No. 12-16775

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD JOHNSON
Plaintiff - Appellant

v.

UNITED STATES DEPARTMENT OF THE TREASURY
and TIMOTHY F. GEITHNER
Defendants - Appellees

On Appeal from the United States District Court
for the Northern District of California

EXCERPTS OF RECORD
VOLUME II [post-judgment]

Clifford Johnson, Appellant *pro se*
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AUTHENTICATION

I, Clifford Johnson, Plaintiff-Appellant in this action, do hereby swear under penalty of law that, based on my personal knowledge, the below documents are true and correct copies of the record in the district court, as listed above.

December 13, 2012 ______________________________

Clifford Johnson

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Clifford Johnson, *Plaintiff* v. United States Department Of The Treasury, and Timothy Geithner, in his official capacity as Secretary of the United States Department of the Treasury, *Defendants*	**No. CV 11-06684 WHA** **AMENDED NOTICE OF APPEAL**

Notice is given that plaintiff Clifford Johnson appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment and order closing the trial court file, and from the Order Granting Defendants' Motion To Dismiss, both of which were entered June 14, 2012; and from the Order Denying Plaintiff's Motion To Alter Or Amend The Judgment, entered October 24, 2012, which clarified the judgment by explaining that the court did not reach the government speech immunity doctrine.

November 22, 2012 (s)____________________________
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

Clifford Johnson, *Plaintiff* v. United States Department Of The Treasury, and Timothy Geithner, in his official capacity as Secretary of the United States Department of the Treasury, *Defendants*	**No. CV 11-06684 WHA** PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF THE MOTION TO ALTER OR AMEND THE JUDGMENT Date: Nov. 15, 2012 Time: 8:00 a.m. Place: Courtroom 8, 19th Floor Judge: Hon. William Alsup

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I. INTRODUCTION AND SUMMARY

Notwithstanding its purported top priority of public education, in a suit that on its face is of fundamental importance as to both constitutional law and national debt, the Treasury not only opposes a motion *to clarify the issues*, but does so with such muddled and fantastic points and authorities as serves only to further fog the issues, invite error, and underscore Johnson's point that the court of appeal deserves a simple clarification of the ambiguities spelled out in his moving memorandum. *Indeed, it would be less burdensome for the court to directly clarify these ambiguities, for the benefit of the court of appeal, than to attempt to decipher the Treasury's perversely opposing mess of conclusory misdirections and rambling page-length footnotes.*

II. ARGUMENT

1. The At-Issue Government Speech Immunity Exceptions Are Reiterated.

For clarity, Johnson first reiterates the at-issue government speech immunity exceptions.

Johnson accepts that mere misrepresentations are reasonably immunized as government speech, even if intentional, on the ground that the government needs such "elbow room" to operate effectively. Johnson contends only that this tolerance is unreasonable **(a)** where the misrepresentations are officially published as objective fact; *and* **(b)** where the government refuses to correct them; *and* **(c)** where some critical additional criterion is met.

Jointly and severally, Johnson alleges four such additional criteria, namely:

(1) where the misrepresentations are intended to suppress the plaintiff's viewpoint;

(2) where the misrepresentations independently violate other constitutional provisions, two such independent violations being alleged; *and/or*

(3) where the misrepresentations result from institutional capture by private interests.

2. A Respectful Motion For Reconsideration Is Contingently Implicit.

As the Treasury observes, reconsideration of the merits is allowed under Rule 59 "if the district court committed clear error or made an initial decision that was manifestly unjust"; and under N. D. Cal. Civ. L. R. 7-9(b) in the event of a "manifest failure by the Court to consider material facts or dispositive legal arguments," where, as herein, the Court's permission to file such a motion has first been obtained. Defendants' Opposition To Plaintiff's Motion To Alter Or Amend Judgment, Dkt. No. 61 ("Opp.") at 2 n. 1.

Of course, Johnson respectfully presumes that the court has already considered the above four misrepresentation-based government speech immunity matters of first impression, which he seeks to clarify. However, the failure of both the Treasury and the court to previously indicate any awareness that misrepresentations are alleged, let alone that matters of first impression are raised, admits the possibility that the court might not have previously considered the dispositive distinctions, being misled by the Treasury's deceptive moving papers. *If this is the case, then the motion for clarification by its nature becomes a full motion for reconsideration on the merits, legitimated by the above procedural provisions.*

3. The Treasury's Procedural History Ludicrously Omits The File Closure.

The Treasury avoids mentioning the closure of the case file, yet it was only this that Johnson objected to, necessarily by letter, and only because it deprived him of the right to file a motion to clarify the issues. It was this objection that the court of appeal construed as a pending motion to reconsider. Upon reconsideration of the closure, the trial court upheld Johnson's objection, by setting this post-judgment motion to clarify the issues.

4. The Treasury's Procedural Argument Is Disrespectful And Frivolous.

The Treasury attacks Johnson's motion to clarify the issues for the purposes of appeal, as follows (Opp. at 3):

> Plaintiff's motion presents no basis under Rule 59(e) for this Court to change its prior ruling dismissing his claim.

First and foremost, this contention is in contempt of the Order Setting Briefing Schedule On Plaintiff's Motion To Alter Or Amend A Judgment (Dkt. No. 50), stating:

> The Court construes this letter as a motion to alter or amend judgment pursuant to FRCP 59(e).

Second, the Treasury ignores Johnson's authority re a litigant's duty to ask a court to resolve ambiguities for appeal purposes, namely, *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1462 (9th cir. 1992). Dkt. No. 58 at 7.

Third, the government itself regularly moves to clarify issues under Rule 59(e). See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 600, a First Amendment case in which the government filed a Rule "59(e) motion to clarify what the court meant by 'religious organizations' for purposes of determining the scope of its injunction." Just so, Johnson seeks to clarify the scope of the court's affirmance of the government speech doctrine.[1] A clarification *per se* amends a judgment.

5. The Treasury Fantasizes That Johnson Moves To Amend *The Complaint*.

The Treasury vaguely imputes that Johnson fails to specify any matters of record to be clarified by the court, and therefore "presumably means that he should have been given an opportunity to amend his complaint."[2] Opp. at 2. Johnson certainly does not want to amend his complaint, and he could not more plainly have spelled out the matters of record to be clarified by the court, which he listed in both the Introduction and Conclusion of his moving memorandum, and which he elaborated as points 2, 3, and 4 of the argument. Dkt. No. 58.

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[1] Johnson is unconcerned re the court's seemingly additional finding that he lacks standing. Having alleged the *quintessential* First Amendment suppressed-personal-viewpoint injury, he automatically accrues standing, if government speech immunity is not upheld.

[2] This claim disrespects the Order Re Johnson's Letters (Dkt. No. 56), which found:

> Plaintiff's letter of September 9 indicates that the relief plaintiff seeks by the pending motion is an order clarifying the reasoning and legal bases of the June 14 order granting defendants' motion to dismiss.

6. The Treasury Fantasizes Allegations Of Mere Belief, Articulated Policy, Ignorant Mistake, And Disagreement, Whereas Johnson Alleges Intentional Misrepresentations Of Categorical Fact And Of Multi-Billion Dollar Sums.

The Treasury states that (Opp. 4 n. 4; emphasis added, but ellipses in orig.):

> Plaintiff's principal theory—"viewpoint coercion"—is that the Treasury Department has violated his First Amendment rights because it has "repudiated" his viewpoint through the "*ignorant* recitation of . . . falsehoods." []
>
> Plaintiff's remarkable theory [is] that the First Amendment is violated when a federal agency *articulates a policy* with which a private citizen *disagrees,* [] if the private citizen *believes* it is based on "misrepresentations"

Remarkably, the allegations as quoted are both misleadingly shortened and misleadingly lengthened. The Treasury imputes that Johnson alleges that the ignorant recitation of what he believes to be falsehoods. Here is the full phrase (First Amended Complaint, ¶ 11(i)):

> In all public fora, Johnson's viewpoint is repudiated by the abusively induced ignorant recitation of said falsehoods…

Johnson of course alleges that the Treasury is *intentionally* misrepresenting a categorical fact and specified multi-billion dollar sums, particularly so as to squelch his viewpoint. The ignorant recitation is not by the Treasury, but by a populace deceived by the Treasury's deliberate and authoritative publication of multi-billion dollar falsehoods re the national debt. The ignorant recitation is "*abusively induced*" – i.e. coerced – by the Treasury's deliberate falsehoods.

7. The Treasury Fantasizes That Johnson Alleges That Statements Are False "Because" Of Collateral Unconstitutionality And Institutional Capture.

The Treasury continues (Opp. 5 n. 4; emphasis added):

> Plaintiff's remaining theories are not First Amendment theories at all. Instead, they all rest on the notion that the Treasury Department's statements of public policy are "falsehoods" *because* the policies themselves contravene certain other constitutional principles or *because* they are the product of "the capture of representative government by private banking interests."

Johnson of course alleges that the specified Treasury-fostered statements are provably false in fact, and he does so in *all* of his four government speech First-Amendment-immunity exception theories.

8. The Treasury Conceals That The Government Speech Immunity Exceptions Are Well-Pleaded Matters Of First Impression.

The Treasury affirms that there is "no basis in law" for the government speech immunity doctrine exceptions Johnson alleges, as though Johnson had inappropriately argued them as matters of established law, rather than as well-pleaded matters of first impression. Opp. at 4.

On the other hand, the Treasury itself *does* claim that cited government speech immunity authorities apply, *concealing that none of them address misrepresentations of any sort, or any of the concomitant special circumstances alleged as disqualifying the immunity*. Opp. at 4-5 n. 4.

Perhaps government speech immunity *is* absolute.[3] But no cited authority, nor any authority known to Johnson, has ever held the immunity absolute; and whether this court holds the immunity absolute is a key issue which the allegations simply and plainly raise, and which Johnson squarely asks the court to clarify, apparently as a matter of first impression.

V. CONCLUSION

To minimally clarify the record for the purposes of appeal, the court should issue a judgment clarifying its decision with respect to the ambiguities elaborated as points 2, 3 , and 4 in Johnson's moving memorandum. Dkt. No. 58.

Respectfully submitted,

October 14, 2012 [/s]____________________________
Clifford Johnson, Plaintiff pro se

3 This concession is merely *arguendo*. Absolute immunity would disallow well-established First Amendment suits attacking statutes and regulations, or based on the Establishment clause.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CLIFFORD JOHNSON, Plaintiff, v. UNITED STATES DEPARTMENT OF THE TREASURY, and TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury, Defendants.	No. C 11-06684 WHA **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT** Date: November 15, 2012 Time: 8:00 a.m. Judge: Hon. William Alsup Location: Courtroom 8, 19th Floor

This Court previously dismissed Plaintiff's First Amended Complaint ("FAC") with prejudice, finding that Plaintiff had failed to state a cognizable claim under the First Amendment, and further, that he lacked standing to pursue this case, which is based on "a generalized grievance no different from every citizen's interest in the proper application of the Constitution." Dkt. No. 43 at 2. For the reasons set forth in its prior order, the Court should now deny Plaintiff's pending motion to alter or amend the judgment.

I. BACKGROUND.

Plaintiff's FAC asserts one cause of action, which is styled as a "First Amendment Claim." Dkt. No. 11 at 5-6. The gist of Plaintiff's claim is that Defendants United States Department of the Treasury and Treasury Secretary Timothy Geithner, by making or publishing certain statements regarding the relationship between Federal Reserve Notes and United States Notes, "impair [Plaintiff's] right to petition for new issues of United States currency." Id. at 5.

On June 14, 2011, the Court dismissed Plaintiff's FAC without leave to amend. Dkt. No. 45. In its order, the Court described Plaintiff's lawsuit as presenting a claim "that the United States Department of the Treasury has sabotaged his own free speech in support of his proposal by maintaining a website that contradicts the merits of his position." Id. at 1. The Court then explained why Plaintiff's pleading failed to assert a viable constitutional claim. Id. at 2-3 (holding that Plaintiff had failed to state a First Amendment claim and that he lacked standing to assert any claim challenging the Treasury Department's conduct). The Court entered judgment in favor of Defendants and against Plaintiff the same day. Dkt. No. 44.

Plaintiff responded to the Court's actions with a letter objecting to the Court's entry of judgment. Specifically, Plaintiff claimed that the Court's entry of judgment deprived him of his "First Amendment right to petition the court to the extent ordinarily provided for by the Federal Rules of Procedure." Dkt. No. 45 at 1. He claimed that in "further trial court proceedings" he would have been able to present an "appropriately clarified record," though he offered no explanation about what further clarifications he might have offered. Id. Plaintiff also complained that the Court had misconstrued his complaint as "challenging the Treasury's policy of not issuing United States notes," when in fact the FAC had challenged only "a policy of deception intended to suppress all debate re United States notes." Id. Plaintiff then filed an appeal with the Ninth Circuit.

On appeal, the Ninth Circuit promptly remanded the case on the ground that this Court had not disposed of "the pending June 28, 2012 motion," *i.e.* had not addressed Plaintiff's post-judgment letter. Dkt. No. 48 at 1. On remand, this Court then issued an order setting a hearing and a briefing schedule on the "motion" presented by Plaintiff's letter. Dkt. No. 50. In response to further correspondence from Plaintiff, the Court then reset the schedule to permit Plaintiff to file an opening brief. Dkt. Nos. 50, 53, 55, 56. In its orders, the Court has construed Plaintiff's letter as a motion to alter or amend the judgment pursuant to Rule 59(e), and Defendant responds to Plaintiff's filings as such.[1] See Dkt. Nos. 50, 56; see also Dkt. No. 58 ("Plaintiff's Motion To Amend or Alter the Judgment").

II. ARGUMENT.

A motion to alter or amend a judgment under Rule 59(e) may be granted if "'(1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law.'" Ybarra v. McDaniel, 656 F.3d 984, 998 (9th Cir. 2011) (quoting

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[1] In one of Plaintiff's letters to the Court, he objected that this Court had mischaracterized his motion as a motion to alter the judgment, rather than as a motion for "reconsideration," in supposed contradiction of the Ninth Circuit's order. Dkt. No. 53. This contention is without merit. The Court correctly construed the pending motion as one brought under Rule 59(e), which is the only procedural mechanism available for post-judgment relief in district court. See Fed. R. Civ. P. 54(b) (stating that any order entered by district court "may be revised at any time *before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities*" (emphasis added)). Plaintiff has now apparently acquiesced on this point, having styled his opening memorandum as a "Motion To Amend or Alter the Judgment." Dkt. No. 58. Regardless, even if this Court were to indulge the request to have Plaintiff's pending motion treated as a motion for "reconsideration" of the Court's prior ruling (which, properly brought, would have required Plaintiff to seek leave of Court, see N.D. Cal. Civ. L.R. 7-9(a)), it should not make any difference to the outcome here. The standard on a motion for "reconsideration" under Local Rule 7-9 is nearly identical to the one under Rule 59(e), and Plaintiff's moving papers raise no "material difference in fact or law" from those presented to the Court on Defendant's motion to dismiss; raise no "emergence of new material facts or a change of law occurring after the time of such order"; and do not identify a "manifest failure by the Court to consider material facts or dispositive legal arguments." N.D. Cal. Civ. L.R. 7-9(b).

Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001)). Here, Plaintiff's motion presents no basis under Rule 59(e) for this Court to change its prior ruling dismissing his claim; indeed, although Plaintiff's June 28 letter and his September 24 memorandum present many different arguments, none of them addresses the governing standard under Rule 59(e), and none of them provides any justification under the criteria set forth above for this Court to revise its prior orders dismissing Plaintiff's lawsuit and entering judgment.

First, there is no merit to Plaintiff's argument that he should have been permitted an opportunity to "clarify" the record in this action—by which he presumably means that he should have been given an opportunity to amend his complaint yet again. Where, as here, it is clear "that the pleading could not possibly be cured by the allegation of other facts," any amendment would be futile and leave to amend should not be granted. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 247 (9th Cir. 1990); Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir. 1993) ("If the amendments to the complaint will fail to cure fatally defective allegations, refusal to allow leave to file the amended complaint is acceptable."). This is true even in the case of a *pro se* litigant such as Plaintiff. See Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987), superseded on other grounds by, 28 U.S.C. § 1915(e)(2)(B)(ii). Nowhere in his letters to the Court or in his opening brief does Plaintiff identify any amendment that would salvage the claims he has presented here. Nor could he, since the basic theory of Plaintiff's case—that the Treasury Department has violated his First Amendment rights by publishing an explanation of its policies on the Internet—is fatally flawed for the reasons set forth in the Court's June 14 order.[2]

Second, there is no merit to Plaintiff's suggestion that this Court misconstrued his lawsuit as substantively challenging the Treasury's fiscal policies, rather than the supposed suppression of Plaintiff's First Amendment rights. To the contrary, the Court correctly identified—and then

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[2] There is also no merit to Plaintiff's suggestion that the Court's immediate entry of judgment in this matter violated his "First Amendment right to petition the court to the extent ordinarily provided by the Federal Rules of Procedure." Dkt. No. 45 at 1. Indeed, this argument only underscores Plaintiff's tendency to mischaracterize any government conduct that does not comport with his own point of view as having violated his First Amendment rights.

correctly rejected—Plaintiff's First Amendment theory. Dkt No. 54 at 1-2 ("In this lawsuit, *which he has limited to the First Amendment right to petition claims*, ..." (emphasis added)). The Court also properly ruled that Plaintiff lacked standing to file suit on the basis of the Treasury Department's conduct as described in his FAC.

Finally, there is no reason for the Court to "clarify" its order of dismissal.[3] The Court clearly and adequately explained that the First Amendment does not allow Plaintiff to restrict "what the Treasury can and cannot say," and further explained why Plaintiff's "generalized grievance" with the Treasury Department's speech does not provide him with standing to pursue a First Amendment challenge to it. Dkt. No. 43 at 2 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). This order was more than adequate to discharge the Court's obligation to state the "legal grounds" for its ruling. Dkt. No. 58 at 7.

Plaintiff apparently believes that the Court should specifically address what he has characterized in his pleadings and moving papers as the four "exceptions" to "government speech immunity." Dkt. No. 55 at 1 (citing Compl. ¶ 11). Plaintiff's analytical framework, however, finds no basis in the law, and the Court's order already adequately addresses why his First Amendment claim is defective.[4]

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[3] In one of Plaintiff's letters to the Court, Plaintiff purported to "narrow" his motion into a request for "clarification" of the basis for the Court's prior order dismissing his claim. Dkt. No. 55 at 1. Plaintiff's memorandum of points and authorities affirms that his "narrower final motion" seeks only an order further explaining the basis for the Court's prior ruling, specifically, the reasons why the Court "overruled" what he describes as the "four exceptions" to "government speech immunity."

[4] Plaintiff's principal theory—"viewpoint coercion"—is that the Treasury Department has violated his First Amendment rights because it has "repudiated" his viewpoint through the "ignorant recitation of . . . falsehoods." Compl. ¶ 11(i). As explained above, this Court correctly held that Plaintiff's rights are not violated by "what elected officials and their appointees . . . say in support of public policy." Dkt. No. 43 at 2; see also Pleasant Grove City v. Summum, 555 U.S. 460, 467 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). The cases cited by Plaintiff in his memorandum regarding "viewpoint coercion" are not applicable here. Such "viewpoint coercion" cases involve situations where the government has placed unconstitutional conditions on speech in connection with, for example, the disbursement of federal funds; or where it has effectively created a public forum for speech (such as through its regulation of FCC licenses) and then

III. CONCLUSION.

the Court was correct to hold in its June 14 order that Plaintiff failed to plead a valid claim under the First Amendment and to dismiss Plaintiff's claims without further leave to amend. Plaintiff's post-judgment correspondence and moving papers present no ground for the Court to revisit, much less reverse, that determination. The Court should therefore deny the instant motion and permit Plaintiff to pursue his pending appeal before the Ninth Circuit.

