case where there is a shortfall, the President shall submit a legislative proposal that recoups from the financial industry an amount equal to the shortfall in order to ensure that the Troubled Asset Relief Program does not add to the deficit or national debt." Sec.134. Congress essentially directs the president to ask Congress down the road to make a law about TARP. This formal (and virtually empty) admonition hardly counts as a guide to implementing TARP.

21. Barney Frank (D-MA) later acknowledged interpolating this section on behalf of a Massachusetts bank that had heavily invested in shares of Fannie Mae and Freddie Mac. See Damian Paletta and David Enrich, "Political Interference Seen In Bank Bailout Decisions—Barney Frank Goes to Bat for Lender, and It Gets an Infusion," *Wall Street Journal*, January 22, 2009, p. A1.

22. EESA, Sec. 103.

23. EESA, Sec. 101(e).

24. Ibid.

25. Sec. EESA, Sec. 113(d).

26. James Madison, "Federalist no. 51," in *The Federalist*, ed. Jacob Cooke (Middletown, CT: Wesleyan University Press, 1961), p. 349.

27. "Text of Draft Proposal for Bailout Plan," *New York Times*, September 20, 2008.

28. EESA, Secs. 115 (a) and (c).

29. United States Senate, "Joint Resolution," http://www.senate.gov/reference/glossary_term/joint_resolution.htm.

30. "Text of Draft Proposal," Sec. 2(a).

31. Madison, *The Federalist* no. 10, p. 63.

32. Paul J. Quirk, "Deliberation and Decision Making" in *Institutions of American Democracy: The Legislative Branch*, eds. Paul J. Quirk and Sarah A. Binder (New York: Oxford University Press, 2005), pp. 314–17.

33. Stewart, p. 70.

34. Billitteri, p. 878.

35. Ibid.

36. Lori Montgomery, Neil Irwin, and David Cho, "A Joint Decision to Act: It Must Be Big and Fast," *Washington Post*, September 20, 2008, A1. The authors cite three people present at the meeting as the source of Bernanke's statements. It should be noted, however, that a later account, apparently based on an interview with Bernanke, said the Fed Chair "didn't want to be accused of exaggerating the danger" during the meeting. See Stewart, p. 77.

37. Carl Hulse and David M. Herszenhorn, "Behind Closed Doors, Warnings of Calamity," *New*

York Times, September 20, 2008, p. 5.

38. Lori Montgomery, Paul Kane, and Neil Irwin, "Bailout Proposal Meets Bipartisan Outrage; Lawmakers Balk as Officials Press Case for Quick Action," *Washington Post*, September 24, 2008, p. A01.

39. David M. Herszenhorn, "Talks on Bailout Plan Advance, Despite Anger and Skeptics in Congress," *New York Times*, September 23, 2008.

40. Neil Irwin and Cecilia Kang, "Away from Wall Street, Economists Question Basis of Paulson's Plan," *Washington Post*, September 26, 2008, p. A1.

41. Peter S. Goodman, "Chilly Review from Experts," *New York Times*, September 23, 2008, p. 1.

42. "Text of Draft Proposal for Bailout Plan."

43. See EESA, Sec. 136 and Sec. 121(b)(6).

44. For example, the original Paulson proposal identified only two goals for the authority delegated by the bill ("Text of Draft," Sec. 3) and clearly required the Secretary to report to Congress about the use of the delegated authority in relation to the goals (called "considerations") ("Text of Draft," Sec. 4). The greater focus of the original proposal arguably would have permitted greater accountability from the secretary.

45. In the September 17 meeting, where Bernanke convinced the congressional leadership of the need for action, Congressman Barney Frank said, "This cannot be seen as just a Wall Street bailout. Something has to be done also about executive compensation and foreclosures." Stewart, p. 77.

46. David M. Herszenhorn, Stephen Labaton, and Mark Landler, "Democrats Set Conditions as Treasury Chief Rallies Support for Bailout," *New York Times*, September 22, 2008, p. A1.

47. Late in the game, House Republicans withdrew support from the Paulson plan in favor of their own alternative involving insurance backed by the government, which was said to better protect taxpayers. This alternative appears to have had little influence on enacting TARP. See David M. Herszenhorn, Carl Hulse, and Sheryl Gay Stolberg, "Day of Chaos Grips Washington; Fate of Bailout Plan Unresolved," *New York Times*, September 26, 2008, p. A1; and John H. Cushman Jr., "Will House Republicans Get What They Want?" *New York Times*, September 26, 2008, p. A1. The Republican alternative, however, had little influence over the final law. "Frank said he was willing to add an insurance option if it secured Republican votes . . . It's no problem to add something that's not going to do much." Lori Montgomery and Paul Kane, "Lawmakers Get Down to Details of Drafting Bill," *Washington Post*, September 27, 2008, p. A1.

