Legal Authority to Issue a U.S. Central Bank Digital Currency

Paige Paridon | June 9, 2021

Central banks around the world are weighing the question of whether to issue a central bank digital currency – both the technological question (can we) and the policy question (should we). An additional question that has not received much attention is who decides whether the U.S. should have a CBDC. Federal Reserve Chairman Jerome Powell recently recognized the significance of any decision on CBDCs noting that “we would not proceed with [a digital dollar] without support from Congress, and I think that would ideally come in the form of an authorizing law, rather than us trying to interpret our law to enable this.”

This blog post will explore whether Congress’s role should be primarily to provide oversight as CBDC proceeds or whether legislation is legally required. Many who have proposed various forms of a United States CBDC have not addressed this question; others have raised the question but not ventured an answer.

**EARLY U.S. HISTORY OF COINS AND NOTES**

**Coins**

In the Constitution, the Founders provided Congress with the power “to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.” They said nothing about paper money, “largely because . . . [they] had seen the bills issued by the Continental Congress to finance the American Revolution—called “continentals”—become virtually worthless by the end of the war.” In 1792, Congress passed the Coinage Act, which provided for a United States mint where silver dollars were coined along with gold coins.

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1 A recently released BPI working paper, “Central Bank Digital Currencies: Costs, Benefits and Major Implications for the U.S. Economic System,” describes what a CBDC is and how it would function, and highlights several policy issues that should be considered prior to a decision on whether to adopt a dollar CBDC. Subsequently released BPI notes evaluate the monetary policy benefits and costs of a U.S. central bank digital currency, and whether it is a necessary or beneficial response to a potential Chinese CBDC.


3 See, e.g., Jess Cheng, Angela N Lawson, and Paul Wong, FEDS Notes, “Preconditions for a general-purpose central bank digital currency,” (February 24, 2021) [”[a] first-order consideration is whether the issuance of a general-purpose CBDC would be consistent with the Federal Reserve’s mandates, functions, and powers as enshrined in . . . the Federal Reserve Act . . .”]; Congressional Research Service, “Financial Innovation: Central Bank Digital Currencies,” March 20, 2020 (”The Fed has highlighted legal uncertainty about whether all of the actions needed to successfully issue a CBDC could be taken under existing authority. These include whether a CBDC would be legal tender; whether the Fed could offer accounts or digital wallets to the public; and what legal rights, obligations, and protections CBDC users would have. Currently, the Fed must charge prices that reflect its costs to provide business services and can only pay interest to banks on balances at the Fed. If Congress chooses to facilitate CBDCs, it might pass legislation to remove any identified legal barriers.”), available at: Financial Innovation: Central Bank Digital Currencies (congress.gov); Speech by Federal Reserve Board Governor Lael Brainard: “An Update on Digital Currencies,” at the Federal Reserve Board and Federal Reserve Bank of San Francisco’s Innovation Office Hours, San Francisco, California (August 13, 2020) (“There are also important legal considerations. It is important to understand how the existing provisions of the Federal Reserve Act with regard to currency issuance apply to a CBDC and whether a CBDC would have legal tender status, depending on the design.”), available at: Speech by Governor Brainard on “An Update on Digital Currencies” - Federal Reserve Board.

4 Article I, section 8, clause 5.

5 “8 Things You May Not Know About American Money.” August 22, 2018, 8 Things You May Not Know About American Money - HISTORY.
beginning in 1794. Free minting privileges were granted to all citizens, whereby, citizens could take either gold or silver to the mint and have it minted into coins. During the early 19th century, depositors such as banks supplied the silver and gold for coining and chose which coins they wanted back, preferring the largest denominations. Various Coinage Acts followed over the years, changing the composition and ratios of gold and silver in U.S. Coinage. In the Coinage Act of 1965, the Secretary of the Treasury was explicitly given authority to “coin and issue . . . half dollars or 50-cent pieces, quarter dollars or 25-cent pieces, and dimes or 10-cent pieces in such quantities as he may determine to be necessary to meet the needs of the public.” The Secretary of the Treasury possesses this authority today.

Notes

Congress enacted a series of laws beginning in 1861 authorizing the Treasury to issue various paper currencies. For example, in 1861, Congress authorized the Treasury to issue the first paper currency, referred to as “Demand Notes.” Other legislation followed. All told, by the end of the 19th century, there were five forms of paper currency circulating in the U.S. economy. However, the U.S. “continued to experience money-related economic and banking crises, as the supply of these currencies could not expand or contract to meet economic conditions.”