DATED: October 5, 2012

Respectfully submitted,

MELINDA HAAG
United States Attorney

/s/ Mark R. Conrad
MARK R. CONRAD
Assistant United States Attorney

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excluded certain viewpoints from it. Dkt. No. 58 at 10 (citing Rust v. Sullivan, 500 U.S. 173, 186 (1991) and R.J. Reynolds Tobacco Corp. v. Bonta, 272 F.Supp.2d 1085, 1107 (E.D. Cal. 2003)). These cases do not support Plaintiff's remarkable theory that the First Amendment is violated when a federal agency articulates a policy with which a private citizen disagrees, even if the private citizen believes it is based on "misrepresentations," and even if the private citizen finds himself overwhelmed by the force of the government's message. Indeed, Plaintiff's own cited cases explain precisely why his understanding of the First Amendment is wrong. Rust, 500 U.S. at 193-94 (finding no First Amendment violation where the government "chooses to fund a program dedicated to advance certain permissible goals" and thereby "necessarily discourages alternative goals"); Bonta, 272 F.Supp.2d 1085, 1103 & n.21 (explaining that the "government speech doctrine" exists because "the government in a democracy must make policy choices about those issues that are properly before it, and must be able to inform the public about why those choices were made") Plaintiff's remaining theories are not First Amendment theories at all. Instead, they all rest on the notion that the Treasury Department's statements of public policy are "falsehoods" because the policies themselves contravene certain other constitutional principles or because they are the product of "the capture of representative government by private banking interests." Compl. ¶ 11. Whatever interpretation Plaintiff may espouse regarding the "Tax Power" or what he calls the "Fiat Money Power," and whatever Plaintiff may believe about the so-called "Capture" of the federal government by private banking interests, there is nothing in his FAC that describes a *First Amendment* violation resulting from the Treasury Department's *speech* about its own policies, and Plaintiff cites no law to support his novel theories.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

Clifford Johnson, *Plaintiff* v. United States Department Of The Treasury, and Timothy Geithner, in his official capacity as Secretary of the United States Department of the Treasury, *Defendants*	**No. CV 11-06684 WHA** PLAINTIFF'S MOTION TO AMEND OR ALTER THE JUDGMENT, SUPPORTING MEMORANDUM Date: Nov. 1, 2012 Time: 8:00 a.m. Place: Courtroom 8, 19th Floor Judge: Hon. William Alsup

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I. INTRODUCTION AND SUMMARY

The motion is extraordinarily brought per the Order Re Johnson's Letters, filed September 17, 2012. For clarity and convenient completeness, the record on which the motion is based is quoted below in larger part than usual. This is fit, proper, and diligent, in the context of this motion, which is made to clarify the judgment, insofar as it and the supporting record is ambiguous re the basic grounds on which the court affirmed the government speech immunity defense. The ambiguities are stated as the captions of points 2, 3, and 4 in the Argument, and in the Conclusion.

II. STATEMENT OF FACTS

1. Pre-Judgment Record: Misrepresentations And Four Consequent Government Speech Immunity Disqualifications Are Alleged

The complaint rests on misrepresentations of categorical fact and multi-billion dollar sums, alleged as deliberately and grossly understated so as to repudiate and suppress public knowledge of the monetary benefits that *automatically* accrue to the government from issuing new United States currency, instead of borrowing Federal Reserve bank notes. In particular, the complaint attacks Treasury-fostered misrepresentations authoritatively published as objective estimates of the net benefit to the government of replacing all Federal Reserve $1 bills with United States $1 coins (complaint ¶ 8(iv)):

> [T]he 2011 GAO report estimates initial *losses* for four years due to start-up costs, and a net benefit after 30 years of only $5.6 billion, if that. In fact, because coins are *United States* currency, the government would also benefit from: **(a)** an early *gain* of $13.75 billion against the debt held by the public, from replacing the present 9.5 billion dollar bills with 150% as many coins; **(b)** a further gain in excess of $30 billion from coins added over the 30 years; and **(c)** a further $14.5 billion gain from 81.5% of the interest relief per note replaced by a coin. Hence, the net government benefit after 30 years would exceed $58 billion, as a matter of accounting fact.

Based wholly on such misrepresentations, four exceptions to government speech immunity are alleged, as follows (complaint, ¶ 11):

> **Government Speech Disqualifications.** Said categorical and financial misinformations ("falsehoods") impair Johnson's right to petition for new issues of United States currency, in violation of the First Amendment, on the following separate and cumulative grounds:
>
> ***(i) Viewpoint Coercion.*** In all public fora, Johnson's viewpoint is repudiated by the abusively induced ignorant recitation of said falsehoods, as concretized by recitations of the 2011 GAO report's financial misinformation in said Chicago-Sun article against H.R. 2911 and S. 2049, and in numerous public comments re these bills submitted through said POPVOX.com public forum.
>
> ***(ii) Independent Unconstitutionality: Tax Power.*** There is no reason to gift massive amounts of tax, or the nation's good faith and credit, to private parties for merely executing mandated or mechanical currency issues, such as the issues proposed by Johnson's petitions. Issuing these parts of the currency as Federal Reserve notes thus violates the constitution's mandate that taxes only be raised "to pay the Debts and provide for the common Defence and *general* Welfare of the United States." U.S. Const., Art. I, Sec. 8. Said falsehoods perpetuate a vast face value seigniorage tax for the welfare of the private banks that own the Federal Reserve.
>
> ***(iii) Independent Unconstitutionality: Fiat Money Power.*** On August 16, 1787, the Framers' final vote on money powers delisted paper money lest it "excite the opposition of the" monopoly-bent "Monied interest," and be used to exploit a general paper-money phobia, so as to altogether exclude it. Before voting, Madison obtained firm agreement that the delisting did "not disabl[e] the government from the use of public notes as far as they could be safe and proper." Said falsehoods impermissibly suppress the use of public notes as far as they can be safe and proper, contrary to the Framers' explicit commitment to secure the sovereign's paper money power against the Monied interest. U.S. Const., Art. I, Sec. 8, Cl. 4, 11; *Notes Of The Federal Convention* (Aug. 16, 1787); *The Debate On The Constitution*, part 2 at 94, 110, 148, 422-423, 476-477, 639-640, 659, 678.
>
> ***(iv) Prima Facie Capture.*** Said falsehoods are the artful product of numerical models and obfuscating mumbo-jumbo designed and promulgated by the Federal Reserve. On their face, said falsehoods secure the one-way bank-government lender-borrower relation inherent in the

> exclusive use of Federal Reserve notes. The borrower is servant to the lender, wherefore this relation per se renders the government subservient to private bank interests. On its face their mumbo-jumbo hijacks the government, as in the 2011 GAO report's rationale, which brazenly asserts that the Federal Reserve *is* the government, so as to palm off the conclusion that there is no overall loss to the government when it pays money in any amount into the Federal Reserve's private account. This outrage boasts the capture of representative government by private banking interests, and loots the Treasury.

At the five-minute April 26, 2012 Case Management Conference, the court conducted an impromptu hearing on the merits. Johnson stressed his reliance on factual misrepresentations (transcript filed September 16, 2012, at 2-3):

> **The Court:** All right. So what is this case about, Mr. Johnson?
>
> **Mr. Johnson (in pro per):** It's about publications by the Treasury saying that there's no difference between United States notes, that's bills, and Federal Reserve notes or bills. They are very different functionally, and the difference is being suppressed by these misrepresentations…My contention is that these are matters of simple fact and accounting fact that are deliberately distorted to suppress public debate on the issue. And I have the right to have my voice not suppressed by authoritarian misrepresentations.

Johnson's opposition to the motion to dismiss *concurred* with the defendants' entire legal argument, but noted that it simply did not apply, since factual misrepresentations were not only unmentioned, but excluded by use of dispositive boilerplate words and phrases, such as policy, personal belief, disagreement, and contradicted merits, but not of a misrepresentation equivalent, such as deceit and fraud. This court should reread the [Corrected] Plaintiff's Memorandum In Opposition to Defendants' Motion to Dismiss, filed May 16, 2012, because it *complains of the ambiguities that the court's subsequent judgment in substance has replicated.* The bulk of the opposition is given over to demonstrating the rock-solid factual grist of the misrepresentations, and their serendipitously easy justiciability/proof, *per the GAO's very own standards of truth*.

The GAO and, standing behind it, the Treasury, are hoisted by their own petard.

2. The Judgment And Order filed June 14, 2012

(i) The Order Upholding The Government Speech Immunity Doctrine

At issue is the clarity of the court's Order Granting Defendants' Motion To Dismiss First Amended Complaint And Vacating Hearing, filed June 14, 2012, insofar as it affirms the government speech immunity doctrine. In full, it does so as follows:

> Clifford Johnson…believes that Federal Reserve notes should be phased out, and, to that end, proposes a pilot program be launched using United States notes to issue Social Security payments. He believes this would save taxpayer's money.
>
> In this lawsuit, he contends that the United States Department of the Treasury has sabotaged his own free speech in support of his proposal by maintaining a website that contradicts the merits of his position. In a David-and-Goliath way, he contends that his own message is being overwhelmed by the more powerful speech of the Treasury and, therefore, his own free speech rights are being suppressed. In this lawsuit, which he has limited to the First Amendment right to petition claims (Opp. Exh. G), he seeks relief in the form of an injunction whereby this Court would regulate what the Treasury can and cannot say on this subject.
>
> This remarkable proposition has no support in the law. Our elected leaders necessarily adopt policy positions. By virtue of their "bully pulpit," they necessarily receive more attention than the rest of us. Nonetheless, it cannot possibly be the law that this circumstance violates anyone's right to say whatever they want about public policy. Nonetheless, it cannot possibly be the law that this circumstance violates anyone's right to say whatever they want about public policy. To rule otherwise would invite thousands of lawsuits by those seeking to regulate through the courts what elected officials and their appointees can and cannot say in support of public policy. This would be an unthinkable result. Mr. Johnson's claim is rejected on the merits.

(ii) The Hearing Vacation And File Closure That Forced Johnson's Letters

The Judgment, filed June 14, 2012, as follows mandated that "The Clerk **SHALL CLOSE THE FILE**." The accompanying Order Granting Defendants' Motion To Dismiss First Amended Complaint And Vacating Hearing declared: "The next stop for Mr. Johnson is the United States Court of Appeals." Thereafter, Johnson had no proper or respectful way to communicate with the trial court, except by addressing it directly. This he did by three one-page letters, which the court graciously filed. Excerpts from two of the letters state the motion, in full as follows.

3. The Clarifications Sought Per Johnson's June 23 Letter

Johnson's letter of June 23, 2012, filed June 28, 2012, and construed by the court of appeal as a motion for reconsideration, as follows described the matters of judgment warranting clarification (italics in orig.):

> [B]ecause the complaint raises, apparently for the first time, the question as to whether factual misrepresentations intended to suppress viewpoints are within the compass of the government speech immunity doctrine, further trial court proceedings would not be futile, if only to present the court of appeal with an appropriately clarified record.
>
> As the record stands, there is no indication in the defendant's papers, or in the court's decision, of any awareness that factual misrepresentations are at issue, let alone any indication why misrepresentations *intended to suppress my viewpoint* should qualify for the aforesaid immunity. On the contrary, it appears that the court construes the complaint as directly challenging the Treasury's policy of not issuing United States notes, which it meticulously avoids.
>
> The only policy that the complaint challenges is a policy of deception *intended to suppress all debate re United States notes,* by misrepresenting that there are no functional differences between United States notes and Federal Reserve notes; and it attacks this policy of deception only as manifested by *particularly alleged misrepresentations of fact*, *authoritatively published as objective*.

4. The Appellate Remand By Order Filed August 13, 2012, Especially To Give This Court This Opportunity To Clarify The Judgment.

Acceding to the trial court's injunction to next appeal, Johnson filed the Notice of Appeal on August 13, 2012, within the 60 days allowed after entry of judgment against official United States defendants. Fed. R. App. P., Rule 4(a)(1)(B). But by Order also filed August 13, 2012, the court of appeal remanded the case, as follows:

> The court's records indicate that this appeal was filed during the pendency of a timely-filed Fed. R. App. P. 4(a)(4) motion. The notice of appeal is therefore ineffective until entry of the order disposing of the last such motion outstanding. *See* Fed. R. App. P. 4(a)(4). Accordingly, proceedings in this court shall be held in abeyance pending the district court's resolution

> of the pending June 28, 2012 motion. *See Leader Nat'l Ins. Co. v. Industrial Indemnity Ins. Co.,* 19 F.3d 444 (9th Cir. 1994).
>
> If appellant wishes to challenge the district court's ruling on the pending motion for reconsideration, appellant shall file an amended notice of appeal within 30 days from entry of the district court's ruling on the motion. See Fed. R. App. P. 4(a)(4). A copy of this order shall be served on the district court. See Fed. R. App. P. 3(d).

Thus, the court of appeal, or it's clerk, construed Johnson's post-judgment letter, filed "June 28, 2012," as a timely and pending motion for reconsideration.[1] In other words, the remand was especially to give the trial court this opportunity to clarify the judgment.

5. The Narrow Clarification Sought Per Johnson's September 9 Letter

Johnson's narrower final motion is set forth as follows, in his letter dated September 9, 2012, which the court filed on September 13, 2012 (boldface in orig.):

> I hereby narrow the motion to a request for clarification as to the ground(s) on which the court overruled each of the four exceptions to the government speech doctrine set forth in paragraph 11 of the complaint, comprising viewpoint coercion by tailored misrepresentations; two independent unconstitutionalities; and prima facie institutional capture. In that the court found the exceptions "unthinkable," it appears that the court affirms government speech immunity as absolute, being a natural corollary of the government's "bully pulpit." ***I request that the court clarify whether it reached the merits of the four exceptions separately, and found each unthinkable particularly; and/or whether it overruled them en bloc, on the general ground that government speech immunity is absolute.***
>
> An order clarifying this detail would suffice to satisfy the motion; and it would surely be expedient for the court to issue this small clarification.

---

[1] Trial court judgments must of course be construed constitutionally, when possible.

I. ARGUMENT

1. The Duty Of The Trial Court Includes Plainly Stating The Basic Legal Grounds For A Dismissal On The Pleadings; And That Duty Is Heightened Where An Appeal Is Held In Abeyance To Provide The Trial Court With The Opportunity To Clarify Its Judgment.

Johnson does not waste this court's time arguing the above-captioned point, since the court already understands it infinitely better than Johnson could ever hope to write it up. A procedural authority re motions for clarification of a judgment "where the court has acted ambiguously" is *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1462 (9^{th} cir. 1992).

2. It Is Not Clear Whether The Court Held That Misrepresentations Intended To Suppress Viewpoints Are Immunized Government Speech, That The Alleged Misrepresentations Are Nonjusticiable, And/Or That The Allegations Fail To State Factual Misrepresentations.

The [Corrected] Plaintiff's Memorandum In Opposition To The Motion To Dismiss, filed May 16, 2012, explains how the complaint rests entirely on "three cherry-picked *misrepresentations*" of categorical and financial fact, giving rise to four exceptions to the government speech immunity doctrine. But to this day, neither the defendants nor the court has anywhere mentioned the alleged misrepresentations, let alone the carefully defined government immunity exceptions based on them.

It needs no argument that the court of appeal should expect a judgment unambiguously setting forth the trial court's basic grounds for deciding any important matter of first impression raised on the face of a complaint—or for not reaching it. Herein, whether the four alleged exceptions to government speech immunity were particularly overruled, and/or were overruled on the ground that the immunity is absolute, and/or were not reached, and why, is basic.

The court's order filed June 14, 2012 emphatically found it "unthinkable" that the attacked government speech would not be immune to First Amendment suits, seeming to hold that the immunity is absolute. In particular, the court's language does not distinguish executive orders and agency regulations, which are routinely attacked on First Amendment grounds.[2] Thus it seems almost certain that the court did not have in mind government speech in the form of executive orders or agency regulations. In other words, *it seems almost certain that the court had in mind one or more subset(s) of government speech, which it failed to specify*. The record is unnecessarily ambiguous on this most important point of law, concerning as it does the hitherto undefined scope of the government speech immunity doctrine.

Adding to the uncertainties, the court's order understates the complaint as attacking speech that supports policy, on arguable costs savings grounds:

In the entire order, there is no recognition that the complaint attacks Treasury-fostered statements as demonstrably and deliberately false matters of accounting fact, authoritatively issued as objective fact, and designed to preempt and suppress all debate as to the relative benefits of United States and Federal Reserve notes.

Did the court find it "unthinkable" that misrepresentations intended to suppress viewpoints could overcome the government speech immunity? Or did the court find the allegations insufficient to sustain the legal label "misrepresentation"? Or did the court not *reach* the allegations of misrepresentation? Or, over-relying on defendants' papers, did the court not even realize that misrepresentations of a routinely adjudicated factual sort are at issue?

It might be possible to infer at law what the court has necessarily decided, by dismissing the complaint as it did. But such inferences would at best be arguable, and Johnson moves that the record be clarified to save this unnecessary fog and burden on appeal.

One more time. The categorical functions and financial costs put at issue are not arguable matters of belief, policy, or accounting artifice. Meticulously avoiding any attack on

[2] See, e.g., *Sorrell v. IMS Health, Inc.*, 10-779 (U.S. 6-23-2011), at 24, which analogously distinguishes as arguably actionable contentions of "false or misleading [statements] within the meaning of this court's First Amendment precedents," unredeemed by countervailing prevention of "false and misleading speech."

policy or artifice, *the complaint specifically attacks multi-billion dollar sums certain*, *as deliberately and grossly understated.* And, as pointed out at page 14 of Johnson's opposition:

> Taking the financial allegations as facts, a dismissal might very well open the door to a deceptively induced [versus fairly debated] rejection of the coin-swap bill, S. 2049, for which Johnson petitions (complaint ¶ 8(iii)).

3. It Is Not Clear Whether The Court Held Independent Unconstitutionality Insufficient To Discount Government Speech Immunity, And/Or That The Allegations Failed To State Any Independent Unconstitutionality.

The above-captioned point similarly arises from the total failure of defendants' papers and the court's rulings to indicate any awareness that independent unconstitutionality is alleged.

4. It Is Not Clear Whether The Court Held Prima Facie Institutional Capture Insufficient To Discount Government Speech Immunity, And/Or That The Allegations Failed To State Prima Facie Institutional Capture.

The above-captioned point similarly arises from the total failure of defendants' papers and the court's rulings to indicate any awareness that prima facie institutional capture is alleged.

5. Three anchoring academic papers are exhibited.

The court is openly skeptical of what it casts as a legally "preposterous" and "David-and-Goliath" sort of political shouting match. To Johnson, this is understandable, in light of the systemic and longstanding nature of the misrepresentations alleged, the irrelevance of defendants papers moving for dismissal, and the court's own academic limitations, by which Johnson means the natural limitations imposed by the dominant priorities of trial court drudgery. Johnson taught econometrics at Sussex University from 1972-75, yet was himself deceived until a Bill Still video enlightened him, in 2008. Re Bill Still, see the Declaration filed herewith, ¶¶ 1, 2.

Johnson might be eccentric, but he is far from naive in contending that government speech First Amendment immunity is not absolute. Official misrepresentations are a natural exception to the immunity, when designed to deprive the public of the informed consent that pretty much defines republican government.[3] Indeed, the primary purpose of the immunity is to free the government to fully inform to the public, *so as to best make sure that it receives sufficient information to inform its consent*. Misrepresentation thus voids "elected" and like political question First Amendment tolerances. See, e.g., *R. J. Reynolds Tobacco Company v. Bonta*, 272 F. Supp. 2d 1085, 1107 (E. D. Cal.), holding that:

> Government speech that 'drowns out' private speech may violate the First Amendment. [Citation.] "[T]he government may not monopolize the marketplace of ideas, thus drowning out private sources of speech." [Citation.] "The government may not speak so loudly as to make it impossible for other speakers to to be heard by their audience. The government would then be preventing the speakers' access to that audience."

Perhaps most telling is the Supreme Court's officially first government speech case, *Rust et al. v. Sullivan*, 500 U.S. 173, 186 (1991), which at 186 singularly recognized the critical role of objective, "reasoned analysis" in GAO reports, because it could be relied on by all sides in political disputes, such as the alleged dispute re pending Senate bill S. 2049. Complaint ¶ 5(iii).

Nor is Johnson naive in contending that United States notes are functionally vastly different from Federal Reserve notes; or in contending that both immediate face-value and delayed interest-relief *dollar amounts certain* automatically accrue to the government by issuing United States currency, in lieu of borrowing Federal Reserve notes.

---

[3] See *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 116 (1991), holding:

> In the context of financial regulation, it bears repeating that the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.

See also *Rosenberger v. Rector And Visitors Of Univ. of VA.*, 515 U.S. 819, 828-829 (1996) and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642-643 (1995) re the especially egregious nature of viewpoint suppression by impaired rights to petition. See also *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 541, 546 (2001), which also points out that government distortions of fact must often carry over to judicial proceedings.