48. As it turned out, even before Congress passed EESA, Secretary Paulson had told his staff "to start drawing up a plan for using some of the $700 billion to recapitalize the banking system—something that Congress was never told and that he had publicly opposed." See Joe Nocera and Edmund L. Andrews, "The Reckoning: Struggling to Keep Up as the Crisis Raced On," *New York Times*, October 23, 2008.

49. See Anthony Faiola and David Cho, "Alternative Solutions Diverge from Administration's Approach," *Washington Post*, September 24, 2008, p. A1.

50. For the opposition see Sheryl Gay Stolberg, "Lawmakers' Constituents Make Their Bailout Views Loud and Clear," *New York Times*, September 25, 2008, p. A27. "A financial industry lobbyist said he'd stopped in a bunch of offices and was told several times that calls and letters were running 100 to 1 against the plan." Quoted in Binyamin Appelbaum, "Rescue's Rush Puts Lobbyists in a Crunch," *Washington Post*, September 25, 2008, p. D5. For the more supportive public mood after the initial rejection of the bill, see Carl Hulse and Robert Pear, "Senate to Vote Today on Bailout Plan," *New York Times*, September 30, 2008.

51. In the CNN poll, 62 percent of voters said that the federal government should intervene in the financial crisis. Any mention of taxpayers' money makes voters skeptical: the *Los Angeles Times/ Bloomberg News* poll asked, "Is it the government's responsibility to use taxpayers' money to bail out private firms whose collapse could harm the economy?" The answer was "no," 55 percent to 31 percent . . . Do Americans believe that a rescue plan will treat taxpayers fairly just because Congress and the president agree on it? "No," by 65 percent to 34 percent in the CNN poll. But do they think it will help the economy? "Yes," by 55 percent to 42 percent. A CNN/Opinion Research Corp. poll released on October 6 found that nearly 6 in 10 Americans thought an economic depression was likely. Billitteri, p. 868.

52. Mark Landler and Steven Lee Myers, "Buyout Plan for Wall Street Is a Hard Sell on Capitol Hill," *New York Times*, September 24, 2008.

53. See the legislative history at 8 CIS PL 110343; 110 CIS Legis. Hist. P.L. 343.

54. See 8 CIS PL 110343; 110 CIS Legis. Hist. P.L. 343.

55. Quirk, p. 317.

56. See Steven M. Davidoff, "The Bailout Halftime Report," *New York Times*, July 9, 2009.

57. EESA, Sec. 2(D). I did not include this among the goals of the law since it is inherent in all legislating.

58. Carl Hulse and David M. Herszenhorn, "House Rejects Bailout Package, 228–205; Stocks Plunge," *New York Times*, September 29, 2008.

59. Carl Hulse and Robert Pear, "Senate to Vote Today on Bailout Plan," *New York Times*, September 30, 2008.

60. Patrick M. Garry notes "Congress has numerous reasons for making vast delegations of power to administrative agencies. Members of Congress often want to escape responsibility for making hard choices. Furthermore, as a way of claiming credit and escaping blame, they 'have a strong incentive to enact vague laws that leave the operative details to someone else.'" See Garry, "The Unannounced Revolution: How the Court has Indirectly Effected a Shift in the Separation of Powers," *Alabama Law Review* 57 (2006): 703.

61. David M. Herszenhorn, Stephen Labaton, and Mark Landler, "Democrats Set Conditions as Treasury Chief Rallies Support for Bailout," *New York Times*, September 22, 2008.

62. EESA, Sec. 104(a)1.

63. Montgomery, Kane, and Irwin.

64. EESA, Sec. 104(b).

65. David Wessel, *In Fed We Trust: Ben Bernanke's War on the Great Panic* (New York: Crown Business, 2009), electronic book, chap. 6.

66. EESA, Sec. 125(A).

67. EESA, Sec. 121(c)(1).

68. See Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: Norton, 1969), p. 126.

69. Billitteri, p. 878. Floyd Norris, "Plan B: Flood Banks with Cash," *New York Times*, October 9, 2008.

70. Carter Dougherty and Landon Thomas, "Two Countries Plan Rescues as European Leaders Continue to Talk," *New York Times*, October 8, 2008; and Landon Thomas Jr. and Julia Werdigier, "Britain Takes a Different Route to Rescue Its Banks," *New York Times*, October 9, 2008.

