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Was the Congressional Grant of 'Bailout' Authority to Treasury Secretary Henry Paulson Really So "Unprecedented?": A Historical Analysis and Comparison of Treasury Secretary Authority During Financial Crisis

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**WAS THE CONGRESSIONAL GRANT OF
'BAILOUT' AUTHORITY TO TREASURY
SECRETARY HENRY PAULSON REALLY
SO "UNPRECEDENTED?": A HISTORICAL
ANALYSIS AND COMPARISON OF
TREASURY SECRETARY AUTHORITY
DURING FINANCIAL CRISIS**

ZACHARY CORMIER*

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I. INTRODUCTION

The time had come for Treasury Secretary Henry Paulson to urge Congress to give him more power, a lot more power. It was the middle of September 2008, the United States' financial thermometer was about to pop as the spark that was the United States housing and mortgage crisis had grown into a raging financial wild fire.¹ The housing bubble burst of 2006 had kindled a 'mortgage default crisis' that proceeded to bankrupt homeowners and lenders nationwide.² The 'crisis' grew and grew, spreading uncontrollably, until at last the investment ties to the 'Main Street' mortgage lenders caught ablaze and nothing could stop the crisis from roaring into Wall Street.³ Financial giants burned, markets boiled over.⁴ Investors threw their panic like gasoline onto the towering flames, unloading securities in fear of a free fall.⁵ The Treasury Department did what it could to contain the insatiable inferno, but still it continued to rage, with no signs of relenting.⁶

The immense heat of the mounting crisis bore down perhaps most sharply on Paulson and the rest of those that worked, and indeed lived, in the Treasury building (which at this point remained open around the clock, every day, with only a tuna-fish and peanut-butter sandwich buffet to sustain those that tried to save the economy).⁷ It had become apparent to Paulson by this time that despite his best efforts, the financial crisis was on the verge of completely exploding. On September 20, 2008, Paulson proposed the Troubled Asset Relief Program⁸ to Congress, a \$700 billion capped bailout plan that created "a taxpayer-backed entity that would acquire mortgage-backed bonds from banks" at Paulson's discretion.⁹

Paulson's enormous plea was crammed tightly within a two-and-a-half page

¹ See *infra* note 20 and accompanying text.

² See *infra* note 20 and accompanying text.

³ See *infra* notes 21, 25 and accompanying text.

⁴ See *infra* notes 36-37, 39 and accompanying text.

⁵ See *infra* notes 39-40 and accompanying text.

⁶ See *infra* notes 38-41 and accompanying text.

⁷ Daniel Gross, *The Captain of the Street*, NEWSWEEK, Sept. 20, 2008, available at <http://www.newsweek.com/id/160119/page/1>.

⁸ *Text Draft Proposal for Bailout Plan*, N.Y. TIMES, Sept. 21, 2008, available at http://www.nytimes.com/2008/09/21/business/21draftend.html?_r=1&ref=business.

⁹ Gross, *supra* note 7, at 3.

document in the hopes of being quickly passed by Congress.¹⁰ Although lean, this proposal was crowded. In addition to requesting the power to grant up to \$700 billion to buy “troubled assets” (representative of one individual effectively controlling five percent of the national gross domestic product),¹¹ Paulson also asserted that this power should be free from any congressional or judicial review.¹² The panicked and weary nation stopped to take a collective gasp at the magnitude of Paulson’s request: was the Secretary of Treasury going to become the most powerful person in the world?

Even after Congress poured amendment after amendment into Paulson’s proposal, striking section eight’s no review clause and adding numerous measures of oversight, the nation and its leaders could not help but grimace to various degrees at Paulson’s eventual powers under the Emergency Economic Stabilization Act of 2008 (“EESA”).¹³ The reaction was extreme. Historians and political scientists alike quickly jumped to labeling Paulson as the most powerful Treasury Secretary in the nation’s history.¹⁴ Many jumped even farther, begrudgingly

¹⁰ See *Draft Proposal*, *supra* note 8; Massimo Calabresi, *Congress and the Bailout Plan: Business As Usual*, TIME, Sept. 23, 2008, available at <http://www.time.com/time/politics/article/0,8599,1843642-1,00.html>.

[Paulson] and his team had been working on his proposal for more than six months, in the event that more piecemeal approaches like the bailout of Bear Stearns or the takeover of Fannie Mae and Freddie Mac didn’t stop the bleeding. When things looked like they were headed for a crisis at the beginning of last week [(September 15)], he had a team up literally all night working with the Federal Reserve to frame a deliberately vague proposal that could make it through Congress. The key issue was to get something that could pass, and quickly, as failure would produce a panic that would be unstoppable. What they came up with was the broad, three-page plan giving the Treasury \$700 billion to buy back Wall Street’s toxic mortgage-backed assets and eventually repackage and sell them.

Id.

¹¹ Maura Reynolds & Peter G. Gosselin, *Bailout Tab: \$700,000,000 Democrats Seek Oversight*, L.A. TIMES, Sept. 21, 2008, available at <http://articles.latimes.com/2008/sep/21/nation/na-wallstreet21>.

¹² See *Draft Proposal*, *supra* note 8, at § 8 (“Decisions 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.”).

¹³ Ryan Ellis, Tax Policy Director at Americans for Tax Reform, believed that Congress was “appointing a financial dictator. Ellis continued stating, “. . . Congress is giving a member of the executive branch virtually unlimited power for the entire economy.” John Ward, *Bill Gives Paulson Unprecedented Power*, WASH. TIMES, Oct. 3, 2008, available at <http://www.washingtontimes.com/news/2008/oct/03/bill-would-hand-paulson-unprecedented-authority/>. Former House Speaker Newt Gingrich believed that “[a] plan that relies on the former chairman of Goldman Sachs presiding over disbursing hundreds of billions of dollars to Wall Street is a terrible concept and inevitably will lead to crony capitalism and the appearance of—if not the actual existence of—corruption.” *Id.* House Representative Louie Gohmert further stated that “[s]ince this country started, since the Constitution in 1787 . . . this country has never done anything like this, given this much power to one person.” Gohmert further stated, “It’s just wrong to our principles of American democracy to give one person this kind of power.” *Id.*

¹⁴ Richard Sylla, New York University financial historian, stated:

Nothing quite of this scale has happened since the early years of the country when Alexander Hamilton wrote the Treasury act to give him the power to borrow and intervene in markets . . . And in Hamilton’s case, Congress quickly clipped his wings, and no successor not even under President Franklin D. Roosevelt at the height of the Depression exercised quite such unfettered power again.

anointing Paulson as one of the most powerful men to have held any United States office.¹⁵ Buzzwords like “financial dictator” became commonplace, the “unprecedented” descriptor appeared so often next to the mention of the EESA that one might figure it was part of the Congressional title.¹⁶

But, was the EESA really so “unprecedented?” Yes, the \$700 billion cap for the newly established Troubled Asset Relief Program was historically significant and indeed its management authorized great power, but when this power is considered carefully in context with other powers given to Treasury Secretaries in times past, Paulson hardly seems to be the unprecedented power-wielding giant that many made him out to be. As many had seemingly forgotten, Congress has been lifting Treasury Secretary authority to such heights since the ink had barely dried upon the United States Constitution.

History places the EESA and Paulson at the back of a long line. Does the EESA’s “leap” in authorized power really surpass the leap taken when Congress authorized Alexander Hamilton to establish and manage a bailout of the early American financial system worth 7/8 of the total national debt?¹⁷ Or did the EESA give more power to Paulson to address the 2008 financial crisis than that which Congress gave Salmon Chase to essentially print money out of thin air to repay Civil War debts?¹⁸ Or can it be said that the size of the 2008 bailout will shake up the financial landscape more than it had been shaken when William G. McAdoo personally shut down the New York Stock Exchange for more than four months?¹⁹

United States Treasury Secretaries have faced financial crises stemming from a multitude of varied causes throughout the nation’s 232-year history.

Reynolds, *supra* note 11. John Ward of the *Washington Times* argued:

Historical precedent for a Treasury secretary this powerful is hard to find: Alexander Hamilton enforced taxes by leading an army to suppress the whiskey rebellion; William G. McAdoo shut down the New York Stock Exchange during World War I; Salmon P. Chase issued currency during the Civil War that he later ruled unconstitutional as a Supreme Court justice; and Robert Morris personally guaranteed promissory notes during the days after the Revolutionary War, when the nation had virtually no credit. Mr. Paulson’s authority in the bill, as written Thursday, is likely to surpass all of those.

Ward, *supra* note 13. Peter Grier of the Christian Science Monitor further stated, “Henry Paulson Jr. has become one of the most famous and, perhaps, consequential US Treasury secretaries since Alexander Hamilton assumed the office on Sept. 11, 1789.” Peter Grier, *Treasury Chief Paulson on Verge of Historic New Powers*, THE CHRISTIAN SCIENCE MONITOR, Sept. 23, 2008, available at <http://www.csmonitor.com/2008/0923/p01s06-usec.html>.

¹⁵ John Ward of the *Washington Times* further believed that “[i]n all of American history, it is likely that no government official besides a wartime president has ever been given as much power over taxpayer money as Treasury Secretary Henry M. Paulson Jr. would receive under the \$700 billion financial rescue plan.” Ward, *supra* note 13. Julian Zelizer, a political history professor at Harvard’s John F. Kennedy School of Government stated that:

[Paulson’s authority] ranks with the top list of delegations of power, especially since there’s some flexibility for Treasury in deciding what to do with all this money Zelizer further stated, “You don’t like to give power over finance and taxes to people who are not democratically accountable like Congress”

Id.

¹⁶ See *supra* notes 13–15 and accompanying text.

¹⁷ See *infra* note 173 and accompanying text.

¹⁸ See *infra* note 212 and accompanying text.

¹⁹ See *infra* note 229 and accompanying text.

Depending upon the severity and need of each crisis, Treasury Secretaries have historically been granted very powerful authority to seek financial and economic stability. The 2008 financial crisis, although unique in one sense, stands at the back of a long line of financial challenges that have called for the acting Treasury Secretary to seek and effectuate monumental powers. This article will analyze the powers given to Treasury Secretary Henry Paulson under the EESA and compare such powers to those exercised by other Treasury Secretaries during past times of financial crisis.

Part II of this article will summarize the financial crisis leading to the EESA. Part III will consist of an analysis of the authority and power given to Paulson under the EESA. Part IV will begin to shed light on how unprecedented Paulson's EESA powers really were, as the section will define the genesis of a congressional trend to magnify Treasury Secretary authority in times of financial crisis by examining the trend's first and truly most powerful proponent, Alexander Hamilton. Part V will further show that Paulson stands in the back of a rather long line of extremely powerful Treasury Secretaries by briefly noting some of the most historic residents of the line. Finally, Part VI will provide a brief conclusion to the article.

II. SUMMARY OF THE "CRISIS" LEADING TO THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008

Paulson had seen the economy boil to the crisis point for some time. The dominos began tipping with the housing bubble burst in mid-2006, giving way to widespread mortgage defaults and lender bankruptcies throughout 2007 and 2008.²⁰ By the spring of 2008, the effect of the drastic increase of loan defaults (especially sub-prime loan defaults) began to weigh down on investment banks nationwide.²¹ Fannie Mae and Freddie Mac, "the Washington-based quasi-governmental firms that together guaranty or insure \$5.4 trillion in mortgages," became increasingly strained.²² With the financial crisis alive and snowballing, Paulson attempted to combat the spread of mortgage defaults by bringing together the New Hope Coalition, "an industry-led group that would modify mortgages before foreclosure."²³ Despite such efforts by Paulson, and several interest rate

²⁰ Gross, *supra* note 7, at 2.

[T]he housing bubble burst in mid-2006; borrowers started defaulting on mortgages and lenders began going belly up. The mortgages had been packaged into exotic securities, sliced and diced and sold as bonds and purchased by investment banks and hedge funds. Because lenders, executives and traders had convinced themselves that home prices would never fall, anything went. The result was debt layered on debt, piled on top of debt, supported by small amounts of cash. And so as Americans in increasing numbers defaulted on their mortgages in 2007 and 2008, it kicked off a domino effect. The value of the mortgage-backed bonds fell, as did that of the financial instruments based on those bonds. Banks were forced to write down the value of their holdings and raise new cash from foreign sovereign-wealth funds—only to report fresh losses as the housing market weakened.

Id.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 3.

cuts by the Federal Reserve, the financial crisis rolled into Wall Street with a full head of steam as the investment giant Bear Sterns²⁴ announced that it had become insolvent.²⁵

The ramifications of an investment bank like Bear Sterns failing would have been disastrous for a vast number of individuals, businesses, and financial institutions; a vicious blow to an ever-weakening economy. Paulson intervened in March of 2008, brokering a deal in which the investment bank JPMorgan Chase received credit from the Federal Reserve to purchase Bear Sterns at a bargain price.²⁶ The move helped to avoid the immediate breakdown of the financial market; however, Paulson must have known this could not be the end, as the crisis ball was still barreling through Wall Street with several more investment banks in its path.

Fannie Mae and Freddie Mac continued to feel the pressure of vast mortgage defaults into the summer.²⁷ In July of 2008, Congress granted Paulson the authority to aid the troubled institutions if he believed it to be necessary for financial rebound.²⁸ Paulson was optimistic that this action would not be necessary however, as he had hoped that the promise of federal support to Fannie Mae and Freddie Mac would be enough to rally investor trust in the companies they insured.²⁹ Unfortunately, his hopes in the already rattled investors would not prove to be fruitful.

On September 7, 2008, Fannie Mae and Freddie Mac essentially went from ‘quasi-governmental institutions’ to ‘nationalized’ institutions as Paulson announced that the federal government would guaranty their debt and provide them with much needed capital.³⁰ Not more than a week after this unprecedented bailout, Lehman Brothers (“Lehman”), another Wall Street investment giant, came to Paulson seeking a Bear Sterns-like rescue.³¹ Paulson was concerned that a

²⁴ Bear Sterns was the fifth largest U.S. securities firm at the time of the August announcement. Alison Fitzgerald, *As ‘Biggest Crisis’ Hit, Congress Held Nose and Backed Bailout*, Oct. 6, 2008, <http://www.bloomberg.com/apps/news?pid=20601109&sid=a2PslgpVvrCI&refer=home>.

²⁵ Gross, *supra* note 7, at 3.

²⁶ *Id.*

Paulson knew the plan flew in the face of the free-market philosophy to which he, and all his colleagues on Wall Street, clung so fiercely. But this was a special case. When commercial banks failed, a tried-and-tested procedure kicked in: the Federal Deposit Insurance Corp. took charge and made insured depositors whole. But there was no existing protocol or regulatory framework to deal with the failure of an investment bank. And because of its massive levels of debt and significance in the markets for credit-default swaps—a sort of insurance policy against investment losses—Bear Sterns had the capacity to harm hundreds of financial institutions.