THE ROLE AND AUTHORITY OF THE FED

The Federal Reserve Act of 1913 was intended to, among other things, “furnish an elastic currency.” However,

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8 U.S. Mint: “The History of U.S. Circulating Coins,” (Content last updated on April 22, 2021), available at: History of U.S. Circulating Coins | U.S. Mint [usmint.gov]. “As a result, smaller denomination silver coins – half dimes, dimes, and quarters – needed for daily transactions were rarely coined. In an effort to bring gold and silver coins into circulation, Congress passed various Acts to discontinue the silver dollar and gold eagle, and to change the weight of coins and ratio of gold to silver. With the help of these laws, new coining technology, and the opening of branch Mints around the country, production increased. Smaller denominations entered circulation in great enough numbers to provide for the country’s needs.”


11 The Demand Note was the first paper currency issued by the U.S. government. These were “essentially government IOUs and were called Demand Notes because they were payable “on demand” in gold coin at certain Treasury facilities.” See Bureau of Engraving and Printing “BEP History Fact Sheet,” last updated March 2013, available at: FactSheet_DemandNotes_20130410.pdf [moneyfactory.gov].

12 Congress then enacted the Legal Tender Act of 1862 authorizing the Treasury Department to issue United States Notes directly into circulation. See Legal Tender Status, United States Department of the Treasury, available at: Legal Tender Status [treasury.gov]. The National Bank Act of 1864 created National Bank Notes that were redeemable at any National Bank of the Treasury. In that same year, Congress also created Gold Certificates, whereby one could deposit gold at the Treasury in exchange for Gold Certificates. In 1878, Congress introduced the Silver Certificate, which allowed people to deposit silver coins in the Treasury in exchange for certificates. The Treasury Note Act of 1890 authorized Treasury to issue Treasury Coin Notes. See A Brief History of U.S. Government, Currency, 1861 – Present: Part 1, A Brief History of U.S. Government Currency, 1861-Present: Part 1 [treasury.gov].


14 Id.

15 The official title of the Federal Reserve Act of 1913 provides that one of the statute’s purposes was to “furnish an elastic currency.” Federal Reserve Act of 1913, 38 Stat. 251, Official Title. The Senate Report accompanying the Senate Bill establishing the Federal Reserve provides that
“currency” is not defined by the Act. 16 Section 16 of the Federal Reserve Act granted the Federal Reserve the authority to issue one form of United States currency: “Federal reserve notes.”17

The context of the Act, as well as other statutes, makes clear that “Federal reserve notes” are paper currency. First of all, in 1913, as noted, various forms of paper notes and certificates were already in circulation — United States Notes, National Bank Notes, Gold Certificates, Silver Certificates, and Treasury Coin Notes.18 It is against this backdrop that Congress authorized the creation of Federal Reserve notes. Thus, the Secretary of the Treasury is directed by statute to “cause plates and dies to be engraved in the best manner to guard against counterfeits and fraudulent alterations, and shall have [Federal Reserve notes] printed therefrom and numbered . . . Such notes shall be in form and tenor as directed by the Secretary of the Treasury under the provisions of this chapter. . . .”19 Only a single regulation cites to this statute, and describes the “distinctive paper” used in dollar bills.20 Further, the statute provides that “[a]ny Federal Reserve bank may make application to the local Federal Reserve agent for such amount of the Federal Reserve notes hereinbefore provided for as it may require,” which appears to suggest physical cash.21 More pointedly, the Act provides that “Federal reserve notes shall bear upon their faces a distinctive letter and serial numbers” and provides a process for cancelling or destroying notes “unfit for circulation” — not a concern with a digital currency.22 The statute also says that the plates and dies must be engraved.23

In 1933, the United States abandoned the gold standard.24 As gold coins, gold bullion, or gold certificates were turned in, the American people received Federal Reserve notes redeemable in silver.25 Congress then outlawed

