INSIDER INTEREST, NOT INDUSTRY INFLUENCE: THE PRACTICE OF FEDERAL RESERVE BANK PRESIDENTIAL APPOINTMENTS

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Conceived as a counterweight to public administration of monetary policy, the quasi-private Federal Reserve Banks now seem an institutional anomaly. The role that private interests play in Reserve Bank governance has prompted criticism that their anomalous structure renders the Reserve Banks unduly insulated and prone to financial industry influence. Yet a survey of the practical effect of the Reserve Banks' unusual governance structure demonstrates not a privileging of private industry interests, but instead a pattern of elevating Federal Reserve System insiders, with potential involvement from publicly appointed Board of Governors of the Federal Reserve System. As a result, this Note argues that conventional fears of the consequences of Reserve Bank governance are largely unrealized. This pattern of elevating Federal Reserve System insiders, however, raises alternate concerns of institutional homogeneity. This Note thus advocates for transparency reforms aimed at mitigating these concerns—reforms that address not a problem of industry influence in Reserve Bank governance, but one of Federal Reserve System insularity.

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I. INTRODUCTION

In November 2017, William Dudley, then President of the Federal Reserve Bank of New York (the "New York Fed"), announced his retirement.[1] Shortly thereafter, the board of directors of the New York Fed—nine citizens representing private and public interests from the Second Federal Reserve District, a region encompassing the entirety of New York,

[1] Press Release, Fed. Reserve Bank of N.Y., New York Fed President Dudley to Retire (Nov. 6, 2017), https://www.newyorkfed.org/newsevents/news/aboutthefed/2017/oa171106 [https://perma.cc/FRK8-UA3X].

parts of New Jersey and Connecticut, the U.S. Virgin Islands, and Puerto Rico[2]—empaneled a search committee empowered to solicit comments from "the New York Fed's constituents" and retain firms to aid in the search.[3] Less than six months later, with one public update from the New York Fed board in the interim,[4] the board plucked John Williams, President of the westernmost Federal Reserve Bank and a "consummate central-bank insider,"[5] to lead the most important of the twelve Federal Reserve Banks.

Although the current and former Chairs of the Board of Governors of the Federal Reserve System welcomed the appointment, public reaction was decidedly more mixed.[6] Commenters decried the selection process as "opaque and pretty byzantine"[7] and "absolute[ly] opa[que],"[8] criticizing the search committee for apparently abandoning its earlier

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2 *What We Do*, FED. RES. BANK N.Y. (Oct. 2015), https://www.newyorkfed.org/aboutthefed/whatwedo.html [https://perma.cc/F34E-C3GM].

3 Press Release, Fed. Reserve Bank of N.Y., *supra* note 1.

4 Statement from Sara Horowitz & Glenn Hutchins, Presidential Search Comm. Co-Chairs, Fed. Reserve Bank of N.Y., New York Fed Presidential Search Update (Mar. 16, 2018), https://www.newyorkfed.org/aboutthefed/presidential-search-update [https://perma.cc/Z8H9-KCPL].

5 Nick Timiraos, *How the New York Fed, Prizing Diversity, Elevated an Insider as its Next President*, WALL ST. J. (Apr. 3, 2018), https://www.wsj.com/articles/how-the-new-york-fed-prizing-diversity-elevated-an-insider-as-its-next-president-1522778996 [https://perma.cc/P8GM-3ELL].

6 *See, e.g.*, Ben Casselman, *New York Fed Names John Williams President, Bucking Calls for Diversity*, N.Y. TIMES (Apr. 3, 2018), https://www.nytimes.com/2018/04/03/business/economy/new-york-fed-president-john-williams.html?module=inline [https://perma.cc/NB7Y-4SFY]; Jeanna Smialek et al., *New York Fed Names John Williams as its Next President*, BLOOMBERG (Apr. 3, 2018), https://www.bloomberg.com/news/articles/2018-04-03/fed-s-williams-shifts-to-n-y-as-powell-shapes-policy-troika [https://perma.cc/XAL9-EKWD].

