RECENT DEVELOPMENTS

EMERGENCY ECONOMIC STABILIZATION ACT OF 2008

I. Introduction: History of a Crisis

Seven hundred billion dollars is a vast deployment of government funds; it took the direst of circumstances to prompt the government to propose such drastic action in the fall of 2008. A financial crisis of epic proportions had been roiling for months. The government had been engaged in ad hoc financial interventions to save failing institutions: Bear Stearns and other Wall Street investment houses in March 2008, Fannie Mae and Freddie Mac in early September, and AIG in late September. After AIG, Secretary Paulson had enough and sought new spending authority, proposing a single $700 billion package that would serve as a coordinated economic intervention in the financial crisis. This led to passage of the Emergency Economic Stabilization Act of 2008 ("EESA") in October.[1]

This Recent Development begins by tracing the events that lead to the passage of EESA. This includes a survey of the government's response to the financial crisis before EESA. Section II traces the difficulties EESA encountered in its abbreviated legislative process. In Section III, this Recent Development examines the details of EESA, focusing on the various means used by Congress to limit executive authority. Finally, Section IV presents details of the initial round of spending pursuant to EESA. This spending demonstrates some of the limitations of Congress's approach to oversight in EESA. The Recent Development concludes with the observation that EESA shows how Congress can play an active role in an emergency despite a general reluctance to directly restrain executive authority.

Even before the financial crisis had matured into a near daily headline,[2] the Federal Reserve initiated action to help the financial industry. It expanded its ordinary lending to depository institutions through a new program, the Term Auction Facility ("TAF") created in December 2007.[3] Initially, the Federal Reserve offered $20 billion in loans outstanding, but that amount grew throughout 2008.[4] By March, there were $80 billion in outstanding loans and by September, $150 billion.[5]

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[1] Pub. L. No. 110–343, 122 Stat. 3765 (2008) [hereinafter EESA].

[2] A search of LexisNexis's *Major US Newspapers* database shows 20 headlines containing the phrase "financial crisis" in 2007, compared to 601 in 2008.

[3] *See* Press Release, Bd. of Governors of the Fed. Reserve Sys. (Dec. 12, 2007), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20071212a.htm.

[4] *See id.*

[5] *See id. See also* Statistical Release, Bd. of Governors of the Fed. Reserve Sys., H.4.1 Factors Affecting Reserve Balances of Depository Institutions and Condition Statement of Federal Reserve Banks (Sept. 25, 2008) [hereinafter H.4.1, Sept. 25, 2008], *available at* http://www.federalreserve.gov/releases/h41/20080925/h41.pdf; Statistical Release, Bd. of Governors of the Fed. Reserve Sys., H.4.1 Factors Affecting Reserve Balances of Depository Institutions

The Federal Reserve also spent much of 2008 propping up Wall Street investment banks. In March, soon after the creation of the TAF, it made $200 billion in loans available through another new program: the Term Securities Lending Facility, "intended to promote liquidity in the financing markets for Treasury and other collateral and thus to foster the functioning of financial markets more generally."[6] The program was designed to allow the key investment houses to use their illiquid assets, such as residential mortgage-backed securities, as collateral for loans.[7] Shortly thereafter, the Federal Reserve announced the creation of the Primary Dealer Credit Facility ("PDCF"), yet another program that allowed investment banks to borrow from the Federal Reserve on favorable terms.[8] Within one week, investment banks had $30 billion in loans outstanding.[9]

March 2008 also saw the first bank failure on Wall Street, as Bear Stearns faced a liquidity crisis that required outside support to prevent bankruptcy.[10] The Federal Reserve stepped in to help, facilitating J.P. Morgan's takeover of Bear Stearns by guaranteeing $29 billion of particularly distressed assets, including mortgage-backed securities.[11] The way the deal was structured, J.P. Morgan absorbed the first $1 billion in losses on the deal, and the Federal Reserve absorbed the losses beyond that, up to $30 billion.[12]

Fannie Mae and Freddie Mac were the next to receive aid—without it, their survival through September was impossible. In July, the Housing and Economic Recovery Act of 2008 ("HERA") was signed into law.[13] HERA contained several pieces designed to help address the crisis in the housing markets: expanded disclosure requirements for mortgage terms,[14] refinancing for struggling homeowners through the FHA,[15] and direct assistance to communities particularly hurt by foreclosures.[16] HERA also gave the Treasury

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and Condition Statement of Federal Reserve Banks (Mar. 20, 2008) [hereinafter H.4.1, Mar. 20, 2008], *available at* http://www.federalreserve.gov/releases/h41/20080320/h41.pdf.

[6] Press Release, Bd. of Governors of the Fed. Reserve Sys. (Mar. 11, 2008), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20080311a.htm.

[7] *See id.*

[8] *See* Serena Ng & Susanne Craig, *Stepping Up to the Fed's Window*, WALL ST. J., Mar. 20, 2008, at C1.

[9] *See* H.4.1, Mar. 20, 2008, *supra* note 5.

[10] *See* David Cho & Neil Irwin, *Crises of Confidence in the Markets; Federal Reserve's Rescue of Bear Stearns Exposes Cracks in Financial System*, WASH. POST, Mar. 18, 2008, at A1.

[11] *See* The Bear Stearns Companies, Inc., Quarterly Report (Form 10–Q), at 8 (Apr. 14, 2008), *available at* http://www.sec.gov/Archives/edgar/data/777001/000091412108000345/be12550652-10q.txt. *See also* Cho & Irwin, *supra* note 10, at A15.

[12] *See* Cho & Irwin, *supra* note 10.

[13] Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, 122 Stat. 2654 [hereinafter HERA]; *see also* Bruce Arthur, *Recent Development: Housing and Economic Recovery Act of 2008*, 46 HARV. J. ON LEGIS. 585 (2009).