“there are certain great fundamentals recognized by all experts as essential and necessary” that were to be included in the legislation, including “[a]uthorizing the issuance of elastic currency against liquid commercial bills under proper safeguards.” S. Rep. 63-133, Banking and Currency (Nov. 22, 1913). See also Michael Bordo, National Bureau of Economic Research, Working Paper No. 2549, “Money, History, and International Finance: Essays in Honor of Anna J. Schwartz,” in The Contribution of “A Monetary History of the United States, 1867-1960” to Monetary History (1989), available at: The Contribution of “A Monetary History of the United States, 1867-1960” to Monetary History (nber.org) (“The Fed was established to provide elasticity to the money supply, specifically to provide easy convertibility between deposits and currency and to prevent a recurrence of the banking panics of the national banking era. This goal, according to Friedman and Schwartz (chapter 5) was to be achieved by the expansion and contraction of Federal Reserve notes and deposits.”) (citing Milton Friedman and Anna Schwartz, "A Monetary History of the United States, 1867-1960" (1963)).

16 FinCEN, a bureau of the Treasury, has defined currency as “[t]he coin and paper money of the United States or any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance.” 31 C.F.R. § 1010.100(m). However, FinCEN has no interpretive authority under the Federal Reserve Act.

17 Section 16(1) of the Federal Reserve Act states that “Federal reserve notes, to be issued at the discretion of the Board of Governors of the Federal Reserve System for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are hereby authorized.” 12 U.S.C. § 411.

18 See note 11, supra.


23 12 U.S.C. § 418. Perhaps Treasury could argue that the “best manner” to secure Federal Reserve notes is to issue them as a CBDC—and perforce, Treasury may interpret “plates and dies” and “printing” broadly to include the architecture of a digital currency, in order to better achieve the purposes of the statute. But such interpretation likely would have to be made on policy grounds in light of statutory language. Further, such a determination would not clearly permit the Treasury to set up the architecture of a digital currency, nor authorize the Federal Reserve to do so per Treasury’s determination.


any obligation requiring payment in gold and provided that any obligation “heretofore or hereafter incurred . . . shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.”

That legislation also provided that “United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues,” meaning that United States coins and currency “are a valid and legal offer of payment for debts when tendered to a creditor.”

While at least one observer suggests that the list could be viewed as authorization for the Federal Reserve to issue a CBDC, two problems arise. First, this provision does not constitute further authority for the Federal Reserve to issue notes or the forms of currency but rather provides only what types of currency (whether that be Federal Reserve notes, bank-issued notes, or Treasury-minted coins) shall constitute legal tender. Second, assuming that some entity had authority to issue CBDC, this provision can be read to include a CBDC as legal tender only if the parenthetical list is read to be indicative (as in, “including but not limited to”) rather than exhaustive. Given the variety of government obligations in circulation, there appears to have been good reason for Congress to specify an exhaustive list of what was in fact included. Even if the list were read to be indicative, under the legal principle of *ejusdem generis*, any instrument would have to be “similar in nature” to those listed in order to qualify. It is difficult to consider a digital currency as similar in nature to paper currency and coins circulating in the early 20th century. This is not only because of its form (digital versus physical) but also because its function and technology raise a host of issues that physical notes do not. As the IMF has noted, “Launching a CBDC is a multidimensional undertaking that extends beyond the central bank’s normal information technology project management frameworks.... The new currency could lead to major disruptions affecting monetary policy transmission, financial stability, financial sector intermediation, the exchange rate channel, and the operation of the payment system.”

The Governor of the Bank of England has noted that potential issuance of a CBDC “raises profound questions about the shape of the financial system and the implications for monetary and financial stability and the role of the central bank.” Thus, a digital currency appears fundamentally different in nature from a paper one.

**THE ROLE AND AUTHORITY OF THE U.S. TREASURY**

Treasury has certain authorities over U.S. currency (some described above), but it does not appear that current statutes or regulations provide the Treasury a basis to issue a digital currency. The Secretary of the Treasury has the authority to mint and issue coins, which are separate from currency, but also a form of legal tender. One could think of a CBDC as a digital coin, but the types of coins that the Treasury may mint and issue are specifically

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26 48 Stat. 31 (1933), *An Act to provide for the establishment of a national employment system and for cooperation with the States in the promotion of such system, and for other purposes.* (loc.gov)

27 *Id.*


29 See Marcelo Prates, “Legal troubles may delay CBDCs,” February 24, 2021, in Official Monetary and Financial Institutions Forum (United States “law stipulates that US ‘coins and currency (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banks) are legal tender for all debts, public charges, taxes and dues’. The word ‘including’ hints that the list that follows is illustrative, allowing other currency formats to be legal tender.”), available at: [Legal troubles may delay CBDCs - OMFIF](https://www.bis.org/bcbs/publ/cb1080.htm).