7 Casselman, *supra* note 6.

8 Jeanna Smialek & Matthew Boesler, *N.Y. Fed Search Casts Wide Net but May Snare an Insider Instead*, BLOOMBERG (Mar. 29, 2018), https://www.bloomberg.com/news/articles/2018-03-29/n-y-fed-search-casts-wide-net-but-may-snare-an-insider-instead [https://perma.cc/QY69-L4ZC].

promises of a diverse and transparent hiring process in favor of installing a member of Federal Reserve Chair Jerome Powell's "inner circle."[9] Legislators took particular exception at the appointment, calling for the New York Fed search committee to appear before Congress or for the nominee himself to appear for a formal confirmation hearing.[10]

It was not the first time in recent memory that the New York Fed had come under public fire. Four years earlier, New York Fed President William Dudley was summoned before the Senate's Subcommittee on Financial Institutions and Consumer Protection, which took aim at a different perceived problem at the Bank: its supervision of banks in the District.[11] After the disclosure of taped conversations among New York Fed supervisors regarding the adequacy of Goldman Sachs' internal conflict-of-interest policy,[12] the Senate subcommittee questioned the New York Fed's ability and desire to supervise important financial institutions headquartered in its District. To some, the disclosures reflected a culture of deference by the New York Fed to the financial industry—a culture rooted in the institutional structure of the New York Fed itself. In one illustrative exchange from the hearing—purportedly aimed at "Examining and Addressing Regulatory Capture"—one senator decried a regulatory "culture in which [the New York Fed President] is perceived . . . as essentially hired and

9 *Id.*

10 *Id.*

11 *Improving Financial Institution Supervision: Examining and Addressing Regulatory Capture: Hearing Before the Subcomm. on Fin. Insts. and Consumer Prot. of the S. Comm. on Banking, Hous., and Urban Affairs*, 113th Cong. 2 (2014) [hereinafter *Hearings*] (statement of Sen. Sherrod Brown, Chairman, S. Subcomm. on Fin. Insts. and Consumer Prot.).

12 These disclosures ultimately culminated in the firing of the bank examiner who released her discussions with bank officials. *See* Jake Bernstein, *Inside the New York Fed: Secret Recordings and a Culture Clash*, PROPUBLICA (Sept. 26, 2014), https://www.propublica.org/article/carmen-segarras-secret-recordings-from-inside-new-york-fed [https://perma.cc/5URT-T9HY] [hereinafter *Inside the New York Fed*]; Jake Berstein, *NY Fed Fired Examiner Who Took on Goldman*, PROPUBLICA (Oct. 10, 2013), https://www.propublica.org/article/ny-fed-fired-examiner-who-took-on-goldman [https://perma.cc/4NXC-QNXZ].

serving at the, if not the will, at least with the influence of those [the Bank] regulate[s]."[13] Indeed, the "opaque and pretty byzantine" process by which the New York Fed President (along with the other regional Federal Reserve Bank Presidents) is selected has, until recently, directly involved representatives of the banks that the Federal Reserve is charged with supervising.

Given the previous role of regulated entities in appointing Federal Reserve Bank Presidents, it comes as little surprise that the Reserve Banks have been criticized as potentially being overly deferential to the banks they regulate.[14] Originally conceived as a check on the potential inflationary tendencies of government, the Reserve Banks have come under fire for the unusual governance structure that sprung from this original conceit.[15] This Note examines the unusual institutional structure of the Federal Reserve System and its quasi-private regional Reserve Banks, and outlines the critique that this structure renders the regional Reserve Banks both constitutionally suspect and, arguably, practically beholden to financial interests.

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13 *Hearings*, *supra* note 11, at 10 (statement of William C. Dudley, President and Chief Exec. Officer, Fed. Reserve Bank of N.Y.). This perception was further exacerbated by the New York Fed's apparent failure to implement recommended changes from its own evaluation of the regulatory lapses that contributed to the financial crisis. The internal report outlined a supervisory culture that was viewed internally as "excessive[ly] deferen[tial] to banks," where "only the most black-and-white issues [were] taken forward as concerns" with supervised entities. *See* FED. RESERVE BANK OF N.Y., REPORT ON SYSTEMIC RISK AND BANK SUPERVISION 8–9 (2009) (unpublished draft report), https://www.documentcloud.org/documents/1303305-2009-08-18-frbny-report-on-systemic-risk-and.html [https://perma.cc/C6SG-6XHR]. See *Inside the New York Fed*, *supra* note 12, for an account of the purported effect of the Beim report at the New York Fed: "Beim handed the report to Dudley. The professor [Beim] kept it in draft form to help maintain secrecy and because he thought the Fed president might request changes. Instead, Dudley thanked him and that was it. Beim never heard from him again about the matter, he said." *See also* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 165–67 (2016).

14 *See infra* Sections III.C, III.D.