To so educate the court, Johnson's Declaration filed herewith offers three sample academic papers vindicating the complaint's legal and accounting premises, comprising:

A. *Government Speech in Transition*, a July 2012 working paper by Helen Norton, which provides a five-page academic synopsis of the government speech doctrine.

B. *Lincoln's Populist Sovereignty: Public Finance Of, By, and For the People,* 12 Chap. L. Rev. 561 (2009), by Timothy Canova, which favorably expounds the functionally distinct constitutional option of public financing through issues of United States notes, versus borrowing Federal Reserve notes.

C. *The Chicago Plan Revisited,* IMF WP/12/202, [Introduction only], August 2012, by Jaromir Benes and Michael Kumhof. This favorably expounds a monetary plan including the functionally distinct option of issuing United States notes, whose automatic national-debt dissolving advantages are detailed and validated, *in full coin-swap detail*, as the third of four "major advantages" of the plan, on pages 4 and 6, as follows (emphasis added):

> Third, allowing the government to issue money directly at zero interest, rather than borrowing that same money from banks at interest, would lead to a reduction in the interest burden on government finances and to a dramatic reduction of (net) government debt, given that irredeemable government-issued money represents equity in the commonwealth rather than debt….
>
> The third advantage of the Chicago Plan is a dramatic reduction of (net) government debt. The overall outstanding liabilities of today's U.S. financial system, including the shadow banking system, are far larger than currently outstanding U.S. Treasury liabilities. Because under the Chicago Plan banks have to borrow reserves from the treasury to fully back these large liabilities, the government acquires a very large asset vis-à-vis banks, and government debt net of this asset becomes highly negative. Governments could leave the separate gross positions outstanding, or they could buy back government bonds from banks against the cancellation of treasury credit. Fisher had the second option in mind, based on the situation of the 1930s, when banks held the major portion of outstanding government debt. But today most U.S. government debt is held outside U.S. banks, so that the first option is the more relevant one. The effect on net debt is of course the same, it drops dramatically.

> In this context it is critical to realize that the stock of reserves, or money, newly issued by the government is not a debt of the government. The reason is that fiat money is not redeemable, in that holders of money cannot claim repayment in something other than money. Money is therefore properly treated as government equity rather than government debt, *which is exactly how treasury coin is currently treated under U.S. accounting conventions* (Federal Accounting Standards Advisory Board (2012)).

6. Johnson's letters are not an improper barrage addressed to the court.

The court's Order Re Johnson's Letters, filed September 17, 2012, states that:

Plaintiff's barrage of letters addressed to the court is improper.

Plaintiff objects that this statement is highly inaccurate, in three respects. For a start, three one-page letters over a period of three months do not credibly comprise a "barrage".[4] Second, far from improper, such direct communication was extraordinarily *proper*, because it respected the file closure, which had rendered some such *direct* address the only obedient option. Moreover, Johnson compliantly *did* next appeal.

Johnson is not responsible for the escalating confusions caused by the court's drastic and unexplained vacation of the hearing date set for the motion to dismiss, in conjunction with the premature and immediate closure of the case file, which in substantial part was reversed. Quite the contrary. This necessarily awkward motion with exceptional propriety, appellate authority, and diligence seeks to minimize the confusions caused by the file closure, in order to obtain a trial court record that meets common-sense minimal standards of clarity for purposes of appeal.

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[4] The online Encarta dictionary defines to "barrage" as to "attack somebody continuously, [i.e.] subject somebody to a relentless onslaught." Johnson's letters are discontinuous. The first objected to the file closure. The second was sent some fifty days later. It reasonably objected to a briefing schedule that *began* with the response brief. The third letter objected to a sudden and still mysterious notice of error, seemingly re the remand. Contrast these with Johnson wryly calls a mere *peppering* of himself with increasingly ironic ECF headlines warning in boldface caps that the case file was closed June 14, 2012. The message remains in the court's computer, stuck at the top of every notice of a further filing. The court, not Johnson, filed his letters, *inter alia*.

V. CONCLUSION

To minimally clarify the record for the purposes of appeal, the court should issue a judgment clarifying its decision with respect to the four ambiguities stated as points 2 to 4 in the main argument, as follows:

> It is not clear whether the court held that misrepresentations intended to suppress viewpoints are immunized government speech, that the alleged misrepresentations are nonjusticiable, and/or that the allegations fail to state factual misrepresentations.
>
> It is not clear whether the court held independent unconstitutionality insufficient to discount government speech immunity, and/or that the allegations failed to state any independent unconstitutionality.
>
> It is not clear whether the court held prima facie institutional capture insufficient to discount government speech immunity, and/or that the allegations failed to state prima facie institutional capture.

Respectfully submitted,

September 23, 2012 [/s]___________________________

Clifford Johnson, Plaintiff pro se

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

Clifford Johnson, *Plaintiff* v. United States Department Of The Treasury, and Timothy Geithner, in his official capacity as Secretary of the United States Department of the Treasury, *Defendants*	**No. CV 11-06684 WHA** PLAINTIFF'S DECLARATION IN SUPPORT OF THE MOTION TO AMEND OR ALTER THE JUDGMENT Date: Nov. 1, 2012 Time: 8:00 a.m. Place: Courtroom 8, 19th Floor Judge: Hon. William Alsup

I, Clifford Johnson, do hereby declare:

1. Previously, I requested an expedited schedule so as to obtain a decision before this year's elections, on the ground that the renowned "Greenbacker" Bill Still was a strong contender for the libertarian party's presidential nomination. However, the nomination ultimately was won by a Gary Johnson, a "goldbug."[1] Wherefore, there is now no special election-time urgency to deciding the action.

[1] "Greenbackers" propose new issues of United States fiat money—i.e. currency not backed by commodities such as gold—versus issues of fiat banknotes by the bank-owned Federal Reserve. "Goldbugs" oppose *all* issues of fiat money.

2. I taught econometrics at Sussex University from 1972-75, yet was myself deceived into thinking that Federal Reserve notes were a form of United States currency, until a Bill Still video documentary enlightened me, in 2008.

3. The below Exhibits A-C are true and correct copies as listed.

I hereby declare under penalty of perjury that the foregoing is true and correct, based on personal information and belief.

September 23, 2012 ____________________________

Clifford Johnson, Plaintiff pro se

Exhibit List

Exhibit A -- *Government Speech in Transition*, working paper by Helen Norton, July 12, 2012

Exhibit B -- *Lincoln's Populist Sovereignty: Public Finance Of, By, and For the People*, 12 Chap. L. Rev. 561 2008-2009, by Timothy A. Canova

Exhibit C -- *The Chicago Plan Revisited*, IMF WP/12/202, [Introduction only], August 2012, by Jaromir Benes and Michael Kumhof

COLORADO LAW
UNIVERSITY OF COLORADO LAW SCHOOL

LEGAL STUDIES RESEARCH PAPER SERIES

Working Paper Number 12-14
July 12, 2012

Government Speech in Transition

Helen Norton
University of Colorado Law School

57 South Dakota Law Review 2012 (forthcoming)

Plaintiff's Declaration In Support Of Motion To Amend -- Exhibit A

GOVERNMENT SPEECH IN TRANSITION

HELEN NORTON†

In *Johanns v. Livestock Marketing Ass'n*,[1] the Supreme Court offered its clearest articulation to date of its emerging government speech doctrine.[2] After characterizing contested expression as the government's, the Court then held such government speech to be entirely exempt from free speech clause scrutiny.[3] In so doing, the Court solved at least one substantial problem, but created others that remain unresolved today.

The good news is that *Johanns* and related cases[4] provide a helpful and important vocabulary for recognizing both the inevitability and the value of government speech. Not only must government speak if it is to govern,[5] its speech is often quite valuable to the public. For example, government speech both informs members of the public on a wide range of topics[6] and enables them to identify their government's priorities (and thus to evaluate its performance).[7] For these reasons, the government speech defense appropriately insulates the government's own expressive choices from free speech clause challenges by private speakers seeking to prevent or alter the delivery of the government's own message.[8]

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† Associate Dean for Academic Affairs and Associate Professor of Law, University of Colorado School of Law. My thanks to the South Dakota Law Review for its gracious invitation to participate in this symposium.

1. 544 U.S. 550 (2005).
2. *Id*.
3. *Id.* at 553, 561-62.
4. For a brief history of the Court's government speech doctrine, *see* Helen Norton & Danielle K. Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 904-10 (2010).
5. *See* ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS 723 (1947) ("Now it is evident that government must itself talk and write and even listen."); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1980) ("If government is to secure cooperation in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs . . . government must be able to communicate.").
6. *See, e.g.*, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964) (government report describing the adverse health effects of smoking).
7. *See* THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION 698 (1970).

> Participation by the government in the system of freedom of expression is an essential feature of any democratic society. It enables the government to inform, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force. Government participation also greatly enriches the system; it provides the facts, ideas, and expertise not available from other sources. In short, government expression is a necessary and healthy part of the system.

Id.

8. In *Johanns*, the entire Court agreed that private speakers can be compelled to pay for government speech with which they disagree, emphasizing that an effective government requires that taxpayers frequently fund government speech with which they quarrel. *See Johanns*, 544 U.S. at 562; *id.* at 574 (Souter, J., dissenting).

> The first point of certainty is the need to recognize the legitimacy of government's power to

Johanns thus solved a problem faced by a number of lower courts that, up until that time, had no vocabulary for dealing with what we now understand as government speech. Indeed, before the emergence of the government speech doctrine, lower courts often struggled mightily by seeking to apply some sort of forum doctrine to what are really government speech problems. In other words, lower courts too often tried to pound the square peg of what we now understand as government speech into the round hole of public forum doctrine[9]—with confusing and unsettling results.

An example helps illustrate this point. In *Griffin v. Department of Veterans Affairs*[10]—a decision that predates *Johanns*—the Fourth Circuit purported to apply forum analysis when rejecting a First Amendment challenge to the Veterans Administration's ("VA's") refusal to fly the confederate flag over one of its cemeteries.[11] Even though the court concluded that "[r]equiring the VA to allow the Confederate flag to fly daily over Point Lookout certainly 'garble[s] [and] distort[s]'" the agency's chosen message,[12] it had no government speech vocabulary from which to draw. It thus strained to characterize the government program at issue as a nonpublic forum, in which government remains free to regulate private speech so long as its actions are reasonable and viewpoint-neutral.[13] Yet an honest assessment of the facts would acknowledge that the Veterans Administration's decision to fly the American, and not the Confederate, flag over a Civil War cemetery is actually viewpoint-based, rather than viewpoint-neutral. Thus forum analysis, if properly applied, would have led the court to strike down the agency's actions. But once *Johanns'* articulation of the government speech defense allowed us to understand that the Veterans Administration's choice about which flag to fly over its property was the government's own expression, this becomes a much easier and more intellectually coherent decision: this was not a case in which the government regulated private speech in some type of forum, but instead a situation in which

> speak despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard. To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.

Id. (footnote omitted). The majority and dissent differed vigorously, however, on the question whether government must identify itself as the source of that speech in order to successfully assert the government speech defense to the plaintiffs' free speech claim. *See infra* notes 14, 15 and accompanying text.

9. Under this doctrine, courts first assess what type of forum has been created, and then determine whether the government regulation can withstand the appropriate test. Speakers may be blocked from traditional or designated public fora only when necessary to serve a compelling government interest and the exclusion is narrowly drawn to achieve that interest. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). Government may limit or deny access to a nonpublic forum only if its restrictions are reasonable and do not target speakers on the basis of their viewpoints. *See id.* Government's ability to regulate private speech thus often depends on how we characterize the forum, but one caveat remains constant: government generally may not regulate private speech in any type of forum on the basis of viewpoint.

10. 274 F.3d 818 (4th Cir. 2001), *cert. denied*, 537 U.S. 947 (2002).

11. *See generally id.*

12. *Id.* at 822.

13. *See id.* at 820-25.

the government itself was speaking, and was thus free to make its own expressive choices.

The bad news is that in solving one problem with its articulation of the government speech defense,[14] *Johanns* and its progeny created others by failing to identify any limits—or even a need for limits—to such a defense, despite the protests of dissenting Justices.[15] Moreover, the Court's imprecision has led many inaccurately to understand the Court to have created a "right" for the government to speak, even though the government generally possesses no First Amendment rights of its own.[16] Indeed, the Supreme Court's most recent government speech decision in *Pleasant Grove City, Utah v. Summum*[17] misleadingly states that "[a] government entity has the right to 'speak for itself.'"[18] Such language has emboldened some government actors to

14. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563-64 (2005).

15. *See id.* at 578-79 (Souter, J., dissenting) (urging the Court to require the government to affirmatively disclose its authorship of the contested message in order to invoke the government speech defense). *See also* Garcetti v. Ceballos, 547 U.S. 410, 438 (2006) (Souter, J., dissenting) (objecting to the majority's decision as "portend[ing] a bloated notion of controllable government speech").

16. *See, e.g.*, Columbia Broad. Sys., Inc., v. Democratic Nat'l Comm., 412 U.S. 94, 139-42 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 42-45 (1983) (arguing that government does not possess First Amendment free speech rights); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1501-08 (2001) (arguing that, because the First Amendment is drafted as a constraint on government action, recognizing government's own First Amendment rights is inconsistent with constitutional text and purpose). This leaves legislatures free to enact laws limiting government speech—and they often do so. *See* Helen Norton, *Campaign Speech Law With a Twist: When Government is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 229-30, 260-61 (2011) (describing federal and state statutes that constrain government speech in various contexts). Note that the Court has suggested that certain institutions with unique communicative functions—such as universities or broadcasters—may have First Amendment interests regardless of their public or private character. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (observing that universities' academic freedom is "a special concern of the First Amendment"); Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998) (noting public and private broadcasters' First Amendment interests in journalistic freedom). *See also* United States v. Am. Library Assoc., 539 U.S. 194, 210-11 (2003) (declining to decide whether public libraries have First Amendment rights); *id.* at 225-26 (Stevens, J., dissenting) (urging the Court to recognize public libraries as First Amendment rightsholders).

17. 555 U.S. 460 (2009).

18. *Id.* at 467. Here the Court inadvertently illustrates Professor Hohfeld's insightful observation that the term "rights" is often used imprecisely to mean very different things. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 YALE L.J. 16, 28-44 (1913) ("One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties,' . . . ."). In Hohfeldian terms, government is better understood as possessing not a right but a privilege to its own speech. *See id.* at 55 ("A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another."); Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914, 914 (2008) ("Existing First Amendment doctrine takes a rather clear position with respect to the Hohfeldian structure: a First Amendment right is a right against the government and only against the government."). The *Summum* majority's later references to government's "freedom" to speak are more in keeping with this understanding and thus more accurate. *See Summum*, 555 U.S. at 468 ("Indeed, it is not easy to imagine how government could function if it lacked this freedom. . . . A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.").

misunderstand the government speech defense as a sword with which they may pierce others' free speech rights,[19] when the defense is instead a shield from certain free speech challenges by private parties who seek to interfere with what is really the government's own expression. Indeed, government bodies increasingly assert government speech interests to claim "—and some courts are permitting them to exercise—the power to punish private parties' speech that [has not been shown to] threaten the government's ability to express its own views."[20] Examples include public entities' efforts to invoke government speech interests to justify not only the punishment of student expression in public schools,[21] but also the exclusion of peaceful dissenters from attendance at the government's public functions.[22]

Moreover, the shield should be smaller in size and scope than the Court has suggested to date. As I have written elsewhere, the Supreme Court "has been too quick to defer to public entities' assertions that contested speech is their own; indeed, it has yet to deny the government's claim to speech in the face of a competing private claim."[23] As just one example, the Court's failure to limit the scope of the government speech defense—and thus the size of the shield—led to its decision in *Garcetti v. Ceballos*[24] that characterized the government's expressive interest in controlling its workers' speech as extremely broad. By treating public employees' speech delivered pursuant to their official duties as the government's own expression that it may control free from First Amendment scrutiny, the majority cut back dramatically on public employees' free speech rights.[25] For example, the *Garcetti* Court concluded that because the

19. For a more general discussion of how recognizing certain actors as having "rights" over others may "facilitate the subordination of the weak by the strong," *see* Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 720 (2011).

20. *See* Helen Norton, *Imaginary Threats to Government's Expressive Interests*, 61 CASE W. RES. L. REV. 1265, 1266 (2011) [hereinafter *Imaginary Threats*] (discussing examples).

21. Doe v. Silsbee Indep. Sch. Dist., 402 Fed. App'x 852, 855-56 (5th Cir. 2010) (rejecting a public high school student's First Amendment challenge to her dismissal from the cheerleading squad when she failed to cheer for a basketball player who she alleged had sexually assaulted her: "In her capacity as cheerleader, H.S. served as a mouthpiece through which [the school] could disseminate speech—namely, support for its athletic teams. Insofar as the First Amendment does not require schools to promote particular student speech, [the school] had no duty to promote H.S.'s message by allowing her to cheer or not cheer, as she saw fit.").

22. *See, e.g.*, Weise v. Casper, No. 05-cv-02355-WYD-CBS, 2008 WL 4838682 at *1-2 (D. Colo. Nov. 6, 2008), *aff'd on other grounds*, 593 F.3d 1163, 1165 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7 (2010) (asserting government speech interests to reject a First Amendment challenge by two individuals who were forcibly ejected from President Bush's speech on Social Security that was otherwise open to the public simply because they arrived at the event's parking lot in a car with a "No More Blood for Oil" bumper sticker). For an example of a government's unsuccessful effort to assert the government speech defense to justify the exclusion of peaceful dissenters from a public event, *see* Liberty & Prosperity 1776, Inc. v. Corzine, 720 F. Supp. 2d 622 (D.N.J. 2010).

23. Helen Norton, *Shining a Light on Democracy's Dark Lagoon*, 61 S.C. L. REV. 535, 536 (2010) [hereinafter *Shining a Light*].

24. 547 U.S. 410, 421 (2006) (holding that public employees' speech made "pursuant to their official duties" receives no First Amendment protection from employer discipline).

25. I have catalogued *Garcetti*'s disturbing legacy at length elsewhere. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4-5, 14-15 (2009) [hereinafter *Constraining Public Employee Speech*]; Norton, *Imaginary Threats*, *supra* note 20, at 1268; Norton, *Shining a Light*, *supra* note 23, at 546-47;

government should be permitted to "exercise . . . employer control over what the employer itself has commissioned or created[,]" the First Amendment poses no barrier to the government's punishment of its workers who report dangerous or illegal conditions when required to do so by their jobs.[26]

Although the Supreme Court has yet to identify meaningful limits to the government speech defense, a number of commentators[27] and lower courts[28] continue to try to do so. Indeed, some judges have declined to take the Court's implicit invitation simply to defer to government claims to contested speech as its own.[29] As just one example, those lower courts seeking to limit *Garcetti*'s reach may seek to distinguish it by questioning whether a public employee's contested speech actually occurred pursuant to her official job duties, and thus whether her government employer should have the power to control it as its own.[30] Others may require the government transparently to disclose its authorship of a message before permitting it to invoke the government speech defense more generally.[31] Whether such efforts will be successful in cabining the scope of the government speech defense remains to be seen.

In sum, *Johanns* marked the Court's long overdue recognition of the ubiquity and importance of government speech, appropriately exempting the government's own expressive choices from free speech clause challenges by private speakers. On the other hand, the Court's failure to clarify that the government speech defense is a shield and not a sword—much less to define and limit the scope of the defense (and thus the size of the shield)—has emboldened some governments and courts to misappropriate the doctrine to punish individuals for speech that does not encroach on the government's expressive

Norton & Citron, *supra* note 4, at 911-12. Note, however, that the trend continues. For example, the circuits are now split as to whether *Garcetti* means that the First Amendment does not protect public employees from retaliation when they refuse to obey their employers' orders to utter falsehoods when speaking pursuant to their official duties. *Compare* Bowie v. Maddox, 653 F.3d 45, 46, 48 (D.C. Cir. 2011) (applying *Garcetti* to hold that the First Amendment does not protect a public employee who refused to sign an affidavit drafted by his employer that he believed to be false) *with* Jackler v. Byrne, 658 F.3d 225, 229 (2d Cir. 2011) (holding that the First Amendment did not permit a police department to retaliate against a probationary police officer after the officer refused to retract his truthful report and make statements that would have been false).

26. *Garcetti*, 547 U.S. at 411, 421. *See also* Norton, *Constraining Public Employee Speech*, *supra* note 25, at 13-16 nn. 45-53 (discussing cases).

27. *See*, *e.g.*, Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35 (2002); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008).