30 See *Circuit City Stores Inc., v. Adams*, 532 U.S. 105 (2001) (describing *ejusdem generis* as a “statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”) Here, obviously, the general words precede the specific objects enumerated, but the principle presumably would apply in the same way.


33 31 U.S.C. §§ 5103; 5111(a)(1); 5112(h).
described by statute, and the Secretary may “only” mint those coins described.\textsuperscript{34} Legislation enacted in 1996 authorized the Secretary to “mint and issue platinum bullion coins and proof platinum coins in accordance with such specifications, designs, varieties, quantities, denominations, and inscriptions as the Secretary, in the Secretary’s discretion, may prescribe from time to time.”\textsuperscript{35} While this raised interesting questions about the Treasury’s authority to issue a trillion-dollar platinum coin during the 2011 and 2013 debt-ceiling crises, the language makes clear that such coin would be a physical coin made of “platinum bullion.”\textsuperscript{36} Thus, Treasury does not currently appear to have the authority to issue a new digital currency absent further legislation from Congress.

While the Treasury does not appear to have independent authority, its assent could be required if the Federal Reserve were to take the position that it had the authority to issue one. After the Federal Reserve Board orders banknotes from the Treasury’s Bureau of Engraving and Printing, “[w]hen such notes have been prepared, the notes shall be delivered to the Board of Governors of the Federal Reserve System subject to the order of the Secretary of the Treasury for the delivery of such notes in accordance with this Act.”\textsuperscript{37} Thus, if a CBDC were read to constitute ‘United States coins and currency,’ then it would appear that the Federal Reserve could produce it only subject to the order of the Treasury.

THE FORM OF THE CBDC MAKES A DIFFERENCE

Further legal questions would be raised depending on the form any future CBDC would take. For example, a question at the forefront of the debate about CBDC is whether it would be directly or indirectly held by consumers. In the direct model, customers would hold CBDC in accounts at the Federal Reserve directly. However, the Federal Reserve is authorized to maintain accounts for U.S. depository institutions\textsuperscript{38} and the U.S. Treasury,\textsuperscript{39} among other entities, but not for individuals.\textsuperscript{40} Thus, some who have proposed a direct model have noted that legislation would be required to allow individuals to hold accounts at the central bank.\textsuperscript{41}

Another question that has arisen is whether the any future CBDC would pay interest. The Federal Reserve Act provides that the Federal Reserve may pay earnings on “balances maintained at a Federal Reserve bank by or on

\textsuperscript{34} 31 U.S.C. § 5112(a). This statute provides that “[t]he Secretary of the Treasury may mint and issue only the following coins: (1) a dollar coin that is 1.043 inches in diameter; (2) a half dollar coin that is 1.205 inches in diameter and weighs 11.34 grams,” and so on.


\textsuperscript{37} 12 U.S.C. § 419 (emphasis added).

\textsuperscript{38} 12 U.S.C. § 342.

\textsuperscript{39} 12 U.S.C. § 391.

\textsuperscript{40} In addition, the Federal Reserve is authorized to open accounts for certain government-sponsored enterprises in the residential mortgage area, see 12 U.S.C. §§ 1435, 1452(d) & 1723a(g), foreign governments, banks, and central banks, see 12 U.S.C. §§ 347d & 358, certain international organizations, such as the International Monetary Fund and the World Bank, see 22 U.S.C. § 286d, and certain designated financial market utilities, see 12 U.S.C. § 5465, and other governmental and government-sponsored entities (citations omitted).

behalf of a depository institution.” A CBDC held by a depository institution for a consumer in the direct model may not be considered a “balance maintained” by or on behalf of a bank.

WHERE DOES THIS LEAVE US?

In summary, the Federal Reserve does not appear to have legal authority to issue a CBDC without congressional authorization, and any authority it did have would appear to require the concurrence of the Treasury Department. Furthermore, if it did issue a CBDC, the Federal Reserve would not have authority to hold accounts for CBDC holders (consumer or corporate) but rather would have to use an indirect model where accounts are held at banks or other intermediaries. It also would not have authority to pay interest on any CBDC.

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42 Section 19 of the Federal Reserve Act provides that the Board may prescribe regulations concerning the payment of interest on balances at a Reserve Bank. See 12 U.S.C. § 461(b)(12).