Legal Opinion Letter

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CONSTITUTIONALLY TROUBLED: "TARP" AND ITS DELEGATION OF LEGISLATIVE POWER

by
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The Troubled Asset Relief Program, not so fondly known as TARP, is about to undergo its umpteenth transformation – this time under the more benign name, Financial Stability Plan. Originally enacted in October 2008 as the rescue program under EESA, the Emergency Economic Stabilization Act [Public Law 110-343], TARP authorized former Treasury Secretary Henry Paulsen to buy toxic assets from insolvent banks. That plan morphed into a scheme to inject capital directly by acquiring stock in selected financial institutions. Then President George W. Bush raised the stakes by allotting billions for the auto industry. Along the way, the Treasury Department floated the idea of government insurance to guarantee private debt and restore market confidence.

None of that worked, so taxpayers and investors eagerly awaited a fresh look from President Barack Obama's new Treasury Secretary, Timothy Geithner. But, in his maiden announcement, Geithner, like Paulsen, seemed to be improvising. He downplayed nationalization, a "bad bank" for toxic assets, and government guarantees. Instead, he proposed a public-private partnership to purchase assets by means undisclosed for prices undetermined, at a total cost of $500 billion to $1 trillion. Not surprisingly, Geithner's audience was unimpressed; reactions ranged from skepticism to deep disappointment.

No wonder. First, the federal government enacted double taxation of dividends and deductibility of interest, which gave rise to more borrowing and greater leverage. Then Alan Greenspan's Federal Reserve System fueled the credit crisis with artificially low interest rates. That was compounded by political pressure for affordable housing and implicit taxpayer guarantees to Fannie Mae and Freddie Mac – all of which led to sub-prime lending and high-risk securitized mortgages. Perverse government policies caused this mess. Why trust government – driven by politics, not economics – to socialize a critical sector of the U.S. economy?

Of course, if we don't like the policies that government puts in place, we can vote the bums out of office. Or can we? Suppose those policies are effected by unelected bureaucrats, unaccountable to the voters? Astonishingly, almost no one in the media or the policy community raised this obvious and important question: Where was Congress during the crafting of TARP's various iterations? Each version of the bailout was foisted on the public not by our elected lawmakers, but by the Secretary of the Treasury. Therein lies a major problem, and it has constitutional implications.

Article I, section 1 of the Constitution states, "All legislative Powers ... shall be vested in a Congress." The text plainly directs that lawmaking is for the legislature, not the Treasury Department. Note the key terms "All" and "shall." They indicate that the vesting provision is neither selective nor

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discretionary. In short, Congress may not delegate its lawmaking authority to another entity.

Regrettably, the non-delegation doctrine has been moribund, although its demise did not happen overnight. Until the 1940s, the Court honored the notion that lawmaking is for Congress only.[1] As early as 1825, Chief Justice John Marshall wrote: "It will not be contended that Congress can delegate … powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. 1, 42 (1825). Unfortunately, Marshall offered little guidance as to which powers were "strictly and exclusively legislative," but he did lay the groundwork for the "intelligible principle" standard that controls non-delegation cases today. Marshall explained: If Congress delegates quasi-legislative powers to another body, it must provide a "general provision" by which "those who are to act" can "fill up the details." *Wayman*, 23 U.S. at 43.

That idea was formalized a century later in *J.W. Hampton Jr. Co. v. United States*. Delegations may be constitutional, said the Court, if Congress legislates "an *intelligible principle* to which the person or body authorized … is directed to conform." *J.W. Hampton Jr. Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added). Just how precise does the intelligible principle have to be? Apparently, not very precise: Not a single post-New Deal statutory program has been invalidated as an unconstitutional delegation of legislative power to the executive branch. But TARP's delegation is off the charts; and it demands attention from the Court.

What is the intelligible principle to which Henry Paulsen and Timothy Geithner were to conform? According to EESA, it is "to purchase ... troubled assets for the purposes of providing stability to and preventing disruption in the economy and financial system" – a noble ambition, but utterly inadequate as a guide for the Treasury Secretary in promulgating specific rules for the bailout. TARP's unpredictability, fits and starts, and total lack of transparency demonstrate that Paulsen and Geithner could do whatever they wanted – unimpeded by any congressional directive. Indeed, Section 101 of EESA specifies that asset purchases can be undertaken "on such terms and conditions as are determined by the Secretary."

The usual argument in favor of legislative delegation is that outside experts, not busy members of Congress, are best equipped to decide complex technical issues. According to law professor David Schoenbrod, that argument is "hogwash." Schoenbrod points out that there are seldom clear technical answers. Moreover, if Congress needs technical assistance to legislate, it can certainly obtain such assistance from congressional staff, universities, professional associations, think tanks and, naturally, from the executive departments that will be responsible for implementation.[2]

The crucial question is whether a statute grants the kind, quality, and quantity of discretion that makes the statute into a delegation. Law professor Gary Lawson, an expert on the non-delegation doctrine, would examine two criteria: the degree of discretion and the importance of the issue. Gary Lawson, "Delegation and the Constitution," *Regulation*, vol. 22, no. 1 (1999), http://www.cato.org/pubs/regulation/regv22n2/delegation.pdf, at 27-29. Admittedly, that leaves substantial wiggle room in assessing whether a statute impermissibly delegates legislative power. Still, says Lawson, line-drawing problems are ubiquitous in constitutional law. That's what the courts are for; that's why judges get paid.

Some calls are tough. The bailout is not one of them. Essentially, it reallocates resources from taxpayers to individuals and businesses which incurred excessive risks and made bad decisions; it substitutes politicians for shareholders in running financial institutions; it prevents capitalism from performing its periodic restorative function, which is to purge inefficient businesses; and it plants the seeds for an inflation such as we've never experienced. That's important stuff; and the Secretary's discretion is nearly total. TARP is manifestly an unconstitutional delegation of legislative power.

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[1]For a brief history of the non-delegation doctrine, *see* William Consovoy, et al., *Can Bush Supreme Court Appointments Lead to a Rollback of the New Deal?* (Washington, D.C.: Federalist Society), at 14-15, http://www.fed-soc.org/doclib/20070403_newdeal.pdf.

[2]David Schoenbrod, Testimony on "Monitoring Administrative Rulemaking" before the Subcommittee on Commercial and Administrative Law, Judiciary Committee, U.S. House of Representatives, September 12, 1996, http://www.cato.org/testimony/ct-ds091296.html, at 1-3.

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