71. Edmund L. Andrews and Mark Landler, "White House Overhauling Rescue Plan," *New York Times*, October 11, 2008. "The Treasury proposal to recapitalize banks stems from the realization that as the stock market keeps tumbling, and as mortgage-related securities on banks' balance sheets also plummet, it has become harder for banks to raise fresh capital from investors. The government concluded it would be able to deliver capital faster and with greater assurance if it did so directly. The switch may also reflect growing doubts about the Treasury's plan to purchase mortgage-related assets . . . the concept is untested, experts said, and the deteriorating market conditions had further dimmed its prospects." Mark Landler and Edmund L. Andrews, "As Crisis Spreads, Global Approach Weighed," *New York Times*, October 10, 2008.

72. Department of Treasury, "Responses to Questions of the First Report of the Congressional Oversight Panel," December 30, 2008, pp. 4–5; Philip Swagel argues that Paulson could not have obtained support from Congress to capitalize banks in late September. Swagel, p. 38.

73. David M. Herszenhorn, "About Those Charges of Bailout Bias," *New York Times*, December 6, 2008.

74. "Because the bailout law gave wide latitude to Mr. Paulson, Washington's interest groups mobilized to take advantage." See Edmund L. Andrews and Eric Dash, "Insurers Are Getting in Line for Piece of Federal Bailout," *New York Times*, October 24, 2008; Mark Landler, "New Terrain for Panel on Bailout," *New York Times*, November 3, 2008; and Edmund L. Andrews and Eric Dash, "Insurers Are Getting in Line for Piece of Federal Bailout," *New York Times*, October 24, 2008.

75. Bill Vlasic, "Federal Aid Seen as Vital to a Merger in Detroit," *New York Times*, October 24, 2008.

76. Edmund L. Andrews and Bill Vlasic, "White House Explores Aid for Auto Deal," *New York Times*, October 27, 2008.

77. Mark Landler and David D. Kirkpatrick, "Lobbyists Swarm the Treasury for Piece of Bailout Pie," *New York Times*, November 11, 2008.

78. "Senator Richard C. Shelby of Alabama, the senior Republican on the banking committee, said he would not support legislation to aid the auto companies and seemed prepared to let one or all of them collapse. 'The financial straits that the Big Three find themselves in is not the product of our current economic downturn, but instead is the legacy of the uncompetitive structure of its manufacturing and labor force,' Mr. Shelby said in a statement. 'The financial situa-

tion facing the Big Three is not a national problem but their problem.'" See David M. Herszenhorn, "Chances Dwindle on Bailout Plan for Automakers," *New York Times*, November 13, 2008. See also Bill Vlasic and David M. Herszenhorn, "Auto Chiefs Fail to Get Bailout Aid," *New York Times*, November 20, 2008.

79. Bill Vlasic and David M. Herszenhorn, "Pursuing U.S. Aid, G.M. Accepts Need for Drastic Cuts," *New York Times*, December 2, 2009.

80. David E. Sanger, David M. Herszenhorn, and Bill Vlasic, "Bush Aids Detroit, but Hard Choices Wait for Obama," *New York Times*, December 19, 2009.

81. By the middle of 2009, the federal government would provide $21 billion in loans to General Motors, $15.5 billion in loans to Chrysler, and $12.5 billion in an investment in preferred stock in GMAC. See Congressional Budget Office, *The Troubled Asset Relief Program: Report on Transactions through June 17, 2009* (Washington: Congressional Budget Office, June 2009), p. 4.

82. Louise Story, "Awaiting Reaction to a Third Try at Bailout," *New York Times*, November 23, 2008.

83. "Bad Assets Don't Just Disappear," *New York Times*, November 25, 2008.

84. Reed Abelson, "Banks' Bailout Unlikely to Crimp Executive Pay," *New York Times*, October 15, 2008.

85. Edward L. Andrews and Mark Landler, "Hints of Relief from the Siege," *New York Times*, November 21, 2008.

86. Swagel, p. 16.

87. Diana B. Henriques, "First Audit Said to Cite Some Snags with Bailout," *New York Times*, November 25, 2008.

88. Diana B. Henriques, "New Yorker Nominated to Monitor U.S. Bailout," *New York Times*, November 14, 2008.

89. Diana B. Henriques, "Bailout Monitor Sees Lack of a Coherent Plan," *New York Times*, December 1, 2008.

90. CBO.

91. United States Government Accountability Office, "Troubled Asset Relief Program: Additional Actions Needed to Better Ensure Integrity, Accountability, and Transparency," (Washington: December 2008), p. 9.