Id. When asked about the intervention in the Bear Sterns deal, Paulson told *Newsweek*, “The Federal Reserve believed—and I supported them—that it was the right thing to come in and intervene.” *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* Paulson commented on such optimism to *Newsweek*: “If you’ve got a bazooka, and people know you’ve got it, you may not have to take it out.” *Id.* *Newsweek* translated this statement as follows: “if the market knew the companies had a federal backstop, investors would be more likely to give them more time to work out their troubles.” *Id.*

³⁰ *Id.*

³¹ *Id.*

“backstop” precedent would have been set if he gave similar aid to Lehman.³² A precedent of federal aid may have given other similarly situated institutions the idea that they really were ‘too big to fail’ and thus encouraged such institutions to take greater risks, sending a message that there was a net to catch them if they were to fall.³³ Paulson also believed that a Lehman failure would not have presented the same kind of dire consequences to the economy that the Bear Sterns failure had.³⁴ Paulson notified Lehman that he would not be coming to their rescue.³⁵ Lehman filed for bankruptcy soon afterwards, a signal that is thought to have motivated the already teetering Merrill Lynch to quickly strike a deal with Bank of America.³⁶

However, Paulson’s strong-handed signal would not prove to be so frugal after all, as only days later the ever-snowballing financial crisis rolled into the doors of AIG; another financial giant that posed catastrophic economic consequences for failure.³⁷ September indeed proved to be the culmination of the crisis. On September 16, 2008, Paulson announced that the federal government was going to spend \$85 billion to bailout AIG in exchange for an eighty percent stake in the company and the power to install a new Chief Executive Officer.³⁸ AIG essentially became as nationalized as the once private Fannie Mae and Freddie Mac.

The financial market was at full panic as every investment bank and firm was suspected to be the next giant to fall. Goldman Sachs and Morgan Stanley’s stock began to freefall as investors rushed to get out, “threatening to force them into mergers with other firms.”³⁹ Even money market funds became tainted with suspicion as investors continued to pull their confidences.⁴⁰ When banks nationwide began to refuse capital even to each other, Paulson knew the time had come for drastic measures.⁴¹ September 20, 2008 had arrived. Paulson brought his plight to Congress in a two-and-a-half page proposal for a \$700 billion capped bailout to be unilaterally controlled by the Treasury Department.⁴² Although the proposal was one that would lead to historic powers for him as the Secretary, Paulson took no pleasure in its submission.⁴³

³² Gross, *supra* note 7, at 3.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* Paulson later stated at a press conference that he “never once considered that it was appropriate to put taxpayer money on the line in resolving Lehman Brothers.” *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Gross, *supra* note 7, at 3; see also CBS News & Associated Press, *U.S. Announces \$85 Billion Bailout of AIG: Federal Reserve Makes Emergency Loan to Keep Global Insurance Giant Afloat, Avoid Deepening Financial Crisis*, Sept. 16, 2008, <http://www.cbsnews.com/stories/2008/09/16/business/main4453942.shtml>.

³⁹ Gross, *supra* note 7, at 3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Gross reported:

It was a message [Paulson] never expected to deliver. Henry Paulson—free-market thinker, former CEO of Goldman Sachs and Treasury secretary to a

Even though many in Congress agreed that some intervention would likely be necessary, it was an uphill battle for Paulson to push his proposal through Congress.⁴⁴ The day after Paulson proposed his initial bailout plan, he appeared on several popular morning talk shows in an attempt to gain public support.⁴⁵ Within days, Paulson and Federal Reserve Chairman Ben Bernanke appeared before the Senate Banking Committee⁴⁶ and the House Financial Services Committee to testify regarding the bailout plan.⁴⁷ Paulson was met with a great deal of opposition from both Republicans and Democrats on the issues of oversight and judicial review.⁴⁸ Several leaders of Congress further voiced their concerns of

conservative Republican president—was unveiling to the world a massive taxpayer bailout of the American financial system. Afterward, as he headed into yet another weekend of nonstop work with his team, carrying the weight of the troubled markets on his shoulders, the former college-football star was clearly conflicted about what he'd just proposed. "It's very unpleasant for me, but it's a lot more attractive than the alternative We can spend a lot of time talking about how it happened and how we got here. But we have to get through the night first."

. . . .

While bailouts are regrettable and expensive, Paulson argues that one is needed to restore confidence in the system. "We're going to have housing issues and mortgage issues for years The key is to get stability."

Id. at 1, 4.

⁴⁴ See generally Fitzgerald, *supra* note 24.

⁴⁵ *Id.*

⁴⁶ Jennifer Youfi, *Paulson and Bernanke Testify Before Congress in Favor of \$700 Billion Government Banking Bailout*, MONEY MORNING, Sept. 23, 2008, <http://www.moneymorning.com/2008/09/23/government-bailout-plan/>.

⁴⁷ Joseph Goldstein, *Bernanke, Paulson Face Tough Audience: Senate Banking Committee Members Stand Against \$700B Bailout*, N.Y. SUN, Sept. 24, 2008, available at <http://www.nysun.com/business/bernanke-paulson-face-tough-audience/86508/>; see also Real Clear Politics, *Paulson's Testimony to the House Services Committee*, Sept. 24, 2008, http://www.realclearpolitics.com/articles/2008/09/paulsons_testimony_to_the_hous.html.

⁴⁸ See Glenn Greenwald, *Growing Right-Wing Opposition to the Paulson Plan*, SALON, Sept. 22, 2008, <http://www.salon.com/opinion/greenwald/2008/09/22/paulson/>. Connecticut Senator Christopher Dodd, Chairman of the Senate Banking Committee, was disturbed by Paulson's request to be free from judicial review. Jason Linkins, *Dirty Secret of the Bailout: Thirty-Two Words that None Dare Utter*, HUFFINGTON POST, Sept. 22, 2008, http://www.huffingtonpost.com/2008/09/22/dirty-secret-of-the-bailo_n_128294.html. Senator Dodd "proposed a bailout legislation of his own, which critically call[ed] for 'an oversight board that not only include[d] the chairman of the Federal Reserve and the SEC, but congressionally appointed, non-governmental officials' and . . . require[d] the President to appoint an 'independent inspector general to investigate the Treasury asset program.'" *Id.* In Senator Dodd's legislation, section eight was effectively stripped from the bill. *Id.* Senator Dodd's proposal would have given deference to Paulson as the acting Treasury Secretary; however, it would retain judicial review: "Any determination by the Secretary with regard to any particular troubled asset pursuant to this Act . . . shall not be set aside unless such determination is found to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law." Rod Smolla, *Is Paulson's Bailout Bill Unconstitutional?*, SLATE, Sept. 24, 2008, <http://www.slate.com/id/2200817/pagnum/all/>. Robert Kuttner of *The American Prospect* believed that the lack of judicial review in Paulson's proposal set his plan for intervention apart from others like it throughout history. Robert Kuttner, *Paulson's Folly*, THE AMERICAN PROSPECT, Sept. 22, 2008, http://www.prospect.org/cs/articles?article=paulsons_folly.

The differences between this proposed bailout and the three closest historical equivalents are immense. When the Reconstruction Finance Corporation of the 1930s pumped a total of \$35 billion into U.S. corporations and financial institutions, there was close government supervision and quid pro quos at every step of the way. Much of the time, the RFC became a preferred shareholder and

bailing out the large financial firms over the average individual struggling through the down economy.⁴⁹ Many members of both parties doubted that the bailout, even as large as it would be, would have any meaningful effect on the crisis.⁵⁰ Others were more concerned about to whom specifically they would be giving such power and authority.⁵¹ The majority seemed to believe that Paulson was indeed a well-qualified and trustworthy individual;⁵² however, Paulson's proposal

often appointed board members. The Home Owners Loan Corporation, which eventually refinanced one in five mortgage loans, did not operate to bail out banks but to save homeowners. And the Resolution Trust Corporation of the 1980s, created to mop up the damage of the first speculative mortgage meltdown, the savings and loan collapse, did not pump in money to rescue bad investments; it sorted out good assets from bad after the fact, and made sure to purge bad executives as well as bad loans. And all three of these historic cases of public recapitalization were done without suspending judicial review.

Id. Kuttner further criticized Paulson's plan with the following claims:

It includes no oversight of his own closed-door operations. It merely gives congressional blessing and funding to what he has already been doing, ad hoc. He plans to retain Wall Street firms as advisers to decide just how to cut deals to value and mop up Wall Street's dubious paper. There are to be no limits on executive compensation for the firms that get relief, and no equity share for the government in exchange for this massive infusion of capital. Both Obama and McCain have opposed the provision denying any judicial review of decisions made by Paulson"

Id.

⁴⁹ Kuttner reported:

House Financial Services Committee Chairman Barney Frank said he would want to add several features to the Paulson plan, including relief for homeowners, a new stimulus package, and limits on CEO compensation. Said Frank, "It would be a grave mistake to say that we're going to buy up the bad debt that resulted from the bad decisions of these [private sector] people and then allow them to get millions of dollars on the way out. . . . It's kind of hard to tell the average American that we're going to continue to have foreclosures that destabilize neighborhoods and deprive cities of revenues they need, but we're going to buy up the [banks'] bad paper."

Id.

⁵⁰ Jennifer Parker of ABC News reported that Alabama Senator Richard Shelby, the most senior member of the Banking Committee, was very hesitant about the plan's success. Jennifer Parker, *Bush Administration Tells Congress to Act Quickly or Risk Recession*, ABC NEWS Sept. 23, 2008, <http://abcnews.go.com/Politics/PersonalFinance/Story?id=5865241&page=1>. Senator Shelby stated, "We have got to look at some alternatives." *Id.* at 1. Shelby further stated, "I have long opposed government bailouts for individuals and corporate America alike." *Id.* at 2. He continued, "We have been given no credible assurances that this plan will work. We could very well send \$700 billion, or a trillion, and not resolve the crisis." *Id.* Representative Joe Barton of Texas disagreed with the proposal of adding to the ever-increasing national debt: "I'm kind of an old-fashioned guy, and I think we ought to pay for what we do as a government, but instead we're talking about adding \$1.5 trillion to our national debt and forcing our children to pay the cost." Kevin G. Hall & Dave Montgomery, *Senate Passes \$810 Billion Economic Bailout*, MCCLATCHY NEWSPAPERS, <http://www.mcclatchydc.com/congress/story/53357.html>.

⁵¹ See Ward, *supra* note 13.

⁵² The Senate unanimously confirmed Paulson's appointment as Treasury Secretary in 2006. See United States Department of the Treasury, http://www.ustreas.gov/education/history/secretaries/hm_paulson.shtml (last visited Feb. 8, 2009).

Before coming to Treasury, Paulson was Chairman and Chief Executive Officer of Goldman Sachs since the firm's initial public offering in 1999. He joined Goldman Sachs Chicago Office in 1974 and rose through the ranks holding several positions including, Managing Partner of the firm's Chicago office, Co-head of the firm's investment Banking Division, President and Chief Operating

would require Congress to place an enormous amount of trust also in an unknown person, as it would grant power that would carry through to the Treasury Secretary of the next administration.⁵³

As significant as this opposition was, Paulson's greatest critics quickly appeared to be free-market conservative Republicans, as they were mortified by the massive market intervention.⁵⁴ Even with the full support of President Bush, it appeared that Republicans were not going to support the plan.⁵⁵ Seeing that the momentum was breaking down, Vice President called a special meeting with House Republicans on September 25th to try to rally support for Paulson's proposal.⁵⁶ The meeting was a failure, ending with only more contentions between

Officer, and Co-Senior partner. Prior to joining Goldman Sachs, Paulson was a member of the White House Domestic Council, serving as Staff Assistant to the President from 1972 to 1973, and as Staff Assistant to the Assistant Secretary of Defense at the Pentagon from 1970 to 1972.

Id.

⁵³ Ward, *supra* note 13. Ward reported that,

The concern from some critics is not with Mr. Paulson, whom they view as focused on fixing the economic crisis. Their worry is what happens after Mr. Paulson leaves.

Mr. Paulson will not likely remain as Treasury secretary under the next administration, even if he is kept on board for a few months during the transition, as Democratic presidential nominee Sen. Barack Obama has said he might do. That makes the next person to hold these extraordinary powers - which last for two years - an unknown quantity.

"We're going to hand these powers off to someone we don't even know. And that's a wild card to me," said Jim Rickards, who served a decade ago as general counsel for Long Term Capital Management, a hedge fund whose failure in the late 1990s required a bailout by other banks and financial firms.

Id. at 3.

⁵⁴ See Fitzgerald, *supra* note 24. A group of free-market Republicans known as the Republican Study Committee agreed upon the "Ten Conservative Concerns With The Treasury Bailout," an alternative that "included suspending the capital gains tax, ending mark-to-market accounting rules and privatizing Fannie Mae and Freddie Mac." *Id.* For a copy of the Ten Conservative Concerns with the Treasury Bailout, see TCCTB, http://www.house.gov/hensarling/rsc/doc/092308_10conservconcerns bailout.pdf.

⁵⁵ Several Republicans even began bringing plans of their own, some of which looked like diametric opposites of Paulson's strategy. See Fitzgerald, *supra* note 24. "[A] group of House Republicans led by Representative Eric Cantor of Virginia circulated an alternate plan calling for Wall Street firms to buy insurance on mortgage-backed securities while cutting taxes and relaxing regulation." *Id.* The Republicans plan was just one of many alternatives proposed by political and economic leaders. Senator Hillary Clinton proposed the Home Owner Loan Corporation (HOLC), a plan that would focus on rebuilding the economy by allowing homeowner's to avoid foreclosure as had been done during the 1930's Great Depression. See Hillary Rodham Clinton, *Let's Keep People in their Homes*, WALL ST. J., Sept. 25, 2008, at A19, available at <http://online.wsj.com/article/SB122230767702474045.html>. Dominique Strauss-Kahn, Managing Director of the International Monetary Fund, recommended a similar approach to Paulson's in focusing upon "liquidity provision; purchase of distressed assets; and capital injections into financial institutions." Dominique Strauss-Kahn, *A Systematic Crisis Demands Systematic Solutions*, Sept. 22, 2008, at <http://www.imf.org/external/np/vc/2008/092208.htm>. Financial investment leader Warren Buffet agreed to an extent with Paulson's bailout plan; however, he urged that the Federal Government must buy the "troubled assets" of financial institutions at the market price rather than Paulson's proposed "hold-to-maturity" as the maturity price was unrealistically favorable to banks. Henry Blodget, *Even Warren Buffet Agrees: Bernanke Bailout Price Plan a Joke*, HUFFINGTON POST, Sept. 24, 2008, at http://www.huffingtonpost.com/henry-blodget/even-warren-buffett-agree_b_128919.html.

⁵⁶ Fitzgerald, *supra* note 24.