15 *See infra* Section III.C.

Fears that private interests can exert undue influence on the Reserve Banks, however, largely focus on the *potential* for such influence without accounting for the *practice* of Reserve Bank governance.[16] In response to the possible drawbacks of involving regulated entities in selecting their regulator, both Congress and the Reserve Banks have taken steps to mitigate perceived or actual financial industry influence within the Banks. Furthermore, despite being appointed by a process criticized as beholden to the private interests represented on Reserve Bank boards, recent Reserve Bank Presidents have almost uniformly been Federal Reserve System veterans. Although the widespread promotion of Federal Reserve insiders to presidential posts assuages concerns of the deleterious effects of private interests on Federal Reserve governance, it raises alternative issues of institutional insularity. As a result, this Note advocates for transparency reforms in Reserve Bank governance aimed at increasing public accountability and engagement in practice, rather than counteracting any theoretical financial industry influence.

The remainder of this Note is structured as follows: Part II outlines the institutional history and the governing statute of the Federal Reserve System, as well as the governance structure of the Reserve Banks. Part III turns to the role that the Reserve Banks play in financial supervision within the System, outlining both the prevailing criticisms of Reserve Bank supervision and potential responses to those critiques. Part IV details the constitutional concerns raised by Reserve Bank governance; Part V subsequently examines the actual results of the appointment process for Federal Reserve Bank Presidents and suggests possible reforms to promote transparency and accountability. A brief conclusion follows.

II. DEVELOPING A PUBLIC-PRIVATE HYBRID: THE HISTORY OF THE FEDERAL RESERVE SYSTEM

The historical development of the Federal Reserve System over the early twentieth century helps to explain the unusual

16 *See infra* Section V.A.

governance structure of the modern Federal Reserve. The current Federal Reserve System consists of the Board of Governors, comprised of seven Presidentially appointed Governors and located in Washington, and the twelve regional Federal Reserve Banks, headed by Presidents and dispersed around the country.[17] Throughout its development, fears that granting both monetary and fiscal policy authority to public officials would incentivize financing government debt through inflation spurred this two-tiered arrangement, with private Reserve Banks operating as a check on these incentives.[18]

Although Peter Conti-Brown has offered an account of three formative events in the founding of the modern Federal Reserve System—the Federal Reserve Act of 1913, the Banking Act of 1935, and the Federal Reserve-Treasury Accord of 1951[19]—this Note will limit its historical

[17] 12 U.S.C. § 241 (2012). The twelve Federal Reserve Banks are headquartered in Boston, New York, Philadelphia, Cleveland, Richmond, Atlanta, Chicago, St. Louis, Minneapolis, Kansas City, Dallas, and San Francisco. *Federal Reserve Banks*, BOARD GOVERNORS FED. RES. SYS. (last updated Apr. 24, 2017), https://www.federalreserve.gov/aboutthefed/federal-reserve-system.htm [https://perma.cc/7MJF-7DC5]. No more than one member of the Board of Governors can be appointed from any one Reserve Bank district. 12 U.S.C. § 241.

[18] Esther L. George, President and Chief Exec. Officer, Fed. Reserve Bank of Kan. City, Structure, Governance, Representation: Federal Reserve Member Banks and Federal Reserve Bank Stock 4–5 (July 2016) (transcript available at https://www.kansascityfed.org/~/media/files/publicat/speeches/2016/structure-governance-representation.pdf [https://perma.cc/QY8N-HBDK]).

[19] *See* CONTI-BROWN, *supra* note 13, at 15–39. The Federal Reserve-Treasury Accord of 1951 refers to a sentence issued on March 4, 1951, after tension between the Federal Reserve's interest-rate policy and the Truman White House. The statement announced that the Treasury Department and the Federal Reserve had "reached full accord with respect to debt management and monetary policies to be pursued in furthering their common purpose to assure the successful financing of the Government's requirements and, at the same time, to minimize monetization of the public debt," thereby forming the foundation for "the idea that the Fed's monetary policy is institutionally separate from the economic policies of the president." *Id.* at 35, 37. *See also* Jessie Romero, *Treasury-Fed Accord*, FED. RES. HIST. (Nov. 22, 2013),

examination to the two Acts, which bear most on the Federal Reserve System's structure.