[14] *See* HERA, *supra* note 13, div. B, tit. V, 122 Stat. at 2855 ("Mortgage Disclosure and Improvement Act of 2008").

[15] *See* HERA, *supra* note 13, div. A, tit. IV, 122 Stat. at 2800 ("Hope for Homeowners Act of 2008").

[16] *See* HERA, *supra* note 13, div. B, tit. III, 122 Stat. at 2850 ("Emergency Assistance for the Redevelopment of Abandoned and Foreclosed Homes").

Department broad authority to take an ownership stake in Fannie Mae and Freddie Mac.[17] These two corporations had issued more than $5 trillion of securities backed by residential mortgages they owned.[18] With foreclosures on the rise, these corporations faced grave difficulties. Fannie Mae, for example, had 44,071 homes go into foreclosure in the first half of the year and by July was the owner of 54,173 foreclosed homes.[19] Both Fannie and Freddie needed to borrow billions of dollars each month to keep afloat.[20] Finally, on August 23, Moody's cut its ratings on Fannie Mae's and Freddie Mac's preferred shares.[21] The writing was on the wall; raising more money would be nearly impossible for either organization.

Two weeks later, the federal government took control of both Fannie Mae and Freddie Mac. The Federal Housing Finance Agency ("FHFA") took over management of both corporations[22] and gave the Treasury the option to become the controlling shareholder.[23] The Treasury in turn exercised its authority under HERA and extended $100 billion in credit to both Fannie Mae and Freddie Mac.[24] The Treasury also received $1 billion in senior preferred stock, paying ten percent interest, along with the rights for additional payments starting in 2010.[25] Fannie Mae and Freddie Mac were also required to commit to slimming their portfolios and shrinking annually until each held less than $250 billion in 2020.[26]

By September, the crisis was in full swing. Immediately after the bailout of Fannie and Freddie, the prominent investment bank Lehman Brothers faced its own crisis. As far back as the Bear Stearns crisis in March, there were doubts about Lehman.[27] Lehman was able to raise $4 billion in April, but it was again "on the ropes" in May.[28] Its share price had

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[17] *See* HERA, *supra* note 13, § 1117, 122 Stat. at 2683.

[18] *See* Charles Duhigg, *A Trickle That Turned into a Torrent*, N.Y. TIMES, July 11, 2008, at C1.

[19] *See* James R. Hagerty & Jonathan Karp, *Bank Stocks Drop Anew Amid Worry over Falling Home Prices*, WALL ST. J., Aug. 13, 2008, at A1.

[20] *See* Charles Duhigg & Vikas Bajaj, *Uncertainty over Freddie and Fannie*, N.Y. TIMES, Aug. 23, 2008, at C1.

[21] *See id.*

[22] *See* HERA, *supra* note 13, §§ 1102(a), 1118, 1201, 122 Stat. at 2663, 2688, 2782 (to be codified at 12 U.S.C. § 4513(a)(4)) (giving the Office of Federal Housing Enterprise Oversight ("OFHEO") the power to appoint conservators for Fannie Mae and Freddie Mac). HERA replaced OFHEO with FHFA. *See* HERA, *supra* note 13, div. A, tit. III, 122 Stat. at 2794.

[23] *See* Fed. Home Loan Mortgage Corp., Current Report (Form 8–K), at 2 (Sept. 11, 2008). *See also* Fed. Nat'l Mortgage Ass'n, Current Report (Form 8–K), at 2–3 (Sept. 11, 2008).

[24] *See* U.S. TREASURY DEP'T OFFICE OF PUB. AFFAIRS, FACT SHEET: TREASURY SENIOR PREFERRED STOCK PURCHASE AGREEMENT 1 (2008), *available at* http://www.treasury.gov/press/releases/reports/pspa_factsheet_090708%20hp1128.pdf.

[25] *See id.*, at 2.

[26] *See id.*

[27] *See* Cho & Irwin, *supra* note 10.

[28] Jon Hilsenrath et al., *Credit Crisis Strains Government's Options*, WALL ST. J., Sept. 12, 2008, at A1 (quoting Ted Truman, a senior Federal Reserve official).

sunk more than ninety percent.[29] On September 10, Lehman announced preliminary results for the quarter that had just ended on August 31: a net loss of approximately $4 billion.[30] This result reflected approximately $8 billion of losses in mark-to-market revaluation of assets.[31] Along with these results, CEO Richard Fuld announced a plan to revive the firm by selling off a significant portion of the business, the Neuberger-Berman investment management unit.[32] Nonetheless, Lehman's share price fell forty-two percent the next day.[33] Lehman's credit rating was also put on review.[34]

Signaling the end of Lehman Brothers as an independent entity, Lehman's CEO attempted to sell the entire firm.[35] Bank of America, Barclays, and HSBC expressed interest in buying out Lehman.[36] Government officials were worried, and leaders from the Federal Reserve and Treasury, including the Secretary of the Treasury, met with CEOs from the leading Wall Street firms to try to arrange a solution.[37] These efforts were unsuccessful; on the morning of September 15, Lehman filed for bankruptcy.[38]

While Lehman Brothers was failing, the American International Group ("AIG"), an insurance company with almost $1 trillion in assets and liabilities, was also floundering. AIG's share price had plummeted, from $22.76 on September 8, to $4.76 on September 15.[39] Both ratings agencies—S&P and Moody's—cut AIG's short-term and long-term credit ratings.[40] Several subsidiaries were also reevaluated.[41] This put significant stress on AIG, as the terms of its insurance contracts required it to post additional collateral in the event of a ratings cut.[42] On September 16, AIG's situation further deteriorated when insurance regulators required AIG to pay back loans it had taken

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[29] *See id.*

[30] *See* Press Release, Lehman Bros. Holdings, Inc., Lehman Brothers Announces Preliminary Third Quarter Results and Strategic Restructuring 5 (Sept. 10, 2008), *available at* http://www.sec.gov/Archives/edgar/data/806085/000110465908057829/a08-22764_2ex99d1.htm.