Republicans.⁵⁷

Another meeting was held later on September 25th between Congressional leaders at the White House to discuss the status of Paulson's proposal.⁵⁸ Staff members and aides of the representatives reported that when House minority leader John Boehner stated that "House Republicans were not on board . . . [t]he meeting erupted in shouting."⁵⁹ It was reported that as:

[T]he meeting broke up and participants stormed out, Paulson followed [Democratic Chairman of the House Financial Services Committee Barney Frank] and House Speaker Nancy Pelosi. Paulson, pleading with Pelosi to keep the deal alive in spite of the partisanship, got down on one knee and begged her to push on . . .⁶⁰

With tensions high within both parties, House Democrats put the proposal to a vote as an amendment to HR 3997 on September 29th.⁶¹ Several Paulson supporters were optimistic, including President Bush, but as a large number of 'no' votes began coming in, it was apparent that the amendment would fail.⁶² Both Democratic and Republican leaders continued to plead with party members to pass the plan, as the vote was held open for forty minutes, "nearly triple the usual [fifteen] minutes" allotted for voting.⁶³ "Pelosi could be seen on the floor pleading with fellow Democrats Bennie Thompson and Jesse Jackson Jr. to change their 'no' votes to 'yes.' Thompson repeatedly shook his head 'no' at the speaker. When the gavel went down, the bill fell [twelve] votes short."⁶⁴ The Dow Jones Industrial Average fell nearly 500 points during the vote alone, finally closing the day down 777 points.⁶⁵

As financial markets continued to fall, the Senate took Paulson's proposal to vote on October 1st as the Emergency Economic Stabilization Act ("EESA") of 2008, an amendment to HR 1424.⁶⁶ The Senate passed the bill with overwhelming approval seventy-four to twenty-five.⁶⁷ Many members of the Senate believed that the bill would pass on House vote as two "sweeteners" were added to motivate votes from numerous constituencies: "a tax cut and extended federal protection for

⁵⁷ *Id.* Fitzgerald reported that "Indiana Republican Mike Pence said it was 'very evident' after the meeting that 'there is a growing discontent among Republicans.'" *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Fitzgerald, *supra* note 24.

⁶² *Id.*

Congressman Michael Conaway, a Texas Republican, waited to see where the vote was going as he tried to decide. An accountant by training, he said he understood the risks posed by securities backed by foreclosed mortgages, yet still opposed bailing out those responsible for them. One of the last to vote, he said he stood in front of the machine with a hand on both the "yes" and "no" buttons and paused. After a moment, he pressed "no."

Id.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Fitzgerald, *supra* note 24.

⁶⁷ Ron Haruni, *U.S. Senate Passes Economic Bailout Bill*, WALL STREET PIT, Oct. 1, 2008, available at <http://wallstreetpit.com/2008/10/senate-passes-economic-bailout-bill/>.

bank deposits . . .”⁶⁸ Furthermore, numerous measures of oversight had been added to the original proposal in addition to striking the ‘no review’ clause.⁶⁹ The bill returned to the House for a vote on October 3rd and passed 263-171, undoubtedly to Paulson’s great relief.⁷⁰ After two weeks of excruciating negotiations, Paulson’s once clear-cut two and a half page proposal now stood as the EESA,⁷¹ a “450 page [statute,] laden with tax breaks and other measures unrelated to the crisis.”⁷² Even so, the essence of Paulson’s \$700 billion capped bailout proposal was now law.⁷³

III. ANALYSIS OF THE EESA AND THE POWER THAT WAS AUTHORIZED TO TREASURY SECRETARY HENRY PAULSON

The amendment to HR 1424 was the 450-page manifestation of the two weeks of hard political negotiations that followed Paulson’s initial bailout proposal. Paulson’s two and a half page proposal, concise and pure in its purpose to address the financial and economic crises through a broad bailout, became the bulletin board on which hundreds of political add-ons were pinned. However, as convoluted as it was, still lying beneath the blanket of both conservative and liberal flavored add-ons was the beating heart of a monumental \$700 billion bailout plan to be managed by Paulson. Thus, underneath the political mess and chains of oversight was a grant of extreme power. As many have argued, the EESA may have made Henry Paulson not only the most powerful Treasury Secretary to date, but also perhaps one of the most powerful political officers in American history.

⁶⁸ Fitzgerald, *supra* note 24. Many considered the new bill to have actually been an \$810 billion bailout as another \$110 billion in tax breaks was further provided for businesses and individuals. See Hall, *supra* note 50.

⁶⁹ See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

The White House said layers of oversight have been added in the . . . two weeks of negotiations to ensure transparency and integrity in the process. [White House spokesman Tony Fratto stated that,] “[t]he government has nuclear programs that don’t have as much oversight, reporting and surveillance . . . [Whereas] [t]he bill will give the Treasury secretary ‘a lot of decision-making authority,’ there will be an “unprecedented amount of oversight and supervision . . .

Ward, *supra* note 13.

⁷⁰ See Dave Burdick, *House Bailout Bill Friday Vote: YEA – 263, NAY – 171*, HUFFINGTON POST, Oct. 2, 2008, http://www.huffingtonpost.com/2008/10/02/house-bailout-vote-encore_n_131222.html.

⁷¹ See Draft Proposal, *supra* note 8.

⁷² Fitzgerald, *supra* note 24.

⁷³ Stephen S. Kudenholdt, *Summary and Analysis of the Troubled Asset Relief Program*, Order No. 14108, in PRACTISING LAW INSTITUTE COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 305 (Practising Law Institute, 2008).

The initial plan that Treasury Secretary Henry Paulson submitted to Congress was short and simple. It gave Secretary Paulson \$700 billion and the authority to use all of the tools of the capital markets to remove distressed assets from institutional balance sheets and to manage, workout, finance, repackage and sell those assets, without the constraints of mark-to-market accounting, capital charges, credit concerns or other impediments to private institutions. Although Congress greatly expanded the final bill, with a few significant exceptions, the Secretary has retained the broad authority that he requested.

Id.

The general purpose of the entire HR 1424 amendment was:

To provide authority for the Federal Government to purchase and insure certain types of troubled assets for the purposes of providing stability to and preventing disruption in the economy and financial system and protecting taxpayers, to amend the Internal Revenue Code of 1986 to provide incentives for energy production and conservation, to extend certain expiring provisions, to provide individual income tax relief, and for other purposes.⁷⁴

As the EESA was the amendment's most powerful tool to accomplish this general purpose, the Act had a much more specific purpose:

- (1) to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States; and
- (2) to ensure that such authority and such facilities are used in a manner that—
 - (A) protects home values, college funds, retirement accounts, and life savings;
 - (B) preserves homeownership and promotes jobs and economic growth;
 - (C) maximizes overall returns to the taxpayers of the United States; and
 - (D) provides public accountability for the exercise of such authority.⁷⁵

In essence, Congress acted to: (1) equip the Treasury Secretary with broad and powerful tools (such as the \$700 billion capped bailout and authority to further insure/guaranty other assets) in order to restabilize the United States financial system; and (2) guide the use of such powers for the mutual benefit of businesses and individual taxpayers alike through oversight and public accountability.

A. Paulson's Authority under the EESA

The main 'authority and facility' given to Paulson under the EESA was the power to establish the Troubled Asset Relief Program ("TARP") as a vehicle for a \$700 billion capped bailout plan.⁷⁶ Under the TARP, Paulson could establish the "Office of Financial Stability"⁷⁷ in order "to purchase, and to make and fund

⁷⁴ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

⁷⁵ Emergency Economic Stabilization Act, Pub. L. No. 110-343, div. A, § 2, 122 Stat. 3765, 3766 (2008).

⁷⁶ Kudenholdt, *supra* note 73, at 309-10.

The centerpiece of the Program is the Secretary's ability to purchase troubled assets from ailing financial institutions in an attempt to stem the write-downs and losses being taken by such institutions. By establishing 'market' prices for troubled assets and providing liquidity to the market, the Program also seeks to encourage private participants to begin purchasing mortgage related and other structured products as well.

Id.

⁷⁷ Although Paulson is given the authority to manage the overall TARP, the EESA required that the Office of Financial Stability "be headed by an Assistant Secretary of the Treasury, appointed by the

commitments to purchase, troubled assets⁷⁸ from any financial institution, on such terms and conditions *as are determined by the [Treasury] Secretary*, and in accordance with [other provisions of the EESA] and the policies and procedures developed and published by the Secretary.”⁷⁹ Paulson’s authority under TARP allowed him to immediately purchase \$250 billion of troubled assets to be held outstanding without any further authorization from Congress.⁸⁰ Paulson could then raise the limit of outstanding troubled assets to \$350 billion upon the President submitting “a written certification” to Congress indicating “that the Secretary needs to exercise [such] authority.”⁸¹ The final step of authorized power allowed Paulson to double the limit of outstanding troubled assets owned by the federal government to \$700 billion with another “written report” submitted to Congress by the President.⁸²

Upon establishing the TARP, Paulson was additionally authorized to guaranty and insure other troubled assets (and set the premiums for such guarantees) with only minor limitations.⁸³ Thus, within only the first few pages of the EESA, Congress anointed Paulson with the power to directly intervene in the financial market to the extent of purchasing \$700 billion of financially “troubled” assets (and indeed to have a greater effect than \$700 billion as Paulson could also insure/guaranty even more assets).

Paulson’s intervention power became even greater when he was given broad authority to manage these programs and the assets they purchased. First, as to management of the programs themselves, EESA section 101(c) granted Paulson the primary execution authority to take actions that he deemed were “necessary to carry out the authorities” in the EESA.⁸⁴ Section 101(c) went on to provide a brief, yet substantial, list of just a few of these powers of execution.⁸⁵ Paulson had the

President, by and with the advice and consent of the Senate.” Emergency Economic Stabilization Act, Pub. L. No. 110-343, div. A, tit. I, § 101(a)(3)(A), 122 Stat. 3765, 3767 (2008).

⁷⁸ “Troubled assets” were considered to be any “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 . . .” § 3(9)(A), 122 Stat. at 3767. Additionally, a “troubled asset” could be “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 . . .” § 3(9)(B), 122 Stat. at 3767. Kudenholdt notes that although section 3(9)(A) focused on a particular group of securities, section 3(9)(B) allowed Paulson to include many other types of financial assets in the Program after consultation with the Chairman of the Federal Reserve Board and notice to Congress. Kudenholdt, *supra* note 73, at 308.

⁷⁹ Emergency Econ. Stabilization Act, Pub. L. No. 110-343, div. A, tit. I, § 101(a)(1), 122 Stat. 3765, 3767 (2008) (emphasis added).

⁸⁰ § 115(a)(1), 122 Stat. at 3780.

⁸¹ § 115(a)(2), 122 Stat. at 3780.

⁸² § 115(a)(3), 122 Stat. at 3780. The “written report” required more than just Presidential certification. The report was required to “[d]etail the plan of the Secretary to exercise the authority.” *Id.* The power to raise the outstanding troubled asset limit to \$700 billion does not actually become effective until fifteen days after the President submits the written report, so long as a joint resolution opposed to the report is not filed within this time period. *Id.*

⁸³ § 102(a)(1)-(2), 122 Stat. at 3768-69.

⁸⁴ § 101(c), 122 Stat. at 3768.

⁸⁵ EESA section 101(c)’s list of powers to carry the bailout into effect was not a limitation on any other power Paulson might deem necessary. “The Secretary is authorized to take such actions as the Secretary deems necessary to carry out the authorities in this Act, including, *without limitation*, the

direct authority to hire and manage employees that would administer the TARP.⁸⁶ In purchasing or guarantying troubled assets, Paulson had the authority to enter into contracts on behalf of the Federal Government and to further designate “financial institutions as financial agents of the Federal Government.”⁸⁷

In the spirit of “[minimizing] cost to taxpayers” for the management of the extensive amount of assets to be held by the TARP, Congress further authorized Paulson the “flexibility” to create financial agents of his own to “purchase, hold, and sell troubled assets and issue obligations.”⁸⁸ Importantly, Congress did not restrict the number or type of financial “vehicles” that Paulson could establish.⁸⁹ Finally, in order to make sure that Paulson’s executive powers were truly complete, Congress then broadly authorized Paulson to issue “such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of” the EESA.⁹⁰

Second, in addition to such administrative authority over the program itself, Paulson was further given broad powers to manage the hundreds of billions of dollars worth of troubled assets that were purchased through the EESA’s application. EESA section 106(b) stated that Paulson “. . . shall have authority to manage troubled assets purchased under this Act, including revenues and portfolio risks therefrom.”⁹¹ Additionally, section 106(a) stated that Paulson may “. . . at any time, exercise any rights received in connection with troubled assets purchased under this Act.”⁹² Paulson was essentially given the complete authoritative control over managing the funds acquired so that he could sell or reinvest such funds to maximize return on the taxpayer’s investment.⁹³

Whereas Paulson was given other powers throughout the EESA, the most consequential were these powers to execute and manage the likely \$700 billion

following . . .” *Id.* (emphasis added). As the Kudenholdt observes, “[o]nce purchased, troubled assets may be managed, financed and sold as the Secretary sees fit.” Kudenholdt, *supra* note 73, at 307.

⁸⁶ Emergency Economic Stabilization Act, Pub. L. No. 110-343, div. A, tit. I, § 101(c)(1), 122 Stat. 3765, 3768 (2008).

⁸⁷ §§ 101(c)(2)-(3), 122 Stat. at 3768.

⁸⁸ § 101(c)(4), 122 Stat. at 3768.

⁸⁹ Paulson’s freedom to establish such financial “vehicles” was further broadened by the Federal Government’s further freedom from tax constraint and liability. As Kudenholdt notes,

[Paulson] will not have to consider the tax, limitation of liability and bankruptcy issues that private institutions must consider when forming entities to hold assets. As a result, the form of vehicle used will likely relate more to convenience, flexibility and suitability for the assets being held and the types of obligations that may be issued. In some of the recent transactions with troubled financial institutions, the Federal Reserve Bank has utilized limited liability companies (where private parties shared an interest in the acquired assets) and pass-through trusts.

Kudenholdt, *supra* note 73, at 315.

⁹⁰ Emergency Economic Stabilization Act, Pub. L. No. 110-343, div. A, tit. I, § 101(c)(5), 122 Stat. 3765, 3768 (2008).

⁹¹ § 106(b), 122 Stat. at 3773.

⁹² § 106(a), 122 Stat. at 3773 (emphasis added).

⁹³ *See* § 106(c), 122 Stat. at 3773 (“The Secretary may, at any time, upon terms and conditions and at a price determined by the Secretary, sell, or enter into securities loans, repurchase transactions, or other financial transactions in regard to, any troubled asset purchased under this Act.”); § 113(a)(2), 122 Stat. at 3778 (“ . . . the Secretary shall hold the assets to maturity or for resale for and until such time as the Secretary determines that the market is optimal for selling such assets . . .”)

bailout of troubled institutions in the United States financial market. However, as part two of the EESA purpose expressed, these powers were given to Paulson with strong guidance and oversight. As members of Congress went to great length to guide and hedge the broad powers given to Paulson, it is important to view Paulson's authority over the bailout plan in the context of the EESA's oversight provisions.