92. See "Questions about the $700 Billion Emergency Economic Stabilization Funds," *The First Report of the Congressional Oversight Panel for Economic Stabilization*, December 10, 2008, pp. 1–6.

93. Ibid., pp. 9–10.

94. Ibid., p. 30.

95. COP, Second Report, p. 12.

96. Diana B. Henriques, "Blunt Advice for Treasury on Progress of the Bailout," *New York Times*, December 10, 2008.

97. See Department of Treasury, "Responses to Questions of the First Report of the Congressional Oversight Panel," December 30, 2008, p. 1, http://www.treas.gov/press/releases/reports/123108%20cop%20response.pdf. The response mentions several small programs dealing with foreclosures. In general, the report suggests Treasury's policy priority was market stability, in part because foreclosures would have become worse if, for example, Freddie Mac and Fannie Mae had not been stabilized.

98. Department of Treasury, "Responses," p. 8.

99. See the table setting out responses from Treasury to the questions in the first report of the panel at COP, Second Report, pp. 14ff. See also, David Barstow, "Treasury's Oversight of Bailout Is Faulted," *New York Times*, January 9, 2009.

100. In December, members of Congress would complain that the bailout was not forcing banks to modify mortgage terms to avoid foreclosures. "A Treasury spokeswoman, Michele A. Davis, said that the department was not required to establish a loan modification program." Charles Duhigg, "Fighting Foreclosures, FDIC Chief Draws Fire," *New York Times*, December 10, 2008.

101. Edmund L. Andrews, "Treasury Has Spent $350 Billion of Bailout Fund," *New York Times*, December 19, 2008.

102. David M. Herszenshorn, "Obama Lobbies for Release of Second Half of Bailout," *New York Times*, January 11, 2009.

103. Phil Mattingly. "Senate Votes to Release Bailout Funds." *CQ Weekly Online* (January 19, 2009), pp. 129–130, http://library.cqpress.com/cqweekly/weeklyreport111-000003012959; and Edmund L. Andrews and Eric Dash, "Banks in Need of Even More Bailout Money," *New York Times*, January 13, 2009.

104. "TARP Phase Two: Whatever Might Work,"

CQ Weekly Online (February 23, 2009), p. 404, http://library.cqpress.com/cqweekly/weeklyreport111-000003058066.

105. Mattingly.

106. See H.R. 384, TARP Reform and Accountability Act of 2009. For the vote, see "For the Record," *CQ Weekly* (January 19, 2009), p. 146.

107. H.R. 384, Sec. 102, (e)(2).

108. Ibid., Sec. 201.

109. Sheryl Gay Stolberg and Stephen Labaton, "Obama Calls Wall Street Bonuses 'Shameful,'" *New York Times*, January 29, 2009.

110. Phil Mattingly, "Salary Cap Added to Bailout Terms," *CQ Weekly Online* (February 9, 2009), p. 308, http://library.cqpress.com/cqweekly/weeklyreport111-000003027318.

111. Louise Story, "Lawmakers Question Bankers on Bailout," *New York Times*, February 11, 2009.

112. Edmund L. Andrews and Stephen Labaton, "Bailout Plan: $2.5 Trillion and a Strong U.S. Hand," *New York Times*, February 10, 2009.

113. Edmund L. Andrews and Eric Dash, "Stimulus Plan Places New Limits on Wall St. Bonuses," *New York Times*, February 14, 2009.

114. Stephen Labaton, "Some Banks, Feeling Chained, Want to Return Bailout Money," *New York Times*, March 10, 2009.

115. Edmund L. Andrews and Jackie Calmes, "Obama in Effort to Undo Bonuses at A.I.G.," *New York Times*, March 16, 2008.

116. Mary Williams Walsh and David M. Herszenhorn, "A.I.G. Seeking Return of Half of Its Bonuses," *New York Times*, March 18, 2009.

117. Carl Hulse and David M. Herszenhorn, "House Approves 90% Tax on Bonuses after Bailouts," *New York Times*, March 19, 2009.

118. Kate Davidson and Benton Ives, "Limits on Execs' Compensation Move in House," *CQ Weekly Online* (March 30, 2009), p. 730, http://library.cqpress.com/cqweekly/weeklyreport111-000003087460.

119. The amendment was defeated by a vote of 26–37. Kate Davidson, "Bill Advances to Increase TARP Oversight," *CQ Weekly Online* (March 16, 2009), p. 622, http://library.cqpress.com/cqweekly/weeklyreport111-000003075252.