28. *See*, *e.g.*, Norton & Citron, *supra* note 4, at 917-19 (discussing examples); Norton, *Imaginary Threats*, *supra* note 20, at 1272-73 (same); Norton, *Shining a Light*, *supra* note 23, at 546-47 (same).

29. *See*, *e.g.*, Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 337 (1st Cir. 2009) (Torruella, J., concurring in part and dissenting in part) ("The majority's position has the potential of permitting a governmental entity to engage in viewpoint discrimination in its own governmentally-owned channels so long as the governmental entity can cast its actions as its own speech after the fact. What is to stop a governmental entity from applying the doctrine to a parade? Or official events? It is nearly impossible to concoct examples of viewpoint discrimination on government channels that cannot otherwise be repackaged ex post as 'government speech.'") (citations omitted).

30. *See* Norton, *Shining a Light*, *supra* note 23, at 546-47 (discussing cases).

31. *See* Norton & Citron, *supra* note 4, at 917-18 (discussing cases).

interests. For these reasons, the legacy of *Johanns* in particular, and the government speech doctrine in general, remains in transition.

Lincoln's Populist Sovereignty: Public Finance Of, By, and For the People*

*Timothy A. Canova***

In recent months, there has been a resurgence of interest in the presidency of Abraham Lincoln, in no small part because a new president, also from Illinois, has openly and repeatedly identified with and invoked Lincoln.[1] Academic interest in Lincoln has mostly focused on the darker side of wartime presidential powers, such as the suspension of civil liberties and overstepping lines of constitutional authority. Far less attention has been given to Lincoln as the activist executive who set a new standard for mobilizing public finance in a crisis, pursuant to express Congressional authority under the Legal Tender Acts, presidential authority at its zenith.[2] There is a modern tendency to dismiss any lessons from the past, to believe that we have little to learn from earlier ages and that our age is superior to all that has come before.[3] This is particularly so in the world of finance. Perhaps the great financial crash of 2008 and its grim economic aftermath may allow scholars to approach with some humility Lincoln's monetary experiment in issuing greenbacks directly into circulation. Lincoln, after all, did mobilize public

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1 Lee Siegel, *Obama's Muse: His literary and political inspiration, the career of Abraham Lincoln, has a double edge*, WALL ST. J., Nov. 15, 2008, at W3; John F. Harris and Alexander Burns, *Straw Man? Historians say Obama is no Lincoln*, POLITICO, Dec. 15, 2008, http://www.politico.com/news/stories/1208/16569.html; James Oakes, *What's So Special About a Team of Rivals*, N.Y. TIMES, Nov. 20, 2008, at A43.

2 Recall Justice Jackson's concurrence in the steel seizure case: "when the President acts pursuant to an express or implied authorization, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

3 According to Ortega y Gasset, "our age is characterized by the strange presumption that it is superior to all past time; more than that, by its leaving out of consideration all that is past, by recognizing no classical or normative epochs, by looking on itself as a new life superior to all previous forms and irreducible to them." JOSÉ ORTEGA Y GASSET, THE REVOLT OF THE MASSES 44 (Anonymous trans., W.W. Norton & Co., Inc. 1957) (1932).

finances and therefore public energy on a grand scale that continues to elude our own generation.

Lincoln is remembered for overcoming enormous political and military challenges. Often overlooked, however, is the economic and financial chaos he confronted upon taking office. In the weeks prior to Lincoln's inauguration, the nation was swept by fear, the hoarding of gold, and a panic perhaps more dangerous than other classic Keynesian liquidity traps in March 1933 and September 2008, since there was no central bank in 1861 with the authority to issue currency and inject liquidity into the financial system to try to break a downward spiral by restraining the psychology of hoarding.[4]

Lincoln's approach to public finance was effective. It empowered the federal government with renewed fiscal capacity, mobilized a massive army, unleashed great latent energy and enormous economic growth.[5] As we bemoan the many ills in today's financial marketplace, we may consider what Lincoln would do if he was alive today. Would a president who asserted executive control over public finance in time of a great civil war do so in our time of obstinate foreign wars and market drama? Today the task may be greater, particularly if private financial interests have undermined the integrity of regulatory agencies and Congress alike. Of course, if he were alive today, Lincoln would also have to contend with all kinds of international financial constraints, far different from what he faced in his own time. This should not diminish from Lincoln's model of national economic sovereignty, but should instead prod us to think how his approach could be updated and squared with the realities of

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4 ROBERT P. SHARKEY, MONEY, CLASS, AND PARTY: AN ECONOMIC STUDY OF CIVIL WAR AND RECONSTRUCTION 26–27, 39, 44 (John Hopkins Press 1959) (1959). It is somewhat misleading to refer to the decades prior to the Civil War as a period of "unprecedented quiescence of monetary issues." Jeffrey Rogers Hummel, *Civil War Finance: Lessons for Today*, 12 CHAP. L. REV. 596, n. 29 (2009). This ignores both the political and economic turmoil surrounding the First and Second Banks of the United States, including the conflict between Treasury Secretary Alexander Hamilton and Secretary of State Thomas Jefferson over the First Bank, constitutional challenges to the First Bank, and President Andrew Jackson's veto of the recharter of the Second Bank on constitutional grounds, as well as the financial turmoil that resulted in the wake of these disputes. WILLIAM F. HIXSON, TRIUMPH OF THE BANKERS: MONEY AND BANKING IN THE EIGHTEENTH AND NINETEENTH CENTURIES 89–120 (1993).

5 This was the view of Lincoln articulated by the economic historian Eliot Janeway who wrote that Lincoln "never organized the Union for victory – he was too practical to try. Instead, he inspired and provoked it to mobilize the momentum for victory. The result was inefficient but irresistible. A victory small enough to be organized is too small to be decisive." ELIOT JANEWAY, THE STRUGGLE FOR SURVIVAL: A CHRONICLE OF ECONOMIC MOBILIZATION IN WORLD WAR II 16 (Yale University Press 1951). As argued below, it was in part through the Legal Tender Acts that Lincoln was able to provide the tools to mobilize.

today's global financial marketplace and national political institutions.

At the time of this writing, the U.S. banking and financial system remains in serious trouble, unemployment and home foreclosures are at dangerously high levels. The real economy suffered a deep contraction, one of the sharpest drops in history.[6] The recovery appears weak and fraught with danger. The U.S. trade and current account deficits exceed $700 billion a year, requiring capital inflows of more than $2 billion a day.[7] Meanwhile, the federal budget deficit has grown from more than $485 billion in the final year of the Bush administration to $1.6 trillion today.[8] Now, with the first installment of a bank bailout costing $700 billion, a fiscal stimulus package of $787 billion, and the Federal Reserve spending another trillion to prop up the markets, a big question on the minds of investors and public officials around the world is how the U.S. will pay for this spending, and whether so much federal borrowing will ultimately undermine the value of the dollar and lead to renewed inflation and some future financial chaos.[9]

This essay will consider Lincoln's financing of the Civil War and its possible application to today's crisis. Lincoln expanded the scope of federal authority by creating the nation's first fiat currency since the American Revolution, a strategy that was seen by many, including himself, as necessary to the financing of the Union's military efforts.[10] This approach harkened back to the emergency measures of the Continental Congress during the American Revolution and the economic development strategies of the colonies prior to the Revolution. It foreshadowed New Deal financing during the Great Depression and was also comparable to the low interest rate financing of the U.S. effort in World War II. Perhaps an enriched view of this history will provoke fresh

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6 Michael Tsang & Whitney Kisling, *Obama May Inherit Bull Market After $6 Trillion Loss*, BLOOMBERG, Nov. 5, 2008, http://www.bloomberg.com/apps/news?pid=20601110&sid=akRyOGDs1EHI#.

7 *See* Jennifer Hughes, *Drop in US inflows spooks dollar,* FINANCIAL TIMES, Feb. 15, 2006, http://www.ft.com/cms/s/0/dda665fc-9e58-11da-b641-0000779e2340.html (reporting disturbing drop in U.S. capital inflows from approximately $3 billion a day to approximately $2 billion a day); *US surprises: trade deficit down; budget shortfall up*, MERCOPRESS, Aug. 13, 2008, http://en.mercopress.com/2008/08/13/us-surprises-trade-deficit-down-budget-shortfall-up.

8 Rodger Runningen, *U.S. Deficit to Reach Record $490 Billion in 2009*, BLOOMBERG, July 28, 2008, http://www.bloomberg.com/apps/news?pid=20601103&refer=news&sid=ae7O8o2c0iNY.

9 Nelson D. Schwartz, *Hearing Stimulas, Fearing Debt*, N.Y. TIMES, Jan. 30, 2009, at B1 (reporting estimate by Niall Ferguson, a Harvard historian, that $2.2 trillion in new U.S. government debt will be issued in 2009, assuming approval of the stimulus plan).

10 MILTON FRIEDMAN, MONEY MISCHIEF: EPISODES IN MONETARY HISTORY 45 (1992).

insights about today's financial difficulties and challenging institutional environment.

I. LINCOLN'S LEGAL TENDER ACTS

When Lincoln was elected in November 1860, the money supply in the United States consisted of about 28% gold coins, 3% silver coins, and about 69% in bank created money, mainly bank notes and bank deposits (or check book money) created by state-chartered banks.[11] This was not a money supply conducive to a strong national government. Indeed, on the day of Lincoln's inauguration, March 4, 1861, the Union was on shaky ground.[12] When Fort Sumter was fired upon barely a month later, the Union Army had only 17,000 soldiers.[13] Lincoln's response was to organize the most impressive mobilization of military manpower in American history up to that time. Within a year, the Union Army numbered nearly 200,000, by the end of 1863 it was more than 600,000, and by the end of 1863, the fateful year of Gettysburg and Vicksburg, the Union Army exceeded 900,000 men.[14]

The costs of this military buildup and the war were enormous. According to William Hixson, the federal government spent about $35 million on the war effort in 1861.[15] In 1862 it spent about $446 million, about a thirteen-fold increase.[16] It was not enough. Union wartime spending rose to $683 million in 1863, $826 million in 1864, and $1.2 billion in 1865.[17]

How was this war effort financed? There was no federal income tax at the start of the war.[18] Most federal revenues came from the sale of public lands and customs duties.[19] But with homesteading rampant, public land sales revenue was falling.[20] Also, without duties on southern exports, and despite passage of

11 HIXSON, *supra* note 4, at 129.

12 The day of Lincoln's first inauguration, March 4, 1861, was also the birth of the college that would become Chapman University. The History of Chapman University, http://www.chapman.edu/about/chapfacts/history/history2.asp (last visited March 14, 2009).

13 HIXSON, *supra* note 4, at 129.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 132, 139.

18 *Id.* at 130.

19 *Id.*

20 The Homestead Act was passed in 1862. LEONARD P. CURRY, BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS 108 (Vanderbilt University Press 1968) (1968). The Morrill Land-Grant College Act, which provided for use of public lands for establishing colleges, was signed by Lincoln in the same year. *Id.* at 114–15.

the Morrill Tariff in the days before Lincoln took office, customs revenues began to fall as well.[21]

In 1861, the nation's fiscal house was in crisis when Congress authorized the Treasury to borrow $250 million by selling bonds to big banks and paying 7% interest.[22] In July 1861, in carrying out this Congressional authorization, Treasury Secretary Salmon Chase entered into agreements with the banks of New York, Philadelphia, and Boston, which, like all banks at the time, were state-chartered banks.[23] These banks were to purchase U.S. Treasury bonds with $50 million in gold.[24] The plan was for the Treasury to then spend the gold back into circulation, which it hoped would then be deposited back into the banks, thereby allowing them to lend again and again to the Treasury.[25] However, due to the psychology of fear and hoarding that swept the nation, the gold did not return to the banking system.[26] The banks suspended payment in gold and so did the Treasury.[27]

This left Chase with few viable options, hoping the banks would extend loans to the Treasury or pay for US Treasury bonds in the form of banknotes and bank credits rather than gold.[28] During the Buchanan presidency, the federal government was paying ruinous interest rates of 10 to 12%, and the yield would likely have to rise even higher to induce the banks to lend to the Treasury.[29] This was neither a viable nor a sustainable option.

Instead, Congress found other means, with Lincoln signing the first of three Legal Tender Acts on February 25, 1862,[30] to create a new government-issued, irredeemable paper currency

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21 SHARKEY, *supra* note 4, at 18; Roger L. Ransom, *The Economics of the Civil War*, EH.NET ENCYCLOPEDIA, (ed. Robert Whaples), Aug. 25, 2001, http://eh.net/encyclopedia/article/ransom.civil.war.us. The North was harmed by the loss of tariff revenues from Southern cotton exports, as well as the loss of Southern purchases of Northern manufactured products. *Id.*

22 SHARKEY, *supra* note 4, at 20.

23 *Id.* at 21.

24 *Id.*

25 *See id.* (Stating that "[i]n essence, though not in legal form, the banks were acting as underwriters").

26 *Id.* at 27.

27 *Id.*; HIXSON, *supra* note 4, at 129–31. In praising the "de facto regime of quasi-free banking" prior to the Civil War, Hummel argues that the currency "consisted solely of state bank notes redeemable for specie on demand." Hummel, *supra* note 4, at 596. This ignores the gold hoarding that preceded Lincoln's inauguration and the suspensions of payment in gold later that year, indicating a failure in the free banking regime. The weaknesses in the free banking regime were perhaps masked by major discoveries of gold in California beginning in 1849, but became apparent when gold production slowed at a time of rising public financing requirements. HIXSON, *supra* note 4, at 121–31.

28 HIXSON, *supra* note 4, at 130–31.

29 SHARKEY, *supra* note 4, at 18.

30 HIXSON, *supra* note 4, at 131; SHARKEY, *supra* note 4, at 49.

(i.e., not redeemable in gold or other specie), United States Notes known as "the Greenback," which were declared by government fiat to be legal tender for all private debts (hence, the term fiat money).[31] By war's end there would be nearly $450 million in these Greenbacks.[32]

The Constitution provided no specific authority for Congress to create a currency, but neither was there any express prohibition on such Congressional power.[33] At the time, numerous public officials, businessmen, bankers, and financial experts supported The Legal Tender Acts.[34] They called on the federal government to assert constitutional authority over the currency and keep the profit from the issuance of currency for the taxpayer, a practice known as "seigniorage."[35] For instance, in the floor debate, Representative Thaddeaus Stevens argued that the government and not the banks should have the profit from creating a medium of exchange.[36]

Lincoln himself wrote, in a letter dated December 6, 1864, that Treasury Secretary Chase had thought the issuance of legal tender notes was "a hazardous thing but we finally accomplished it and gave the people of this Republic the greatest blessing they ever had—their own paper money to pay off their debts."[37] Although Chase had misgivings about the Greenback, by February 1862, Chase wrote, in a letter to the *New York Post*, "I

31 MILTON FRIEDMAN, MONEY MISCHIEF: EPISODES IN MONETARY HISTORY 45 (1992) (describing fiat paper money as "notes that are issued on the fiat of the sovereign" specified in value and declared as legal tender for payment of debts).

32 HIXSON, *supra* note 4, at 131; SHARKEY, *supra* note 4, at 49. Congress began removing the greenback from circulation in 1879 when it made the greenback redeemable in gold. GRETCHEN RITTER, GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA 24, 38 (Cambridge Univ. Press 1997).

33 *See* HIXSON, *supra* note 4, at 89–90. Delegates to the Constitutional Convention voted down a proposed clause that would have given the federal government specific authority to issue paper money, and also voted down a proposed clause that would have denied the federal government such authority. *Id.*

34 The list of public officials included Congressional leaders, majorities in both houses of Congress, the President, an apparently reluctant but willing Treasury secretary, Salmon Chase, and Attorney General Edward Bates. HIXSON, *supra* note 4, at 131, 133–35, 150 (reporting the support of Henry C. Carey, the so-called founder of the American School of Economics); SHARKEY, *supra* note 4, at 30, 31, 35 ("Letters of support [for the first Legal Tender Act] from various bankers and business men pointed up the fact that the [opposing] opinions of the associated bankers [of New York, Boston, and Philadelphia] voiced in Washington, by no means represented the sentiments of the business community at large.").

35 Seigniorage is defined as "the return on the monopoly right to print money held by domestic monetary authorities." PETER MOLES & NICHOLAS TERRY, THE HANDBOOK OF INTERNATIONAL FINANCIAL TERMS 491 (1997).

36 BRAY HAMMOND, SOVEREIGNTY AND AN EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR 192 (1970).

37 HIXSON, *supra* note 4, at 133.

consent to the expedient of United States Notes in limited amounts being made a legal tender."[38]

Of the $3 billion direct cost of the war to the North, taxes paid for about 20 percent, borrowing in the form of bank paper covered about 65 percent, and the Greenback paid for about 15 percent.[39] The peak years for the new currency were 1862 and 1863 when the Greenback paid for nearly 40 percent of the costs of the Civil War to the North.[40] In his December 1862 message to Congress, Lincoln explained the necessity of the action:

> The suspension of specie payments by banks . . . made large issues of United States Notes [Greenbacks] unavoidable. In no other way could the payment of the troops . . . be so economically or so well provided for. The judicious legislation of Congress . . . has made them a universal circulating currency . . . saving thereby to the people immense sums in discounts and exchanges.[41]

This was the same message to Congress in which Lincoln said:

> The dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.[42]

Some historians insist the Greenback was not necessary because it never accounted for a majority of the funds used to carry on the war and that the government may have been able to sell its securities below par.[43] More persuasive are those like Leonard Curry, who concludes: "To leave the country dependent on a motley array of irredeemable, often counterfeited, frequently worthless bank paper was not only to invite, but to insure, disaster."[44] Likewise, historian Robert Sharkey points out that a majority of the members of Congress "were not willing to subject the credit of the government to such a trial."[45]

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38 *Id.* at 133–34.

39 *Id.* at 132–33, 139–40; Hummel, *supra* note 4, at 599, fig. 3. Ransom put the direct government expenditure costs to the North at $2.7 billion and concluded that the Greenback accounted for about 18 percent of all government revenues. Ransom, *supra* note 21.

40 HIXSON, *supra* note 4, at 132.

41 *Id.* at 134.

42 Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in THE COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler ed., Rutgers Univ. Press, 1953) (1953).

43 *See* DON C. BARRETT, THE GREENBACKS AND RESUMPTION OF SPECIE PAYMENTS, 1862-1879 25-57 (Harvard Univ. Press 1965) (1931); SHARKEY, *supra* note 4, at 32–33.

44 LEONARD P. CURRY, BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS 197 (Vanderbilt Univ. Press 1968) (1968).

45 SHARKEY, *supra* note 4, at 33.

In addition to the Greenback, Congress passed legislation in 1862 creating the National Banking System, providing for the chartering of federal banks that were required to purchase large amounts of federal bonds to hold as security against the national bank notes they would issue.[46] Although the National Banking System did not take the form of a central bank, it can still be seen as a forerunner of the Federal Reserve, also privately-owned and directed to support the federal government's fiscal needs by purchasing federal bonds.[47] While this was an improvement from the chaos that had preceded the National Banking Act, it was still lacking from the perspective of government finance when compared with the approach of the Federal Reserve during World War II, which kept interest rates near zero percent for federal government securities.[48]

For the Confederacy, the cost of the war was about $2.25 billion, of which about $250 million was raised in taxes and $500 million was borrowed.[49] The rest, about $1.5 billion, or nearly 60 percent of the Confederacy's war costs, was in printing press money.[50] The Confederate currency collapsed in value, the victim of a counterfeiting war strategy by the North.[51]

There has also been criticism of the inflation that coincided with the Greenback, with some claiming this was the result of not making the Greenback redeemable in gold.[52] But, as discussed above, the record shows a rather wise management by Congress, with the amount of paper currency issued limited to only about 12 percent of the total financing of the war and peaking at less than 40 percent in 1862 and 1863.[53] According to Roger Ransom, Northern wages did not keep pace with inflation, but fell by about 20 percent during the war.[54] Even this, Ransom concluded, was not as severe as it would seem since agriculture, not industry, was the largest economic sector in the North, and "farmers fared much [better] in terms of their income during the war than did wage earners in the manufacturing sector."[55]

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46 Ransom, *supra* note 21.

47 Committee for Monetary Reform v. Board of Governors of the Federal Reserve System, 766 F.2d 538, 540 (D.C. Cir. 1985) ("The Federal Reserve Banks are private corporations whose stock is owned by the member commercial banks within their districts.") (citing to 12 U.S.C. § 321).