B. Congressional Guidance of Paulson's Authority

Congress understood that Paulson needed broad and flexible powers in order for the bailout to be most effective and efficient in addressing the financial crisis. Even so, Congress did not want to hand over the keys to the \$700 billion vault without at least giving Paulson some small bit of advice on how to spend it. Like the father who cannot help but give his teenager one last lecture of guidance before handing over the keys to the car, Congress delivered section 103's "considerations" for Paulson to review before 'punching' the brand new bailout vehicle's gas pedal.

Congress reminded Paulson to protect taxpayer interests in seeking maximum return to seek stability for financial markets and prevent further disturbance, "to help families keep their homes," to remember the towns and counties that have been affected, and to protect American "jobs, savings, and retirement security."⁹⁴ Congress further urged Paulson to think in the long-term when investing, to ensure that the TARP would not discriminate against certain financial institutions, to remember smaller institutions that serve low to moderate-income areas, and to consider the "utility of purchasing other real estate owned and instruments backed by mortgages on multifamily properties . . ."⁹⁵

C. Oversight of Paulson's Authority

Of course, Congress had not left \$700 billion in Paulson's hands on guidance alone. For as much as Congress had granted immense power to Paulson in the EESA, it also set up several substantial measures of disclosure,⁹⁶ limitation,⁹⁷

⁹⁴ See §§ 103(1)-(3), (7), (9), 122 Stat. at 3770.

⁹⁵ See §§ 103(4)-(6), (9), 122 Stat. at 3770. Congress further provided Paulson with outside guidance under section 101(b) by requiring him to "consult with the [Board of Governors of the Federal Reserve System], [Federal Deposit Insurance Corporation], Comptroller of the Currency, Director of the Office of Thrift Supervision, Chairman of the National Credit Union Administration Board, and the Secretary of Housing and Urban Development" when exercising his authority under the EESA. § 101(b), 122 Stat. at 3768.

⁹⁶ Congress required Paulson to disclose more specifics about how the program would work through publishing the "program guidelines." § 101(d), 122 Stat. 3768. Paulson's "program guidelines" had to disclose: (1) mechanisms for purchasing troubled assets; (2) methods for pricing and valuing troubled assets; (3) procedures for selecting asset managers; and (4) criteria for identifying troubled assets for purchase. *Id.*

⁹⁷ One of the most important measures of limitation upon Paulson's power was duration. § 120(a), 122 Stat. at 3788. Section 120(a) stated that all of the "authorities provided [to Paulson] under sections 101(a), excluding section 101(a)(3), and 102 shall terminate on December 31, 2009." *Id.* Either Paulson or the next Treasury Secretary could have however extended such authority nearly another year by submitting a written certification for extension to Congress. § 120(b), 122 Stat. at 3788 (which allowed for an extension to last no later than two "years from the date of enactment of [the EESA]"). The subsequently appointed Secretary Tim Geithner was required to include in such a certification a

accountability,⁹⁸ and oversight to check Paulson's exercise of such power. The two major instruments of oversight used by Congress were oversight boards. The first of these boards was the Financial Stability Oversight Board ("FSOB") established by EESA section 104.⁹⁹ The FSOB's primary purposes included reviewing the exercise of power taken by Paulson under the TARP, making recommendations to Paulson concerning future exercises of power, and reporting "any suspected fraud, misrepresentation, or malfeasance to the Special Inspector General for the [TARP] or the Attorney General of the United States."¹⁰⁰ The FSOB also retained the authority to "ensure" that Paulson's continuing policies for the TARP were: (1) congruent with the Congress' stated purposes for the EESA; (2) "in the economic interests of the United States;" and (3) "consistent with protecting taxpayers."¹⁰¹ Additionally, the FSOB had the option of creating a Credit Review Committee to further evaluate Paulson's exercise of power in purchasing troubled assets.¹⁰²

The second oversight board instituted by the EESA was the Congressional Oversight Panel ("COP")¹⁰³ established by section 125.¹⁰⁴ The duty of the COP was to continually "review the current state of the financial markets and the regulatory system" and submit several reports¹⁰⁵ to Congress on its findings.¹⁰⁶

"justification of why the extension is necessary to assist American families and stabilize financial markets, as well as the expected cost to the taxpayers for such an extension." *Id.*

⁹⁸ In addition to numerous measures of oversight, Paulson was required to further submit several of his own reports to Congress concerning the exercise of his newly granted authority under the bailout plan. First, Paulson was required to submit an extensive report to various Congressional committees every thirty days which includes: (1) an overview of the actions he has taken in connection with his EESA authority; (2) "obligations and expenditures" of section 118 funding since the last report with an estimated projection for the next period; and (3) a "detailed financial statement" that meticulously discloses the details of all financial actions taken by Paulson under his EESA authority. § 105(a), 122 Stat. at 3771-72. Paulson was required to further submit a "Tranche" report to Congress every time the TARP breached a new \$50 billion plateau of purchased assets. § 105(b), 122 Stat. at 3772. Along with all of this, Paulson was required to provide a justification with every report for the prices the TARP was paying. *Id.* Paulson was also required to submit a "regulatory modernization report" to Congress by April 30, 2009. §105(c), 122 Stat. at 3772. This report was required to analyze "the current state of the regulatory system and its effectiveness at overseeing the participants in the financial markets, including the over-the-counter swaps market and government-sponsored enterprises, and providing recommendations for improvement . . ." *Id.* at 3772-73.

⁹⁹ § 104(a), 122 Stat. at 3770. The FSOB is a five member board comprised of the: (1) Chairman of the Board of Governors of the Federal Reserve System;(2) Treasury Secretary; (3) Director of the Federal Housing Finance Agency; (4) Chairman of the Securities Exchange Commission; and (5) Secretary of Housing and Urban Development. § 104(b), 122 Stat. at 3771.

¹⁰⁰ § 104(a), 122 Stat. at 3770.

¹⁰¹ § 104(e), 122 Stat. at 3771.

¹⁰² § 104(f), 122 Stat. at 3771.

¹⁰³ The COP is a five member board comprised of : (1) one member appointed by the Speaker of the House of Representatives; (2) one member appointed by the minority leader of the House of Representatives; (3) one member appointed by the majority leader of the Senate; (4) one member appointed by the minority leader of the Senate; and (5) one member appointed by the Speaker of the House of Representatives and the majority leader of the Senate, "after consultation with the minority leader of the Senate and the minority leader of the House of Representatives." § 125(c)(1), 122 Stat. at 3792.

¹⁰⁴ § 125, 122 Stat. at 3791-92.

¹⁰⁵ The COP was required to provide "general reports" to Congress every thirty days pertaining to the use, impact, and effectiveness of Paulson's power under the EESA. §125(b)(1)(A), 122 Stat. at 3791. The COP was further required to submit a "special report on regulatory reform" to Congress by no later than January 20, 2009:

The COP was given several powers in order to fulfill its duty as the panel could: (1) hold hearings with the authority to receive evidence and sworn testimony; (2) enlist agents; and (3) obtain direct information from any department or agency of the United States.¹⁰⁷

In addition to these two oversight boards, Congress also anointed two governmental officials with the authorization to personally oversee how Paulson exercised his powers under the EESA. The first of these officials was the Comptroller General of the United States. EESA section 116(a) authorized the Comptroller General to conduct “ongoing oversight” of literally every component of Paulson’s execution of the TARP.¹⁰⁸ The Comptroller General could investigate all “activities and performance of the TARP and of any agents and representatives of the TARP . . . including vehicles established by the Secretary.”¹⁰⁹ In addition to this general oversight power, the Comptroller General could further “audit the programs, activities, receipts, expenditures, and financial transactions of the TARP and any agents and representatives of the TARP . . . including vehicles established by the Secretary.”¹¹⁰ Congress ordered Paulson to do much more than just submit to such extensive oversight. EESA section 116 required Paulson to allow constant Comptroller “presence,” as Paulson had to provide the Comptroller General sufficient “space and facilities” within the Treasury Department to conduct the oversight.¹¹¹ If that weren’t enough, Congress further ordered the Treasury Department to pay the bill of its own oversight as EESA section 116(a)(2)(C) stated that “[t]he Treasury shall reimburse the Government Accountability Office for the full cost of any such oversight activities as billed therefor by the Comptroller General.”¹¹²

[A]nalyzing the current state of the regulatory system and its effectiveness at overseeing the participants in the financial system and protecting consumers, and providing recommendations for improvement, including recommendations regarding whether any participants in the financial markets that are currently outside the regulatory system should become subject to the regulatory system, the rationale underlying such recommendation, and whether there are any gaps in existing consumer protections.

§ 125(b)(2), 122 Stat. at 3792.

¹⁰⁶ § 125(b), 122 Stat. at 3791-92.

¹⁰⁷ § 125(e), 122 Stat. at 3793.

¹⁰⁸ § 116(a), 122 Stat. at 3783.

¹⁰⁹ *Id.* Similar to the COP, the Comptroller General was required to continually investigate whether Paulson’s performance under the TARP met the purposes of the EESA in advancing foreclosure mitigation, cost reduction, stability in financial markets, and protection of taxpayers. § 116(a)(1)(A), 122 Stat. at 3783. The Comptroller General was to evaluate “[t]he financial condition and internal controls of the TARP” along with the characteristics of its purchases, obligations, and disposition of assets. § 116(a)(1)(B)-(D), 122 Stat. at 3784. Additionally, the Comptroller General was required to monitor the TARP’s operations efficiency, compliance with all other laws, efforts in avoiding conflicts of interest among agents and representatives, and “efficacy of contracting procedures pursuant to section 107(b).” § 116(a)(1)(E)-(H), 122 Stat. at 3784. While “overseeing” the TARP, the Comptroller General was given complete access to all TARP related information. § 116(a)(2)(B), 122 Stat. at 3784.

¹¹⁰ § 116(b)(2), 122 Stat. at 3785. Whereas the Comptroller General had the general power to audit upon discretion, he or she was required to conduct at least one annual audit per year. § 116(b)(1), 122 Stat. at 3785. The Comptroller General’s annual audit required the TARP to “prepare and issue to the appropriate committees of Congress and the public audited financial statements.” *Id.*

¹¹¹ § 116(a)(2)(A), 122 Stat. at 3784.

¹¹² § 116(a)(2)(C), 122 Stat. at 3785.

The Comptroller General was not the only official keeping a personal eye upon Paulson's exercise of power in the TARP. Congress concurrently established the "Office of the Special Inspector General for the Troubled Asset Relief Program."¹¹³ The Inspector General had the authority to investigate and audit the "purchase, management, and sale of assets by the Secretary of the Treasury under *any program* established by the Secretary under section 101, and the management by the Secretary of *any program* established under section 102 . . ."¹¹⁴ The Inspector General could be involved in the oversight of every troubled asset Paulson purchased under the bailout plan, as among the articles of information the Inspector General was required to report to Congress¹¹⁵ was "an explanation of the reasons the Secretary deemed it necessary to purchase *each* such troubled asset."¹¹⁶ Similar to the Comptroller General, Congress did not stop at just requiring Paulson to submit to the official's oversight. EESA section 121(g) required Paulson to allocate \$50 million of the funding set aside for his use under EESA section 118 to provide funding for the Inspector General to fulfill the oversight duties.¹¹⁷

In addition to these major instruments of oversight, Congress also hedged Paulson's exercise of power by installing a measure of judicial review in EESA section 119, effectively scrapping the "no review" clause from Paulson's proposal.¹¹⁸ EESA section 119(a)(1) subjected Paulson's exercise of power to the general judicial review provisions provided in "chapter seven of title 5 [of the] United States Code" and directed the adjudicator to find and set aside any of Paulson's actions ". . . that are found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law."¹¹⁹ Even though this highly sought-after judicial review existed in Congress' final grant of power to Paulson, there was significant debate over whether it is a true check on his authority as EESA section 119 also provided substantial limitations on the types of parties that can bring suit¹²⁰ and more importantly upon the equitable relief that may be granted.¹²¹

¹¹³ § 121(a), 122 Stat. at 3788.

¹¹⁴ § 121(c), 122 Stat. at 3788-89 (emphasis added).

¹¹⁵ The Inspector General was required to collect and summarize information such as the complete listings of every purchased troubled asset, the names of each financial institution that sold the assets, a detailed biography of every "person or entity hired to manage such troubled assets," and a list of all insurance contracts that have been issued by Paulson under section 102. §§ 121(c)(1)(B), (D)-(E), (G), 122 Stat. at 3788-89. The Inspector General was also required to keep a current estimate of the "total amount of troubled assets purchased" by any section 101 program. § 121(c)(1)(F), 122 Stat. at 3789. The Inspector General is broadly equipped to acquire such information by sections 121(c)(2), 121(d), and 121(e).

¹¹⁶ § 121(c)(1)(C), 122 Stat. at 3789 (emphasis added).

¹¹⁷ § 121(g), 122 Stat. at 3790.

¹¹⁸ See Draft Proposal, *supra* note 8.

¹¹⁹ § 119(a)(1), 122 Stat. at 3787.

¹²⁰ Section 119(a)(3)'s "limitations on actions by participating companies" provided that "[n]o action or claims may be brought against the Secretary by any person that divests its assets with respect to its participation in a program under" under the EESA. The only exception to this limitation was if Paulson were to waive the limitation expressly in a contract with the company or individual. § 119(a)(3), 122 Stat. at 3787.

¹²¹ The major limitation on equitable relief against Paulson was EESA section 119(a)(2)(A): ". . . no injunction or other form of *equitable relief* shall be issued against the Secretary for actions pursuant to section 101, 102, 106, and 109, other than to remedy a violation of the Constitution." David Zaring, blogger for the Conglomerate, believed that this limitation effectively canceled out the judicial review. See David Zaring, *Judicial Review in the Bailout Bill*, Oct. 2, 2008, <http://www.theconglomerate.org/>

D. Impact of Paulson's Bailout Authority

Given that the 2008 crisis was considered by many to have had “an *unprecedented* amount of uncertainty as to the extent of either its causes or effects,” the impact (or non-impact) of Paulson's bailout authority will not truly be ascertainable for quite some time.¹²²

It may well be that the \$700 billion bailout will calm the financial markets, be sufficient to prevent further collapses among insurers, banks and investment houses, and perhaps even prove to be far less costly to taxpayers than its \$700 billion price tag when assets acquired by the federal government . . . at steep discounts are later sold at a profit. Such a ‘soft landing’ is far from certain, however. The bailout seeks to stabilize the financial and credit markets primarily by purchasing mortgage-backed securities, the worth of which is highly suspect.¹²³

E. Summary and Conclusion of Paulson's Authority

The EESA granted Treasury Secretary Henry Paulson tremendous authority to establish, execute, and manage a \$700 billion capped bailout of the United States financial system. His power was not only defined simply by the magnitude of its reach, but also by the enormity of the microscope that Congress continually hovered above him through the EESA's extensive oversight. All of this considered, there is no doubt that Paulson will be remembered as a historically powerful government official.