120. COP, February Report, p. 7.

121. Ibid., February Report, p. 3.

122. Ibid., March Report, p. 85.

123. Ibid., April Report, p. 10.

124. Two members of the panel objected to the drift from overseeing implementation to offering options for an alternative strategy: "First and foremost, the Panel is charged with evaluating the effectiveness of Treasury's use of the new authority granted it under the Emergency Economic Stabilization Act. It is not our role to design or approve Treasury's strategy, nor should the Panel's mission be expanded to encroach on that authority . . . to the extent that the Panel report focuses more on alternatives and less on evaluation of current activities through objective metrics, we have missed an opportunity to closely engage with our primary task." See Congressional Oversight Panel, April Report, p. 88, Additional Views of Richard H. Nieman and John E. Sununu.

125. COP, May Report, p. 67.

126. Andrew Ross Sorkin, "'No-Risk' Insurance at the FDIC," *New York Times*, April 6, 2009.

127. Benton Ives and Phil Mattingly, "Two-Pronged Strategy to Remove 'Toxic' Assets," *CQ Weekly Online* (March 30, 2009), p. 729, http://library.cqpress.com/cqweekly/weeklyreport111-000003087464.

128. Charlie Gasparino, "Treasury Set to Unveil PPIP; Ross, GE Capital Participate," CNBC.com, June 30, 2009.

129. See Damian Paletta and David Enrich, "Political Interference Seen In Bank Bailout Decisions—Barney Frank Goes to Bat for Lender, and It Gets an Infusion," *Wall Street Journal*, January 22, 2009, p. A1; and Charlie Savage, "Geithner Sets Limits on Lobbying for Bailout Money," *New York Times*, January 27, 2009.

130. Ran Duchin and Denis Sosyura, "TARP Investments: Financials and Politics?" University of Michigan, Ross School of Business Working Paper no. 1127, July 2009, p. 17.

131. Louise Story, "Goldman Posts Profit and Plans Share Sale," *New York Times*, April 13, 2009.

132. Congressional Budget Office, *The Troubled Asset Relief Program*, Table 1, p. 2.

133. See Zachery Kouwe, "As Banks Repay Bailout Money, U.S. Sees a Profit," *New York Times*, August

31, 2009. Later analysis confirms that the money lent to banks will show a slight profit for the government. See Jackie Calmes, "Treasury Forecasts Smaller Loss from Bank Rescue," *New York Times*, December 7, 2009, p. A1.

134. The initial proposal did say "the Secretary shall take into consideration means for . . . protecting the taxpayer." See the original version of EESA.

135. CBO, June 2009, 4. See Davidoff, "The Bailout Halftime Report."

136. Ibid.

137. Joe Nocera, "The Problem With Flogging A.I.G.," *New York Times*, March 20, 2009.

138. As noted earlier, it is not clear that Congress was entirely serious about spending money on foreclosure prevention in the fall of 2008. It might also be noted that precluding debt relief was one reason for strengthening the national government at the 1787 Constitutional Convention.

139. CBO, p. 4.

140. This explanation of congressional behavior is noted in Ronald J. Krotoszynski Jr., "Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine," *Indiana Law Journal* 80 (2005): 239.

141. Earlier Court decisions striking down overly broad delegations of legislative authority "expressed concern not only with the delegations' broad subject matters, but with the absence of transparency and procedural regularity." Heidi Kitrosser, "The Accountable Executive," *Minnesota Law Review* 93 (May 2009): 1743.

142. Gary Lawson argued that "to abandon openly the nondelegation doctrine is to abandon openly a substantial portion of the foundation of American representative government." Gary Lawson, "Delegation and Original Meaning," *Virginia Law Review* 88 (April 2002): 332.

143. More experiences similar to EESA would imply that Article I, section 1 of the Constitution is no longer valid. Some commentators take this view regarding crises: "the conditions of the administrative state make it practically inevitable that the executive and the agencies will be the main crisis managers, with legislatures and courts reduced to adjusting the government's response at the margins and carping from the sidelines. Congress and the courts suffer from crippling institutional debilities as crisis managers; legislators and judges are aware of this, and do what they have no real choice but to do, which is delegate sweeping power to the executive to cope with the crisis." Eric A. Posner and Adrian Vermeule, "Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008," University of Chicago Law School John M. Olin Law and Economics Working Paper no. 440 (2nd Series), p. 16. In this view, the United States may be said to have entered a "state of exception" in the fall of 2008. On the concept of the "state of exception," see Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, MA: MIT Press, 1985), pp. 5–6. Schmitt denies that a "state of exception" can be constrained by law.

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