

Winter 1-1-2011

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Recommended Citation

Adam F. Scales, *SIGTARP: A Problem in Name Only?*, 68 Wash. & Lee L. Rev. 457 (2011),
<https://scholarlycommons.law.wlu.edu/wlulr/vol68/iss1/12>

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SIGTARP: A Problem in Name Only?

Adam F. Scales*

One of the very interesting distinctions between a nominally private body of law, such as Torts, and a public body of law, such as Administrative Law, is the relative weight each assigns to examining the underlying merits of a decision. In Torts, the question is nearly always, "What is Justice?" In Administrative Law, justice, or efficiency, or some other specific social policy usually takes a back seat to questions about process and institutional structure. Administrative Law, despite its obvious relevance to nearly every facet of modern life, turns to a surprising degree on matters of form.

Little is seemingly more "inside baseball" than Mr. Sims's concerns regarding the indefinite location, within our constitutional structure, of the Special Inspector General for TARP. The SIGTARP is nominated by the President and confirmed by the Senate, of course. And he is removable by the President. So far, so good. However, even by the wide-ranging remits of the various IGs Congress has authorized, the SIGTARP does enjoy an unusual degree of independence from the President. Sims suggests that this independence from the Executive, paired with a correlative identification with Congress, and topped by the IG's potential to dictate the terms of Executive action, raises serious constitutional concerns. Put simply, his concern is that Congress—acting through the SIGTARP—will obtrude into a function explicitly assigned to the President, that he should take care to faithfully execute the laws.

As abstract as power-allocating debates can be, the persuasiveness of contending positions usually turns on some adverse practical consequence. (Of course, this consequence may not be the one that prompts a litigant to challenge the allocation; it may simply be enough that some other avoidable evil may persuade a court to intervene.) Accordingly, Mr. Sims does not rest solely on the abstract inelegance of the SIGTARP's role, but focuses attention on the specific potential for mischief he finds inherent in the entire scheme. While the SIGTARP is something less than a model of clockwork design, I am not persuaded that it isn't an acceptable way to tell time. I'll

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consider some of the specific problems Sims identifies, and emphasize some background that I think illustrates why various political and judicial actors are unlikely to share the depth of his concerns. I'll close with a just a few thoughts on the final section of his piece, in which he urges people to reclaim the principles that he sees threatened here.

Sims's paper must navigate between two landmarks, *Bowsher v. Synar*¹ and *Morrison v. Olson*.² He considers whether the SIGTARP strays closer to *Bowsher*, in which case it is likely impermissible. Or, does it stay safely within the range of *Morrison*, which produced a 7-1 decision, and which Samuel (now Justice) Alito once described as having delivered a Mike Tyson-like blow to the concept of separation of powers?³ Unsurprisingly, Sims gives a lot of emphasis to Scalia's dissent in *Morrison*.

The first big concern for Sims, and I think this his principal objection, is how the SIGTARP is tasked with identifying deficiencies in the use of TARP funds. He is to make recommendations to the Secretary of Treasury (for example, "claw back some of that money you overpaid," or, "stop buying this category of bad loans"). The Secretary can either act to address the deficiencies, or certify that no action is necessary or appropriate. On Sims's reading, one plausible interpretation is that action could be required when the Secretary finds that action is necessary or appropriate. Let me repeat that, because it sounds a little strange. One might think that the problem here is that the Secretary could be compelled to perform acts that the SIGTARP thinks are necessary, but which the Secretary does not. Or, one might think the problem narrower: That the Secretary might be compelled to do something that he finds inappropriate (though the SIGTARP presumably finds it either necessary or appropriate). But, that is not what Sims is saying. He is saying that the constitutional problem arises because TARP obligates the Secretary to take actions he, the Secretary, thinks are necessary or appropriate—because the TARP IG wants him to.

This is a difficult argument to make. Before explaining why, let me turn briefly to the exact mechanism here. Assume that the Secretary does not want to make SIGTARP-recommended changes. He must then certify to Congress that action was not necessary or was not appropriate.