Paulson was given great power to address a dire financial crisis, but in context, was he *really* the most powerful Treasury Secretary in United States history? Was the scope of the authority given to Paulson under the EESA *really* an “unprecedented” leap by Congress? The next section of this article will begin to show that the answer to these questions is no, as the section will define the genesis of a Congressional trend to magnify Treasury Secretary authority in times of financial crisis by examining the pattern's first and truly most powerful proponent, Alexander Hamilton.

IV. THE BEGINNING OF THE CONGRESSIONAL TREND TO MAGNIFY

2008/10/judicial-review.html. Zaring stated that “it looks a bit like the bill provides for [arbitrary and capricious review] in one section, and then takes it away, by taking away equitable relief, in the other section.” *Id.* Zaring's main contention was that the arbitrary and capricious review granted by EESA section 119(a) was itself considered to be an equitable relief by the Supreme Court. *Id.* (citing *Doe v. Chao*, 540 U.S. 614, 619 n.1 (2004) (“referring to the ‘the general provisions for equitable relief within the Administrative Procedure Act’ and citing a section of the same Title 5, Chapter 7 referenced in the bailout bill's judicial review provisions”). Zaring did not believe that “someone who thought that . . . Paulson underpaid for a particular mortgage backed security [could] sue . . .” under the arbitrary and capricious standard. *Id.* Zaring conceded however that some sort of declaratory judgment might be available to such a plaintiff in asserting that Paulson had made a sale that was plainly inconsistent with the EESA. *Id.* Either way, Zaring pointed out that under *Darby v. Cisneros*, 509 U.S. 137 (1993), the Treasury Department could “use its broad powers to set up a mandatory administrative appeals process, which . . . would keep plaintiffs out of the courts until they had exhausted their administrative remedies, and which would give the courts an adjudicated process to look at (and, hopefully for Treasury, rubber stamp).” *Id.*

¹²² Alan C. Weinstein, *Current and Future Challenges to Local Government Posed by the Housing and Credit Crisis*, 2 ALB. GOV'T L. REV. 259, 271 (2009) (emphasis added).

¹²³ *Id.* at 271-72.

TREASURY SECRETARY AUTHORITY IN THE MIDST OF CRISIS:
ALEXANDER HAMILTON (1789-1795)

A. The Public Credit Crisis

The infant United States presented newly elected President George Washington with a multitude of challenges upon his taking office in the spring of 1789, none more complex and critical to the future of the Union than the state of the nation's finances. Fighting the War of Independence against England had caused the Continental Congress to retain debt from ". . . more creditors than any other government in the world."¹²⁴ The vast majority of the Revolutionary War debt, or as political leaders called it "the price of liberty," had not yet been "settled since independence due to the 'embarrassment of a defective constitution' under the Confederation."¹²⁵ By 1789 the United States' foreign debt totaled over \$10 million (with \$1.6 million more in arrears of interest).¹²⁶ The nation's domestic debt, largely comprised of war certificates and bonds issued to former Continental soldiers and suppliers, amounted to more than \$40 million with accrued interest.¹²⁷ All in all, the newly formed federal government was in a \$50 million hole; a virtual anvil around the neck of its hopeful Constitution.

Adding to the financial strain of the nation was the fact that the individual states also owed both domestic and foreign investors an aggregated \$25 million,¹²⁸ which only a few states had made significant progress in paying.¹²⁹ The size of the national and state debts was only the beginning of the problem however, as the organization and subsequent management of the domestic debt could be described as nothing short of chaotic.¹³⁰ Furthermore, faith in the fledgling United States

¹²⁴ JOHN C. MILLER, *ALEXANDER HAMILTON AND THE GROWTH OF THE NEW NATION* 230 (Transaction Publishers 2004) (1959).

¹²⁵ MARIE B. HECHT, *ODD DESTINY: THE LIFE OF ALEXANDER HAMILTON* 180 (1982).

¹²⁶ MILLER, *supra* note 124, at 230.

¹²⁷ *Id.* See also MARGARET G. MYERS, *A FINANCIAL HISTORY OF THE UNITED STATES* 61 (1970).

The total owed to individuals amounted to more than 40 million dollars. Of which about one-third was accrued interest. Many of the certificates had originally been issued to pay soldiers and officers of the army; others had been given to farmers and merchants by commissary officers. Many of the bonds had been purchased by patriotic investors who had later been obliged to sell them at a loss; some of the securities, like some certificates and warrants, had changed hands several times.

Id.

¹²⁸ JACOB ERNEST COOKE, *ALEXANDER HAMILTON* 76 (1982).

¹²⁹ "Massachusetts and South Carolina had large unpaid obligations on the war account; North Carolina, Virginia, Maryland, and Georgia had paid off most of their war debts; the other states had less at stake." MYERS, *supra* note 127, at 61.

¹³⁰ See MILLER, *supra* note 124, at 230.

The domestic debt consisted of a chaos of virtually worthless paper money; loan-office certificates; IOU's signed by the Quartermaster commissary generals; lottery prizes (the government had conducted lotteries but had been unable to pay the winners in cash); certificates given to soldiers and officers in lieu of pay; indents (paper certificates representing interest debt). Hardly a means of going into debt known to the governments of the eighteenth century had been omitted by the Continental Congress . . .

Id.

financial system was low and diminishing, significantly compounding the problem of borrowing and repayment.¹³¹

Many historians believe that the success of Washington's administration, and indeed the sustained future of the whole nation, rested upon how Washington addressed the nation's mounting financial crisis.¹³² Washington turned to Robert Morris, former Superintendent of Finance under the Confederation, for guidance in asking, "[w]hat are we to do with this heavy debt?"¹³³ Morris' only answer for the President was a referral: "[t]here is but one man in the United States who can tell you; that is Alexander Hamilton."¹³⁴ Washington appointed Hamilton, his long-time friend and confidant,¹³⁵ to be the first Treasury Secretary of the United States on September 11, 1789.¹³⁶ Hamilton's exercise of power in addressing the post-Revolutionary financial crisis and further creating the initial American financial system has caused many to consider him to be the most influential, powerful, and indeed controversial Treasury Secretary in United States history.¹³⁷

The sheer size and nature of the national debt forced Hamilton to face a critical market intervention dilemma from the outset of his service. Whereas the majority agreed that all foreign debt should be repaid, many wanted Hamilton to consider an arbitrary cancellation of the domestic debt altogether.¹³⁸ In the face of national bankruptcy, the argument for canceling the domestic debt was supported

¹³¹ The United States' revenue from taxation failed to even meet the interest of the government's obligations. *Id.* at 231. Hamilton would later define the problem as a rather vicious cycle. *Id.* at 230.

Hamilton had always contended that the government could not endure without credit 'commensurate with the utmost extent of the lending faculties of the community'; but credit could not be established until provision had been made for the existing debt. Little could be done toward disposing of the existing debt, however, until the government had regained its ability to borrow. Truly the finances of the United States were a dilemma wrapped in a paradox.

Id.

¹³² Cooke believed that "[t]he success of Washington's administration largely hinged on its adoption of fiscal policies that would revive confidence in the fledgling nation, both at home and abroad . . ." COOKE, *supra* note 128, at 73. Miller further expressed that "[t]he success of the Constitution and the very existence of the republic depended upon the skill with which the financial obligations of the government were handled." MILLER, *supra* note 124, at 230.

¹³³ HECHT, *supra* note 125, at 177.

¹³⁴ *Id.*

¹³⁵ Hamilton served as Washington's "chief of staff" and "principal and most confidential aide," during the Revolutionary War. RON CHERNOW, ALEXANDER HAMILTON 90, 91 (2004). Washington considered Hamilton to be like a surrogate son during their time in the war, even referring to him as "my boy." *Id.* at 87.

¹³⁶ HECHT, *supra* note 125, at 177. The Senate would go on to confirm Hamilton as the Treasury Secretary later that same day. *Id.*

¹³⁷ See generally RICHARD B. MORRIS, ALEXANDER HAMILTON AND THE FOUNDING OF A NATION 285 (1957). As to the founding of the initial American financial system:

Hamilton came into Washington's cabinet with a seven-point program: (1) the restoration of public credit; (2) a sound system of taxation; (3) a national bank; (4) a sound currency; (5) the promotion of commerce; (6) the encouragement of manufactures; and (7) a liberal immigration policy. In his public papers he made it clear that the carrying out of this program was not to be at the expense of agriculture, but would result in the building of a balanced economy which would benefit all economic groups. His program was brilliantly presented to the nation in a series of bold and masterful reports.

Id.

¹³⁸ MILLER, *supra* note 124, at 231.

both by a basic call for national self-preservation and a rationale that the United States had in a sense already fulfilled a greater obligation to creditors in providing them with liberty through the defeat of England.¹³⁹ Whereas Hamilton held that the federal government did have the power to cancel debt,¹⁴⁰ he concluded that it would not be “just” to do so in this case as he sincerely believed that the United States could fulfill its debt obligations upon reform of policy.¹⁴¹

Even though Hamilton had refused such an extreme measure, market intervention was still on his mind. In October of 1789, only weeks after Hamilton’s appointment, Congress requested that Hamilton submit a proposal to address the public credit crisis.¹⁴² Hamilton responded two months later with his historic First Report on the Public Credit.¹⁴³ Similar to Paulson, Hamilton submitted a three-part proposal¹⁴⁴ involving measures of far-reaching market intervention that required Congress to give Hamilton and the Treasury Department a tremendous amount of power.¹⁴⁵ First, Hamilton proposed that the Treasury Department, acting on behalf of the President, be authorized to borrow money and use excess tax revenue as necessary to pay down the entirety of the foreign debt owed to France, Holland, and Spain over the next fifteen years.¹⁴⁶ This was the least controversial part of Hamilton’s plan as it was generally agreed that the priority for the United States was to protect its financial reputation with foreign nations.¹⁴⁷

Second, Hamilton proposed that the federal government address the domestic debt by allowing the Treasury Department to *offer* the speculators which held the controversial war bonds and certificates¹⁴⁸ a redemption of their securities in

¹³⁹ *Id.*

¹⁴⁰ “The highest law of the state, [Hamilton] admitted, was self-preservation; when its existence was at stake, a government could alter the terms of contracts, discriminate between various groups of creditors and declare its obligations null and void.” *Id.*

¹⁴¹ *Id.* Hamilton expressed this belief in stating that if he were to “establish that a government may decline a provision for its debts, though able to make it . . . and you overthrow all public morality . . . You have anarchy, despotism, or what you please, but you have no *just* or *regular* government.” *Id.*

¹⁴² *Id.* at 231-32.

¹⁴³ MYERS, *supra* note 127, at 60.

¹⁴⁴ In sum, Hamilton’s report would seek to explain how “the debt could be paid, to whom it should be paid and what was to be done with the state debts dating from the Revolutionary War.” MILLER, *supra* note 124, at 232.

¹⁴⁵ MYERS, *supra* note 127, at 60-62.

¹⁴⁶ *Id.* at 60-61.

¹⁴⁷ *Id.* at 61.

¹⁴⁸ The majority of men who had been originally “paid” with the war certificates were veteran soldiers and suppliers of the Revolutionary War. *See generally* MILLER, *supra* note 124, at 232-34. These veterans, and often their widows or orphans, were met with hard times after the war. *Id.* Many of them were forced by their circumstances to sell the war securities to speculators “often at a fraction their nominal value . . .” *Id.* at 232. Due to this sad situation, a widespread “equity” debate spread throughout Congress pertaining to who should be justly paid for the outstanding war certificates and bonds. Congressman Aedanus Burke “proposed that a discrimination should be made between the original holders of the public securities and their assignees and that a scale of depreciation be prepared accordingly.” HECHT, *supra* note 125, at 184. James Madison, who would eventually become Hamilton’s greatest opponent in getting his report passed by Congress, joined Burke’s proposal, “even after Burke withdrew it . . .” *Id.* Madison would go on to later publicly criticize Hamilton on the Congressional floor for not discriminating against the speculators, “dwelling at length upon the plight of the widows, orphans and ex-soldiers who had been defrauded by unconscionable speculators.” MILLER, *supra* note 124, at 240-41. “What would it profit the federal government, [Madison] asked, if in

exchange for a new contract that reduced the interest that the government was obligated to pay.¹⁴⁹ In essence, Hamilton proposed a bailout of the securities to further strengthen investor confidence, as the offer to buy them at face value was substantially higher than the securities' market value before his report was submitted.¹⁵⁰ Indeed, many of the speculators stood to gain nearly an eighty-five percent profit, as it was not unusual for financially troubled veterans to have sold their securities for fifteen cents on the dollar.¹⁵¹ New securities would be issued by the federal government to “. . . be exchanged for outstanding obligations at their specie value at the rate of 100 to 1.”¹⁵²

Similar to Paulson, Hamilton was proposing a wide scale bailout of the United States financial system to promote stability and attract further investment.¹⁵³ However, with Hamilton, the scale in context was much larger.

gaining the rich, it lost the affections of the people – the certain consequence of permitting this ‘shower of gold’ to fall upon the rich alone?” *Id.* The situation looked even more repulsive as the government buyout of the speculators' securities would in turn be paid for by the original veterans, as they would be forced to pay federal taxes covering the purchase. The issue continued to boil over as many thought that rich northern speculators were particularly preying upon the poorer veterans of the south and “were urging refunding in order to obtain a huge unearned profit.” *See MYERS, supra* note 127, at 61. Hamilton, a former veteran himself, put aside thoughts of the unfortunate situation to see the drastic financial consequences that would come from not honoring the correct holder of the security. *Id.* The security itself stated that “the amount thereon specified should be paid to the bearer, thereby creating, said Hamilton, a contractual relationship that made them as much the property of bona fied purchases ‘as their houses or their lands, their hats or their coats.’” *Id.* The Continental Congress had previously assured foreign investors that purchased such securities that they would be paid as the securities' holder. *Id.* “If the federal government now attempted to discriminate in the name of equity between different types of creditors, Hamilton was prepared to renounce all hope that foreigners would ever again trust their money to the perfidious republicans across the Atlantic.” *Id.*

¹⁴⁹ “In exchange for the security afforded by the funding system, Hamilton proposed to take what he called ‘a stout Slice’ from the accrued interest owing the public creditors . . . Roughly, this deduction amounted to an interest rate of 4 1/2 instead of 6 per cent upon the national debt.” MILLER, *supra* note 124, at 236. Two-thirds of the new deal would bear a six percent interest rate from 1791 as the final one-third would not begin accruing interest until 1800. MYERS, *supra* note 127, at 61. “The arrears of interest would be paid in securities bearing only [three] percent.” *Id.*

¹⁵⁰ As the government redemption, or bailout, of the securities became more certain, the prices to buy such securities skyrocketed to a twenty percent premium. MYERS, *supra* note 127, at 62. “Since 1787 there had been much speculative buying and selling of Continental and Confederation certificates of indebtedness and bills of credit on the prospect that they might be redeemed by the new Federal government. Speculation reached its climax while the funding program was under debate.” MORRIS, *supra* note 137, at 286-87. “Since Hamilton's report had been submitted to Congress, the speculators had been busy buying all the securities in sight, even going to the length of chartering ships to carry their agents to the southern states before the news of Hamilton's report reached that region.” MILLER, *supra* note 124, at 239.

