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All Deliberate Speed: Constitutional Fidelity and Prudent Policy Go Hand in Hand in Fixing the Credit Crisis

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Even in times of difficulty or crisis, the constitutional design for legislation requires careful, bicameral deliberation and presentment to the President. For sound policy and constitutional reasons, Congress should not recess until it acts on a solution to the credit crisis, but it should also be mindful of the virtues of calm deliberation and the dangers to liberty of a crisis mentality. The mounting resistance to the Administration's proposal presents an opportunity for careful deliberation. The constitutional and policy concerns expressed by many Members of Congress and thoughtful scholars this past week must be thoroughly considered.

No one doubts the importance of Treasury Secretary Henry Paulson's call for immediate legislative action to calm the financial markets, which have the potential to wreak long-term damage to the world economy, but the initial deadline with which he urged Congress to act on a dramatic bailout plan raises risks that Congress must avoid: either acting imprudently (and with serious constitutional consequences) or not acting at all before it recesses.

Members of Congress had planned to depart Washington on Friday to spend the month campaigning for votes, but they should stay in session around the clock if that is necessary to complete action before the end of the month. The exigencies of electoral politics should not be allowed to keep Congress from its constitutional duties. That result—Members of Congress abandoning Washington in a time of crisis to campaign for their own reelections—would be irresponsible. It is also, in all likelihood, unnecessary: What statesman would believe that his constituents would exact punishment for staying a few extra days to do the people's work? In the minds of true statesmen, this contest between constitutional values and politicking should not present a conflict.

Constitutional and Policy Concerns Converge. As many have come to realize this week, there are some fundamental constitutional values at stake in the present debate. The Paulson proposal, and the several congressional proposals based upon it, raise substantial constitutional questions regarding: (1) Congress's enumerated power—or lack thereof—to intervene with private markets in the manner contemplated, (2) the lack of meaningful standards to guide the extremely broad grant of discretion to the Treasury secretary (the "legislative delegation" problem), (3) limitations on judicial review over the exercise of that almost limitless discretion, and (4) related separation of powers concerns.

From a constitutional standpoint, the current versions of the legislation are different in scope, and

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especially in kind, from almost any federal legislation that has come before. In short, many analogies to past emergency economic powers, such as those exercised in response to the thrift failures of the 1980s, are not on point with regard to these central constitutional concerns. Rather than rely on these precedents, Congress must take the time to work through these constitutional concerns.

And these concerns are serious, regardless of how the courts might resolve them. Some would treat the Constitution as a legalistic document and employ narrow legalistic arguments to circumvent its strictures and protections. The substance of this debate, however, should not turn on what provisions might or might not pass muster with the courts under a pinched conception of our fundamental law. Rather, it is the principles the Constitution embodies, which have served us well through so many crises, that should be the focus of debate. In short, Americans should take little comfort that legislation might barely pass muster in the courts if the legislation does serious damage to the underlying constitutional principles that were designed to protect our individual rights against governmental usurpations.

In particular, legal scholars across the ideological spectrum recognize that, with regard to sweeping and seemingly standardless delegations of discretion to the executive branch, the courts have not been assertive in policing this aspect of the constitutional separation of powers. Yet even under the courts' permissive, modern approach to such delegations, the delegation of authority in the legislation that some recommend for swift passage is questionable. This counsels caution.

Moreover, fidelity to our constitutional principles also coincides with prudent policy prescriptions. Those who argue that we need to suspend the fundamental charter in order to save it (or the economy) have it backward. Our fundamental charter has always been a bulwark for the free market. The recommendations below to address constitutional concerns should not only improve the short-term value of any emergency legislation; it should also support the long-term viability of free markets and, ultimately, free people.

Needed Constitutional Changes. To satisfy the substantial constitutional and policy concerns—if not the Constitution itself—the draft legislation must cabin the scope and character of the Treasury secretary's discretion, connect the exercise of that discretion to legitimate government purposes, and allow Americans adversely affected to seek meaningful judicial review. If the bailout is to pass constitutional muster, lawmakers must concern themselves with at least the following specifics, while keeping in mind the broader outlines of its constitutional authority:

- *Type and Scope of Indebtedness.* The type of financial instruments or debt that the secretary can purchase, as well as the industries that may seek relief, should be defined by statute carefully so as to limit the secretary's discretion. There are various ways to do this that would preserve the discretion necessary for the secretary to achieve the goals of the legislation and provide the limits necessary to protect the taxpayers. For instance, the legislation could expressly cover defined mortgage-related, non-equity securities of the type normally held by financial institutions. In addition, Congress and the administration could work together to identify other relevant, non-debt securities and set forth the circumstances under which the secretary could acquire them.