A. The Federal Reserve Act of 1913

Drafted in the aftermath of a financial crisis in 1907, the Federal Reserve Act of 1913 created the institutional forerunner of the current Federal Reserve System.[20] Prior to the Act's enactment, the National Monetary Commission, an early attempt to create a new system of monetary policy, spent four years investigating international banking structures before proposing the National Reserve System.[21] The proposed National Reserve System would correct some of the "principle defects in [the] banking system," including the lack of "power to enforce the adoption of uniform standards with regard to capital, reserves, examinations, and the character and publicity of reports of all banks in the different sections of the country."[22] While four public officials would serve as ex officio members, the System would primarily consist of forty-six private directors appointed largely by the industry-dominated boards of directors of district branches.[23]

Although the National Reserve System proposal was ultimately abandoned,[24] the Commission introduced many ideas that would later be repurposed into the Federal Reserve System and first articulated the concerns motivating the inclusion of private interests into the Federal Reserve's governance structure.[25] Hesitant to grant too much power

https://www.federalreservehistory.org/essays/treasury_fed_accord [https://perma.cc/ABD8-WZ6L].

[20] *See* CONTI-BROWN, *supra* note 13, at 15–39.

[21] *See Uncurrent Events: The National Monetary Commission, 1909-1912*, FED. RES. BANK ST. LOUIS (May 2, 2018), https://insidefraser.stlouisfed.org/2018/05/national-monetary-commission-1909-1912/ [https://perma.cc/X8YV-S9S6].

[22] NAT'L MONETARY COMM'N, REPORT OF THE NATIONAL MONETARY COMMISSION 6, 9 (1912).

[23] *Id.* at 12–13.

[24] *See Uncurrent Events*, *supra* note 21.

[25] Among other proposals that foreshadowed the coming Federal Reserve System, the Commission recommended a fifteen-district structure

over the administration of monetary policy to the government, the Commission argued that, "[w]hile it may be contended that the issue of money of any kind is a distinctive function of sovereign power, the exercise of this authority by Governments has, as shown by the experience of the world, inevitably led to disastrous results."[26] On the other hand, an exclusively private institution would deny "the vital interest in which the public has in the management of the association."[27] To balance these competing concerns, the Commission assumed that democratic engagement could sufficiently ensure public accountability for the predominantly private entity, as the "acts of the directors of the branches and of the reserve association [would] be open to public inspection and . . . subject to the closest scrutiny by the shareholders of the association and the public."[28]

The Federal Reserve Act of 1913 created a system that, much like the forerunner National Reserve Association, coupled public and private components. Characterized as the "Wilsonian Compromise of 1913,"[29] the 1913 Act balanced the Washington-based Federal Reserve Board, comprised of the Treasury Secretary, Comptroller of the Currency, and five presidential appointees, with the geographically dispersed private Reserve Banks.[30] The end result was a system in which the Reserve Banks would "function cooperatively but independently . . . to achieve the advantages of central banking without acquiring the monopoly powers of a single

with branches of the Association in every district, each governed by a board of directors of at least 12 members. NAT'L MONETARY COMM'N, *supra* note 22, at 11–12. The twelve members of the board, much like current Federal Reserve Bank boards, would be chosen to represent a mixture of purely financial and non-financial interests. *Id.* Ultimately, the National Reserve Association sought to not "overshadow[] banks," but be "their representative." *Id.* at 15.

26 *Id.* at 18.

27 *Id.* at 14.

28 *Id.* at 39.

29 CONTI-BROWN, *supra* note 13, at 21.

30 *Id.* at 21–22.

central bank."[31] As part of this cooperation, Reserve Banks were empowered to engage in open market operations.[32]

This first stab at monetary policy administration, however, emphasized independence over coordination, foregoing the advantages of a unified central bank. Instead of a cooperative system of authority split between Reserve Banks and the Board, the two centers of power sparred over their ambiguous policy authority.[33] As part of this early split, Reserve Bank Governors held regular meetings, known as the Governors Conference, to discuss and coordinate open market operations—an arrangement alien to the current centralization of monetary policy.[34]

B. The Banking Acts of 1933 and 1935

If the financial crisis of 1907 demonstrated the need for a federal monetary policy authority, the Great Depression laid bare the inadequacies of a system without a central locus of authority. In the run-up to the Great Depression, the Board and Reserve Banks remained locked in a "continuing struggle" over policy matters and their balance of authority.[35] Moreover,

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31 ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE VOLUME I, 1913–1951 68 (2003).