48 Richard H. Timberlake, *Federal Reserve System*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, 2008, http://www.econlib.org/library/Enc/FederalReserveSystem.html.

49 HIXSON, *supra* note 4, at 148.

50 *Id.*

51 *Id.*

52 FRIEDMAN, *supra* note 31, at 57.

53 Hixson, *supra* note 4, at 132, 140.

54 Ransom, *supra* note 21.

55 *Id.*

The inflation in the North was less a function of any over-issuance of currency and more the result of a classic wartime boom with excess demand pulling up prices faster than manufacturing wages.[56] Public administration was at a rather rudimentary and unsophisticated stage of development at the time of the Civil War.[57] It would have to wait until the next century, after civil service reforms and the rise of a federal bureaucracy during World War II for the tools to contain such inflationary forces.

For instance, throughout World War II, the federal government found the means to finance an even more impressive military buildup and war effort. As a practical matter, the central bank lost its independence during the 1941–1951 period.[58] The Federal Reserve was required by political convention with the White House and Treasury to purchase government securities in any amounts and at any price needed to keep the yield on government debt pegged at near zero for short-term securities and barely two percent for long-term bonds, the functional equivalent of printing money for the war effort.[59]

With such an easy money policy during World War II, the federal government was able to increase wartime spending to nearly forty-five percent of Gross Domestic Product (GDP), nearly double today's levels of federal spending.[60] Some economists point to the easy money and heavy reliance on seigniorage during World War II to explain the end of the Great Depression.[61] Of course, easy money without federal spending would likely not have increased either the velocity of money or aggregate demand. While easy money in the 1930s brought some recovery from the Depression,[62] it was only the massive fiscal

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56 GEORGE T. MCJIMSEY, THE DIVIDING AND REUNITING OF AMERICA: 1848–1877 87–89 (1981).

57 *See Id.* at 196–97.

58 *See* Timothy A. Canova, *American Wartime Values in Historical Perspective: Full-Employment Mobilization or Business as Usual*, 13 ILSA J. INT'L & COMP. L. 1, 13–14 (2006) [hereinafter Canova, *American Wartime Values*].

59 *Id.* at 13.

60 Timothy A. Canova, *Non-State Actors and the International Institutional Order: Central Bank Capture and the Globalization of Monetary Amnesia*, 101 AM. SOC'Y INT'L L. PROC. 469, at 470–71 nn.8–9 (2007) (citing to tables of the 1984 and 2007 Annual Reports of the Council of Economic Advisers).

61 Hummel, *supra* note 4, at 605.

62 Christina D. Romer, *What Ended the Great Depression?*, 52 J. ECO. HISTORY 757, 757–58 (Dec. 1992). Romer cites to a 1956 article by E. Cary Brown for support that fiscal policy "seems to have been an unsuccessful recovery device in the 'thirties—not because it did not work, but because it was not tried." *Id.* at 758.

stimulus, albeit accommodated by the central monetary authority that ended the Depression once and for all.[63]

The economy roared, with real growth rates of greater than fifteen percent for three consecutive years, the fastest economic growth in American history.[64] Yet, the federal government also managed to maintain price stability through a program of regulatory controls on prices, wages, and capital flows, and margin requirements on borrowing for private consumption, stock speculation, and housing construction.[65] In fact, consumer price inflation was less than three percent a year for the final three years of the war.[66]

The World War II model was actually extended for several years after the war, in large part because of the need for continued massive federal spending on the Marshall Plan reconstruction of Europe and Japan, the Korean War effort, and the G.I. Bill of Rights spending on education, health care, housing, and jobs for the sixteen million veterans of World War II (fully one-quarter of the U.S. work force).[67]

This followed a long tradition of federal government intervention to promote economic growth. For example, Alexander Hamilton, as Treasury Secretary, in his Report on Manufacturers, much of which was adopted by Congress, had called for subsidies to industry, paid for in part by tariffs on imports, to encourage the growth of manufacturing, as well as the building of roads and canals.[68] Decades later, Henry Clay would incorporate Hamilton's ideas into the "American System," which was adopted by Lincoln in his fiscal program of subsidies to encourage economic development, which could be seen as a

63 Bruce Bartlett, *The Real Lesson of the New Deal*, FORBES, Feb. 13, 2009 (arguing that "in terms of fiscal policy, Roosevelt's error [in the 1930's] wasn't that he spent too much, but that he didn't spend nearly enough.").

64 Canova, *American Wartime Values*, *supra* note 58, at 5 n.12.

65 *Id.* at 14–15, n.67.

66 *Id.* at 16. Hummel seems to acknowledge that a central bank-dominated monetary regime is fully capable of producing high inflation and contributing less to economic growth than a monetary regime characterized by Treasury-issued currency when he writes that "during America's Great Inflation of the 1970s, seigniorage accounted for only 2 percent of federal revenue, which translates into less than half a percent of GDP." Hummel, *supra* note 4, at 607.

67 Timothy A. Canova, *Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform*, 5 GEO. J. L. & PUB. POL'Y 341, 393–94 (2007) [hereinafter Canova, *Closing the Border*].

68 MICHAEL LIND, HAMILTON'S REPUBLIC: READINGS IN THE AMERICAN DEMOCRATIC NATIONALIST TRADITION 72–73 (1997).

modification of mercantilism and a precursor to Keynesian economic policies.[69]

To be sure, critics of this model will claim that the cure is worse than the disease, and that an easy money policy and active fiscal policy can work only if the federal government imposes controls which are said to be incompatible with a free-market economy, and that inflation is bound to return once the controls are lifted or relaxed.[70] But this line of argument understates the range of government regulations and interventions that are routinely imposed on any free-market economy, even during times of hard money. Further, it also ignores the moral and strategic context in which wartime controls have been imposed. If inflation is merely delayed, the question becomes what was gained during the interval of delay. The World War II era controls that suppressed and delayed inflation until the late 1940s and early 1950s provided the federal government with the breathing space and resources necessary to win a world war against fascist tyrannies in less than four years and then to rebuild war-torn Europe and Japan and integrate one-quarter of the U.S. work force.[71] Not a bad trade-off, indeed.[72]

Likewise, Lincoln used the resources of easy money for grand purposes. It took four bloody years of fighting but the scourge of

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69 MICHAEL LIND, WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA'S GREATEST PRESIDENT 23, 72–73 (2004); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (Oxford U. Press, 1970) (1970).

70 *See* MILTON FRIEDMAN & ANNA SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867–1960 558 (1963). The authors argue:

> The result was that "prices," in any economically meaningful sense, rose by decidedly more than the 'price index' during the period of price control. The jump in the price index on the elimination of price controls in 1946 did not involve any corresponding jump in 'prices'; rather it reflected largely the unveiling of price increases that had occurred earlier. *Id.*

See also Robert Higgs, *Wartime Prosperity? A Reassessment of the U.S. Economy in the 1940s*, 52 J. ECO. HISTORY 41, 54–55 (Mar., 1992), *available at* http://www.independent.org/publications/article.asp?id=138.

71 *See* Canova, *American Wartime Values*, *supra* note 58, at 15–16.

72 Hummel also argues that the World War II debt burden was reduced by high inflation after the war. Hummel, *supra* note 4, at 603. But inflation remained largely contained throughout the 1950s and 1960s, rising to significantly high levels only in the late 1970s. It is more accurate to conclude that the World War II debt burdens were reduced by maintaining low interest rates and high real economic growth rates which contributed to high tax revenues even while tax rates were being reduced. Hummel also repeats the claim of Robert Higgs that war always "ratchets up" post war spending and government intervention. *Id.* at 592, n. 3. First, it is instructive to point out that federal spending during World War II peaked at about forty-five percent of GDP; today it is about twenty-six percent of GDP. Moreover, it may be that, had U.S. and foreign governments spent and intervened far more in their economies prior to the 1930s, the global Great Depression and the cataclysm of World War II may very well have been averted.

slavery was finally lifted from the nation. Both wartime presidents, Lincoln and Roosevelt, understood they could ill afford to lose their wars or pass them on to future generations.[73]

As Justice Jackson would write in his concurrence in the so-called Steel Seizure case, *Youngstown Sheet & Tube Company v. Sawyer* (1952), "the power to legislate for emergencies belongs in the hands of Congress."[74] National emergencies and war need not expand the powers of Congress and the President, but they do provide the opportunity for the elected branches to act to the full extent of their constitutional powers. This was the case with the constitutional legacy of the Legal Tender Acts that paved the way for other far-reaching monetary reforms during the New Deal.

In June 1864, after securing re-nomination and with the financial position of the Union in better shape, Lincoln accepted the resignation of his Treasury Secretary Salmon Chase.[75] Several months later, partly to placate the Radical wing of his party, Lincoln nominated Chase as Chief Justice of the Supreme Court. In one of history's great ironies, when the Legal Tender Acts were challenged, Chase would twice vote to declare the Greenback unconstitutional.[76]

In *Hepburn v. Griswold* (1870), Chase refused to disqualify himself and in fact delivered the decision declaring the Greenback unconstitutional and ruling that Congress could not make the Greenback legal tender in payment of all debts, public and private.[77] As characterized by Milton Friedman and Anna Schwartz, Chief Justice Chase essentially convicted himself of having been responsible for an unconstitutional action in his prior capacity as Secretary of the Treasury.[78]

At issue before the Court in *Hepburn* was the validity of contracts made before the war.[79] The decision was applied also to contracts entered into after the war.[80] A major portion of the nation's money supply was suddenly rendered worthless for the

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73 *See* Timothy A. Canova, *The Mystical Roots of American Political Democracy: Social Justice and Religious Belief in a Newer World*, in RELIGION AS ART (Univ. of New Mexico Press 2009) (discussing the similarities between Lincoln and Roosevelt as mystical political leaders).

74 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

75 CLARENCE EDWARD MACARTNEY, LINCOLN AND HIS CABINET 259–60 (Charles Scribner's Sons, 1931).

76 FRIEDMAN & SCHWARTZ, *supra* note 70, at 46–47.

77 Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

78 FRIEDMAN & SCHWARTZ, *supra* note 70, at 46.

79 *Id.*

80 *Id.* at 47.

satisfaction of debts.[81] But, then, two vacancies on the Court were filled by President Grant and amid charges of court-packing, the Legal Tender Acts came up once again before the new Court.[82] This time, in *Knox v. Lee* (1871), the Greenback was upheld as constitutional, reversing *Hepburn* by a 5-to-4 vote, this time with Chase in dissent.[83] The Court held in *Knox* that Congress did indeed have authority to reasonably decide what definition of legal tender would best serve the public interest.[84] Finally, in *Julliard v. Greenman* (1884), in a third Legal Tender case, the Court upheld the power of Congress to create legal tender currency in peacetime.[85]

During this time there were parallel Court decisions holding that the Legal Tender Acts were not intended to bar enforcement of private contracts requiring payment of debts in gold.[86] Such "gold clauses" were a device to protect creditors from repayment in depreciated currency, particularly until the Greenback became redeemable in gold in 1879.[87] Half a century later, by Executive Order in April 1933, President Franklin Roosevelt ordered the seizure of gold in an effort to forbid hoarding.[88] Gold clauses were once again used to protect creditors.[89] But later in 1933, Congress simply outlawed these gold clauses by joint resolution, and in 1935, the Supreme Court upheld the constitutionality of the joint resolution by a 5-to-4 vote, holding that Congress has authority to exert ultimate control in defining lawful media of exchange to satisfy debts, even for private contracts made prior to the legislation.[90]

The cumulative effect of the Legal Tender cases and the gold clause cases was to permit Congress to once again authorize the issuance of Greenbacks, this time during the Great Depression. According to Milton Friedman and Anna Schwartz, the Thomas Amendment to the Agricultural Adjustment Act of 1933 authorized the issuance of $3 billion in United States Notes.[91] In addition, the amendment authorized the Treasury to revalue its gold holdings and realize a large "paper" profit; as a result, it

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81 *Id.* at 48.
82 *Id.* at 47 n.47.
83 Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871).
84 *Id.* at 553.
85 Julliard v. Greenman, 110 U.S. 421, 450 (1884) (upholding an act of 1878 reissuing greenbacks and declaring them to be legal tender in payment of private debts).
86 FRIEDMAN & SCHWARTZ, *supra* note 70, at 469.
87 *Id.* at 468–69.
88 *Id.* at 462–63.
89 *Id.* at 463.
90 *Id.* at 469.
91 *Id.* at 470.

could print additional paper money titled "gold certificates" to a nominal value of nearly another $3 billion.[92]

Within each of these lines of cases, the Legal Tender cases and the gold clause cases, urgent circumstances existed that initially justified the use of positive regulation to compel citizens to accept government paper as legal tender for payment of all debts, private and public. In both the 1860s and 1930s democracy and freedom were subject to the gravest of challenges. The responses of Congress and the President were similar. In each instance, the federal government asserted sovereignty over the currency and financial system, thereby empowering the government with enormous fiscal capabilities that helped mobilize the nation for war and develop the country's economic resources for decades.

II. EARLY AMERICAN HISTORY

Much like Lincoln's Greenback, colonial governments issued paper currency that was not redeemable in gold and was declared by government fiat to be legal tender for the payment of debts.[93] The colonial currencies were lent into circulation through state-controlled land banks and were secured by mortgages on the borrowers' property at low interest rates, usually five percent.[94]

According to historian James Ferguson, "[a] modern economist finds the tactics of colonial government analogous to those of the New Deal and in some ancestral relationship to present-day Keynesian doctrine."[95] For instance, during the Great Depression, first under Hoover and then under Roosevelt, the Reconstruction Finance Corporation lent millions to U.S. industry.[96] Likewise, the federal Home Owners' Loan Corporation, founded in 1933, offered mortgage loans directly to homebuyers at five percent with repayment periods of up to twenty-five years.[97] But the moneys for these New Deal lending programs were mostly borrowed by the Treasury Department through the sale of government bonds.[98] In contrast, some

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92 *Id.* at 470, 518 n.33.

93 A. Barton Hepburn, History of Currency in the United States 71 (The Macmillan Co. 1915) (1915).

94 E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790 5 (Univ. of North Carolina Press 1961).

95 *Id.*

96 MARK I. GELFAND, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933–1965 29(Oxford Univ. Press 1975)(1975).

97 C. LOWELL HARRISS, HISTORY AND POLICIES OF THE HOME OWNERS' LOAN CORPORATION 1 (National Bureau of Economic Research 1951).

98 GELFAND, *supra* note 96, at 48.

colonial governments actually created the currency that was lent into circulation without incurring government borrowing costs.[99]

While Lincoln's Greenback was spent into circulation and earned no interest for the government, the colonial currencies were actually lent into circulation, thereby earning interest for colonial governments. In fact, in the middle colonies, "the loans served as a substitute for taxes," and the interest received by these colonial governments "was sufficient to pay most of the ordinary cost of administration."[100] While land banks were less successful in New England and the south, currency emissions in New York, New Jersey, Delaware, and Maryland were regarded as stable, and were never great enough in volume as to impair credit.[101]

According to Ferguson, historians agree that Pennsylvania's currency was held in universal esteem, a principal factor in the colony's growth and prosperity, and maintained "without fear of repudiation and to the manifest benefit of the province":

> Pennsylvania managed a land bank almost continuously after 1723 without mishap. For more than twenty-five years before the French and Indian War, the interest received by the government supported expenses without the necessity of direct taxes. Relative freedom from taxation probably contributed to Pennsylvania's remarkable growth.[102]

None other than Adam Smith, the grandfather of classical economics, described the currency emissions in glowing terms:

> The government of Pennsylvania without amassing any treasure [i.e., any stock of gold or silver] invented a method of lending, not money indeed, but what is equivalent to money, to its subjects. [It advanced] to private people at interest, upon security on land to double the value, paper bills of credit . . . . made transferable from hand to hand like bank-notes, and declared by act of assembly to be legal tender in all payments from one inhabitant of the province to another.[103]

According to numerous historians, the price level in Pennsylvania during the fifty-two years prior to the American Revolution and while Pennsylvania was on a paper standard "was more stable than the American price level has been during

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99 HIXSON, *supra* note 4, at 53.

100 FERGUSON, *supra* note 94, at 5–6.

101 *Id.* at 6–8.

102 *Id.* 6, 13, 16. Hummel asserts, "No one needs to be reminded that government cannot create resources out of thin air." Hummel, *supra* note 4, at 597. The colonial experience suggests otherwise. Colonial governments created currency out of thin air, lent the currency into circulation, and the result was the bringing to market of real resources. *See* HIXSON, *supra* note 4, at 53–54.

103 HIXSON, *supra* note 4, at 48–49 (words in brackets are Hixson's).

any succeeding 50 year period."[104] This price stability was due in large part to the commonwealth's wise management of its currency emissions. In *The Wealth of Nations*, published in 1776, Adam Smith wrote:

> Pennsylvania was always more moderate in its emissions of paper money than any other of our colonies. Its paper currency accordingly is said never to have sunk below the value of the gold and silver which was current in the colony before the first emission of its paper money.[105]

Thomas Pownall, also writing during this period, concluded that there "never was a wiser or better measure, never one better calculated to serve the uses of an encreasing country . . . never a measure more steadily pursued, nor more faithfully executed for forty years together."[106]

The British did not look favorably on the colonial practices, and the British Parliament passed the Restraining Act of 1764 forbidding enactment of such legal tender laws.[107] According to William Hixson, Parliament acted at the behest of British bankers who "wanted the colonies, rather than creating their own notes, to acquire a colonial money supply by borrowing banknotes in Britain (at interest payable in specie [i.e., gold or silver coin])."[108] Protests immediately broke out in New York, Pennsylvania, Maryland, Virginia, and South Carolina, "colonies which were scarcely in the grip of leveling elements."[109]

Benjamin Franklin fought enactment of the Restraining Act of 1764 and tried to get it repealed.[110] One of the main reasons for the alienation of the American colonies from the mother country, according to Franklin, was the restrictions on paper money.[111] Franklin wrote, "Every colony was ruined before it made paper money" as gold coin was drawn away by the purchase of imports from Britain.[112]

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104 Richard A. Lester, *Currency Issues to Overcome Depressions in Pennsylvania, 1723 and 1729*, 46 JOURNAL OF POLITICAL ECONOMY 324, 325 (June 1938), (quoted in HIXSON, *supra* note 4, at 51.)

105 ADAM SMITH, THE WEALTH OF NATIONS 356–57 (ed. Edwin Cannan 1994).

106 THOMAS POWNALL, THE ADMINISTRATION OF THE COLONIES, 4th ed. (London 1768), at 185, (quoted in FERGUSON, *supra* note 94, at 16).

107 FERGUSON, *supra* note 94, at 15.

108 HIXSON, *supra* note 4, at 56.

109 FERGUSON, *supra* note 94, at 15.

110 *Id.* at 16.

111 *Id.*

112 HIXSON, *supra* note 4, at 47 (brackets omitted). According to Ferguson, there was significant popular unrest in New York which was "stilled only by the repeal of the Townshend duties, but also by a special act of Parliament which allowed the colony to issue paper money." FERGUSON, *supra* note 94, at 16.