1. See generally *Bowsher v. Synar*, 478 U.S. 714 (1986).

2. See generally *Morrison v. Olson*, 487 U.S. 654 (1988).

3. Carl Hulse & David D. Kirkpatrick, *After Memo, Democrats Are Taking Firmer Stance Against Alito Nomination*, N.Y. TIMES, Dec. 2, 2005, <http://www.nytimes.com/2005/12/02/politics/politicsspecial1/02confirm.html?pagewanted=all> (last visited Feb. 16, 2011) (on file with the Washington and Lee Law Review).

Presumably, if he felt that action was warranted, but he didn't feel like doing it, then he could not so certify.

Oddly, although Sims attacks the certification requirement, I wonder if that requirement actually relieves the (in my view) very slight possibility of institutional intrusiveness. Let me explain. First, we can all agree that Congress's wordsmiths are up to their usual tricks here. What does "necessary or appropriate" mean here? The words are independently unambiguous, but together there is both the question of whether "or" is used truly disjunctively, or is impliedly conjunctive, as in "Necessary and Proper." Presumably, Mr. Sims's next piece will be about the constitutional challenges to health care reform. It is very difficult to imagine that something could be necessary, but not appropriate. Does that create a problem here? I don't think so.

Sims suggests that the Secretary might think action necessary, but feel that it is best pursued later. Or, that action was appropriate, but that other deficiencies might be more appropriate for immediate action. The problem with the first suggestion is that a decision to defer implies, pretty convincingly, that action now is not, in fact, necessary. The Secretary could maintain a straight face and say, "Nope. No action needed here!" As we all know, a week is a lifetime in the financial system these days. Maybe action will be necessary next week. But not today.

The same can be said about "appropriate." Sims must be correct that the SIGTARP and the Secretary might have differing views about the relative importance of the IG's recommendation. Thus, some recommendations might be more appropriate than others, even while all are at least somewhat appropriate. That might create a situation in which the Secretary can be bossed around by an inferior official he can't control. But this strikes me as highly implausible for several interrelated reasons.

First, it isn't at all clear that the TARP IG's recommendations, even if approvingly viewed by the Secretary, are required to be implemented wholesale. The Secretary must merely take action to address these problems, which implies a great deal of wriggle room in assigning priorities. Second, given that appropriate is a relative term, I see the same straight-faced Secretary saying, "Nope. Action is not appropriate." *Pause.* "Because I have to fix other problems first." That does, it seems, acceptable violence to the term "appropriate." So, I think the Secretary holds the keys to the prison Sims imagines.

But, the real difficulty with Sims's critique is that TARP doesn't mandate action when the recommendations abstractly possess the qualities

of necessity or propriety, but only when the Secretary thinks that they do.⁴ This brings me back to the certification requirement. Certification requirements are the equivalent of "get out of jail cheap" cards. If Congress had empowered courts to review the Secretary's determination on a nondeferential basis, it could be rather messy. But, we don't even have that possible problem here, as there is no obvious mechanism for formally reviewing the Secretary's determination, and certainly no means of doing so without the significant deference associated with administrative policy making.

There are all kinds of interesting certification requirements. For much of the past year, Tim Geithner has been sitting on a report that likely says China is manipulating its currency.⁵ Once he releases that, he's obligated to make recommendations and engage the relevant House and Senate committees in ways that he probably would rather avoid. Relatedly, the State Department makes annual certifications regarding the cooperation of various countries in the drug wars. Billions of dollars in aid turn on these reports.

Yet, the Executive seems capable of manipulating timing in order to not unduly hamper the ability to conduct foreign policy. I agree with Sims that the SIGTARP is stronger stuff, but nothing a consummate bureaucrat such as Geithner shouldn't be able to sidestep, should he desire.

Sims recognizes that noninvasive readings of the statute are plausible. So, he trains fire on the possibility that the SIGTARP's indeterminate political location makes him beholden to Congress, a Congress that will exact revenge on noncooperative Treasury Secretaries in the form of endless invitations for Treasury to assist Congress with its oversight of TARP. An oversight that, Sims rightly points out, is not enjoyed by the President over the SIGTARP, although he can fire him.

4. See, e.g., *Webster v. Doe*, 486 U.S. 592, 601 (1988) (finding that the CIA Director's discretion with respect to employee discharges for national security reasons is unreviewable under the Administrative Procedure Act). The statute in *Doe* authorizes dismissal whenever the Director "deem[s]" it necessary or advisable, not when it is necessary or advisable. *Id.* at 600.