32 Federal Reserve Act, Pub. L. No. 63-43, § 14, 38 Stat. 251, 264 (codified as amended at 12 U.S.C. § 353 (2012)).

33 Conti-Brown expands on this point in noting that:

> Because the statute—in the tradition of many great political compromises—left room for divergent interpretations for competing factions, the legislative authors of the Federal Reserve Act never . . . specif[ied] the power relationship between and among the Federal Reserve Board and the Reserve Banks. In the two places where the Fed exercised the most power—the proactive purchase of securities in the open market and the reactive discounting of securities brought to the doors of the Reserve Banks—rivalries arose immediately, both between the board and the banks and among the banks themselves.

CONTI-BROWN, *supra* note 13, at 23.

34 *See* MELTZER, *supra* note 31, at 77, 81.

35 *Id.* at 262; *see also id.* at 265–66 ("The 1929 recession began with the Federal Reserve System divided on personal and substantive issues . . . .

the power of the Reserve Banks raised concern that "banker interest . . . ha[d] prevailed over the public interest."[36]

Enacted in response to the Great Depression and in the midst of broader experimentation during the New Deal, the Banking Act of 1933 marked the first step toward establishing the contemporary centralization features of the Federal Reserve. Importantly, the Act established a formal monetary policy body in the Federal Open Market Committee (the "FOMC").[37] Although the early FOMC was little more than a regular meeting of the twelve Reserve Bank Governors, it marked a step towards the formalization of monetary policy decision-making.[38] While Reserve Banks could refuse to conduct open market operations upon advance notice to the Federal Reserve Board, the Act began to shift open market operations authority from the Reserve Banks to the Board.[39]

Two years later, the Banking Act of 1935 marked the end of the dysfunctional federalism of the early Federal Reserve System. Spearheaded by newly appointed Federal Reserve Board Governor Marriner Eccles, the Act cemented the FOMC as the sole monetary policy decision-making entity.[40] The reformulated FOMC would be predominantly comprised of the Board of Governors of the Federal Reserve System, with Reserve Bank representation decreasing to five Reserve Bank Presidents (or First Vice Presidents).[41] The result was a

The financial system entered the Great Depression divided, unprepared to take decisive action, and uncertain whether policy action was useful or desirable to stop economic decline and price deflation.").

36 CONTI-BROWN, *supra* note 13, at 27.

37 Banking Act of 1933, Pub. L. No. 73-66, § 12A, 48 Stat. 162, 168 (codified as amended at 12 U.S.C. § 263 (2012)).

38 CONTI-BROWN, *supra* note 13, at 25.

39 *See* MELTZER, *supra* note 31, at 430.

40 *See* CONTI-BROWN, *supra* note 13, at 29–32.

41 *See* CONTI-BROWN, *supra* note 13, at 30. Reserve Bank representatives on the FOMC are selected from five groups. The Federal Reserve Bank of New York has a permanent seat on the FOMC, one FOMC member is selected from the Federal Reserve Banks of Boston, Philadelphia, and Richmond; one from the Federal Reserve Banks of Cleveland and Chicago; another from the Federal Reserve Banks of Atlanta, Dallas, and St. Louis; and one from the Federal Reserve Banks of Minneapolis, Kansas

Federal Reserve System that retained the institutional structure of the original System but whose power had shifted toward the center.[42] At bottom, the "1935 Act permitted the Federal Reserve to become a central bank."[43]

C. The Modern Federal Reserve

Today, the Federal Reserve System retains this historical public-private arrangement. The Board of Governors, located in Washington, consists of up to seven members who are selected by the President and subject to Senate confirmation.[44] Governors serve fourteen-year terms and are protected by for-cause removal constraints.[45] Three members of the Board are selected to serve four-year terms as Chairman and Vice Chairmen, with one of the two Vice

City, and San Francisco. 12 U.S.C. § 263(a) (2012). The New York Fed's permanent seat on the FOMC was codified in 1942. Pub. L. No. 77-656, § 1, 56 Stat. 647, 647–48 (codified at 12 U.S.C. § 263 (2012)).

42 *See* CONTI-BROWN, *supra* note 13, at 30–31. An abandoned proposal aimed at reforming the Federal Reserve System during this period would have nationalized the Reserve Banks. Under the proposed 1937 bill, which garnered broad support in Congress, all outstanding Reserve Bank stock would be purchased. Ultimately, Federal Reserve staff concluded that the bill conflated ownership of Reserve Bank stock (a requirement for all private member banks) with actual control over the Reserve Banks. MELTZER, *supra* note 31, at 488–89.