[31] *See id.*

[32] *See* Eric Dash, *5 Days of Pressure, Fear and Ultimately, Failure*, N.Y. TIMES, Sept. 16, 2008, http://www.nytimes.com/2008/09/16/business/16reconstruct.html (on file with Harvard Law School Library).

[33] *See* Hilsenrath et al., *supra* note 28.

[34] *See* Matthew Karnitschnig et al., *Lehman Races to Find a Buyer*, WALL ST. J., Sept. 12, 2008, at A1.

[35] *See* Dash, *supra* note 32.

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *See* Am. Int'l Group, Inc., Quarterly Report (Form 10–Q), at 8 (Nov. 10, 2008) [hereinafter AIG 10–Q, Nov.], *available at* http://www.sec.gov/Archives/edgar/data/5272/000095012308014821/y72212e10vq.htm.

[40] *See id.* at 56.

[41] *See id.*

[42] *See id.* at 8; *see also* Am. Int'l Group, Inc., Quarterly Report (Form 10–Q), at 40 (Aug. 6, 2008), *available at* http://www.sec.gov/Archives/edgar/data/5272/000095012308008949/y59464e10vq.htm ("A significant portion of . . . transactions include provisions that require AIGFP[, a subsidiary], upon a downgrade of AIG's long-term debt ratings, to post collateral . . . .").

from an insurance subsidiary.[43] As a result of the ratings cuts, its lower stock price, and the financial environment, AIG faced insolvency. Unable to borrow in the private market, it decided instead to seek help from federal government.[44]

On the evening of September 16, the Federal Reserve agreed to an $85 billion bailout of AIG.[45] What frightened government officials was the effect an AIG bankruptcy would have on investors because of AIG's large business insuring financial instruments.[46] Bankruptcy would prevent AIG from paying its insurance claims, forcing anyone holding such an insured instrument to significantly devalue it. A bank that revalued its holdings would need to raise more capital to replace the lost value, which, as AIG itself had found out, was difficult in the economic climate. Thus, if AIG defaulted, "it could set off a devastating chain reaction through the financial system."[47]

The Federal Reserve structured the bailout of AIG as an $85 billion line of credit made available in exchange for preferred shares in the corporation, set at an interest rate of 8.5% over the prevailing interbank short-term lending rate, as measured by the London Interbank Offered Rate ("LIBOR").[48] The Federal Reserve received interest on the loan and became the controlling shareholder of AIG, with a 79.9% stake.[49] The deal was finalized on September 22.

Much of the government's economic intervention through September had been conducted through the Federal Reserve: $200 billion through TSLF, $30 billion through PDCF, $30 billion in guarantees for Bear Stearns, and $85 billion for AIG. These actions were based on the Emergency Relief and Construction Act, statutory authority enacted as part of the New Deal.[50] That Act added Section 13(3) to the Federal Reserve Act, granting the Federal Reserve sweeping powers "in unusual and exigent circumstances . . . to discount for an individual, partnership, or corporation."[51] In other words, the

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[43] *See* AIG 10–Q, Nov., *supra* note 39, at 50.

[44] *See id.*

[45] *See* Edmund L. Andrews et al., *Fed in an $85 Billion Rescue of an Insurer Near Failure*, N.Y. Times, Sept. 17, 2008, at A1.

[46] *See id.*

[47] *Id.* The risk in AIG's case was further heightened by the credit default swaps it had engaged in. *See generally To Review the Role of Credit Derivatives in the U.S. Economy: Hearing before the H. Comm. On Agriculture*, 110th Cong. (2008) (statement of Robert Pickel, Chief Executive Officer, International Swaps and Derivatives Association), *available at* http://agriculture.house.gov/testimony/110/h81015/Pickel.pdf (describing the role of credit default swaps in destabilizing AIG); Aaron Unterman, *Innovative Destruction—Structured Finance and Credit Market Reform in the Bubble Era*, 5 Hastings Bus. L.J. 53, 74–77 (2009).

[48] *See* Am. Int'l Group, Inc., Current Report (Form 8–K) (Sept. 22, 2008), *available at* http://sec.gov/Archives/edgar/data/5272/000095012308011496/y71452e8vk.htm (The shares are to be held in a trust "for the benefit of the United States Treasury.").

[49] *See id.* (using the LIBOR rate as a baseline).

[50] Pub. L. No. 72–302, § 210, 47 Stat. 709, 715 (1932).

[51] 12 U.S.C. § 343 (2006).

Federal Reserve can lend money to virtually anyone, on whatever terms it sees fit.[52]

The Federal Reserve's broad lending power had been used sparingly during the early stages of the crisis, but by this point in the crisis had been fully deployed.[53] As the Federal Reserve is an independent agency, no political actors were directly responsible for any of this lending. The Treasury Department had been involved, but final authority lay with the independent agency. By September, elected officials faced the problem of taking blame for the state of economy in upcoming elections without having weighed in on the appropriate course of action. New legislation would provide an opportunity for this debate.