5. Sewell Chan, *U.S. to Delay Report on Chinese Currency*, N.Y. TIMES, Apr. 3, 2010, <http://www.nytimes.com/2010/04/04/business/04yuan.html> (last visited Feb. 16, 2011) (on file with the Washington and Lee Law Review); Kevin G. Hall & Nancy A. Youssef, *U.S. to Delay Report on Allegations of Chinese Currency Manipulation*, STAR-TELEGRAM, Jan. 19, 2011, <http://www.star-telegram.com/2010/04/03/2779823/us-to-delay-report-on-allegations.html?storylink=digger-topic> (last visited Feb. 16, 2011) (on file with the Washington and Lee Law Review).

By chance, these Comments were presented the same week that Clarence Thomas and Anita Hill were back in the news. I was pained to observe that most of the attendees were children when I and other law students around the country were glued to the high drama of his confirmation hearings. They were, frankly, embarrassing for almost everyone. Peggy Noonan described them as a three-day commercial for term limits. So, I'm not necessarily a fan of even more TARP-related hearings than the hundred or so we seem to have gotten this past year. But, that's politics. Of *course* Congress wants to make life tough for Presidents who spend money unwisely (particularly when Congressional opposition is newly emboldened by recent elections). That is the system working, not failing. It is, indeed, the epitome of "checks and balances," which is probably the term we should use in thinking about SIGTARP, rather than "separation of powers."

So, I'm not as concerned as Mr. Sims about Congressional encroachment. I also want to offer some perspective about why clean-sheet constitutional designs (such as a theory of separation of powers) do not often survive the first gunshot of political engagement.

Begin with *Morrison*. It is simply impossible to understand this case without considering the two elephants in the room: Watergate, which gave rise to the Independent Counsel Statute, and Iran-Contra, which preceded *Morrison* by a couple years (and of course continued long thereafter thanks to Lawrence Walsh). Watergate fundamentally weakened the Presidency and the supposed purity of Separation of Powers because Nixon fired the special prosecutor investigating him. And, as Fate would have it, the hatchet man was none other than Robert Bork, who was also in the news that year. Indeed, he had been rejected by the Senate six months before the oral argument in *Morrison*. Not only was Iran-Contra apparently a cheap remake of Watergate (starring Oliver North and the improbably named Fawn Hall), but the underlying controversy itself was a proxy war between the Executive and Congress. With all this in the air, it is unsurprising that the case for an unfettered executive did not carry the day.

Consider also *Bowsher* and *Immigration & Naturalization Service v. Chadha*.⁶ I certainly agree that these are cases of congressional encroachment, particularly in my view, the *Chadha* case. But they are not simply about usurpation. Instead, I like to think of them as cases in which Congress has skirted its own responsibilities, rather than appropriated the Executive's. In *Chadha*, the issue was bicameralism. A one-house

6. See generally *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

legislative veto removes from Congress the often messy burden of negotiating bicamerally, with the considerable complexity of working out a three-corner deal involving the President. That's pretty bad, but *Bowsher* is much worse. Under *Bowsher*, Congress gets to vote for all the crowd-pleasing spending it likes, wait for some bureaucrat no one outside of Washington has heard of to object (how many readers can name the current Comptroller General?),⁷ and then let the President take the blame for cutting "necessary and appropriate" spending! Yes, the mechanism by which the Court struck the Gramm-Rudman-Hollings Act down was usurpation, but the evil was Congressional abdication.

Along these lines, I'd like to suggest that not only is political and historical context generically important, it was crucially important in TARP. Mr. Sims dutifully recounts in footnotes the unprecedented nature of the financial crisis and our responses. I'm not sure he's really conveyed the texture of how this unfolded. I'd recommend anyone interested in the financial crisis to take a look at Andrew Sorkin's *Too Big To Fail*.⁸ From following news coverage—obsessively, for example—you would already know most of the details. What comes through pretty well in the book is the utterly ad hoc, seat-of-their-pants, seems-like-a-good-idea-at-the-time quality of Treasury's response to the crisis.⁹ The indelible images the book paints are of Tim Geithner padding around the New York Federal Reserve Bank in his pajamas, sleeping on a cot, or doing the same at Treasury a few months later, when he had no confirmed staff. Or, of Hank Paulson marching up to Capitol Hill to politely ask Nancy Pelosi for \$700 billion. Which was initially \$500 billion, then briefly \$1 trillion, but finally \$700

7. The Comptroller of the United States is currently Gene L. Dodaro. U.S. Government Accountability Office, *From the Comptroller General*, <http://www.gao.gov/cghome/index.html> (last visited Feb. 16, 2011) (on file with the Washington and Lee Law Review).