The monetary experiment continued during the American Revolutionary War, which was paid to a remarkable extent by issue of paper currency known as the "Continental" despite an acute shortage of specie.[113] But the paper money was issued and counterfeited in large quantities out of all proportion to increases in the output of goods and services.[114] Therefore the currency declined sharply in value in terms of gold and silver, and there was runaway price inflation during the war.[115]

Previously, in many of the colonies, counterfeiting was a serious problem that threatened and often did undermine the confidence and value of their currencies, particularly in the south and northeast colonies.[116] Pennsylvania's lieutenant governor, Patrick Gordon, in a speech to the state Assembly, warned:

> It may not unjustly be compared to the Poisoning the Waters of a Country; the blackest, and most detestable Practice that is known, and which the Laws of Nations, and those of War condemn even in declared Enemies; for as that destroys the Lives of the innocent in taking their Natural Food, this would effectively overthrow all Credit, Commerce and Traffick, and the mutual Confidence that must subsist in Society, to enable the Members of it to procure to themselves and Families their necessary Bread.[117]

While most counterfeiting of colonial currencies had been carried on by private criminal gangs, with the advent of the open rebellion, the British made counterfeiting a wartime strategy.[118] According to historian Kenneth Scott, "for the first time in history, counterfeiting was resorted to by a government to undermine confidence in the currency, and thereby the credit, of the enemy."[119]

The Continental currency actually held its value during the first year or two of the Revolution even though it was not redeemable in specie.[120] But as early as the first week of January 1776, if not before, a printing press aboard the *H.M.S. Phoenix*, a British ship of forty-four guns lying in New York harbor, was turning out counterfeits of the thirty dollar bill of emission.[121] When New York fell to the British, it became and remained the

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113 HIXSON, *supra* note 4, at 73.
114 *Id.*
115 *Id.* at 73–74.
116 KENNETH SCOTT, COUNTERFEITING IN COLONIAL AMERICA 93 (Oxford Univ. Press 1957).
117 *Id.* at 11.
118 *Id.* at 253.
119 *Id.*
120 FERGUSON, *supra* note 94, at 18.
121 Scott, *supra* note 113, at 253.

chief source of counterfeits made by the British or with British sanction.[122]

The record is replete with evidence of a massive and largely successful counterfeiting effort by the British.[123] Franklin wrote that "immense quantities of these counterfeits, which issued from the British government in New York, were circulated among the inhabitants of all the States, before the fraud was detected."[124] This, he said, depreciated the whole mass, "first, by the vast additional quantity, and next by the uncertainty in distinguishing the true from the false; and the depreciation was a loss to all and the ruin of many."[125]

According to Scott, "[f]requently the colonies were put to the trouble and expense of recalling whole emissions. Sometimes trade was greatly hampered or, as in Virginia in 1773, came to a complete standstill."[126] Moreover, the general depreciation of the Continental currency (hence the term, "not worth a Continental") meant that the Continental Congress was forced to issue even more currency to pay for its war efforts. While the specie value of the currency emissions remained roughly steady in 1777 and 1778, a period of intense counterfeiting, the paper amounts of the currency issued rose sharply.[127] A vicious cycle set in. Previous counterfeiting and over-issuance was depreciating the currency so greatly while the demands of war remained so pressing "that money had to be printed every month, then every fortnight."[128] In 1779, John Jay defended the issue of paper money and blamed depreciation on the widespread counterfeiting by the British.[129]

Gouverneur Morris, the person chiefly responsible for planning the use of paper money, had previously been opposed to the project.[130] But like others in the Continental Congress, he agreed that in a crisis, paper money was the only option available.[131] Without the power to tax, however, the Congress had no effective means of retiring its paper money from circulation after it had served its purpose of paying for war provisions.[132] Appeals were made to the states to tax a portion of

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122 *Id.* at 253–54.
123 *See id.* at 253–63.
124 *Id.* at 260.
125 *Id.*
126 *Id.* at 262.
127 FERGUSON, *supra* note 95, at 28.
128 *Id.* at 29.
129 HIXSON, *supra* note 4, at 78.
130 DONALD R. STABILE, THE ORIGINS OF AMERICAN PUBLIC FINANCE: DEBATES OVER MONEY, DEBT, AND TAXES IN THE CONSTITUTIONAL ERA, 1776–1836 23 (1998).
131 *Id.*
132 HIXSON, *supra* note 4, at 86–87.

the paper money and send those back to Congress to retire the bills, but to no avail, the money was not forthcoming.[133] The states did not come through, and this defect in the allocation of taxing authority contributed further to the depreciation in the currency.[134]

Franklin was more sanguine than others about the currency depreciation which he viewed as "a kind of imperceptible tax" that was more progressive than other taxes:[135]

> The general effect of the depreciation [of Continental and state bills] among the inhabitants of the states has been this, that it has operated as a gradual tax upon them. Their business has been done and paid for by the paper money, and every man has paid his share of the tax according to the time he retained any of the money in his hands and to the depreciation within that time. Thus it has proved a tax on money, a kind of property very difficult to be taxed by any other mode: and it has fallen more equally than many other taxes, as those people paid most, who, being richest, had most money passing through their hands.[136]

Franklin's defense of the inflation tax was probably a combination of putting the best face on a bad situation, along with a vestige of his general enthusiasm with paper money going back to the pre-Revolutionary experience in colonial Pennsylvania. While many were horrified by the depreciation and inflation, others believed the war could not have been fought and independence could not have been won without the issues of paper money.[137] According to the historian Donald Stabile, "Highly regarded leaders such as Thomas Paine and Alexander Hamilton looked at the issuance of paper money as a necessary and a reasonable substitute for taxes."[138] Franklin stressed that when the war began, the colonies "had neither arms nor ammunition, nor money to purchase them or to pay soldiers" and it was the paper currency that allowed Congress to pay, clothe and feed the troops, fit out ships, and conduct the war.[139]

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133 STABILE, *supra* note 130, at 23.

134 *Id.* at 23–24.

135 *Id.* at 24.

136 HIXSON, *supra* note 4, at 79 (quoting BENJAMIN FRANKLIN, THE WRITINGS OF BENJAMIN FRANKLIN 9:134–35 (Albert Henry Smith ed., 1907)). In another letter, Franklin wrote: "The currency as we manage it is a wonderful machine. It performs its office when we issue it; it pays and clothes troops, and provides victuals and ammunition: and when we are obliged to issue a quantity excessive, it pays itself off by depreciation." *Id.* (quoting FRANKLIN, *supra* note 132, at 7: 294).

137 STABILE, *supra* note 130, at 24.

138 *Id.* As Stabile concluded, currency emissions during the Revolution were overlarge, but supported by many as "a necessary evil." *Id.* at 33.

139 HIXSON, *supra* note 4, at 77.

The numbers support these conclusions. According to Hixson, the total cost of war for the American side was about $168 million and the original specie value of Continental currency issued was about $46 million, or nearly 40 percent of the war's total costs to the colonies.[140]

After the war, the Articles of Confederation marked a period of weak federal authority. Class warfare between debtors and creditors broke out throughout the new nation during a time of such harsh treatment of debtors as debtor's prisons.[141] According to Hixson, "By the end of 1786, seven states had new issues of paper money in circulation—the size and legal-tender status of the various issues reflecting the balance of power between creditors and debtors of the particular states."[142] Not all state currencies were badly managed, but even where the legal tender bills were kept fairly steady, the problems of interstate commerce in a confederation with multiple currencies still existed.[143]

The Constitutional Convention settled the issue in favor of creditor interests by adopting Article I, Section 10, forbidding states from emitting bills of credit (paper money) or passing any law impairing the obligation of contracts, which included debt contracts.[144] In the drafting of the Constitution, creditor interests clearly had the upper hand. Early American history has since been skewed against paper money. As Ferguson concludes:

> Upon reviewing the evidence, it appears that the impression of colonial public finance conveyed by later scholars gives a misleading background for a financial history for the Revolution. The efforts of the American provinces to create a medium of exchange, provide agricultural credit, and equip government with the means of incurring and discharging responsibilities, hardly constitute a "dark and disgraceful" picture, nor, on the whole, a record of failure. Most colonies handled their currency with discretion and were successful in realizing the purposes associated with its use.[145]

In creating the Greenback, Lincoln and the Civil War Congress had to overcome the traditional bias against a government-issued fiat currency. The multiple interconnected crises that they faced—political disintegration, economic stagnation, financial panic, and military exigency—suggest the

140 *Id.* at 74.
141 *Id.* at 84–85.
142 *Id.* at 85.
143 *Id.*
144 U.S. CONST. ART. I, § 10.
145 FERGUSON, *supra* note 94, at 24.

nature of the sea change in conventional thinking. Necessity was once again the mother of invention.

III. WHAT WOULD LINCOLN DO?

Some economists dismiss the significance of Treasury-issued fiat currency by pointing out facile similarities with today's system of Federal Reserve-issued fiat currency. For instance, Hummel argues that the two processes work out roughly the same financially.[146] The Fed creates money and loans it to the Treasury at interest; but after covering its operating expenses (several billion dollars), the Fed rebates around ninety percent of such interest payments (some tens of billions of dollars) back to the Treasury.[147] This ignores that the money rebated annually is in the tens of billions of dollars, while the Treasury must pay in the hundreds of billions of dollars in interest to its bondholders, both domestic and foreign, who happen to also own shares in the Federal Reserve banks that take part in deciding the interest rate that Treasury will pay to its bondholders.

Hummel makes an important concession about the difference between government issued currency and privatized currency issuance: "The one thing that does change under a central bank is who is in charge of issuing fiat money, and the resulting incentives."[148] Indeed. When Treasury issues currency and spends it into circulation, it pays no interest. When Treasury issues currency and lends it into circulation, it earns interest, and is thereby able to reduce the tax burden for taxpayers. When a central bank, like the Federal Reserve, issues currency and lends it to Treasury, it is that same central bank that now sets the rate of interest on all short-term Treasury borrowing, including the interest that Treasury pays to bondholders other than the Federal Reserve, such as the commercial banks and investment banks that hold trillions of dollars in Treasury debt and also happen to exercise formal and informal influence in the Federal Reserve's interest rate decisions.

History bears out certain advantages that Treasury-issued currency has over a regime dominated by an autonomous central bank. For instance, the Greenback allowed the North to issue currency and spend it into circulation without incurring interest charges. However, to the extent that Greenbacks were insufficient in the amount of United States Notes actually issued, the North had to finance much of the rest of its war effort by

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146 Hummel, *supra* note 4, at 604.
147 *Id.* at 604–05.
148 *Id.* at 605.

borrowing banknotes at significant interest rates, thereby adding to the burdens of future taxpayers.[149]

Likewise, during World War II, the effect of central bank-issued money was ameliorated by the fact that the Federal Reserve was not functionally independent and interest rates on all government debt were essentially set by the Treasury.[150] As a result, the Treasury was able to borrow at near zero interest rates.[151] This was the so-called "pegged period" in which the Federal Reserve kept interest rates pegged at 3/8 of one percent on short-term Treasury debt and about 2 percent for longer-term Treasury bonds.[152]

By contrast, in more recent years, the Federal Reserve has set interest rates on all Treasury debt through decisions made by its Federal Open Market Committee (FOMC), a committee which includes the seven members of the Fed's Board of Governors, as well as the twelve unelected and un-appointed presidents of the regional Federal Reserve Banks, which are privately owned by the same commercial banks that have profited by the higher interest rates set by the FOMC on Treasury securities.[153]

Several economists, including Nobel laureate Paul Krugman, have spoken of "cognitive regulatory capture" to describe the intellectual uniformity that has pervaded central bank thinking and let to the triumph of deregulatory ideology.[154] With regards to the Federal Reserve, the agency capture is not just cognitive capture, but a matter of institutional design. The presidents of the regional Federal Reserve Banks, though acting functionally as officers of a supposedly federal agency, are not appointed by the President of the United States and not subject to Senate confirmation.[155] The Federal Reserve System further evades

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149 HIXSON, *supra* note 4, at 139–42. *See also* BERT W. REIN, AN ANALYSIS AND CRITIQUE OF THE UNION FINANCING OF THE CIVIL WAR 31–51 (Amherst C. Press 1962) (discussing the Union's use of greenbacks and borrowing to finance the Civil War).

150 Canova, *American Wartime Values, supra* note 58, at 13.

151 *Id.*

152 Timothy A. Canova, *Financial Liberalization, International Monetary Dis/order, and the Neoliberal State*, 15 AM. U. INT'L L. REV. 1279, 1300 (2000) [hereinafter Canova, *Financial Liberalization*].

153 *See* Canova, *American Wartime Values, supra* note 58, at 21–22; Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 116–18 (1989).

154 Paul Krugman, *Nobel Laureate Paul Krugman on the Economy: The Return of the Depression Economics*, The Washington Post (Transcript, Dec. 15, 2008), http://www.washingtonpost.com/wpdyn/content/discussion/2008/12/11/DI2008121102406.html. (last accessed August 16, 2009).

155 After Timothy Geithner stepped down as president of the New York Federal Reserve Bank to become Treasury Secretary, the New York Fed named William C. Dudley as its new president after a search headed by the chairman and deputy chairman of the board of directors of the privately-owned New York Fed. There was no formal

oversight by not relying on a penny of congressional appropriations, and by its exemption from various statutes such as the Federal Advisory Committee Act and certain provisions of the Freedom of Information Act.[156] Finally, the governors themselves serve for fourteen-year terms, longer than three presidential administrations and longer than any other officer of the federal government.[157]

Although the Federal Reserve rebates much of the interest it receives from the Treasury, it has traditionally set short-term interest rates much higher than during the 1941–1951 peg, while surrendering the long-term rate to market forces.[158] As a result, the Treasury's interest rate burdens have risen to enormous levels: net interest payments by the federal government have risen from about $14 billion in 1970 to $52 billion in 1980, $184 billion in 1990, and approximately $250 billion by 2008.[159]

To focus only on the interest payments rebated by the Federal Reserve to Treasury, while ignoring the Treasury's enormous interest payments to private bondholders misses key differences between a regime of Treasury-issued currency and a monetary regime dominated by central bank-issued currency. Of

involvement by the Obama administration or Congress in the search, and certainly no input from any other interests from civil society. Press Release, Federal Reserve Bank of New York, New York Fed Names William C. Dudley President, (Jan. 27, 2009), (on file with Chapman Law Review).

156 In late 2008, the Federal Reserve refused a request by Bloomberg news to disclose information about the recipients of more than $2 trillion in emergency loans from U.S. taxpayers made by the Fed and the assets the Fed is accepting as collateral. Bloomberg filed suit under the Freedom of Information Act and the Fed responded by asserting the Fed's express FOIA exemptions related to trade secrets and commercial information. Mark Pittman, *Fed Refuses to Disclose Recipients of $2 Trillion (Update 2)*, BLOOMBERG NEWS, Dec. 12, 2008, http://www.bloomberg.com/apps/news?pid=20601109&sid=apx7XNLnZZlc&refer=home. The District Court rejected the Fed's argument and ordered the Fed to disclose the identities of the borrowers in several of its emergency lending programs. Bloomberg L.P. v. Board of Governors of the Federal Reserve System, No. 08 Civ. 9595 (LAP), 2009 WL 2599336 at *17 (S.D.N.Y. Aug. 24, 2009) (Preska, C.J.). The Fed subsequently asked for a delay in enforcement of the disclosure order until the case can be heard by the U.S. Court of Appeals for the Second Circuit where it is presently pending at the time of this writing. Mark Pittman, *Federal Reserve Says Disclosing Loans Will Hurt Banks (Update1)*, BLOOMBERG, Aug. 27, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=aAOhgVw78e3U.

157 *See* Canova, *American Wartime Values*, *supra* note 58, at 22. There have been numerous challenges to the constitutionality of the Federal Reserve System, on both private non-delegation and Appointments Clause grounds, but all have been dismissed by the U.S. Court of Appeals for the D.C. Circuit on narrow procedural grounds (lack of standing for private plaintiffs and a newly-created equitable discretion doctrine for congressional plaintiffs). Canova, *Closing the Border, supra* note 63, at 404.

158 Canova, *American Wartime Values, supra* note 58, at 14–15, 21.

159 Economic Report of the President: 2009 Report Spreadsheet Tables, Council of Economic Advisors, Table B-80, http://www.gpoaccess.gov/eop/tables09.html (last accessed March 4, 2009). Hummel seems to acknowledge the disadvantage of central-bank issued currency: "Such privately created money, even when its quantity expands, provides no seigniorage." Hummel, *supra* note 4, at 607.

course, in addition to the interest paid by Treasury to private bondholders must be added the trillions of dollars in hidden subsidies and guarantees made by the Federal Reserve to prop up U.S. financial institutions, interbank lending, and money markets. Last year, after the Federal Reserve subsidized J.P. Morgan's $29 billion acquisition of Bear Stearns, former Fed Chairman Paul Volcker questioned the central bank's independence.[160] Since then the Fed has come to the rescue of other clients, including the American Insurance Group (AIG), Citigroup, and Bank of America, and creditors and counterparties of AIG such as Goldman Sachs and perhaps various favored hedge funds, while propping up financial markets for the same private financial interests.[161]

The Federal Reserve, now the model of autonomous central banks around the world, is not a disinterested entity, but is stacked with the representatives of financial institutions that have numerous interests that conflict with the interests of the Treasury Department and the taxpayer. The enormous transfers of wealth from the taxpayer to large financial institutions that are a central feature of a privatized system of money creation make little sense at any time, and particularly in a time of war, economic recession, or other national crisis. Such wealth transfers apparently made little sense to Lincoln or Roosevelt, both of whom found ways around the straight-jackets of so-called "sound money" and "sound finance."

Roosevelt followed Lincoln's wartime example by taking control of the commanding heights of finance to pay for the military effort in World War II.[162] During Lincoln's tenure, this meant having the Treasury issue currency directly into circulation, as authorized by Congress. During World War II, it meant bringing the Federal Reserve under the direction of the Treasury to lend freely to the federal government. In both of these models, the federal government asserted its financial and economic sovereignty to achieve the most important policy objectives of generations in crisis. It is certainly fair to ask what a comparable assertion of financial and economic sovereignty would or should look like today.

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160 Pedro Nicolaci da Costa, *Former Fed Chair Volcker: Financial Crisis not Over*, REUTERS, Mar. 20, 2008, http://www.reuters.com/article/telecomm/idUSN1933392020080320.

161 Andrew Ross Sorkin & Mary Williams Walsh. *A.I.G. Reports Loss of $61.7 Billion as U.S. Gives More Aid,* N.Y. TIMES, Mar. 2, 2009, http://www.nytimes.com/2009/03/03/business/03aig.html.

162 Hummel, *supra* note 4, at 593.

The present financial and economic crisis, the worst since the Great Depression, has raised a range of proposals, most of which involve the expenditure of large sums of federal revenue, including the $787 billion fiscal stimulus, the $700 billion Troubled Asset Relief Program (TARP) to assist financial institutions in distress, Treasury Secretary Geithner's proposal to spend up to another $2 trillion of taxpayer money to purchase the toxic assets of failing banks in partnership with certain hedge funds deemed co-investors.[163] The programs already authorized will add significantly to the federal budget deficit, which now exceeds $1.6 trillion and could soon approach $2 trillion a year. As Hummel correctly points out, all of this additional debt, much of it foreign debt, raises the specter of a possible sovereign default by the U.S.[164]

The economic recovery of the 1930s, however insufficient in size, was spurred in large part by the monetary stimulus stemming from the devaluation of the dollar and inflows of gold.[165] It could be that a similar devaluation, if done in an orderly way, could help inflate our way partly out of this debt deflation. The experience of the 1940s suggests, however, that further fiscal stimulus may be needed to pull out of the present recession and keep the economy from falling into a deeper financial crisis and depression. If what is needed is federal spending of the magnitude of the 1940s (recall, 45 percent of GDP), then several questions are raised: (1) what would be the appropriate outlets for spending when it makes no sense to have assembly lines producing aircraft carriers, tanks, warplanes, and other armaments; and (2) how to pay for such a massive fiscal stimulus.

Perhaps a new G.I. Bill of Rights for the present generation would restore the purchasing power for the middle class to put the economy back on a growth path. Others point to the vast physical infrastructure needs of the public sector, which has been estimated in the trillions of dollars just to repair roads and

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163 Mike Caggeso, *Fed Announces $800 Billion in Homeowner, CONSUMER AND SMALL BUSINESS AID*, Moneymorning.com, Nov. 26, 2008, http://www.moneymorning.com/2008/11/26/consumer-business-bailout/; Pallavi Gogoi, Sue Kirchhoff, Barbara Hagenbaugh & Kathy Chu, *Bailout plan: Foreclosure issues still a major hurdle*, USATODAY, Feb. 13, 2009, http://www.usatoday.com/money/economy/2009-02-10-bailout-details_N.htm.

164 Hummel, *supra* note 4, at 611–12; *see also* Michael Pettis, *Is the US trade deficit sustainable? Is China's trade surplus?*, Jan. 13, 2009, http://mpettis.com/2009/01/is-the-us-trade-deficit-sustainable-is-china%E2%80%99s-trade-surplus/.

165 Romer, *supra* note 62, at 759.

bridges, as well as water, sewage, and other capital improvements.[166]

One proposal that was rejected as an amendment to the 2009 fiscal stimulus package would have authorized the Treasury to issue bonds for spending on transit, water, highway, bridge, and road infrastructure projects by federal, state or local government.[167] One problem with this proposal, as with the entire stimulus package, is that it would have added to the federal deficit and national debt, made the U.S. more dependent on foreign borrowing, and possibly undermined the value of the dollar and stability of U.S. financial markets.

A somewhat different approach was proposed in 1999 by Representative Ray LaHood (like Lincoln, a Republican from Illinois), who introduced legislation to create $360 billion in United States Notes to be lent interest-free to state and local governments over a five-year period to fund capital projects.[168] The bill, entitled the State and Local Government Empowerment Act, received about 22 cosponsors but never made it out of

166 *See* John Bacino, *Investing in Crumbling Infrastructure in the States Before It's Too Late*, PROGRESSIVESTATES.ORG, Aug. 9, 2007, http://www.progressivestates.org/blog/650/investing-in-crumbling-infrastructure-in-the-states-before-its-too-late (last visited Mar. 10, 2009).

167 H.R. 852, which was introduced by Representative Loretta Sanchez (Democrat-California) and did not specify actual amounts to be appropriated, would have authorized the Secretary of the Treasury to issue bonds, to be known as "Re-Build America Bonds," for spending on transit, water, highway, bridge, and road infrastructure projects by any governmental unit. H.R. 852, 111th Cong. (2009) *available at* http://www.govtrack.us/congress/bill.xpd?bill=h111-852. Congresswoman Sanchez is a 1982 graduate of Chapman University. Congresswoman Loretta Sanchez – About Loretta, http://www.lorettasanchez.house.gov/index.php?option=com_content&task=view&id=18&Itemid=21 (last visited Mar. 10, 2009).

168 H.R. 1452, the State and Local Government Empowerment Act, introduced April 15, 1999 in the 106th Congress, 1st Session. H.R. 1452, 106th Cong. (1999) *available at* http://www.govtrack.us/congress/bill.xpd?bill=h106-1452. The bill had at least twenty-two cosponsors and was referred to the House Banking and Financial Services Subcommittee on Domestic and International Monetary Policy, and the House Budget Committee. *Id.* In 2003, LaHood introduced apparently similar legislation, H.R. 4310 and H.R. 4371, to direct the Secretary of Commerce instead of Treasury to make noninterest bearing loans to state and local governments for capital projects. This time, the legislation had seven cosponsors, including Representative Rahm Emanuel (Democrat-Illinois), who is now President Obama's White House Chief of Staff. H.R. 4310, 4371, 108th Cong. (2004) *available at* http://www.govtrack.us/congress/bill.xpd?bill=h106-1452&tab=related.

committee.[169] Significantly, Mr. LaHood is now Secretary of Transportation in the Obama administration.[170]

Mr. LaHood's proposal was a variation of the Sovereignty Loan Proposal, an initiative drafted by a private Illinois citizen Ken Bohnsack, and like the Sovereignty Loan Proposal, was modeled on Lincoln's Greenback.[171] Under the LaHood proposal, the annual increase in the money stock would be well below the current levels of money growth, and therefore no more inflationary than privately-issued currency by the logic of monetarists.[172] In addition, the newly-issued currency could be removed from circulation when paid back to the Treasury, or circulated again in the form of new loans to state and local governments. Most importantly, the $360 billion that would have been created under the LaHood proposal would not add a single penny to the federal deficit, the national debt, or foreign borrowing. The federal government would incur no interest or principal obligations.[173] Furthermore, if the issuance of these United States Notes were to lead to some devaluation of the dollar, perhaps that would provide some monetary stimulus to recovery.

In addition to the needs of state and local governments, and proposals for fiscal stimulus to restore economic growth, there is the problem of the financial system itself. The federal government has pumped nearly $700 billion into the biggest commercial banks, which were sinking under the weight of their declining portfolios of mortgage-backed securities, unmarketable derivatives, and other asset-backed securities.[174] A number of

169 H.R. 1452, 106th Cong. (1999) *available at* http://www.govtrack.us/congress/bill.xpd?bill=h106-1452. According to Section 5 of the bill, every state, county, township, incorporated municipality, school district, and Indian tribe would have been entitled to obtain a loan in amounts based on resident population. Section 7 provided maturity periods of the loans to be between 10 and 30 years, and based on the estimated number of years of the useful life of the infrastructure financed by the loan. Upon repayment, the funds would be transferred to the U.S. government, presumably for use in future interest-free loans. *Id.*

170 U.S. Department of Transportation / Ray LaHood http://www.dot.gov/bios/lahood.htm. LaHood has a record of supporting mass transit and transportation infrastructure construction and improvement. Adam Doster, *"Ray LaHood? Really?,* PROGRESS ILLINOIS, Dec. 17, 2008, http://progressillinois.com/2008/12/17/ray-lahood-really.

171 Telephone Interview with Ken Bohnsack (Feb. 4, 2009). Bohnsack has recently suggested that the LaHood proposal should be revised from interest-free loans to outright grants to state and local governments for capital investment. *Id.*

172 Monetarist Theory of Economics, http://www.interzone.com/~cheung/SUM.dir/econthym1.html (last visited March 14, 2009).

173 H.R. 1452, 106th Cong. (1999) *available at* http://www.govtrack.us/congress/bill.xpd?bill=h106-1452.

174 Dan Wilchins, *U.S. aid to banks seen exceeding $700 billion,* REUTERS, Oct. 21, 2008 http://www.reuters.com/article/ousiv/idUSTRE49K8OK20081021.

commentators advocated nationalization of these banks to restore them to solvency, with an eye to privatizing or converting them into banking cooperatives in the future.[175] This might be one way to stop the financial hemorrhaging without having to spend billions or trillions more in taxpayer money.

Others have proposed having the federal government and/or state governments charter and capitalize new banks, publicly-owned and managed, to lend directly to U.S. businesses and consumers.[176] To the extent new banks are capitalized by the federal government, this would once again provide an opportunity to finance the new investment through the issuance of United States Notes. It could also suggest a return to the colonial model of public finance where the government itself lends money into circulation at interest, and with the interest earned thereby reducing the tax burden on ordinary citizens.

Likewise, the proposal by Senate Republicans, also rejected during the fiscal stimulus debate, to have the federal government offer 30-year fixed rate mortgages at 4 percent, would have required some outlay of public funds, and presumably significant federal borrowing to finance the plan.[177] If the federal government were to borrow at less than 4 percent, then its profit could be applied to pay for the difference between the new 4 percent mortgages and today's prevailing mortgage interest rate, which was estimated at above 5 percent.[178] Once again, although not proposed by the Senate Republicans, this could have also presented an opportunity for the federal government to issue and lend currency directly into circulation and thereby reduce tax burdens by hundreds of billions of dollars from the interest earned on a high volume of such refinancing transactions.

Finally, proposals to have state governments charter and capitalize their own banks would provide a way around the Article I, Section 10 prohibition against states emitting paper money.[179] For instance, in 1919, North Dakota established the

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175 Interview by the Real News Network with Timothy Canova, Worst week ever on world markets (Oct. 11, 2008) *available at* http://therealnews.com/t/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=2557 (advocating nationalization model used by Sweden in the 1990s); Tunku Varadarajan, *Nationalize' the Banks: The Weekend Interview with Nouriel Roubini*, WALL ST. J., Feb. 21–22, 2009, at A9.

176 Willem H. Buiter, *'Good Banks' Are the Cost Effective Way Out of the Financial Crisis*, WALL ST. J., Feb. 21–22, 2009, at A11.

177 Jeanne Sahadi, *Stimulus: Senate's housing hope*, CNNMONEY, Feb. 2, 2009, http://money.cnn.com/2009/02/01/news/economy/Senate_stimulus_housing/.

178 *Id.*

179 Ellen Brown, *A Radical Plan for Funding a New Deal*, YES! MAGAZINE, Dec. 2008, http://www.yesmagazine.org/article.asp?id=3162.

Bank of North Dakota, the only state-owned bank in the nation, to lend funds to the private sector to encourage agriculture, commerce, and industry within the state.[180] Created with $2 million of capital, today the Bank of North Dakota operates with more than $160 million in capital, provides federally insured student loans, and draws on a deposit base that includes all state funds and funds of state institutions.[181] While the Bank of North Dakota does not actually create currency, like the land banks in colonial America it does provide credit and, with any interest earned, reduces the tax burdens on its citizens.

For the past generation, the economic orthodoxy has claimed that the Federal Reserve System, the model of an autonomous and largely unaccountable central bank, is the only alternative to allowing elected public officials exercise authority over currency and monetary policy. But these pretensions of economics as a science have led to wrong-headed conclusions that government is incapable of resolving our most important problems and competing claims. Today's collapsing financial bubble economy suggests that we pay a steep price when letting self-interested bankers and their chosen technocrats monopolize these monetary functions. Surely a central bank could be designed that ensures diversity of perspectives and a pluralism of interests while maintaining some degree of policy-making autonomy. We should ask why there is no room for industrial capital, perhaps the National Association of Manufacturers, and the representatives of industrial unions, public sector employees, and student debtors on the boards and committees deciding currency and monetary policy. Instead of a marketplace of ideas and a forum to test one's theories, our central banks have become echo chambers for flawed and outdated orthodoxies.

Perhaps the most important questions we face are not those of economic science or competing models of public finance and currency creation. Rather, perhaps they are political and strategic in nature and ultimately moral questions: whether we face existential challenges as great as did the generations of Americans who looked to Lincoln and Roosevelt for vision and leadership.

According to Lincoln, "The monetary needs of increasing numbers of people advancing toward higher standards of living can and should be met by the government. . . . The issue of

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180 Bank of North Dakota, http://www.banknd.nd.gov/bndhome.jsp. (last visited Mar. 10, 2009).

181 About Bank of North Dakota, http://www.banknd.nd.gov/about.jsp (last visited Mar. 10, 2009).

money should be maintained as an exclusive monopoly of the National Government."[182] Lincoln's approach to public finance, like Roosevelt's, was one of populist economic sovereignty: the reassertion of democratic control of the financial system, as permitted under the Constitution, to empower the elected branches of government to meet the needs of the day in an hour of pressing need.

182 HIXSON, *supra* note 4, at 146 (quoting from GORHAM MUNSON, ALLADIN'S LAMP 124 (N.Y.: Creative Age Press 1945) (1945)).

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The Chicago Plan Revisited

Jaromir Benes and Michael Kumhof

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The Chicago Plan Revisited

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Abstract

At the height of the Great Depression a number of leading U.S. economists advanced a proposal for monetary reform that became known as the Chicago Plan. It envisaged the separation of the monetary and credit functions of the banking system, by requiring 100% reserve backing for deposits. Irving Fisher (1936) claimed the following advantages for this plan: (1) Much better control of a major source of business cycle fluctuations, sudden increases and contractions of bank credit and of the supply of bank-created money. (2) Complete elimination of bank runs. (3) Dramatic reduction of the (net) public debt. (4) Dramatic reduction of private debt, as money creation no longer requires simultaneous debt creation. We study these claims by embedding a comprehensive and carefully calibrated model of the banking system in a DSGE model of the U.S. economy. We find support for all four of Fisher's claims. Furthermore, output gains approach 10 percent, and steady state inflation can drop to zero without posing problems for the conduct of monetary policy.

JEL Classification Numbers: E44, E52, G21

Keywords: Chicago Plan; Chicago School of Economics; 100% reserve banking; bank lending; lending risk; private money creation; bank capital adequacy; government debt; private debt; boom-bust cycles.

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I. Introduction

The decade following the onset of the Great Depression was a time of great intellectual ferment in economics, as the leading thinkers of the time tried to understand the apparent failures of the existing economic system. This intellectual struggle extended to many domains, but arguably the most important was the field of monetary economics, given the key roles of private bank behavior and of central bank policies in triggering and prolonging the crisis.

During this time a large number of leading U.S. macroeconomists supported a fundamental proposal for monetary reform that later became known as the Chicago Plan, after its strongest proponent, professor Henry Simons of the University of Chicago. It was also supported, and brilliantly summarized, by Irving Fisher of Yale University, in Fisher (1936). The key feature of this plan was that it called for the separation of the monetary and credit functions of the banking system, first by requiring 100% backing of deposits by government-issued money, and second by ensuring that the financing of new bank credit can only take place through earnings that have been retained in the form of government-issued money, or through the borrowing of existing government-issued money from non-banks, but not through the creation of new deposits, ex nihilo, by banks.

Fisher (1936) claimed four major advantages for this plan. First, preventing banks from creating their own funds during credit booms, and then destroying these funds during subsequent contractions, would allow for a much better control of credit cycles, which were perceived to be the major source of business cycle fluctuations. Second, 100% reserve backing would completely eliminate bank runs. Third, allowing the government to issue money directly at zero interest, rather than borrowing that same money from banks at interest, would lead to a reduction in the interest burden on government finances and to a dramatic reduction of (net) government debt, given that irredeemable government-issued money represents equity in the commonwealth rather than debt. Fourth, given that money creation would no longer require the simultaneous creation of mostly private debts on bank balance sheets, the economy could see a dramatic reduction not only of government debt but also of private debt levels.

We take it as self-evident that if these claims can be verified, the Chicago Plan would indeed represent a highly desirable policy. Profound thinkers like Fisher, and many of his most illustrious peers, based their insights on historical experience and common sense, and were hardly deterred by the fact that they might not have had complete economic models that could formally derive the welfare gains of avoiding credit-driven boom-bust cycles, bank runs, and high debt levels. We do in fact believe that this made them better, not worse, thinkers about issues of the greatest importance for the common good. But we can say more than this. The recent empirical evidence of Reinhart and Rogoff (2009) documents the high costs of boom-bust credit cycles and bank runs throughout history. And the recent empirical evidence of Schularick and Taylor (2012) is supportive of Fisher's view that high debt levels are a very important predictor of major crises. The latter finding is also consistent with the theoretical work of Kumhof and Rancière (2010), who show how very high debt levels, such as those observed just prior to the Great Depression and the Great Recession, can lead to a higher probability of financial and real crises.

We now turn to a more detailed discussion of each of Fisher's four claims concerning the advantages of the Chicago Plan. This will set the stage for a first illustration of the implied balance sheet changes, which will be provided in Figures 1 and 2.

The first advantage of the Chicago Plan is that it permits much better control of what Fisher and many of his contemporaries perceived to be the major source of business cycle fluctuations, sudden increases and contractions of bank credit that are not necessarily driven by the fundamentals of the real economy, but that themselves change those fundamentals. In a financial system with little or no reserve backing for deposits, and with government-issued cash having a very small role relative to bank deposits, the creation of a nation's broad monetary aggregates depends almost entirely on banks' willingness to supply deposits. Because additional bank deposits can only be created through additional bank loans, sudden changes in the willingness of banks to extend credit must therefore not only lead to credit booms or busts, but also to an instant excess or shortage of money, and therefore of nominal aggregate demand. By contrast, under the Chicago Plan the quantity of money and the quantity of credit would become completely independent of each other. This would enable policy to control these two aggregates independently and therefore more effectively. Money growth could be controlled directly via a money growth rule. The control of credit growth would become much more straightforward because banks would no longer be able, as they are today, to generate their own funding, deposits, in the act of lending, an extraordinary privilege that is not enjoyed by any other type of business. Rather, banks would become what many erroneously believe them to be today, pure intermediaries that depend on obtaining outside funding before being able to lend. Having to obtain outside funding rather than being able to create it themselves would much reduce the ability of banks to cause business cycles due to potentially capricious changes in their attitude towards credit risk.

The second advantage of the Chicago Plan is that having fully reserve-backed bank deposits would completely eliminate bank runs, thereby increasing financial stability, and allowing banks to concentrate on their core lending function without worrying about instabilities originating on the liabilities side of their balance sheet. The elimination of bank runs will be accomplished if two conditions hold. First, the banking system's monetary liabilities must be fully backed by reserves of government-issued money, which is of course true under the Chicago Plan. Second, the banking system's credit assets must be funded by non-monetary liabilities that are not subject to runs. This means that policy needs to ensure that such liabilities cannot become near-monies. The literature of the 1930s and 1940s discussed three institutional arrangements under which this can be accomplished. The easiest is to require that banks fund all of their credit assets with a combination of equity and loans from the government treasury, and completely without private debt instruments. This is the core element of the version of the Chicago Plan considered in this paper, because it has a number of advantages that go beyond decisively preventing the emergence of near-monies. By itself this would mean that there is no lending at all between private agents. However, this can be insufficient when private agents exhibit highly heterogeneous initial debt levels. In that case the treasury loans solution can be accompanied by either one or both of the other two institutional arrangements. One is debt-based investment trusts that are true intermediaries, in that the trust can only lend government-issued money to net borrowers after net savers have first deposited these funds in exchange for debt instruments issued by the trust. But there is a risk that these debt instruments could themselves become near-monies unless there are strict and effective regulations. This risk would be eliminated under the remaining alternative, investment trusts that are funded exclusively by net savers' equity investments, with the funds either lent to net borrowers, or invested as equity if this is feasible (it may not be feasible for household debtors). We will briefly return to the investment trust alternatives below, but they are not part of our formal analysis because our model does not feature heterogeneous debt levels within the four main groups of bank borrowers.

The third advantage of the Chicago Plan is a dramatic reduction of (net) government debt. The overall outstanding liabilities of today's U.S. financial system, including the shadow banking system, are far larger than currently outstanding U.S. Treasury liabilities. Because under the Chicago Plan banks have to borrow reserves from the treasury to fully back these large liabilities, the government acquires a very large asset vis-à-vis banks, and government debt net of this asset becomes highly negative. Governments could leave the separate gross positions outstanding, or they could buy back government bonds from banks against the cancellation of treasury credit. Fisher had the second option in mind, based on the situation of the 1930s, when banks held the major portion of outstanding government debt. But today most U.S. government debt is held outside U.S. banks, so that the first option is the more relevant one. The effect on net debt is of course the same, it drops dramatically.

In this context it is critical to realize that the stock of reserves, or money, newly issued by the government is not a debt of the government. The reason is that fiat money is not redeemable, in that holders of money cannot claim repayment in something other than money.[1] Money is therefore properly treated as government equity rather than government debt, which is exactly how treasury coin is currently treated under U.S. accounting conventions (Federal Accounting Standards Advisory Board (2012)).

The fourth advantage of the Chicago Plan is the potential for a dramatic reduction of private debts. As mentioned above, full reserve backing by itself would generate a highly negative net government debt position. Instead of leaving this in place and becoming a large net lender to the private sector, the government has the option of spending part of the windfall by buying back large amounts of private debt from banks against the cancellation of treasury credit. Because this would have the advantage of establishing low-debt sustainable balance sheets in both the private sector and the government, it is plausible to assume that a real-world implementation of the Chicago Plan would involve at least some, and potentially a very large, buy-back of private debt. In the simulation of the Chicago Plan presented in this paper we will assume that the buy-back covers all private bank debt except loans that finance investment in physical capital.

We study Fisher's four claims by embedding a comprehensive and carefully calibrated model of the U.S. financial system in a state-of-the-art monetary DSGE model of the U.S. economy.[2] We find strong support for all four of Fisher's claims, with the potential for much smoother business cycles, no possibility of bank runs, a large reduction of debt levels across the economy, and a replacement of that debt by debt-free government-issued money.

[1] Furthermore, in a growing economy the government will never have a need to voluntarily retire money to maintain price stability, as the economy's monetary needs increase period after period.

[2] To our knowledge this is the first attempt to model the Chicago Plan in this way. Yamaguchi (2011) discusses the Chicago Plan using a systems dynamics approach.

Furthermore, none of these benefits come at the expense of diminishing the core useful functions of a private financial system. Under the Chicago Plan private financial institutions would continue to play a key role in providing a state-of-the-art payments system, facilitating the efficient allocation of capital to its most productive uses, and facilitating intertemporal smoothing by households and firms. Credit, especially socially useful credit that supports real physical investment activity, would continue to exist. What would cease to exist however is the proliferation of credit created, at the almost exclusive initiative of private institutions, for the sole purpose of creating an adequate money supply that can easily be created debt-free.

At this point in the paper it may not be straightforward for the average reader to comprehend the nature of the balance sheet changes implied by the Chicago Plan. A complete analysis requires a thorough prior discussion of both the model and of its calibration, and is therefore only possible much later in the paper. But we feel that at least a preliminary presentation of the main changes is essential to aid in the comprehension of what follows. In Figures 1 and 2 we therefore present the changes in bank and government balance sheets that occur in the single transition period of our simulated model. The figures ignore subsequent changes as the economy approaches a new steady state, but those are small compared to the initial changes. In both figures quantities reported are in percent of GDP. Compared to Figure 3, which shows the precise results, the numbers in Figure 1 are rounded, in part to avoid having to discuss unnecessary details.