II. Congress Acts: The EESA

The argument that action was needed was supported by the contemporaneous movement of the stock markets. When rumors of a possible comprehensive bailout package hit Wall Street, the Dow Jones Industrial Average rose over six hundred points, ending the trading day up approximately four percent.[54] Congress seemed convinced. Rep. Nancy Pelosi (D-Cal.) announced that Democrats were "committed to quick, bipartisan action," while Rep. Roy Blunt (R-Mo.) urged members of Congress to set politics aside to pass the bailout.[55]

President Bush announced the outline of his bailout plan: "We must address the root cause behind much of the instability in our markets—mortgage assets that have lost value during the housing decline and are now restricting the flow of credit."[56] New legislation would allow the government to move beyond the ad hoc approach and accomplish this goal. Each of the actions thus far was designed primarily to stave off collapse and handle the most pressing and immediate concern instead of addressing any root cause. A congressional appropriation could provide the market with the confidence needed to restart the lending process. It could be large enough "to have maximum impact and restore market confidence."[57]

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[52] Prior to the most recent amendment in 1991, the Federal Reserve could only lend using the same terms offered to member banks. *See* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102–242, tit. IV, § 473, 105 Stat. 2236, 2386 (1991).

[53] *See* David Fettig, *Lender of More Than Last Resort*, The Region, Dec. 2002, *available at* http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3392.

[54] *See* Edmund L. Andrews, *Federal Reserve and Treasury Offer Congress a Plan for a Vast Bailout*, N.Y. Times, Sept. 19, 2008 at A1.

[55] Greg Hitt, *The Financial Crisis: Congress Pledges Action*, Wall St. J., Sept. 20, 2008, at A4.

[56] President George W. Bush, *Remarks on the National Economy*, 44 Wkly. Compilation Presidential Documents 1225, 1226 (2008).

[57] *Turmoil in U.S. Credit Markets: Recent Actions Regarding Government Sponsored Entities, Investment Banks and Other Financial Institutions: Hearing before the S. Comm. on Banking Housing, and Urban Affairs*, 110th Cong. 2 (2008) [hereinafter *Paulson Testimony*]

The President called on Congress "to pass legislation approving the federal government's purchase of illiquid assets, such as troubled mortgages, from banks and other financial institutions."[58] Rep. Barney Frank (D-Mass.) stated his view bluntly, saying "we'll become the lender," and calling for loan modifications to prevent foreclosures.[59] Democrats in Congress accepted this focus on mortgages and pushed for specific aid for homeowners.[60]

The administration's initial proposal, named the Paulson Plan by the press, was breathtakingly short and sought sweeping powers for the Treasury Department, including $700 billion to spend buying mortgage-related assets.[61] There were few details beyond that. The Treasury was free to buy whatever mortgage-related assets it thought appropriate.[62] Once in possession of those assets, the Treasury was free to act as the owner, exercising whatever rights came with the assets, controlling revenue generated by the assets, and selling the assets on whatever terms deemed appropriate.[63] By selling assets, the Treasury would free up authority to buy more assets, as long as the outstanding amount of purchased assets remained at $700 billion.[64] These powers were set to sunset in two years.[65]

The Paulson Plan's breadth did not pass unnoticed. One article described the Paulson Plan as seeking "the most incredible powers ever bestowed on one person over the economic and financial life of the nation. It is the financial equivalent of the Patriot Act."[66] Ron Chernow, a historian, noted "the irony of a free-market administration doing things that the most liberal Democratic administration would never have been doing in its wildest dreams."[67]

The breadth of the powers sought was magnified by the inclusion of only minimal direct oversight. The Treasury Department was not required to give its first public accounting until three months after it initiated action under the plan.[68] Furthermore, the content of that required report was not

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(testimony of Henry Paulson, Jr., Sec'y of the Treasury), *available at* http://banking.senate.gov/public/_files/PAULSONTestimony92308.pdf.

[58] Remarks on the National Economy, *supra* note 56.

[59] Edmund L. Andrews, *Bush Officials Urge Swift Congressional Action on Broad Rescue Powers*, N.Y. Times, Sept. 20, 2008, at A1.

[60] *See* Hitt, *supra* note 55.

[61] Though the Paulson Plan was never officially published by the Treasury, a copy of the proposal appeared on the New York Times's website. *See Text of Draft Proposal for Bailout Plan*, N.Y. Times, Sept. 21, 2008, http://www.nytimes.com/2008/09/21/business/21draftcnd.html (on file with Harvard Law School Library) [hereinafter "Paulson Plan"]. Henry Paulson, Jr., the plan's namesake, was serving as Secretary of the Treasury at the time.

[62] *See id.* ("Sec. 2. Purchase of Mortgage-Related Assets.").

[63] *See id.* ("Sec. 5. Rights; Management; Sale of Mortgage-Related Assets.").

[64] *See id.* ("Sec. 6. Maximum Amount of Authorized Purchases.").

[65] *See id.* ("Sec. 9. Termination of Authority.").

[66] Andrew Ross Sorkin, *A Bailout Above the Law*, N.Y. Times, Sept. 23, 2008, at C1.

[67] Nelson D. Schwarz, *Abroad This Bailout is a Shocker*, N.Y. Times, Sept. 18, 2008, at C1.

[68] *See* Paulson Plan, *supra* note 61 ("Sec. 4. Reports to Congress."). Reports were also required semiannually thereafter. *See id.*

defined in the proposal. In addition, the Paulson Plan expressly precluded judicial review: "[d]ecisions by the Secretary pursuant to the authority of this Act are non-reviewable and committed to agency discretion, and may not be reviewed by any court of law or any administrative agency."[69]

Legislators from both parties were uneasy with the bailout plan.[70] Rep. Louie Gomert (R-Tex.) said that he was not prepared to say that "socialism works in a crisis."[71] Sen. Sherrod Brown (D-Ohio) shared the "universally negative" reaction that his constituents had to the proposal.[72] Given this reaction in Congress, the Paulson Plan proved to be merely the opening salvo in a tense negotiating process. The Paulson Plan was unveiled on September 20; it was not until September 28 that the administration and Congress negotiated a compromise plan that could be sent to the floor of the House.[73]