¹⁵¹ JOHN S. PANCAKE, THOMAS JEFFERSON & ALEXANDER HAMILTON 161 (1974).

¹⁵² MYERS, *supra* note 127, at 61.

¹⁵³ Jerry Bowyer of Forbes.com believed that Hamilton's Report on Public Credit and Paulson's bailout plan were exceedingly analogous. Jerry Bowyer, *Ron Paul Vs. Alexander Hamilton*, FORBES, Oct. 3, 2008, http://www.forbes.com/2008/10/03/bailout-constitutional-hamilton-oped-cx_jb_1003_bowyer.html. Bowyer explained that:

[W]e've been here before. As George Washington was taking the oath of office, U.S. credit markets were in full meltdown. America faced a credit crisis in which debt obligations were being purchased by banking houses at [twenty-five] cents on the dollar. Paulson's predecessor was a guy named Hamilton, and Bush's predecessor was a guy named Washington. Hamilton wrote up a plan (called “Report on the Public Credit”) in which he proposed that the Treasury department buy the troubled securities from the private sector, thus restoring the collapsing credit market . . . Hamilton's case was simple. When any part of a

Congress and the media continually called the \$700 billion bailout plan “unprecedented,” but if one looks closely at the Hamilton bailout, the context shows that Hamilton asked for a taxpayer funded program that represented 4/5 of the total national debt.¹⁵⁴ In order for Paulson’s power under the bailout plan to truly be unprecedented, the EESA would need to have capped the bailout plan at just over \$8 trillion; more than eight times the current maximum.¹⁵⁵ Hamilton had essentially asked for eight times the reach of Paulson’s power by only the second point of his proposal; and still, he was far from done.

Third, and most controversially, Hamilton proposed a full-scale assumption, or rather a further bailout, of the states’ aggregated \$25 million debt.¹⁵⁶ At first glance this appeared to be a step in the wrong direction, as the bailout would raise the national debt by more than fifty percent to almost \$80 million with interest included.¹⁵⁷ However, Hamilton was confident that he could similarly proffer a bargain with the holders of the state obligations to cut interest rates because of the added confidence the new Constitution¹⁵⁸ and his debt management system would provide their securities.¹⁵⁹ With these lesser interest rates, Hamilton believed his debt management system would more than provide for steady repayment of the national debt through an established “Sinking Fund,” which would “receive

nation participates in a massive repudiation of debt, the creditworthiness of the whole nation is damaged. Hamilton saw this as a national problem in need of a national solution. He argued that the whole nation would benefit from a return to a well-functioning credit market, with low interest rates fueling growth. Hamilton believed that if the Constitution gave executive power to the president, then that included the authority to create specific institutions and programs necessary to exercise that power [T]he Treasury bought up the paper, America’s credit markets were restored quickly, and although we’ve had a few rough patches, the ensuing 218 years have gone pretty well so far.

Id.

¹⁵⁴ The domestic debt represented stood at \$40 of the \$51.6 million national debt. See MYERS, *supra* note 127, at 61.

¹⁵⁵ According to the Huffington Post and the U.S. National Debt Clock, the outstanding public debt of the United States as of October 7, 2008 surpassed \$10 trillion. See Scott Bittle & Jean Johnson, *National Debt Passes \$10 Trillion, No One Notices*, HUFFINGTON POST, Oct. 7, 2008, http://www.huffingtonpost.com/scott-bittle-and-jean-johnson/national-debt-passes-10-t_b_132732.html; see also U.S. National Debt Clock, http://www.brillig.com/debt_clock/ (last visited Jan. 14, 2008).

¹⁵⁶ MILLER, *supra* note 124, at 235.

¹⁵⁷ *Id.*

¹⁵⁸ See PANCAKE, *supra* note 151, at 160-61. Specifically,

The new Constitution had conferred upon Congress the power to tax, and Congress had already in the summer of 1789 enacted tariff duties on imports and tonnage duties on shipping entering American ports. The assurance of an income, the audacity and boldness of the young Secretary, the return of prosperity after the depression of the 1780’s – all these things inspired confidence It was this public confidence that resulted in the sale of the entire bond issue within a few weeks of its being put on the market.

Id. at 161.

¹⁵⁹ Instead of annual appropriations by the [state or federal] legislature toward debt retirement, the creditors of the [federal] government were offered by Hamilton permanent appropriations inviolably dedicated to the payment of interest and principal. Every guarantee possible under the Federal Constitution against popular ‘instability’ and ‘caprice’ was given public creditors

MILLER, *supra* note 124, at 236. Indeed, the individuals that held the state war obligations were the same speculators that held the national securities involved in the domestic debt portion of Hamilton’s proposal. *Id.* at 234-35.

surplus revenues from import and tonnage duties, interest saved on government securities which were redeemed, and proceeds from the sale of public lands.”¹⁶⁰

Hamilton’s proposal for the federal government to assume state debt was not just an action to help the “the people of the United States [who] labored under a heavy load of state debts” by way of taxes;¹⁶¹ it was a power play. Hamilton was one of the chief proponents of the Federalist Party, which believed that the greater power in the federal-state relationship should exist within the federal government.¹⁶² Hamilton was sure that “if all the public creditors receive their dues from one source, distributed by an equal hand, their interests will be the same. And, having the same interests, they will unite in the support of the fiscal arrangements of the Government.”¹⁶³ Hamilton wanted this support to be centrally united under the federal government and feared that with both the federal government and the states having large debts on their books, both entities would be forced to compete for the “allegiance of the creditor class and for the citizens’ tax dollar.”¹⁶⁴ Thus, a shift of taxpayer investment from the states to the federal government meant a shift of taxpayer allegiance and support to the federal government.¹⁶⁵ In essence, Hamilton was asking Congress to vest him with the power to single-handedly sway the coveted allegiance of the investor class American by tying him to the financial success of the federal government.

¹⁶⁰ MYERS, *supra* note 127, at 63.

¹⁶⁰ MYERS, *supra* note 127, at 63.

¹⁶¹ MILLER, *supra* note 124, at 234.

¹⁶² *Id.* at 193, 195.

The principle theme of *The Federalist* is that the purpose of the Constitution is the establishment of an energetic and efficient national government notwithstanding the powers reserved to the states. Even though Hamilton deferred to the new kind of federalism created by the Constitution, it is clear from his essays that his sympathies lay wholly with nationalism. Reference to “the streams of national power” and “the Fabric of American Empire” reveal that even while he was justifying the federalist system he was dreaming of the centralized system that he hoped would emerge from the chrysalis of federalism.

Id. at 195.

¹⁶³ *Id.* at 235 (internal quotation marks omitted).

¹⁶⁴ *Id.*

The result, Hamilton feared, would be that the states would attempt to pre-empt (as the Constitution, by recognizing concurrent taxation, permitted them to do) the remaining objects of taxation and that the affluent citizens of the United States would be divided against themselves, the state creditors seeking to strengthen the states while the holders of federal securities endeavored to aggrandize the powers and the revenues of the national government.

Id. Miller further explained:

Hamilton regarded concurrent taxation as “the Gordian-knot of our political situation.” In *The Federalist* he observed that the only way concurrent taxation could be made workable was for each government to exercise “reciprocal forbearance” by respecting the rights of the first occupant. As Secretary of the Treasury, Hamilton left no doubt that he intended the federal government to do the occupying, while forbearance was to be practiced by the states.

MILLER, *supra* note 124, at 235.

¹⁶⁵ “With all the creditors, state and national, gathered into the fold of the federal government, Hamilton’s vision of a powerful national government, supreme over the states, would begin to assume concrete reality.” *Id.* Miller believed that “Hamilton’s constant objective was to bind [speculators and investors] to the national government by the durable ties of ‘Ambition and Avarice.’” *Id.*

Although Paulson's request for authority under his bailout proposal was met with a notable amount of controversy, it pales in comparison to the uproar which followed Hamilton's request for power under his report, especially as to the assumption of state debts.¹⁶⁶ James Madison, one of the leaders of the Republican Party, opposed Hamilton's proposal in Congress on the grounds that it forced citizens of states that had already paid off a large amount of their war debts to now pay federal taxes for the debts of other states.¹⁶⁷ Much like Paulson's later opposition, Hamilton's opposition further feared that giving Hamilton the power to assume state debts would greatly "magnify" his power, as well as that of the federal government.¹⁶⁸

Hamilton's opponents won the initial battle of the state assumption portion of his proposal, as it was defeated in the House thirty-one to twenty-nine.¹⁶⁹ This was not the proposal's death however, but rather its transformation into a political bargaining chip. Republican leaders James Madison and Secretary of State Thomas Jefferson agreed in a "behind-the-scenes" meeting with Hamilton to drop their opposition of the state assumption bill in exchange for an agreement to support having the "new national capital at a site on the banks of the Potomac."¹⁷⁰ With this alliance in place, the assumption of state debt became the final piece of Hamilton's proposal to become law.¹⁷¹

With the measures of the Report on Public Credit passed, Hamilton was authorized to use a great amount of discretion in managing¹⁷² what stood as a bailout worth 7/8 of the national debt – more than twelve times the amount Paulson would ever control under the EESA.¹⁷³ Additionally, with almost every significant investor in the young nation now tied to Hamilton's policy favoring the federal government, Hamilton also single-handedly held the power to drastically shift political favor to the federal government during the time when the nation's foundation was being laid. Although Paulson's management of the TARP has had substantial economic consequences, it will have nowhere near the lasting political

¹⁶⁶ Many of the political leaders of the time felt that Hamilton's Report on the Public Credit was the first great controversy of the new nation, almost tearing the new union to bits. *Id.* at 238.

. . . Hamilton's report fell like a bolt from the blue, utterly destroying the President's hope that his administration would inaugurate an era of good feelings. In John Marshall's words, Hamilton's financial program "seemed to unchain all those fierce passions which a high respect for the government and for those who administered it, had in a great measure maintained." Before the storm blew itself out, some Americans were seriously considering disunion.

Id.

¹⁶⁷ See PANCAKE, *supra* note 151, at 164-65. This complaint is not much different than the complaints made by modern taxpayers who oppose paying taxes to bailout corporations.

¹⁶⁸ See MORRIS, *supra* note 137, at 287.

¹⁶⁹ PANCAKE, *supra* note 151, at 165.

¹⁶⁹ PANCAKE, *supra* note 151, at 165.

¹⁷⁰ MYERS, *supra* note 127, at 62; *see also* PANCAKE, *supra* note 151, at 166.

¹⁷¹ MYERS, *supra* note 127, at 62.

¹⁷² *See id.* at 63.

¹⁷³ With the bailout of the domestic debt (\$40 million) and state war debts (\$30 million after interest) represented \$70 million of the \$80 million national debt (the other \$10 million being attributed to the country's foreign debt). *See supra* notes 128, 156-57. The EESA's maximum bailout of \$700 billion represented barely over seven percent of the current national debt, which continued to soar past \$10 trillion. *See supra* note 155.

and legal effect that Hamilton's use of this political power has had on the nation's governmental system. The evidence of this was quickly seen as Hamilton used the exercise of his newly authorized power and influence in establishing the United States' first national bank.

B. *The First National Bank*

Hamilton's next major goal in addressing the public debt was the establishment of a public bank, a modern tool he believed the federal government needed for ongoing financial management.¹⁷⁴ To this effect, Hamilton eventually submitted his historic Report on a National Bank to Congress in late 1790, effectively requesting that Congress establish the Bank of the United States.¹⁷⁵ With Congress having already firmly placed their trust in Hamilton by granting him great power and discretion in managing the public debt crisis, the issue of the bank itself was only moderately controversial as the bill proposing Hamilton's bank passed both houses of Congress convincingly.¹⁷⁶ However, State-rights oriented leaders such as Madison and Jefferson recognized that lying within Hamilton's proposal was a request for immense authority as Hamilton implicitly asserted that Congress had the constitutional authority to establish a national bank.¹⁷⁷

With the foundational scope of Congress' constitutional authority at issue, the debate that ensued became one of the most divisive and consequential political power struggles in United States history. It was not a fight over a bank, but over power. Since the bank bill had passed both houses of Congress, Madison and Jefferson took their argument to President Washington who had yet to sign the bill into law.¹⁷⁸ Principally, Madison and Jefferson argued that Congress was authorized by the Constitution to act only upon its enumerated power under Article I and "measures *indispensably necessary* to give effect to [these enumerated]

¹⁷⁴ MYERS, *supra* note 127, at 66. Specifically, Hamilton saw that a public bank would be a great utility for the Treasury department in terms of "short term loans and for bills of exchange with which to make payments" for foreign debt. *Id.* Additionally, Hamilton believed that a national bank would substantially aide the country's sprouting economy as it would grow the United States' "circulating capital" and "[facilitate] payments for business and government." *Id.* Furthermore, "Hamilton hoped to embody his ideal of a partnership between government and the business community by which government would stimulate and direct the activities of businessmen and receive in return part of their capital in the form of loans." MILLER, *supra* note 124, at 260. Hamilton based his beliefs in a large part on the historical effects of the Bank of England. *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See MILLER, *supra* note 124, at 264. Hamilton did ask for a considerable amount of executive power in proposing the bank as it would be "bank of deposit, to act as the fiscal agent of the government, and to loan the government money." MILLER, *supra* note 124, at 261. Furthermore, Hamilton's proposal pushed the new country to unprecedented grounds among national governments, as the federal government would purchase \$2 million (twenty percent) of the bank's stock; something even England did not do with its own public bank. MYERS, *supra* note 127, at 67-68. Although the bank was managed by private citizens (the government would only be allowed to appoint five of the twenty five directors), Hamilton was personally authorized to inspect the bank's books. *Id.* at 68. Even with all of these increases in power and changes to the nation's financial landscape opponents of the bank's bill "did not hope to defeat the bill, only to make some changes." HECHT, *supra* note 125, at 198.

¹⁷⁷ See MILLER, *supra* note 124, at 264.