43 MELTZER, *supra* note 31, at 486.

44 12 U.S.C. § 241 (2012). Senate confirmation of the Chairman and Vice Chairmen of the Board of Governors to their particular positions as Chairman and Vice Chairmen stands in contrast to the appointment procedure for other administrative agency chairs. For example, the President designates the Federal Trade Commission Chairman, selected from its five Commissioners, without Senate approval. 15 U.S.C. § 41 (2012).

45 12 U.S.C. § 242 (2012). Although the Federal Reserve Chairman and Vice Chairmen enjoy for-cause removal protection for their role as Governors, they are not explicitly protected from being demoted by the President from their position as Chairman or Vice Chairmen. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1175–79 (2013). Regardless of the lack of statutory protection against at-will demotion, however, norms against political interference with the Federal Reserve constrain the actions of political officials. *Id.* at 1196–99.

Chairmen serving, after the passing of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") in 2010, as Vice Chairman for Supervision.[46] Currently staffed by former Treasury official and investor Randal Quarles, the Vice Chairman for Supervision is tasked with "develop[ing] policy recommendations for the Board regarding supervision and regulation of depository institution holding companies and other financial firms supervised by the Board, and . . . oversee[ing] the supervision and regulation of such firms."[47]

In contrast to the publicly appointed Board of Governors, the twelve Federal Reserve Banks are structured as quasi-private entities.[48] Reserve Banks issue stock to regulated member banks, who must purchase stock as a condition of membership in the Federal Reserve System.[49] Although member banks thus hold stock in the Reserve Banks, they do not quite "function as the Reserve Banks' private stockholders."[50] Ownership of Federal Reserve stock does not afford traditional ownership interests to member banks, as Reserve Bank stock retains a constant $100 par value and cannot be transferred or pledged.[51]

The Reserve Banks' governance structures similarly bear some of the trappings of a private entity. Although the Presidents are the public face of the Reserve Banks, the Banks operate, by statute, "under the supervision and control of a board of directors."[52] Each board of directors is comprised of nine members from the Federal Reserve District, categorized into three classes, with each class representing distinct

46 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1108(a)(1), 124 Stat. 1376, 2126 (codified at 12 U.S.C. § 242 (2012)).

47 *Id.*

48 *See* CONTI-BROWN, *supra* note 13, at 105 ("If [the Federal Reserve Banks] are not private corporations, neither are they purely government agencies.").

49 12 U.S.C. § 222 (2012).

50 CONTI-BROWN, *supra* note 13, at 105.

51 12 U.S.C. § 287 (2012).

52 *Id.* § 301.

interests. Class A and Class B directors, who constitute two-thirds of the board seats, are selected by regulated member banks.[53] Class A directors are directly "representative of the stockholding banks" and financial interests, and can be bank officers, directors, or employees.[54] Class B directors are similarly chosen by stockholding member banks, but cannot be employees of member banks and are selected to "represent the public" rather than banking interests.[55] Finally, Class C directors, who occupy the remaining three seats on the board of directors, are similarly elected to "represent the public," but are appointed by the Board of Governors rather than stockholding banks.[56]

As part of "the duties usually appertaining to the office of directors of banking associations,"[57] Reserve Bank boards of

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53 *Id.* § 304. The voting process begins with the solicitation of nominees from three groups of member banks within the district, categorized according to their capitalization. Each group can nominate one Class A candidate and one Class B candidate. *Id.* For the most recent New York Fed board election of Class A and B directors, the three groups were banks with capital and surplus of more than $2 billion, banks with capital and surplus of $40 million to $2 billion, and banks with capital and surplus of less than $40 million. Letter from the Fed. Reserve Bank of N.Y. to Member Banks of the Second Fed. Reserve Dist. (October 2, 2018) (available at https://www.newyorkfed.org/medialibrary/media/banking/circulars/class1nomination-1018.pdf [https://perma.cc/D5KX-T2C9]).

54 12 U.S.C. §§ 302–303 (2012). For example, the current Class A directors of the New York Fed are the Chairman and CEO of Morgan Stanley, the Chairman of Valley National Bank, and the President and CEO of Solvay Bank. *Board of Directors*, FED. RES. BANK N.Y. (Sept. 13, 2019), https://www.newyorkfed.org/aboutthefed/org_nydirectors.html [https://perma.cc/PP8J-U3GY].