  If the nature of the economic problems changes, Congress may choose to expand the scope of authority in specific ways rather than granting a blank check at the outset. This and future Administrations should bear the burden of defining and limiting the necessary financial instruments or debt that they are seeking power to manage. Indeed, Congress should exercise a healthy suspicion if the Administration cannot define the scope of the authority it needs.

  The revolving nature of expenditures should also be capped. In the Administration proposal, the only limitation was the total value of securities the government could hold at any one time, which was $700 billion. The House bill converted that figure into an overall cap. Congress should impose some overall limit and stand ready to reconsider the cap if additional expenditures prove necessary.

- *Standards to Guide the Secretary's Discretion.* It is questionable whether the current bills satisfy the court-created test of providing an "intelligible principle" to guide the secretary's discretion (see, e.g., *Whitman v. American Trucking Association*), but that minimum standard is woefully inadequate for citizens and Members of Congress who care about the constitutional order. Congress must undertake the hard work of crafting legislative alternatives that achieve vital ends without straining our constitutional structure. In order to do so, the legislation itself must contain an objective set of criteria that would guide the secretary's exercise of discretion in practice and not just in theory. The criteria that the government has employed in deciding when to act (e.g., Bear Stearns, AIG, etc.) and when not to act (e.g., Lehman Brothers) suggest that some guiding principle is necessary, and the Administration should be made to articulate it expressly and expose it to the process of democratic consideration.

  In contrast, the existing drafts provide almost no meaningful standards to cabin the secretary's discretion on what debt he may buy, for what purposes, to whom he may sell it, and on what terms. The definition of "troubled" assets is also unreasonably open-ended and not subject to judicial review. The two sweeping, subjective findings the secretary must make in the Administration proposal (three in the House bill) do not seriously limit his subsequent actions. Coupled with the existing limitation on judicial review, his discretion to manage "troubled" markets, "provide stability," or "prevent disruption" is almost limitless. Equally important, that a particular market is "troubled" or that there is a risk of "disruption" is still a questionable ground for action if there is no legitimate government interest involved. The statute should set forth some objective criteria that connect the particular market problem with a traditional government purpose—e.g., currency stabilization. That connection should not be fictionalized or unreasonably tenuous, or it will simply serve as a bad precedent for other questionable delegations. With regard to all of these factors, the objective criteria must actually operate to guide and sometimes limit the secretary's exercise of discretion and not merely serve as a hortatory preamble for congressional action.
- *Meaningful Judicial Review.* It might be reasonable to subject particular factual determinations made by the secretary to a deferential standard of review and to limit certain types of judicial remedies (e.g., injunctions and other equitable relief). But citizens adversely affected by the government's actions must be able to seek a redress in the courts for fundamental constitutional violations or damages at law.
- *Sunset of All Regulatory Authority.* Congress can codify or expand regulatory authority within two years if it proves necessary and prudent. However, there is no sound reason to sunset some of the authorities under the proposed legislation but allow unlimited discretion to issue market regulations that will never sunset, as the current proposals provide. All regulations promulgated under the authority of the emergency legislation should sunset with the rest of the statute absent subsequent congressional action.

This combination of changes will go far to addressing the substantial constitutional questions about the existing proposals. If the scope of the authority is carefully defined, the standards for proper action are set forth in the statute, and those two limits are subject to meaningful court review, then citizens can at least know whom to hold accountable and where to go for redress of grievances. The ensuing changes will also move the proposals in the right policy direction as well.

Bicameral for a Reason. As Alexis De Tocqueville observed: "To divide legislative strength, thus to slow the movement of political assemblies…are the sole advantages" of our system of legislative bicameralism. Congress needs to act swiftly to address the financial crisis, but it also needs to deliberate.

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