Republicans won inclusion of a parallel program that would create an insurance pool to guarantee troubled assets, funded by premiums collected from private industry.[74] Democrats in Congress won inclusion of greater oversight of the plan and executive compensation limitations for companies that received money under the plan.[75]

On September 29, the House voted on the bailout bill.[76] After just three hours of debate,[77] the vote was taken and the bill failed 205–228.[78] During the vote, the Dow Jones Industrial Average dropped several hundred points, finishing the day down seven percent.[79]

After the House version failed, the Senate took charge of giving the Treasury Department the $700 billion it wanted. Instead of restarting the legislative process, the Senate proceeded to add the bailout as an amendment to a different piece of legislation that had already passed the House: the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 ("Paul Wellstone Mental Health and Addiction Equity Act").[80] The Paul Wellstone Mental Health and Addiction Equity Act required em-

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[69] *Compare id.* ("Sec. 8. Review.") *with* Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2006) (detailing availability of judicial review for administrative actions).

[70] *See* Carl Hulse, *Faced with Financial Upset and an Election, Lawmakers Lash Out*, N.Y. Times, Sept. 24, 2008, at A24.

[71] *Id.*

[72] *Id.*

[73] *See* Greg Hitt & Damian Paletta, *The Financial Crisis: GOP Leaders Try to Secure Rank-and-File Vote*, Wall St. J., Sept. 29, 2008, at A6.

[74] *See id. See also* EESA, *supra* note 1, § 102, 122 Stat. at 3896–99.

[75] *See* Greg Hitt et al., *Bailout Compromise Gets New Life: Negotiations Resume, with Nod to Conservatives' Objections*, Wall St. J., Sept. 27, 2008, at A1.

[76] Technically, the House vote was to amend a pending bill to include the bailout provisions. *See* 154 Cong. Rec. H10348 (daily ed. Sept. 29, 2008) (motion for the bailout bill to be included as an amendment to H.R. 3997, 110th Cong. (2nd Sess. 2008)).

[77] *See* 154 Cong. Rec. H10359 (daily ed. Sept. 29, 2008).

[78] *See* 154 Cong. Rec. H10410 (daily ed. Sept. 29, 2008).

[79] *See* Sarah Lueck et al., *Bailout Plan Rejected, Markets Plunge, Forcing New Scramble to Solve Crisis*, Wall St. J., Sept. 30, 2008, at A1.

[80] H.R. 1424, 110th Cong. (2nd Sess. 2008); *see also* EESA, *supra* note 1, div. C, tit. V, subtit. B, 122 Stat. at 3881.

ployer provided health care plans to cover mental health and substance abuse treatment under the same rules that govern medical and surgical treatments. The law would improve coverage for over 100 million people, while raising insurance premiums by an average of 0.2%.[81]

While the bailout was left essentially unchanged, a few modifications were made to smooth passage in the House. The amount of savings insured by the Federal Deposit Insurance Corporation was raised from $100,000 to $250,000, convincing some in the House to support the bill the second time around.[82] Other changes ranged from Alternative Minimum Tax relief[83] to making permanent the IRS's authority to conduct undercover operations.[84] Members of the House were also likely swayed by the stock market's reaction to their first failure to pass the bailout. In the end, EESA passed both the Senate and the House by wide margins: 74–25 in the Senate,[85] and 226–171 in the House.[86]

III. The New Rescue Plan: EESA

EESA is both broader and narrower than the original Paulson Plan. The original concept of a focused bailout based on government activity in the mortgage and mortgage-backed securities markets was broadened. The central piece of EESA is the Troubled Asset Relief Program ("TARP"), which authorizes the government to purchase troubled assets.[87] In EESA, the definition of troubled asset is broad, including both "mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages" and "any other financial instrument . . . the purchase of which is necessary to promote financial market stability."[88] This contrasts sharply to the "mortgage-related asset" limitation used in the Paulson Plan.[89] This broader definition gave significant flexibility to the administration to shape the financial relief as events developed and to reorganize the economic intervention without going to Congress.

TARP is not merely an appropriation. It allows the Treasury Department to keep up to $700 billion in assets "outstanding at one time."[90] As

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[81] *See* Robert Pear, *Equal Coverage for Mental and Physical Ailments is Required in Bailout Law*, N.Y. Times, Oct. 6, 2008, at A13 (citing cost estimate from the Congressional Budget Office).

[82] *See* EESA, *supra* note 1, § 136, 122 Stat. at 3799. *See also* David M. Herseznhorn, *Bush Signs Bill*, N.Y. Times, Oct. 4, 2008, at A1.

[83] *See* EESA, *supra* note 1, div. C, tit. I, 122 Stat. at 3863.

[84] *See id.* § 401, 122 Stat. at 3875.

[85] *See* 154 Cong. Rec. S10294 (daily ed. Oct. 1, 2008).

[86] *See* 154 Cong. Rec. H10805 (daily ed. Oct. 3, 2008).

[87] *See* EESA, *supra* note 1, § 101, 122 Stat. at 3767.

[88] EESA, *supra* note 1, § 3(9)(B), 122 Stat. at 3767 (including the definition of troubled asset). *See also* Jenny Anderson et al., *Big Financiers Start to Lobby for Wider Aid,* N.Y. Times, Sept. 22, 2008, at A1.

[89] *See* Paulson Plan, *supra* note 61.

[90] EESA, *supra* note 1, § 115, 122 Stat. at 3780.