55 12 U.S.C. §§ 302–303. The public interests represented include "agriculture, commerce, industry, services, labor, and consumers." *Id.* § 302. The current Class B directors of the New York Fed are the Chairman and Co-Founder of two private equity funds, the CEO of Infor, a cloud computing company, and the President and CEO of Nasdaq. *Board of Directors*, *supra* note 54.

56 12 U.S.C. § 302. The Class C directors of the New York Fed are a union executive officer, a community investment corporation, and a low-income health and housing services provider. *Board of Directors*, *supra* note 54.

57 12 U.S.C. § 301.

directors select the Presidents and First Vice Presidents of the Reserve Banks to five-year terms.[58] Until the passing of the Dodd-Frank Act, the entire nine-member board selected the President.[59] Currently, however, only the representatives of public interests in the Districts, Class B and C directors, play a role in the appointment of a Reserve Bank's President.[60] To further safeguard against the potential conflicts arising from representatives of supervised entities appointing Reserve Bank staff, Reserve Bank-specific bylaws prevent directors affiliated with thrift institutions from selecting the Bank Presidents.[61] After the boards of directors make an initial candidate selection, the Board of Governors of the Federal Reserve System renders the ultimate decision on the choice.[62] In addition to their power to select the Reserve Bank Presidents, boards of directors are also empowered to fire their Presidents without cause.[63] Due to their authority to both select and remove the Reserve Bank Presidents, the powers of the boards of directors have engendered serious constitutional and practical concerns about the Federal Reserve System's governance structure.[64]

Along with their authority to select and remove the Presidents of the Reserve Banks, the Reserve Banks' boards of directors play a number of other formal and informal governance roles. True to their corporate form, Reserve Bank directors nominally oversee Reserve Bank operations and

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58 *Id.* § 341.

59 The Dodd-Frank Act eliminated the role of Class A directors in selecting Reserve Bank Presidents. *See* Pub. L. No. 111-203, § 1107, 124 Stat. 1376, 2126 (codified at 12 U.S.C. § 341 (2012)).

60 *Id.*

61 *See, e.g.*, FED. RESERVE BANK OF N.Y., BYLAWS, art. I § 5 (2018); FED. RESERVE BANK OF CHI., BYLAWS OF THE FEDERAL RESERVE BANK OF CHICAGO art. IX § 1 (2016).

62 12 U.S.C. § 341.

63 *Id.*

64 *See infra* Section IV.A. By contrast, the other responsibilities of Reserve Bank boards of directors raise fewer practical concerns. *See* CONTI-BROWN, *supra* note 13, at 105.

adopt bylaws regulating Reserve Bank business.[65] Notably, all twelve Reserve Banks have voluntarily limited the involvement of Class A and B directors in their financial supervisory activities, adopting express provisions in their governing bylaws aimed at "minimiz[ing] the risk of an actual or perceived conflict of interest at the board level."[66] In addition, the Federal Reserve Banks' boards of directors establish their own discount rate—the interest rate on Federal Reserve loans they issue—through at least a biweekly vote, although the final rate is reviewed and determined by the Board of Governors and is uniform across the Federal Reserve System.[67] Finally, the boards of directors serve an

65 *See* CONTI-BROWN, *supra* note 13, at 105. As part of their governance responsibilities, the regional boards of directors have established subject-matter specific committees. *See* FED. RESERVE BANK OF BOS., BYLAWS OF THE FEDERAL RESERVE BANK OF BOSTON art. II § 3-6 (2017) (Audit Committee, Business Commitments and Performance Committee, Research and Regional Outreach Committee, Nominating and Governance Committee); *Board of Directors*, *supra* note 54 (Nominating and Corporate Governance Committee, Audit and Risk Committee, Management and Budget Committee). Boards also oversee internal audits. *See id.*