¹⁷⁸ *Id.*

powers.”¹⁷⁹ Accordingly, Madison and Jefferson argued that Congress could not establish a national bank because it was neither an enumerated power under Article I nor “indispensably necessary” to effectuate any of its other enumerated powers.¹⁸⁰ Hamilton held the exact opposite view, arguing that the Constitution gave Congress general enumerated powers and the implied powers to effectuate such enumerated powers in the most effective manner (what is “necessary and proper,” not just as “indispensably necessary”).¹⁸¹ Washington sided with Hamilton and his interpretation, signing the bank bill into law.¹⁸²

In establishing such substantial power for Congress, Hamilton again procured great power for his own office by managing the public debt crisis through the execution of the First Bank of the United States. Although the United States Bank would have its ups and downs in subsequent time periods, Hamilton’s *Report on a National Bank* was essentially the birth of the federal banking system; another lasting thumbprint on the nation. In addition to further broadening his own authority and influence on the national economy, Hamilton again tremendously increased the power of the federal government within the federal-state relationship. Congress now had been assured of far-reaching implied powers, which consequentially won the Treasury Department an equally broad power of execution (the lasting effect memorialized within the Supreme Court’s approval in *McCullough v. Maryland*).¹⁸³

C. The Whiskey Rebellion

Whereas Hamilton’s most financially consequential powers came through the before mentioned public credit crisis bailouts and establishment of the Bank of the United States, perhaps the greatest single display of Hamilton’s authority during his time as the Treasury Secretary came in his leading the Western Army to squash the “Whiskey Rebellion” in 1794.¹⁸⁴ Hamilton, having taken full control of managing the assumed state debts, convinced Congress to place a large federal excise on manufactured whiskey in his *Second Report on the Public Credit in 1791*.¹⁸⁵ Grumblings amongst whiskey manufacturers began immediately upon the passage of the excise, eventually climaxing in 1794 within western counties of Pennsylvania through armed actions against Hamilton’s revenue officers and an assault on Pittsburgh.¹⁸⁶

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *See id.* at 263-65. Hamilton believed that “the Bank of the United States was a necessary and proper means of carrying into effect the regulation of commerce between the states and of providing for the public credit and defense.” *Id.* at 266.

¹⁸² MILLER, *supra* note 124, at 267.

¹⁸² MILLER, *supra* note 124, at 267.

¹⁸³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹⁸⁴ *See* MILLER, *supra* note 124, at 406-09.

¹⁸⁵ *Id.* at 396. Hamilton had originally proposed the whiskey excise in his First Report on the Public Credit to no avail. *Id.* However, with Hamilton’s power and discretion in managing the assumed states’ debts now fully in motion, Congress “had very little to say in the matter . . . [and] the excise became law in early 1791.” *Id.* The excise on whiskey was a costly eight cents per gallon, or about “twenty-five percent of the net value of the product.” *Id.* at 397.

¹⁸⁶ *Id.* at 405.

After personally convincing the Supreme Court that the federal government needed to resort to force to successfully oppose the insurrection, Hamilton set out with President Washington to lead the 13,000-man army (a force roughly the size of the Continental Army that fought in the Revolutionary War)¹⁸⁷ against the “whiskey boys.”¹⁸⁸ Once it had been decided that the army would have to cross the Allegheny Mountains to meet the insurrection forces, Washington returned to Philadelphia to see to other pressing matters.¹⁸⁹ Although Governor Lee of Virginia was supposed to have been the ranking official with Washington’s departure (as it was a multi-state militia force), Hamilton was reputed to have been “the real leader” of the forces and would “[run] the show.”¹⁹⁰ “Hamilton issued orders in his own name” and even rebuked the acting governor of Pennsylvania, General Thomas Mifflin (another supposed ranking official).¹⁹¹ It was reported that Hamilton “indulged in the airs of a commander-in-chief and, capitalizing upon his friendship with Washington, made his influence felt in every department of the army.”¹⁹² Soldiers of the army could hardly believe “[t]hat they were in the presence of a mere Secretary of Treasury.”¹⁹³ Hamilton led the troops across the Alleghany Mountains and captured 150 members of the insurrection (including the “whiskey boys” spokesman Hugh Henry Brackenridge); effectively dispersing the opposing forces and ending the rebellion.¹⁹⁴

D. Final Summary and Comparison of Alexander Hamilton’s Powers

It is clear that in context, the EESA’s \$700 billion capped bailout did not give Paulson the “unprecedented” power that many had claimed. In the face of an analogously dire financial crisis, Hamilton was given greater deference to establish and manage a bailout of the United States financial system that was worth 7/8 of the nation’s total debt; an amount comparatively twelve times larger in scope than the bailout under Paulson.¹⁹⁵ Furthermore, Hamilton used his authority over state debt to tie the United States’ investor class to the federal government, ultimately leveraging this authority to establish a national bank and secure broad implied

Revenue officers were terrorized – sometimes at gun point – into resigning their offices; United States marshals were forcibly prevented from serving processes upon rioters; and the United States mail was seized by armed bands. Early in August, 1794, a meeting of armed men was held at Braddock’s Field and preparations were made to attack Pittsburgh; the assault was averted only when the citizens, realizing that they could not withstand the attackers, marched out to join them.

Id.

¹⁸⁷ See NationMaster.com, Whiskey Rebellion, <http://www.nationmaster.com/encyclopedia/Whiskey-Rebellion> (last visited Jan. 15, 2009).

¹⁸⁸ MILLER, *supra* note 124, at 406-07.

¹⁸⁹ *Id.* at 408-09.

¹⁹⁰ *Id.* at 409.

¹⁹¹ See *id.*; Encyclopedia.com, Thomas Mifflin Facts, <http://www.encyclopedia.com/doc/1E1-Mifflin.html> (last visited Jan. 15, 2009).

¹⁹² MILLER, *supra* note 124, at 409.

¹⁹³ *Id.*

¹⁹⁴ See *id.* at 409-13.

¹⁹⁵ See *supra* text accompanying note 173.

powers for Congress in the process.¹⁹⁶ With the momentum of such authority and power, Hamilton raised heavy excises for the federal debt and led an army of 13,000 men to defend his purposes.¹⁹⁷ Thus, Hamilton was granted far more authority by Congress and exercised such power to a far greater extent (and to a much greater consequence) than was ever possible for Paulson.

The principle of a congressional pattern was established with Hamilton; extreme financial and economic challenges led Congress to grant the acting Treasury Secretary equally extreme measures of authority to seek resolution. Although Hamilton is likely to have been the most powerful and influential proponent of this pattern, the next section of this article will show that he really was just the beginning. Section V will shed light upon the continuation of this pattern by briefly examining a few of the more notable Treasury Secretaries that have faced critical financial challenge in subsequent United States history; thus putting Paulson not at the front, but rather at the back of a rather large line.

V. THE LONG LINE OF IMMENSELY POWERFUL TREASURY SECRETARIES DURING TIMES OF FINANCIAL CRISIS

A. *Salmon P. Chase and the Financial Crisis of the Civil War (1861-1864)*

The five years leading to the civil war were not only wrought with bitter political conflict, but also severe financial and economic crisis.¹⁹⁸ On the heels of such crises, the national debt had doubled during 1857-1860 to \$60 million, with the Treasury balance hovering meagerly around \$3.6 million.¹⁹⁹ In order to meet current obligations, the Treasury resorted to paying exorbitant twelve percent interest rates.²⁰⁰ Even congressmen went without salary for several weeks in 1860.²⁰¹ With this load on the nation's back, or rather on the 'Union's' back, the United States prepared to wage and finance the most expensive war in its young history.²⁰²

When President Abraham Lincoln appointed Salmon P. Chase as his Treasury Secretary in 1861, he essentially handed him a \$75 million national debt, a paper-thin checkbook, and the guarantee that the looming war would only make matters worse.²⁰³ Chase was confident of a quick defeat of the Southern Army and proposed an optimistic \$320 million revenue plan for the next year to be

¹⁹⁶ MILLER, *supra* note 124, at 267.

¹⁹⁷ *Id.* at 406-07.

¹⁹⁸ There had been a large financial panic in 1857 that caused banks to fail nationwide and sunk the United States into recession through the beginning of the Civil War. *See generally* JAMES L. HUSTON, *THE PANIC OF 1857 AND THE COMING OF THE CIVIL WAR* 13-34 (Louisiana State University Press 1987).

¹⁹⁹ MYERS, *supra* note 127, at 149.

²⁰⁰ IRWIN UNGER, *THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865-1879*, at 13 (Princeton University Press 1964).

²⁰¹ MYERS, *supra* note 127, at 149.

²⁰² UNGER, *supra* note 200, at 14-15.

²⁰³ *See* ROBERT P. SHARKEY, *MONEY, CLASS, AND PARTY: AN ECONOMIC STUDY OF CIVIL WAR AND RECONSTRUCTION* 16-17 (The Johns Hopkins Press 1959).

accomplished in large part by issuing federal securities.²⁰⁴ However, the Union's defeat at the Battle of Bull Run in July of 1861 assured a long war with the Southern Army²⁰⁵ and illuminated just how insufficient Chase's financial projections had been.²⁰⁶ "The soldiers needed to be paid" and Chase had to find a way to do it.²⁰⁷

1. *The Birth of Greenbacks: Chase's Authority to Print Money Out of Thin Air*

Chase reported the anticipated Treasury deficit in his Annual Report in 1861, causing a public panic that froze gold trading on the market, which in turn caused further crisis as the gold specie that backed the national coin became scarce in Treasury reserves.²⁰⁸ The Treasury did the unthinkable: it ceased to pay coin for its debt obligations and dropped the "gold standard" for the foreseeable future.²⁰⁹ With the revenue crisis now further compounded by the lack of physical money, the federal government's growing war debt appeared impossible. Chase needed more power, new power; he needed to make money appear out of thin air.

In the face of such a meltdown, that's exactly what Congress let him do. By way of three Legal Tender Acts from 1862-1863, Congress authorized Chase to issue and spend the nation's first non-specie "legal tender paper money" or "greenbacks" up to the staggering amount of \$450 million.²¹⁰ For the first time ever, a Treasury Secretary paid for debt through a currency that was backed by promises alone.²¹¹

Essentially, Congress granted Chase perhaps the greatest power a Treasury Secretary could ever have asked for, the ability to print money at will. The United States \$10,000 bill features a portrait of Chase as a monument to this tremendous power and to the ramped inflation it would later cause.²¹² However, the monument which would perhaps best depict the magnitude of Chase's greenback power was later erected by Chase himself, as he would rule as Chief Justice of the United States Supreme Court that the authority given to him under the Legal Tender Act to issue the greenbacks (the very power that he had pleaded for and exercised only seven years earlier) was unconstitutional.²¹³

²⁰⁴ *Id.* at 19.

²⁰⁵ See JASON GOODWIN, GREENBACK: THE ALMIGHTY DOLLAR AND THE INVENTION OF AMERICA 219 (Henry Holt & Company 2003).

²⁰⁶ SHARKEY, *supra* note 203, at 19-20.

²⁰⁷ GOODWIN, *supra* note 205, at 219.

²⁰⁸ UNGER, *supra* note 200, at 14.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 14-15.

²¹¹ GOODWIN, *supra* note 205, at 220.

Secretary Chase, who only six months earlier had warned against the danger of irredeemable paper, now took the position of "regretting exceedingly" the "necessity," and accepting it as "the mode most useful and least hurtful" to the general interest The Act . . . provided for an issue of notes to be "lawful money and legal tender in payment of all debts public and private"

MYERS, *supra* note 127, at 155.

²¹² GOODWIN, *supra* note 205, at 220.

²¹³ See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869).

2. *Chase and the Nation's First Federal Income Tax*

In order to further boost revenue for a war that cost nearly \$2 million per day,²¹⁴ Chase proposed that Congress install the nation's first federal income tax.²¹⁵ Congress agreed to the proposal and granted Chase the truly unprecedented power to collect taxes on income through the Revenue Act of 1861.²¹⁶ Congress further empowered Chase to collect the nation's first income tax by creating the Internal Revenue Board (which would later become the Internal Revenue Service) in 1862.²¹⁷ Similar to Chase's greenback power, his monumental power to collect income taxes was later ruled to be unconstitutional (only to be brought back to life in 1913 by the Sixteenth Amendment to the Constitution).²¹⁸

3. *Chase's National Banking System*

Congress' authorization for the issuance of greenbacks concurrently provided Chase with a platform to seek further power for a government-backed national banking system that would provide for a common national currency.²¹⁹ Indeed, Chase did more than advocate for such a system, he ". . . demanded it as an instrument of war policy and hinted that he would resign if the scheme did not receive Congressional approval."²²⁰ Upon President Lincoln's further insistence, Congress passed the National Bank Act in 1863,²²¹ authorizing Chase to *directly* involve the United States in banking for the first time in its history.²²² Chase's National Bank Act was a move so vast and dramatic that one author believes that, "[i]t was only in the midst of such a war that such a bill could have been passed."²²³

4. *Salmon P. Chase Conclusion*

In terms of receiving "unprecedented power," there are few, if any, Treasury Secretaries that are comparable to Salmon Chase. In order to meet the financial crisis surrounding the Civil War period, Congress authorized Chase to issue and spend \$450 million of non-specie greenbacks, collect taxes from income, and

²¹⁴ CHARLES F. RITTER, JAY COOKE *in* LEADERS OF THE AMERICAN CIVIL WAR: A BIOGRAPHICAL AND HISTORIOGRAPHICAL DICTIONARY 99 (Charles F. Ritter & Jon L. Wakelyn eds., Greenwood Publishing Group 1998).

²¹⁵ David L. Mowery, *Salmon Portland Chase: Lincoln's Able Financier*, Mar. 14, 2004, http://www.cincinnatiwrt.org/data/ohio%20in%20the%20war/bios/mowery_salmon%20chase.html#_edn16.

²¹⁶ MYERS, *supra* note 127, at 159.

²¹⁷ Salmon Chase – United States Department of the Treasury, <http://www.ustreas.gov/education/history/secretaries/spchase.shtml> (last visited Feb. 12, 2009).

²¹⁸ *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

²¹⁹ *See* MYERS, *supra* note 127, at 162; SHARKEY, *supra* note 203 at 224.

²²⁰ SHARKEY, *supra* note 203, at 226 (citing ANDREW MCFARLAND DAVIS, ORIGIN OF THE NATIONAL BANKING SYSTEM 88 (Government Printer's Office, 1910)).

²²¹ MYERS, *supra* note 127, at 163.

²²² *See supra* note 217.

²²³ MYERS, *supra* note 127, at 163.

establish a national banking system.²²⁴ All three of these powers were firsts in American history and proved to be tremendously powerful tools for the Treasury Secretary to influence the national economy.