Secretary Paulson emphasized in his testimony before the House Committee on Financial Services, "[t]he $700 billion program we have proposed is not a spending program. It is an asset purchase program, and the assets which are bought and held will ultimately be resold with the proceeds coming back to the government."[91] This feature of TARP makes it difficult to know ahead of time either how costly the program will be or how much activity the program will see. TARP might go through several multiples of $700 billion before it expires in two years.[92] If the program is successful, assets might be resold at little or no loss. If the assets purchased under TARP become worthless, the program would cost the full $700 billion. Thus, Congress limits the downside exposure to $700 billion, while allowing the program to continue operating if successful.

Congress further limits the authority of the administration by breaking up the $700 billion into separate tranches. EESA provides for breakpoints at $250 billion and $350 billion.[93] In order for TARP to exceed $250 billion outstanding, the President must certify to Congress that additional resources are needed.[94] To raise the ceiling from $350 billion to $700 billion, the President must also certify that the resources are needed, but EESA specifically allows for Congress to pass a joint resolution of "disapproval" limiting TARP to $350 billion of outstanding assets.[95] The structure of the breakpoints makes it extremely unlikely that TARP would not be extended to $700 billion. No President would be likely to fail to certify to Congress the need for more than $250 billion in TARP authority. To get the full $700 billion, the President would merely need to veto any joint resolution from Congress limiting TARP to $350 billion. A Congressional override of the veto does not seem likely.[96] Though these breakpoints were not likely to actually block spending, they did serve as focal points for public scrutiny and possible Congressional action.[97]

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[91] *Paulson Testimony*, *supra* note 57.

[92] *See* EESA, *supra* note 1, § 120, 122 Stat. at 3788 (ending authority for TARP on Dec. 31, 2009, extendible to two years after enactment by the Treasury Secretary).

[93] *See id.* § 115(a)(1), 122 Stat. at 3780.

[94] *See id.* § 115(a)(2), 122 Stat. at 3780 (raising TARP's ceiling to $350 billion).

[95] *See id.* § 115(a)(3), 122 Stat. at 3780.

[96] Congress is limited to using a joint resolution, which must be signed by the President, because of the constitutional limitation on legislative vetoes. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 954–55 (1983). All joint resolutions have the full force of law. 110TH CONGRESS HOUSE RULES MANUAL, H.R. DOC. NO. 109–157, at Sec. XXI, § 397, *available at* http://bulk.resource.org/gpo.gov/rules/manual/110.html ("the joint resolution, is a bill so far as the processes of the Congress in relation to it are concerned . . . ."). Thus, Congress retains the ability to limit TARP, though it might take supermajorities in both houses to override a potential presidential veto.

[97] *See, e.g.*, Lori Montgomery & David Cho, *Obama Seeks Rest of Bailout; Request for Funds Meets Skepticism on Capitol Hill*, WASH. POST, Jan. 13, 2009, at A1. The additional funds were approved, as the resolution disapproving funds failed in the Senate. *See* Lori Montgomery and Paul Kane, *Senate Votes to Release Bailout Funds to Obama*, WASH. POST, Jan. 16, 2009, at A1.

The breakpoints available to Congress provide a mechanism for Congress to change course as new information becomes available. This staged decision procedure is particularly useful because of the dynamic nature of the financial crisis.[98] To the extent that future legislative action can provide a check on the executive, Congress may well have felt comfortable broadening the class of assets covered by TARP because of this staged decision procedure.

EESA also replaces the complete lack of judicial oversight in the original proposal with limited judicial review based on (but less generous than) the judicial review provisions in the Administrative Procedure Act.[99] Review is available and "[a]ctions . . . shall be held unlawful and set aside if found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law."[100] The impact of these provisions is likely to be limited, at best. EESA provides that equitable relief is available only for constitutional violations.[101] Other, non-equitable relief is unavailable because the Administrative Procedure Act provisions cited in EESA provide only for equitable relief.[102] Thus, it appears only constitutional rights will be protected when the government acts pursuant to EESA.

Policing compliance with the statute occurs not through judicial review, which would likely take far too long to be effective, but with additional reporting mechanisms. Given the politically charged atmosphere surrounding EESA and the financial crisis, it seems likely that merely making the government actions pursuant to TARP transparent will provide some incentives to comply with the law. Voters are watching and making decisions based on this issue.[103]

The Treasury Department's reports to Congress are due every thirty days,[104] and for every $50 billion in assets purchased.[105] These reports cover the basic information about activity under TARP: what assets have been purchased and how the price for these assets was determined.[106] Both pieces of

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[98] *See* Jacob E. Gersen, *Temporary Legislation*, 74 U. Chi. L. Rev. 247, 268 n.75 (2007) ("[W]hen initial decisions are likely to be wrong, staged decision procedures facilitate the correction of errors, and this is particularly likely to be the case in policy contexts dominated by uncertainty.").

[99] *See* EESA, *supra* note 1, § 119(a)(1), 122 Stat. at 3787 (citing the Administrative Procedure Act's judicial review provision, 5 U.S.C. §§ 701–06 (2006)).

[100] EESA, *supra* note 1, § 119(a)(1), 122 Stat. at 3787.

[101] *See id.* § 119(a)(2), 122 Stat. at 3787.

[102] *See* 5 U.S.C. § 706 ("The reviewing court shall . . . (1) compel agency action . . . [or] (2) hold unlawful and set aside agency action . . ."). *See also* Doe v. Chao, 540 U.S. 614, 619 n.1 (2004) (characterizing 5 U.S.C. § 706 as providing "equitable relief").

[103] UPI.com, *Pew Survey Focuses on Economy, Jobs*, http://www.upi.com/Top_News/2009/01/23/Pew_survey_focuses_on_economy_jobs/UPI-76121232744004/ (last visited Feb. 25, 2009) ("The share of Americans saying that strengthening the nation's economy should . . . get top priority has risen from 68 percent two years ago to 85 percent today.").

[104] *See* EESA, *supra* note 1, § 105(a), 122 Stat. at 3771–72.

[105] *See id.* § 105(b), 122 Stat. at 3772. These reports are referred to as "tranche reports." They are due one week after the threshold dollar amount is crossed. *See id.*

[106] *See id.* § 105 (b), 122 Stat. at 3772.

information are vital, but the disclosure of the pricing model used is particularly important given that it is linked to how the $700 billion program is measured.

For example, in the Fannie/Freddie deals and the AIG deal, the government received what might be classified as "troubled assets": shares of the struggling firms, in exchange for lines of credit. What if these transactions were part of TARP? EESA does not specify how these lines of credit are to be counted against the $700 billion limit. If the full amount of the line of credit is not deducted immediately from the $700 billion, the Treasury Department would need to estimate the value of the line of credit based on the risk that it would be utilized. In this process, the same valuation problems plaguing the private market might infect TARP. Because of this importance of pricing, EESA requires a separate additional report for pricing models used in TARP, within two days of their use.[107]

In addition to the Treasury's own reports, EESA provides for several independent reviews of TARP. EESA creates a Special Inspector General and requires that office to submit quarterly reports that include detailed accounting of "all purchases, obligations, expenditures, and revenues" for TARP.[108] EESA also calls for an independent Oversight Panel appointed by the party leaders in both houses of Congress.[109] The Oversight Panel is also required to report every thirty days on the effectiveness of TARP in increasing market transparency, mitigating foreclosures, and maximizing taxpayer benefits.[110]

The EESA suggests that Congress was also concerned with possible conflicts of interest among those administering the authority granted under the Act.[111] Congress identified it as a specific area of concern, leaving the rulemaking to the Treasury Department.[112] The first area of concern was with hiring professional services firms: the money managers, accountants, and lawyers would inevitably be drawn from the small pool of Wall Street firms and the closely affiliated professional services with which they work.[113] Congress also identified the obvious potential conflict of interest in choosing assets to buy and in managing the assets held in TARP.[114] Finally, Congress was also concerned about post-employment activities by TARP personnel.[115]

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[107] *See id.* § 114, 122 Stat. at 3780.

[108] *Id.* § 121(f)(1), 122 Stat. at 3790.

[109] *See id.* § 125(c), 122 Stat. at 3792.

[110] *See id.* § 125(b), 122 Stat. at 3791–92.

[111] *See id.* § 108, 122 Stat. at 3774.

[112] *See id.*

[113] *See* U.S. Dep't of the Treasury, Initial Section 105(a) Troubled Asset Relief Program Report To Congress For The Period of October 6, 2008 to November 30, 2008 9 (2008) [hereinafter Dep't of the Treasury TARP Report], *available at* http://www.treasury.gov/initiatives/eesa/congressionalreports.shtml (listing professional services contracts with EnnisKnupp, Bank of New York Mellon, PriceWaterhouse Coopers, and Ernst & Young).

[114] *See* EESA, *supra* note 1, § 108 (a), 122 Stat. at 3774.

[115] *See id.*

EESA also addresses conflict of interest problems for executives of companies that benefit from TARP. If assets are purchased under TARP without competitive bidding, or the Treasury acquires debt or equity in a company as part of a TARP deal, compensation for the top five highly paid executives is limited by EESA.[116] One concern is that TARP beneficiaries might take excessive risks once government money is received. The Treasury's rules can limit compensation paid to top executives if such excessive risk taking is identified.[117] For material misstatements, another possible problem for TARP recipients, EESA provides for recovery of bonuses falsely paid on the basis of misstated financials.[118] Lastly, companies in TARP holding debt or equity are prohibited from awarding so-called "golden parachute" payments.[119]

IV. The EESA in Action

EESA emerged from a rapid legislative process as a significantly more balanced bill than the original Paulson Plan. Nonetheless, the oversight provided for in EESA did not effectively check executive authority. As soon as the bill became law, the administration put TARP's flexibility to use. Congress's decision to leave flexibility with the administration left the door open to immediate reorientation of TARP away from mortgage-related assets.

The first program established under TARP was the Capital Purchase Program ("CPP").[120] Instead of purchasing troubled assets held by financial institutions, CPP allowed the government to directly purchase equity in troubled banks.[121] The shares purchased were preferred shares, initially paying a five percent dividend.[122] The first $100 billion in assets acquired under TARP were shares in some of the largest financial institutions in America: Bank of America, Citigroup, Goldman Sachs, Morgan Stanley, Wells Fargo, and Merrill Lynch.[123] By November 30, the Treasury had purchased about $150 billion in total equity from more than fifty institutions.[124] TARP was in name, and was marketed as, about purchasing troubled assets, but the mortgage-related troubled assets identified in the Paulson Plan and specifically mentioned in EESA did not receive any direct funding.[125]

This reorientation of EESA happened entirely without Congressional approval. TARP was broad enough to allow the administration to purchase

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[116] *See id.* § 111 (a), (c), 122 Stat. at 3776–77.
[117] *See id.* § 111 (b)(1), 122 Stat. at 3776.
[118] *See id.* § 111 (b)(2), 122 Stat. at 3776–77.
[119] *See id.* § 111 (b)(3), 122 Stat. at 3777.
[120] *See* U.S. Dep't of the Treasury, First Tranche Report to Congress 1 (2008), *available at* http://www.treasury.gov/initiatives/eesa/docs/Tranche-Reportfinal.pdf.
[121] *See id.* at 2–3.
[122] *See id.* at 2. The dividend rate steps up to nine percent after five years. *Id.*
[123] *See* Dep't of the Treasury TARP Report, *supra* note 113, at 10.
[124] *See id.* at 3.
[125] *See id.* at 1–3.

any financial instrument as long as the administration believed it "necessary to promote financial market stability."[126] Given the change in plan, Congress's focus on reporting requirements provided the only limitation on executive authority. Without reports from the administration, Congress would not be able to monitor spending under TARP and to reevaluate the response to the financial crisis.

The lack of limitation on executive authority was made even clearer by the first question posed by the Congressional Oversight Panel created by EESA: "What is the economic strategy?"[127] EESA itself provided no answer, leaving the strategic plan for TARP to be determined by the Department of the Treasury. President Bush's original argument was that the decline in the value of mortgage assets was driving a credit crisis.[128] This position would have to be evaluated in the context of the pre-EESA governmental actions. The Federal Reserve and Treasury Department had already injected several hundred billion dollars of liquidity into the financial system. In this environment, it was debatable if further injections of the same sort would fix the problem.

The minority view is that the financial crisis was not caused by an increased cost of credit for low-risk projects. The usual evidence cited to show the increased cost of credit is the increased spread between available interest rates for private borrowers and the rate for U.S. Treasuries.[129] The counter argument, however, suggests that "a focus on spreads can lead to misleading inferences during financial crises."[130] If during a crisis, investors seek the safety of Treasury securities, the real return on these securities will fall dramatically. The spread might increase, but the cost of credit as measured by interest rates will not necessarily do so as well. During the current crisis, for example, the interest rate on BBB-rated corporate bonds remained below 2006 levels.[131] Those corporations apparently retained access to capital at the same interest rates they had had two years earlier.

If lenders were passing on profitable loans, then there should be "hard evidence that good borrowers with relatively safe projects are unable to get credit because of the increased cost of intermediation due to a breakdown in the system of financial intermediation, not because of increases in the riskiness of their project."[132] In other words, uncertainty about project success

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[126] EESA, *supra* note 1, § 3(9)(B), 122 Stat. at 3767.

[127] Cong. Oversight Panel for Econ. Stabilization, Questions About the $700 Billion Emergency Economic Stabilization Funds 8 (2008), *available at* http://cop.senate.gov/documents/cop-121008-report.pdf.

[128] *See* Remarks on the National Economy, *supra* note 56.

[129] *See, e.g.*, Edmund L. Andrews, *As Economy Weakens, Federal Reserve Officials Consider Lowering Rates*, N.Y. Times, Oct. 3, 2008, at C4.

[130] V.V. Chari et al., *Facts and Myths About the Financial Crisis of 2008* 6 (Fed. Reserve Bank of Minn. Research Dep't, Working Paper No. 666, 2008), *available at* http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4062.

[131] *See id.* at 7.

[132] *Id.*

cannot be solved with a loan. The Congressional Oversight Panel similarly suggested the possibility that economic insecurity triggered the crisis.[133] If insecurity is the root cause, "increasing liquidity [would] have little impact."[134] More evidence is needed to resolve this question.

This debate illustrates how Congress was unable to provide input into important questions such as the economic motivation behind TARP. EESA simply left these questions to be determined and redetermined by the administration. In December, the Automotive Industry Financing Program was established under TARP.[135] Twenty billion dollars in loans were allocated to GM, GMAC, and Chrysler.[136] These firms are even more removed from the mortgage crisis than the institutions that wrote and purchased mortgage-related assets. It could not be more clear that in the current economic climate, only the $700 billion cap on TARP limits the reach of the President's authority.

V. Conclusion

EESA gives the administration virtually unlimited discretion in spending a vast sum of money. This is not an unprecedented outcome for legislation passed during emergency. In the post-9/11 era, the Patriot Act was passed with minimal Congressional involvement.[137] This tendency for legislatures to delegate to the executive during times of crisis was noted long ago,[138] and affects the judicial as well as the legislative branch.[139]

EESA moves beyond this model of legislating during crisis through public disclosure and staged decision making. Though $700 billion is a large sum to allocate, EESA was not the final response to the financial crisis.[140] As such, Congress took advantage of the staged decision-making to refine strategy in response to new information. Congress was assisted in gathering this

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[133] *See* Cong. Oversight Panel for Econ. Stabilization, *supra* note 127, at 13.

[134] *Id.*

[135] *See* U.S. Dep't of the Treasury, Fourth Tranche Report to Congress 2 (2009), *available at* http://www.treasury.gov/initiatives/eesa/tranche-reports.shtml.

[136] *See id.*

[137] *See* Erwin Chemerinsky, *Post 9/11 Civil Rights: Are Americans Sacrificing Freedom for Security?*, 81 Denv. U.L. Rev. 759, 765 (2004) (quoting a Senator saying "[w]e're in a crisis, we don't have time to hold hearings").

[138] *See* William E. Scheuerman, *Exception and Emergency Powers: The Economic State of Emergency*, 21 Cardozo L. Rev. 1869, 1883–84 (2000) ("Schmitt recognized that emergency economic power had become ubiquitous in the liberal democratic political universe, observing that its expansion had occurred . . . under the auspices of left-wing as well as right-wing governments. Already in the 1931 *Guardian of the Constitution*, Schmitt accurately identified the most likely institutional implications of this trend—the growth of far-reaching discretionary executive power and the concomitant decline of elected legislatures.").

[139] *See* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 Harv. L. Rev. 1095, 1140 (2009) ("[W]here judges perceive an emergency . . . standards of rationality, statutory clarity, evidence, and reasonableness all become more capacious and forgiving.").

[140] *See, e.g.*, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009) (appropriating an additional several hundred billion dollars in tax cuts and spending programs).

information by EESA's significant reporting requirements. Though these are not unique or novel techniques in drafting legislation, EESA shows how Congress can limit executive authority outside of narrow grants of power and fixed appropriations.

*—Archit Shah**

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