8. See generally ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* (2009).

9. Indeed, Neil Barofsky has concluded precisely this in his most recent report, describing as "strikingly ad hoc" the determination that Citigroup was "too [big] . . . to fail" and required TARP intervention. SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, EXTRAORDINARY FINANCIAL ASSISTANCE PROVIDED TO CITIGROUP, INC., at summary of report (2011), available at <http://www.sig tarp.gov/reports/audit/2011/Extraordinary%20Financial%20Assistance%20Provided%20to%20Citigroup,%20Inc.pdf>. As it happens, this report may represent Mr. Barofsky's last official word on the matter. On February 14, 2011, he announced his resignation as SIGTARP, to the evident delight of Treasury officials who described his departure as a "valentine." Brady Dennis, *Neil Barofsky, TARP's Outspoken Overseer, Will Resign*, WASH. POST, Feb. 14, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/14/AR2011021406089.html>.

billion because his staff thought that it might be big enough, but not too big to scare off Congress. Oh, yes, and Charles Schumer blanching when Paulson tells him that ATMs will shut down in a matter of days if the government doesn't act. Not to mention that this unfolded in the weeks before a Presidential election in which a once-imperial presidency figured prominently.

I almost forgot the best part: Treasury never used TARP to buy up "troubled assets"—a catchy phrase which I believe I read somewhere—instead injecting capital directly into banks and other institutions—exactly what Paulson had rejected doing when he went to Congress.

I'm not blaming these people, and I'm grateful I didn't have their job. Indeed, I'm grateful that I still *have* a job, in no small part thanks to these interventions. But, if the words "spending power" and "Congress" are ever to be used in the same sentence again, some kind of oversight along the lines of the SIGTARP seems to me not simply justified, but politically inevitable.

Let me close with a few words about Sims's political remedy. He wants people to reclaim, from lazy or usurping branches of government, the timeless principle of separation of powers. I think there are two ways in which he's going to be disappointed, yet one way in which he may be right.

First, separation of powers in the civics lesson sense has rarely had a complete purchase on the practices of American government. From the beginning—that is, the First Congress—the executive and judicial branches have been invested with substantial legislative power. Many agencies wield all three types of power. Sims acknowledges this but I think holds fast to a pure vision of separation of powers that is difficult to establish as a stable historical fact.

Second, I'm pretty sure I know what the average person thinks of the bailouts. Most of it is ill-suited for the congenial pages of this law review. But there's one thing I'm quite sure the average person is *not* thinking: "I wish Congress would stop its meddling ways and take the President's word that he's spending my money wisely." I think the likelihood of public engagement on this issue along the lines of Mr. Sims's hopes is quite low.

And yet, a problem emerges, one implicit in his paper, but which I think could use more focused attention. There is always, it seems, a good reason to bend the rules. In *Bowsher*, everyone wanted—sort of—a way to cure the deficit. In *Morrison*, people rightfully demanded that no one was above the law. With TARP, we question how wisely so much money can be spent so quickly by so few. Yet, the often-inelegant constitutional clockwork that Sims examines is threatened precisely when there appears to

be an emergent situation requiring thinking slightly outside the constitutional box.¹⁰ Whether your pet issue is health care reform, Guantanamo detainees, or Government Motors, the public has assuredly been desensitized to the need to restrain the branches of government from re-allocating power among themselves in ways that ultimately enhance governmental prerogatives, rather than individual liberty.

I do not think Mr. Sims has quite made the case that TARP merits the clarion call just yet, but I suspect this is a subject that will prove receptive to his concerns should he continue to develop them. I hope Mr. Sims files an amicus brief when Randy Barnett makes his way back to the Supreme Court.

10. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring).