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By Dan Epstein

Wednesday, August 14, 2013

In his [Second Treatise on Civil Government](#) , [John Locke](#) wrote, “[h]is power to act according to discretion without the prescription of the law, and sometimes even against it, is that which is called prerogative there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.”

[Locke](#) referred to the prerogative of monarchs, echoing the arbitrariness of dominion prior to the rise of the liberal, constitution-based democracy enjoyed in the United States today. The rise of our current administrative state, though, which has engaged in unprecedented discretionary spending and regulation, presents a new problem of political prerogative and the concomitant concerns of arbitrary and abusive executive power unchecked by the law. Perhaps the most poignant contemporary example of the dangers of acting with discretion particularly when it hasn't even been granted is the [U.S. Department of Energy](#)'s Loan Guarantee Program.

A perfect case study is [XP Vehicles](#) , which with its sister company, [Limnia](#) , sued the [Department of Energy](#) on Jan. 10 for denying them government loans under the Advanced Technology Vehicles Manufacturing Loan Program and the Loan Guarantee Program. Perhaps most troubling about these programs is the fact that our federal executive thinks that no legal remedy exists for challenging agencies that act as though [Congress](#) has granted them full discretionary authority, even when they haven't.

[XP Vehicles](#) and [Limnia](#) accused the two loan programs of politicization for awarding loans to financial backers of [President Obama](#)'s campaign. They claimed that Advanced Technology Vehicles Manufacturing Loan director [Lachlan Seward](#) politicized the taxpayer-funded program and that the [Energy Department](#) manipulated the loan program to favor political cronies. [Congress](#) authorized then-Energy Secretary [Steven Chu](#) and [Mr. Seward](#) to hand out tens of billions of American taxpayer dollars and charged them to run honest and fair loan programs. Instead, they treated taxpayer funds as a piggy bank for the politically connected and powerful.

Though the [Energy Department](#)'s decision-making was “impermissibly infected with political pressure” and “contrary to law, arbitrary and capricious, and in excess of [its] statutory authority,” the government claims [Mr. Chu](#) and [Mr. Seward](#) are immune from civil liability because their alleged conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.” Arguing that no private right of action exists against taxpayer-funded government officials who politicize federal funds and fail to apply equitable and merit-based principles to a loan applicant, the [government](#) has created a loophole allowing the politicization of agency decision-making.

The Energy Department(/topics/usa-department-of-energy/) awarded Fisker Automotive taxpayer dollars even though its financiers were lobbying the department and the White House simultaneously. The Energy Department(/topics/usa-department-of-energy/) approved a loan to Shepherd s Flats Wind Farm in Oregon when the White House asked for it, and the department was receptive to requests from the White House to ensure that applicants in Sen. Harry Reid s state of Nevada were funded. Imagine if the process of receiving a home loan was premised on one s political connections. It would clearly be subject to legal challenge, yet the government(/topics/civil-government/) argues that applicants for a government loan don t have a due-process right to fair and merit-based consideration.

The federal government contends that when you apply for grant or loan funds, you have no right to expect that the effort you put into your application entitles you to anything not even a fair and full evaluation. According to the government, "[w]hen a statute leaves a benefit to the discretion of a government official, no protected property interest in that benefit can arise." The power to act, then, is simply a matter of discretion, without a prescription of the law.

Since no judicial remedy exists when agency officials stonewall one company and favor others because of their political contributions and connections, it is up to Congress(/topics/congress/) to foster a system of transparency. Lawmakers must ensure that in grant, loan, direct-payment or cooperative-agreement programs, legislative rules that minimize executive discretion are actually enforced. The government s claim that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion" is perhaps the reason we have had taxpayer-funded failures such as Solyndra, Fisker, BrightSource, First Solar and others.

As this administration moves toward greater opaqueness and executive discretion, only Congress(/topics/congress/) can appropriately exercise the power necessary to ensure a measure of accountability in federal discretion.

Dan Epstein is executive director of Cause of Action, which is representing XP Vehicles Inc.(/topics/xp-vehicles-inc/) and Limnia Inc.(/topics/limnia-inc/) in a lawsuit against the Department of Energy(/topics/us-department-of-energy/).

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