Written by **Steven J. DuBord** on November 13, 2008

The Bailout and the Constitution

It is sadly ironic that one of the first things new law students get is a pocket Constitution because, over the next three years, they learn that modern federal laws have nearly nothing to do with what is specifically enumerated in that document. This unconstitutional trend continues with the recent record-setting bailout, which is officially called the Emergency Economic Stabilization Act of 2008 (EESA).

The mainstream press reported the political battle over passage of EESA being mainly an issue of whether it would garner enough votes and not whether the federal government is even empowered to do such a thing in the first place. It was rare to even hear any mention of the Constitution in the debate, but there were a few questions asked by true proponents of our founding document. Congressman Ron Paul (R-Texas) questioned the dubious constitutionality of EESA on CNN: "You're asking people to just totally defy the Constitution because there's no place in the Constitution that says that we can do these things."

EESA authorizes the U.S. Secretary of the Treasury to spend up to $700 billion to purchase troubled assets, mainly mortgage-backed securities, from the nation's banks. The Department of the Treasury is an executive department established by an act of Congress in 1789. Executive departments are authorized, by reference, within the Constitution in Article 2, Section 2, Clause 1, where it says the president "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," and in Clause 2 regarding the appointment power of inferior officers by "the Heads of Departments." The Constitution does not contain any specific grants of powers to these departments. As part of the federal government, they face the same constitutional restraints, although constitutional restraints on government have been in a steady state of decline for quite some time.

Throughout the years the Supreme Court has ruled on the powers and limits of executive departments. However, as with the rest of the federal government, the court has found that executive departments have plenty of power and very few limits. So, is EESA constitutional?

Lawyer Robert A. Levy, of the Cato Institute, answers with a resounding no. In his October 20 *Legal Times* article "Is the Bailout Constitutional?" he writes: "The federal government has no constitutional authority to spend taxpayers' money to buy distressed assets, much less to take an ownership position

in private financial institutions."

The Constitution's commerce clause — which authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and the Indian Tribes" — has been used to justify vast increases in the power of the federal government. Consequently, arguments in favor of EESA might employ a broad reading of the commerce clause to defend the act's constitutionality. But Levy disagrees with that idea as well: "The commerce power is to 'regulate,' but commerce is not regulated by eliminating private risk and substituting tax-funded handouts to favored economic actors. The Framers who crafted the commerce clause could not have intended to empower Congress to give an executive official virtual carte blanche over all financial institutions."

Levy's position is consistent with that of James Madison, the father of the Constitution, who stated in a letter dated February 13, 1829 that "it is very certain that [the commerce clause] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." Put simply, this clause did not empower Congress to manage the American economy.

In addition, EESA's broad grant of powers to the Treasury Secretary raises numerous problems in regard to Congress delegating its legislative ability to another branch. Legal Scholar William J. Watkins, Jr., of the Independent Institute, wrote in a recent article about the bailout debate: "Under separation of powers principles, legislative power typically cannot be exercised by members of the executive branch or the judiciary.... With the EESA, the Secretary of the Treasury is given czar-like power over a large segment of the private market. The purchase and management of bank assets is left to his best judgment. Congress' delegation of power under the EESA raises serious separation-of-powers concerns and threatens to improperly mix legislative and executive authority."

Furthermore, the legislative maneuvers utilized by Congress to pass EESA in spite of such widespread public opposition raise procedural questions about its constitutionality. Bruce Fein, a former associate deputy attorney general in the Reagan administration, opined in the *Washington Times* that EESA was "unconstitutional at birth" since the bailout bill originated in the Senate (after the House had initially defeated it) despite the constitutional provision requiring all appropriations bills to originate in the House.

Fein is also worried about the dangers to liberty presented by the implementation of the bill. "Any statute authorizing the executive branch to 'purchase' an asset carries with it [an] ... authorization for the government to 'take' that asset by eminent domain!... The government has taken private property for the purpose of encouraging private lending to the private sector. If economic benefit ... justifies eminent domain, then no private property is sacred. The government can always claim it knows of a superior economic use of an asset — ranging from a woman's gold jewelry or Google's search engine."

In summation, EESA was unconstitutionally made into law by a Congress that unconstitutionally delegated legislative authority to the Treasury Secretary to perform unconstitutional government actions. This is a very dangerous legal precedent in our nation's history. The idea of the Supreme Court overturning clearly unconstitutional legislation like EESA seems unlikely. It is easy to quickly lose hope as our country declines further into socialism and the government gains new and dangerous powers with each passing day, but there is hope.

It resides in the fact that our Constitution, though often ignored and circumvented, is still the law of the

land, and we can still use the freedoms our Constitution guarantees to save our freedoms. The Framers of the Constitution delegated more powers to Congress than to either of the other two branches of the federal government, and we can and must apply informed pressure on our federal lawmakers — both representatives and senators — to take seriously their oaths to the Constitution. A constitutional-minded Congress would not only begin dismantling extra-constitutional programs such as that established by EESA, it would also apply constitutional means to rein in federal judges and presidents who unconstitutionally abuse their powers.

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