As shown in the left column of Figure 1, the balance sheet of the consolidated financial system prior to the implementation of the Chicago Plan is equal to 200% of GDP, with equity and deposits equal to 16% and 184% of GDP. Banks' assets consist of government bonds equal to 20% of GDP, investment loans equal to 80% of GDP, and other loans (mortgage loans, consumer loans, working capital loans) equal to 100% of GDP. The implementation of the plan is assumed to take place in one transition period, which can be broken into two separate stages. First, as shown in the middle column of Figure 1, banks have to borrow from the treasury to procure the reserves necessary to fully back their deposits. As a result both treasury credit and reserves increase by 184% of GDP. Second, as shown in the right column of Figure 1, the principal of all bank loans to the government (20% of GDP), and of all bank loans to the private sector except investment loans (100% of GDP), is cancelled against treasury credit. For government debt the cancellation is direct, while for private debt the government transfers treasury credit balances to restricted private accounts that can only be used for the purpose of repaying outstanding bank loans. Furthermore, banks pay out part of their equity to keep their net worth in line with now much reduced official capital adequacy requirements, with the government making up the difference of 7% of GDP by injecting additional treasury credit. The solid line in the balance sheet in the right column of Figure 1 represents the now strict separation between the monetary and credit functions of the banking system. Money remains nearly unchanged, but it is now fully backed by reserves. Credit consists only of investment loans, which are financed by a reduced level of equity equal to 9% of GDP, and by what is left of treasury credit, 71% of GDP, after the buy-backs of government and private debts and the injection of additional credit following the equity payout.

Figure 2 illustrates the balance sheet of the government, which prior to the Chicago Plan consists of government debt equal to 80% of GDP, with unspecified other assets used as the balancing item. The issuance of treasury credit equal to 184% of GDP represents a large new financial asset of the government, while the issuance of an equal amount of reserves, in other words of money, represents new government equity. The cancellation of private debts reduces both treasury credit and government equity by 100% of GDP. The government is assumed to tax away the equity payout of banks to households before injecting those funds back into banks as treasury credit. This increases both treasury credit and government equity by 7% of GDP. Finally, the cancellation of bank-held government debt reduces both government debt and treasury credit by 20% of GDP.

To summarize, our analysis finds that the government is left with a much lower, in fact negative, net debt burden. It gains a large net equity position due to money issuance, despite the fact that it spends a large share of the one-off seigniorage gains from money issuance on the buy-back of private debts. These buy-backs in turn mean that the private sector is left with a much lower debt burden, while its deposits remain unchanged. Bank runs are obviously impossible in this world. These results, whose analytical foundations will be derived in the rest of the paper, support three out of Fisher's (1936) four claims in favor of the Chicago Plan. The remaining claim, concerning the potential for smoother business cycles, will be verified towards the end of the paper, once the full model has been developed. But we can go even further, because our general equilibrium analysis highlights two additional advantages of the Chicago Plan.

First, in our calibration the Chicago Plan generates longer-term output gains approaching 10 percent. This happens for three main reasons. Monetary reform leads to large reductions of real interest rates, as lower net debt levels lead investors to demand lower spreads on government and private debts. It permits much lower distortionary tax rates, due to the beneficial effects of much higher seigniorage income (despite lower inflation) on the government budget. And finally it leads to lower credit monitoring costs, because scarce resources no longer have to be spent on monitoring loans whose sole purpose was to create an adequate money supply that can easily be produced debt-free.

Second, steady state inflation can drop to zero without posing problems for the conduct of monetary policy. The reason is that the separation of the money and credit functions of the banking system allows the government to effectively control multiple policy instruments, including a nominal money growth rule that regulates the money supply, a Basel-III-style countercyclical bank capital adequacy rule that controls the quantity of bank lending, and finally an interest rate rule that controls the price of government credit to banks. The latter replaces the conventional Taylor rule for the interest rate on government debt. One critical implication of this different monetary environment is that liquidity traps cannot exist, for two reasons. First, the aggregate quantity of broad money in private agents' hands can be directly increased by the policymaker, without depending on banks' willingness to lend. And second, because the interest rate on treasury credit is not an opportunity cost of money for asset investors, but rather a borrowing rate for a credit facility that is only accessible to banks for the specific purpose of funding physical investment projects, it can become negative without any practical problems. In other words, a zero lower bound does not apply to this rate, which makes it feasible to keep steady state inflation at zero without worrying about the fact that nominal policy rates are in that case more likely to reach zero or negative values.[3]

[3]Zero steady state inflation has been found to be desirable in a number of recent models of the monetary business cycle (Schmitt-Grohé and Uribe (2004)).

The ability to live with significantly lower steady state inflation also answers the somewhat confused claim of opponents of an exclusive government monopoly on money issuance, namely that such a system, and especially the initial injection of new government-issued money, would be highly inflationary. There is nothing in our theory that supports this claim. And as we will see in section II, there is also virtually nothing in the monetary history of ancient societies and of Western nations that supports this claim.

The critical feature of our theoretical model is that it exhibits the key function of banks in modern economies, which is not their largely incidental function as financial intermediaries between depositors and borrowers, but rather their central function as creators and destroyers of money.[4] A realistic model needs to reflect the fact that under the present system banks do not have to wait for depositors to appear and make funds available before they can on-lend, or intermediate, those funds. Rather, they create their own funds, deposits, in the act of lending. This fact can be verified in the description of the money creation system in many central bank statements[5], and it is obvious to anybody who has ever lent money and created the resulting book entries.[6] In other words, bank liabilities are not macroeconomic savings, even though at the microeconomic level they can appear as such. Savings are a state variable, so that by relying entirely on intermediating slow-moving savings, banks would be unable to engineer the rapid lending booms and busts that are frequently observed in practice. Rather, bank liabilities are money that can be created and destroyed at a moment's notice. The critical importance of this fact appears to have been lost in much of the modern macroeconomics literature on banking, with the exception of Werner (2005), and the partial exception of Christiano et al. (2011).[7] Our model generates this feature in a number of ways. First, it introduces agents who have to borrow for the sole purpose of generating sufficient deposits for their transactions purposes. This means that they simultaneously borrow from and deposit with banks, as is true for many households and firms in the real world. Second, the model introduces financially unconstrained agents who do not borrow from banks. Their savings consist of multiple assets including a fixed asset referred to as land, government bonds and deposits. This means that a sale of mortgageable fixed assets from these agents to credit-constrained agents (or of government bonds to banks) results in new bank credit, and thus in the creation of new deposits that are created for the purpose of paying for

[4] The relative importance of these two features can be illustrated with a very simple thought experiment: Assume an economy with banks and a single homogenous group of non-bank private agents that has a transactions demand for money. In this economy there is no intermediation whatsoever, yet banks remain critical. Their function is to create the money supply through the mortgaging of private agents' assets. We have verified that such a model economy works very similarly to the one presented in this paper, which features several distinct groups of non-bank private agents.

[5] Berry et al. (2007), which was written by a team from the Monetary Analysis Division of the Bank of England, states: "When banks make loans, they *create* additional deposits for those that have borrowed the money." Keister and McAndrews (2009), staff economists at the Federal Reserve Bank of New York, write: "Suppose that Bank A gives a new loan of $20 to Firm X, which continues to hold a deposit account with Bank A. Bank A does this by crediting Firm X's account by $20. The bank now has a new asset (the loan to Firm X) and an offsetting liability (the increase in Firm X's deposit at the bank). Importantly, Bank A still has [unchanged] reserves in its account. In other words, the loan to Firm X does not decrease Bank A's reserve holdings at all." Putting this differently, the bank does not lend out reserves (money) that it already owns, rather it creates new deposit money ex nihilo.

[6] This includes one of the authors of this paper.

[7] We emphasize that this exception is partial, because while bank deposits in Christiano et al. (2011) are modelled as money, they are also, with the empirically insignificant exception of a possible substitution into cash, modelled as representing household savings. The latter is not true in our model.

those assets. Third, even for conventional deposit-financed investment loans the transmission is from lending to savings and not the reverse. When banks decide to lend more for investment purposes, say due to increased optimism about business conditions, they create additional purchasing power for investors by crediting their accounts, and it is this purchasing power that makes the actual investment, and thus saving[8], possible. Finally, the issue can be further illuminated by looking at it from the vantage point of depositors. We will assume, based on empirical evidence, that the interest rate sensitivity of deposit demand is high at the margin. Therefore, if depositors decided, for a given deposit interest rate, that they wanted to start depositing additional funds in banks, without bankers wanting to make additional loans, the end result would be virtually unchanged deposits and loans. The reason is that banks would start to pay a slightly lower deposit interest rate, and this would be sufficient to strongly reduce deposit demand without materially affecting funding costs and therefore the volume of lending. The final decision on the quantity of deposit money in the economy is therefore almost exclusively made by banks, and is based on their optimism about business conditions.

Our model completely omits two other monetary magnitudes, cash outside banks and bank reserves held at the central bank. This is because it is privately created deposit money that plays the central role in the current U.S. monetary system, while government-issued money plays a quantitatively and conceptually negligible role. It should be mentioned that both private and government-issued monies are fiat monies, because the acceptability of bank deposits for commercial and official transactions has had to first be decreed by law. As we will argue in section II, virtually all monies throughout history, including precious metals, have derived most or all of their value from government fiat rather than from their intrinsic value.

Rogoff (1998) examines U.S. dollar currency outside banks for the late 1990s. He concludes that it was equal to around 5% of GDP for the United States, but that 95% of this was held either by foreigners and/or by the underground economy. This means that currency outside banks circulating in the formal U.S. economy equalled only around 0.25% of GDP, while we will find that the current transactions-related liabilities of the U.S. financial system, including the shadow banking system, are equal to around 200% of GDP.

Bank reserves held at the central bank have also generally been negligible in size, except of course after the onset of the 2008 financial crisis. But this quantitative point is far less important than the recognition that they do not play any meaningful role in the determination of wider monetary aggregates. The reason is that the "deposit multiplier" of the undergraduate economics textbook, where monetary aggregates are created at the initiative of the central bank, through an initial injection of high-powered money into the banking system that gets multiplied through bank lending, turns the actual operation of the monetary transmission mechanism on its head. This should be absolutely clear under the current inflation targeting regime, where the central bank controls an interest rate and must be willing to supply as many reserves as banks demand at that rate. But as shown by Kydland and Prescott (1990), the availability of central bank reserves did not even constrain banks during the period, in the 1970s and 1980s, when the central bank did in fact officially target monetary aggregates.[9] These authors show that broad monetary

[8]In a closed economy saving must equal investment.

[9]Carpenter and Demiralp (2010), in a Federal Reserve Board working paper, have found the same result,

aggregates, which are driven by banks' lending decisions, led the economic cycle, while narrow monetary aggregates, most importantly reserves, lagged the cycle. In other words, at all times, when banks ask for reserves, the central bank obliges. Reserves therefore impose no constraint. The deposit multiplier is simply, in the words of Kydland and Prescott (1990), a myth.[10] And because of this, private banks are almost fully in control of the money creation process.

Apart from the central role of endogenous money, other features of our banking model are based on Benes and Kumhof (2011). This work differs from other recent papers on banking along several important dimensions. First, banks have their own balance sheet and net worth, and their profits and net worth are exposed to non-diversifiable aggregate risk determined endogenously on the basis of optimal debt contracts.[11] Second, banks are lenders rather than holders of risky equity.[12] Third, bank lending is based on the loan contract of Bernanke, Gertler and Gilchrist (1999), but with the crucial difference that lending is risky due to non-contingent lending interest rates. This implies that banks can make losses if a larger number of loans defaults than was expected at the time of setting the lending rate. Fourth, bank capital is subject to regulation that closely replicates the features of the Basel regulatory framework, including costs of violating minimum capital adequacy regulations. Capital buffers arise as an optimal equilibrium phenomenon resulting from the interaction of optimal debt contracts, endogenous losses and regulation.[13] To maintain capital buffers, banks respond to loan losses by raising their lending rate in order to rebuild their net worth, with adverse effects for the real economy. Fifth, acquiring fresh capital is subject to market imperfections. This is a necessary condition for capital adequacy regulation to have non-trivial effects, and for the capital buffers to exist. We use the "extended family" approach of Gertler and Karadi (2010), whereby bankers (and also non-financial manufacturers and entrepreneurs) transfer part of their accumulated equity positions to the household budget constraint at an exogenously fixed rate. This is closely related to the original approach of Bernanke, Gertler and Gilchrist (1999), and to the dividend policy function of Aoki, Proudman and Vlieghe (2004).

The rest of the paper is organized as follows. Section II contains a survey of the literature on monetary history and monetary thought leading up to the Chicago Plan. Section III presents an outline of the model under the current monetary system. Section IV presents the model under the Chicago Plan. Section V discusses model calibration. Section VI studies impulse responses that simulate a dynamic transition between the current monetary system and the Chicago Plan, which allows us to analyze three of the four above-mentioned claims in favor of the Chicago Plan made by Fisher (1936). The remaining claim, regarding the more effective stabilization of bank-driven business cycles, is studied in Section VII. Section VIII concludes.

using more recent data and a different methodology.

[10] This is of course the reason why quantitative easing, at least the kind that works by making greater reserves available to banks and not the public, can be ineffective if banks decide that lending remains too risky.

[11] Christiano, Motto and Rostagno (2010) and Curdia and Woodford (2010) focus exclusively on how the price of credit affects real activity.

[12] Gertler and Karadi (2010) and Angeloni and Faia (2009) make the latter assumption.

[13] Van den Heuvel (2008) models capital adequacy as a continously binding constraint. Gerali et al. (2010) use a quadratic cost short-cut.

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The Honorable William H. Alsup, Judge,
United States District Court,
450 Golden Gate Avenue,
San Francisco, CA 94102

September 9, 2012 (by express U.S. mail)

Re: Case No. C 11-06684 WHA
Clifford Johnson v. United States Department Of The Treasury, and Timothy Geithner, in his official capacity as Secretary of the United States Department of the Treasury

Objections to ECF notice of correction issued September 7, 2012, et alia

Your Honor,

Notwithstanding the ECF notice of correction, issued September 9, 2012, rescinding the order setting a briefing schedule filed September 4, 2012, as "**Filed by Error: party not known**"; this is to respectfully request: (1) that the court add both my triggering letter dated September 6, 2012, and this letter to the otherwise closed trial court file; and (2) that the court within 10 days of receiving this letter set a briefing schedule to decide the motion to alter or amend the judgment, which was filed with the court's exceptional permission, on June 28, 2012, and was set for briefing by the rescinded order.

In my opinion, the court of appeal's August 13, 2012 abeyance of the appeal pending resolution of the de facto post-judgment motion is on the face of the record *not* erroneous, whether or not it was issued inadvertently; and it remains in effect unless and until a correction issues *from the court of appeal*.

Please also accept the following simplification of said motion. I hereby narrow the motion to a request for clarification as to the ground(s) on which the court overruled each of the four exceptions to the government speech doctrine set forth in paragraph 11 of the complaint, comprising viewpoint coercion by tailored misrepresentations; two independent unconstitutionalities; and prima facie institutional capture. In that the court found the exceptions "unthinkable," it appears that the court affirms government speech immunity as absolute, being a natural corollary of the government's "bully pulpit." ***I request that the court clarify whether it reached the merits of the four exceptions separately, and found each unthinkable particularly; and/or whether it overruled them en bloc, on the general ground that government speech immunity is absolute.***

An order clarifying this detail would suffice to satisfy the motion; and it would surely be expedient for the court to issue this small clarification of its decision, rather than to suffer both parties and both courts to share the burdens concomitant on an appellate motion (or writ of mandate) to compel a properly briefed hearing on such a motion for clarification, filed upon the expiry of the aforesaid 10 days.

Yours respectfully,

C. Johnson

Clifford Johnson, plaintiff pro se

Cc: Marc R. Conrad,
U.S. Attorney's Office,
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FILED
SEP 1 0 2012
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

The Honorable William H. Alsup, Judge,
United States District Court,
450 Golden Gate Avenue,
San Francisco, CA 94102

September 6, 2012 (delivered by hand)

Re: Case No. **C 11-06684 WHA**
Clifford Johnson v. United States Department Of The Treasury, and Timothy Geithner, in his official capacity as Secretary of the United States Department of the Treasury

Objections to Order Setting Briefing Schedule filed September 4, 2012

Your Honor,

This is to respectfully request that you add this letter to the generally closed trial court record.[1]

I object to the Order Setting Briefing Schedule On Plaintiff's Motion To Alter Or Amend A Judgment, filed September 4, 2012 on the ground that, without specified cause or authority, it deprives me of my First Amendment and due process rights to petition the court to the extent ordinarily provided for by the Federal Rules of Civil Procedure.

Together with the general closure of the case file, said Order fails to provide me with reasonable and fundamental opportunities (1) to amend the motion in light of the court of appeal having granted it in peculiar part by finding the extant file incomplete for purposes of appeal, and (2) to submit a supporting memorandum of points and authorities. Because a Reply, which the Order singularly allows me to file, is limited to points and authorities raised in opposition, this enables the opposition to suppress unanswerable points and authorities, simply by not addressing them.[2]

I also object that said Order mischaracterizes the appellate finding of a "motion for reconsideration" as a "motion to amend or alter a judgment." It would seem that the court of appeal construed the complained of failures to even mention misrepresentations as a prima facie failure to properly consider them.

Yours respectfully,

C. Johnson

Clifford Johnson, plaintiff pro se

Cc by hand and e-mail: Marc R. Conrad,
U.S. Attorney's Office,
450 Golden Gate Avenue, Box 36055,
San Francisco, CA 94102-3495

[1] ECF notices continue to state "**WARNING: CASE CLOSED on 06/14/2012**" (boldface caps in original). And the court's motion practice is to announce dates for *all* allowed filings, including moving papers.

[2] The opposition is also hamstrung by the lack of an opening memorandum. For example, the motion (my letter dated June 23, 2012) states that "it appears that the court construes the complaint as directly challenging the Treasury's policy of not issuing United States notes, which it meticulously avoids." Surely the opposition should be informed of which statements on the record substantiate these contentions?

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FILED
2012 AUG 13 A 9:19
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Clifford Johnson, *Plaintiff* v. United States Department Of The Treasury, and Timothy Geithner, in his official capacity as Secretary of the United States Department of the Treasury, *Defendants*	**No. CV 11-06684 WHA** **NOTICE OF APPEAL**

Notice is given that the above plaintiff Clifford Johnson appeals to the United States Court of Appeals for the Ninth Circuit, from the Judgment and order closing the trial court file, and from the Order Granting Defendants' Motion To Dismiss, both of which were entered herein on June 14, 2012.

August 12, 2012 (s) C. Johnson
Clifford Johnson, Plaintiff pro se [address as in the caption]

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RECEIVED
JUN 28 2012
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

The Honorable William H. Alsup, Judge,
United States District Court,
450 Golden Gate Avenue,
San Francisco, CA 94102

June 23, 2012

Re: Case No. **C 11-06684 WHA**
Clifford Johnson v. United States Department Of The Treasury, and Timothy Geithner, in his official capacity as Secretary of the United States Department of the Treasury

Objection to Judgment entered June 14, 2012, insofar as it closes the trial court record

Your Honor,

This is to respectfully request that you add this letter to the otherwise closed trial court record, with or without a response. It objects to the Judgment's mandate that the record be closed, as best I can without in any way disrespecting that mandate.

I object that, without specified cause or authority, the closure deprives me of my First Amendment right to petition the court to the extent ordinarily provided for by the Federal Rules of Procedure.

I appreciate that the judgment is dispositive. However, because the complaint raises, apparently for the first time, the question as to whether factual misrepresentations intended to suppress viewpoints are within the compass of the government speech immunity doctrine, further trial court proceedings would not be futile, if only to present the court of appeal with an appropriately clarified record.

As the record stands, there is no indication in the defendant's papers, or in the court's decision, of any awareness that factual misrepresentations are at issue, let alone any indication why misrepresentations *intended to suppress my viewpoint* should qualify for the aforesaid immunity. On the contrary, it appears that the court construes the complaint as directly challenging the Treasury's policy of not issuing United States notes, which it meticulously avoids.

The only policy that the complaint challenges is a policy of deception *intended to suppress all debate re United States notes*, by misrepresenting that there are no functional differences between United States notes and Federal Reserve notes; and it attacks this policy of deception only as manifested by *particularly alleged misrepresentations of fact, authoritatively published as objective*.

Yours most respectfully,

C. Johnson

Clifford Johnson

Cc by U.S. mail and e-mail: Evan H. Perlman,
Assistant United States Attorney
U.S. Attorney's Office,
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San Francisco, CA 94102-3495