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More Judicial Activism, Please

By George F. Will
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"We," said Queen Victoria, employing the royal plural, "are not amused." "We," said the Treasury Department on Tuesday, relishing the royal prerogatives it exercises nowadays, "are gratified that not a single court that reviewed this matter, including the U.S. Supreme, found any fault whatsoever with the handling of this matter by either Chrysler or the U.S. government." Is it lese-majeste to note that Treasury is being misleading?

At issue was the government's rush to push the remnants of Chrysler through bankruptcy and into marriage with Fiat, the Italian company that is now yet another business subsidized by U.S. taxpayers. But as the court said in its order permitting completion of Chrysler's bankruptcy, its refusal to review what lower courts have authorized "is not a decision on the underlying legal issues" and pertains to "this case alone."

That matters because the more complex and consequential General Motors bankruptcy is not completed, and as a consultant said in an e-mail to Chrysler's then-chief executive, Chrysler was a "guinea pig" on which the government tested what it can get away with in GM's bankruptcy, which involves the same issues: Is it lawful to use Troubled Assets Relief Program (TARP) funds for this? Does the mistreatment of Chrysler's secured creditors constitute an unconstitutional taking of property?

Richard Mourdock, the Indiana state treasurer who has been criticized for contesting the terms of the Chrysler bailout, notes that "no critic has ever challenged us on the points of law." Indiana's pension funds for retired teachers and state police officers were among Chrysler's secured creditors. It has been settled law that secured creditors, as compensation for lending money at rates lower than the borrowing company's condition might justify, are first in line to be paid in the event of bankruptcy. Indiana's funds and other secured creditors received less per dollar than did an unsecured creditor, the United Auto Workers, which also got 55 percent ownership of Chrysler. So the government is simultaneously subsidizing Italians and injuring retired Hoosiers.

The Supreme Court has said nothing about "bailout law," a phrase that currently is an oxymoron. America as Bailout Nation is governed by unconstrained executive discretion.

Last September, Treasury Secretary Henry Paulson testified to the Senate that TARP money was necessary for ailing "financial institutions." Nowhere in the bill's 169 pages was there any reference to government funding of "automobile" or "manufacturing" companies. In November, Paulson told a House committee: "I've said to you very clearly that I believe that the auto companies fall outside of [TARP's] purpose." Then advocates of a Detroit bailout proposed legislation to authorize that. It failed. So President Bush's Treasury Department gave an "interpretation" of the law that ignored the unambiguous terms of the pertinent legislation, the history of its enactment and Treasury's own prior interpretations of it.

Controversy about the judiciary's proper role is again at a boil because of a Supreme Court vacancy, and conservatives are warning against "judicial activism." But the Chrysler and GM bailouts and bankruptcies are reasons for conservatives to rethink the usefulness of that phrase and to make some distinctions.

Of course courts should not make policy or invent rights not stipulated or implied by statutes or the Constitution's text. But courts have no nobler function than that of actively defending property, contracts and other bulwarks of freedom against depredations by government, including by popularly elected, and popular, officials. Regarding Chrysler and GM, the executive branch is exercising powers it does not have under any

statute or constitutional provision. At moments such as this, deference to the political branches constitutes dereliction of judicial duty.

"At present," notes the Economist, "there's enough capacity globally to make 90 million vehicles a year, but demand is little more than 60 million *in good economic times*" (emphasis added). Unfortunately, says Reason magazine's Jacob [Sullum](#), America's president "can imagine a world in which the internal combustion engine is obsolete but not one in which GM is." So, doubling down on his predecessor's misbegotten policy, the president is acting strenuously to perpetuate some of America's portion of the excess capacity.

A bemused Paulson, who was present at the creation of Bailout Nation with TARP funds, said while still in office: "Even if you don't have the authorities -- and frankly I didn't have the authorities for anything -- if you take charge, people will follow." This would not be happening were Congress awake, or were the courts properly active. Constitutionalists are not amused.

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