B. William McAdoo: World War I and the European Investment Crisis (1913-1918)

The buildup to World War I brought unease amongst investors worldwide. Unfortunately, a great bulk of this uneasiness fell upon the United States, as it was one of the few nations of financial power that did not have a central banking system in place.²²⁵ In the spring of 1914, European investors finally panicked and began cashing in their United States based securities and currency for gold specie at catastrophic levels, causing a full-scale gold run.²²⁶ This created an immediate financial crisis, as the Treasury Department and major banks would not be able to cash out the entirety of the demand.²²⁷ With the nation's gold and financial confidence bleeding uncontrollably, the United States dollar and its financial markets were quickly brought to the edge of a freefall.²²⁸

Treasury Secretary William G. McAdoo needed to act quickly and decisively. On July 31, 1914, McAdoo ordered the New York Stock Exchange ("NYSE") to be shut down to prevent any further run on capital.²²⁹ Many were outraged as McAdoo's action admittedly fell somewhere high upon the tyrannical spectrum; however, it did ultimately serve its purpose as the gold run abroad was quickly halted.²³⁰ With such financial consequences on the line, Congress left the action unchallenged, as McAdoo would continue to keep the NYSE closed for an unprecedented four straight months.²³¹

While the foreign security problem had been met, McAdoo still needed to stop the bank run domestically. McAdoo decided to essentially bailout the United States financial system by pumping the market full of "emergency currency," thus allowing banks to continue to supply capital while retaining gold specie.²³² Unlike many of his predecessors, McAdoo did not have to plead with Congress for this power, as Congress had already established this magnified authority for Treasury Secretary George Cortelyou²³³ in the recent banking crisis of 1907 through the

²²⁴ See *supra* note 210, 216, 221.

²²⁵ Daniel Gross, *The Unknown Financial Hero: The Amazing Story of William McAdoo and How He Saved the American Economy*, SLATE, Mar. 22, 2007, <http://www.slate.com/id/2162467>.

²²⁶ *Id.*

²²⁷ *Id.* See also WILLIAM L. SILBER, WHEN WASHINGTON SHUT DOWN WALL STREET: THE GREAT FINANCIAL CRISIS OF 1914 AND THE ORIGINS OF AMERICA'S MONETARY SUPREMACY 4 (2007).

²²⁸ See SILBER, *supra* note 227, at 32. The Wall Street Journal reported on July 27, 1914 that, "Conditions which have not been witnessed before by some of the oldest operators prevailed in the foreign exchange market on Monday. A well-nigh complete state of demoralization characterized the market, and where rates were quoted they fluctuated with a violence that deterred operators from transacting in the majority of instances . . ." *Id.* See also Gross, *supra* note 225.

²²⁹ See SILBER, *supra* note 227, at 4; Gross, *supra* note 225.

²³⁰ Gross, *supra* note 225.

²³¹ See SILBER, *supra* note 227, at 4; Gross, *supra* note 225.

²³² See Gross, *supra* note 225; SILBER, *supra* note 227, at 4.

²³³ See George Cortelyou – United States Department of the Treasury, <http://www.ustreas.gov/education/history/secretaries/gbcortelyou.shtml> (last visited Feb. 3, 2009).

Aldrich-Vreeland Act.²³⁴ Congress submitted to the necessity of the new mounting crisis and continued to let this bailout power run to McAdoo as he eventually issued the emergency currency.²³⁵ In addition to this national bailout, McAdoo would further organize a bailout of New York City's massive foreign debt, a move that one author called the single-handed introduction of the "[T]oo Big Too Fail doctrine" into the American financial system.²³⁶

Having stopped the bleeding of American gold and confidence, McAdoo wanted to pull the nation (and its gold reserves) up from financial gloom and back into prosperity. McAdoo pushed Congress' deference even further by persuading them to establish the Bureau of War Risk Insurance, a government entity that would provide domestic shippers insurance to ship American cargo across the war-ridden Atlantic Ocean to Europeans that were in great need of products like cotton.²³⁷ With McAdoo's Bureau hedging the risky voyages, European traders paid for American goods with much of the gold that had been retracted.²³⁸ McAdoo's act of restoring the nation's gold reserves allowed banks to retire the emergency currency and gave him the confidence to reopen the NYSE.²³⁹ With stability in the national market restored, McAdoo pushed the nation into the powerful realm of global financial lenders as he introduced the first United States Federal Reserve Banking System in the fall of 1914.²⁴⁰

C. *William H. Woodin (1933) & Henry Morgenthau Jr. (1934-1945):
Control over Banks and Gold During the Great Depression*

The Great Depression presented the United States with a frightening monetary crisis in 1933. With the American dollar actually depreciating, Americans frantically exchanged whatever currency or security they could for gold.²⁴¹ This widespread demand drained the Federal Reserve's gold supply almost past the point of the legal minimum and forced newly-elected President Franklin Delano Roosevelt to take immediate action.²⁴² Roosevelt relied upon the World War I Trading with the Enemy Act ("TEA") to order that all commercial banks be closed until his administration could approve reopening on a bank-by-bank basis.²⁴³ Essentially, Roosevelt declared a war upon the Great Depression. Widespread criticism arose over whether the TEA actually granted such power, causing Roosevelt to seek post-action confirmation from Congress through an amendment to the TEA.²⁴⁴

²³⁴ See SILBER, *supra* note 227, at 4; Gross, *supra* note 225.

²³⁵ Gross, *supra* note 225.

²³⁶ SILBER, *supra* note 227, at 4; see also Gross, *supra* note 225.

²³⁷ See Gross, *supra* note 225.

²³⁸ *Id.*

²³⁹ See *id.*; SILBER, *supra* note 227, at 4-5.

²⁴⁰ See Gross, *supra* note 225.

²⁴¹ Blanchard, *Gold Confiscation: Will It Happen Again?*, http://www.blanchardonline.com/beru/confiscation_1933.php. (last visited Feb. 12, 2009).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

The amendment was proposed as the Emergency Banking Relief Act of 1933 (“EBRA”), a bill that would not only have confirmed Roosevelt’s previous actions, but would also have granted the President and his Treasury Secretary William Woodin great unilateral power going forward.²⁴⁵ Congress met within an emergency session and passed the EBRA on a “voice vote” without actually seeing or debating the text of the bill.²⁴⁶ With the weight of the worst economic crisis in history bearing down upon the United States, Congress once again deferred and greatly magnified the Treasury Secretary’s power.²⁴⁷ In order to meet the monetary crisis, the EBRA authorized Woodin to confiscate “any or all gold coin, gold bullion, and gold certificates” from any individual or corporation.²⁴⁸ Additionally, the EBRA allowed Roosevelt to grant Woodin the sole discretion and authority to decide which commercial banks could reopen.²⁴⁹ Essentially, Woodin now personally controlled all the gold and banks in the entire country without any check on his power.

Woodin fell ill and passed this power to Henry Morgenthau Jr. in 1934.²⁵⁰ Morgenthau soon discovered that because he physically controlled all the gold in the United States (which had been turned over to the federal government by executive order), he also reigned over the gold markets.²⁵¹ Morgenthau met with Roosevelt every morning by his bedside to eat breakfast and arbitrarily set the price of gold in an increasing trend to encourage inflation.²⁵² All the while, Congress continued to differ without challenge. Morgenthau described the process in his diary:

The actual price of gold on any given day made little difference. The amounts settled on were generally arbitrary. One day, for instance, the bedside conference decided on a rise of [twenty-one] cents; “It’s a lucky number,” the President remarked, “because it’s three times seven.”

²⁴⁵ *Id.*

²⁴⁶ See William F. Jasper, *From Henry Morgenthau to Henry Paulson*, NEW AMERICAN, Oct. 31, 2008, <http://www.thenewamerican.com/history/american/473>. “Rep. Ernest Lundeen of the Minnesota Farm Labor Party, one of the few who refused to cave in to FDR’s legislation-by-hysteria campaign, rebuked his fellow members of Congress for their willingness to pass a bill they had not seen, read, or debated. He noted that the bill had been ‘driven through the House with cyclonic speed,’ and argued: ‘We must not allow ourselves to be swept off our feet by hysteria.’” *Id.* On the evening of March 9, 1933, with Congress hastily assembled, the President delivered to the floor of both houses a single copy of his emergency banking bill. Since there was no time to print copies of the bill, it was simply read to the assemblies upon its introduction. At 8:30 p.m., Congress hurriedly put the President’s proposal to a vote and overwhelmingly passed it. The vote was taken when every bank in the country had been closed for four straight days, and there was enormous pressure on Congress to allow the banks to open. Unable to justify a delay to debate, several congressmen were pressured to pass the bill even though they opposed many of its provisions. Due to the short period of time prior to the enactment, some congressmen’s votes were not recognized and there was no roll call vote allowed in the House. To this day, the legislative intent behind the bill remains unclear. Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 266–67 (2000).

²⁴⁷ See Jasper, *supra* note 246.

²⁴⁸ Emergency Banking Relief Act, ch. 1, § 3, 48 Stat. 1, 2 (1933) (repealed 1947).

²⁴⁹ See BLANCHARD, *supra* note 241.

²⁵⁰ The United States Department of the Treasury, <http://www.ustreas.gov/education/history/secretaries/hmorgenthaujr.shtml> (last visited Jan. 29, 2009).

²⁵¹ See Jasper, *supra* note 246.

²⁵² *Id.*

. . . If anybody ever knew how we set the gold price through a combination of lucky numbers and so forth, I think they would really be frightened.²⁵³

VI. CONCLUSION

There has been no great gap between Alexander Hamilton and Henry Paulson. Since the Treasury Department's creation, financial crisis has almost continually caused Congress to magnify the Treasury Secretary's authority to great and "unprecedented" heights. Members of this elite line have initiated and controlled massive public and private bailouts,²⁵⁴ printed money at will,²⁵⁵ flooded financial markets with emergency currency,²⁵⁶ controlled financial markets,²⁵⁷ shut down financial markets,²⁵⁸ confiscated all the gold in the country,²⁵⁹ and led a 13,000-man army to enforce treasury excises.²⁶⁰ Paulson was simply the most current member of this growing line, a recent proponent of the Congressional pattern to inflate Treasury Secretary power during times of financial crisis.

Indeed, Congress granted Treasury Secretary Henry Paulson historic authority to address the 2008 financial crisis through the EESA's \$700 billion capped bailout plan. However, as broad and consequential as this authority was, analysis of past financial crises and Treasury Secretary authority has shown that such heightened power was by no means "unprecedented." In fact, the EESA was proof that the longstanding Congressional pattern to magnify Treasury Secretary authority during financial crisis will likely continue indefinitely. This conclusion is substantially relevant to the business, legal, and political realms for two main reasons.

First, the business, banking, and finance world should be aware that financial crises have frequently resulted in Treasury Secretaries becoming intimately involved in either greatly empowering or greatly restricting business and market action. Although such actions have been very contextual, this history gives the business world a general precedent to rely upon in predicting future intervention and planning accordingly. At the very least, for planning purposes, such history should prevent members of the business world from ruling out any plausible Treasury Secretary intervention measure on the premise that such a measure would be too powerful or "unprecedented."²⁶¹

²⁵³ *Id.*

²⁵⁴ See *supra* notes 173, 236 and accompanying text.

²⁵⁵ See *supra* note 212 and accompanying text.

²⁵⁶ See *supra* note 232 and accompanying text.

²⁵⁷ See *supra* notes 252–54 and accompanying text.

²⁵⁸ See *supra* note 229 and accompanying text.

²⁵⁹ See *supra* note 248 and accompanying text.

²⁶⁰ See *supra* note 188 and accompanying text.

²⁶¹ For example, this principle was immediately applicable to Paulson's successor, Treasury Secretary Timothy Geithner, in his request for broadened authority in 2009. In his efforts to further address the financial crisis stemming from 2008 and to ensure a broader capability to address future financial crises, Geithner requested authority from Congress to be able to "seize large insurers, investment firms and hedge funds, leaping beyond [the] present authority to seize only banks." FOX NEWS, *Geithner Seeks Power to Seize Imperiled Firms*, <http://www.foxnews.com/politics/elections/2009/03/24/fed-treasury-chief-grilled-aig/> (last visited Mar. 26, 2009). Essentially, Geithner proposed that the federal government assume the new authority to seize almost any financial institution

Second, Congress and other political leaders must recognize that American history has shown that financial crises often necessitate a concentration of power in the Treasury Secretary. Recognition that a longstanding Congressional trend exists to greatly empower Treasury Secretaries during times of crisis should give future political leaders confidence to empower the Treasury Secretary if this action would be the most effective and efficient solution to a crisis. This recognition should prevent the unnecessary political delay of congressional leaders getting hung-up on hesitations that empowering the Treasury Secretary is somehow novel or un-American. Whereas Congress must always delegate power responsibly with measures of oversight and checks on unilateral power, recognition of Treasury Secretary history should also prevent Congress from *over*-burdening or ‘handcuffing’ the Secretary when the crisis calls for an efficient use of power. Congress must remember that the Treasury Secretary’s capability to act quickly and efficiently is the very aspect that sets the office apart as an effective tool.

This is not to say that this historical precedent mandates that Congress recklessly give the Treasury Secretary power for the sake of granting power, as instances such as Salmon Chase’s greenback power proved to have long-lasting detrimental effects on the economy.²⁶² Rather, this historical precedent simply calls political leaders to not be so hesitant to consider the option that Congress has used to address so many of this nation’s crises: a grant of power, even tremendously broad and “unprecedented” power, to the Treasury Secretary.

that “totter[ed]” on the line of failure. See Binyamin Applebaum & David Cho, *U.S. Seeks Expanded Power to Seize Firms*, WASH. POST, Mar. 24, 2009, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/23/AR2009032302830.html>. Many recognized that “[g]iving the [Geithner] authority over a broader range of companies would mark a significant shift from the existing model of financial regulation, which relies on independent agencies that are shielded from the political process.” *Id.* On cue, this recognition caused many in the media to quickly throw around their favorite ‘U’ word. See, e.g., Suzanne Malveux, *Geithner to Seek Unprecedented Powers, Insiders Say*, CNN POLITICS, Mar. 24, 2009, <http://www.cnn.com/2009/POLITICS/03/24/geithner.powers/index.html>. Political leaders echoed these sentiments as House Minority Leader John Boehner told reporters that Geithner’s request was asking for “an unprecedented grab of power.” FOX NEWS, *supra* note 162. As shocked as everyone appeared to have been, the conscious observer and planner should have been completely prepared for Geithner’s request no matter how “unprecedented” it was, as it was a plausible option given the context of the crisis leading to the request. Although Geithner’s request asked for new authority, it was a logical step as non-depository financial institutions (those which the FDIC did not have seizure authority over) were enormous contributors to the financial crisis. *Id.* Geithner pointed out the logic himself. “As we have seen with AIG, distress at large, interconnected, non-depository financial institutions can pose systematic risks just as distress at banks can. The administration proposes legislation to give the U.S. government the same basic set of tools for addressing financial distress at non-banks as it has in the bank context.” *Id.*

²⁶² See *supra* note 212 and accompanying text.