66 *Board of Directors*, *supra* note 54. *See also* FED. RESERVE BANK OF DALLAS, BYLAWS art. IV § 1 (2016); FED. RESERVE BANK OF KAN. CITY, BYLAWS art. I § 1 (2017); FED. RESERVE BANK OF N.Y., BYLAWS art. I § 5 (2018); FED. RESERVE BANK OF PHILA., BYLAWS art. III § 1 (2017); FED. RESERVE BANK OF RICHMOND, BYLAWS art. I § 1(c) (2018); FED. RESERVE BANK OF ATLANTA, BY-LAWS OF THE FEDERAL RESERVE BANK OF ATLANTA art. II § 1 (2017); FED. RESERVE BANK OF BOS., BYLAWS OF THE FEDERAL RESERVE BANK OF BOSTON art. I § 2 (2017); FED. RESERVE BANK OF CHI., BYLAWS OF THE FEDERAL RESERVE BANK OF CHICAGO art. I § 2 (2016); FED. RESERVE BANK OF CLEVELAND, BYLAWS OF THE FEDERAL RESERVE BANK OF CLEVELAND art. I § 5 (2017); FED. RESERVE BANK OF MINNEAPOLIS, BYLAWS OF THE FEDERAL RESERVE BANK OF MINNEAPOLIS art. II § 3 (2018); FED. RESERVE BANK OF S.F., BYLAWS OF THE FEDERAL RESERVE BANK OF SAN FRANCISCO art. I § 2 (2012); FED. RESERVE BANK OF ST. LOUIS, BYLAWS OF THE FEDERAL RESERVE BANK OF ST. LOUIS art. I § 4 (2013).

67 12 U.S.C. § 357; *Policy Tools: The Discount Rate*, BOARD GOVERNORS FED. RES. SYS. (last updated Oct. 15, 2019), https://www.federalreserve.gov/monetarypolicy/discountrate.htm [https://perma.cc/R77N-G5Y6].

informal role in informing the Reserve Bank staff of the economic conditions of their districts.[68]

The Federal Reserve System thus couples the Board of Governors, comprised of seven publicly appointed officials, with the twelve somewhat private, somewhat public Reserve Banks. Although, as outlined above, the early failures of the Federal Reserve System spurred a centralization of institutional power, the Reserve Banks and the Board of Governors still share some overlapping authority. Five Reserve Bank Presidents serve on the FOMC, with the New York Fed President occupying a permanent role.[69] Each FOMC member, Governor and President alike, has an equally weighted vote on monetary policy decisions.[70]

In addition, the Board of Governors may delegate "any of its functions, other than those relating to rulemaking or . . . the establishment of policies for the supervision and regulation of depository institution holding companies and other financial firms" to the Reserve Banks.[71] In turn, the Board of Governors can review any actions taken under this delegated authority, and "exercise[s] general supervision over . . . Federal reserve banks."[72] Finally, in addition to the general supervisory power the Board of Governors exercises

68 *See, e.g.*, *Board of Directors*, *supra* note 54 ("The roles of Reserve Bank directors" include "acting as a 'link' between the government and the private sector[,]" and "bring[ing] to the Federal Reserve System the greatest benefits of regional autonomy: a diversity of viewpoints on economic and credit conditions."); *Our District: Governance*, FED. RES. BANK S.F. https://www.frbsf.org/our-district/governance/boards-directors/ [https://perma.cc/SUJ8-78QA] ("The roles of Reserve Bank directors" include "acting as a 'link' between the government and the private sector" and "bring[ing] to the Federal Reserve System the greatest benefits of regional autonomy: separate and eclectic viewpoints on economic and credit conditions.").

69 12 U.S.C. § 263(a). Reserve Banks may also be represented on the FOMC by First Vice Presidents. *Id.*

70 *Id.*; *see also Structure of the Federal Reserve System: Federal Open Market Committee*, BOARD GOVERNORS FED. RES. SYS. (Oct. 28, 2016), https://www.federalreserve.gov/aboutthefed/structure-federal-open-market-committee.htm [https://perma.cc/4H2F-V7BS].

71 12 U.S.C. § 248(k).

72 *Id.* § 248(j).

over the Reserve Banks, the Board of Governors can also remove Reserve Bank officers or directors, including Reserve Bank Presidents, for cause.[73]

So stands the general balance of power in the Federal Reserve System and the governance structures of the Reserve Banks and the Board of Governors. The particular role that the Reserve Banks play in financial supervision, and the problems associated with their supervisory role, is examined in Part III.

III. THE RESERVE BANKS AND FINANCIAL SUPERVISION

As previously mentioned, the Federal Reserve Act enables the Board of Governors to delegate "any of its functions" to the Reserve Banks, save its rulemaking power and its authority to establish supervisory and regulatory policies for regulated financial institutions.[74] The Board of Governors has delegated its immediate supervisory authority of financial institutions to the Reserve Banks, "rely[ing] largely on the supervisory staff of the Reserve Banks to be . . . the 'eyes and ears' of the Federal Reserve Board's supervisory staff."[75] Acting as the "eyes and ears," the Reserve Banks can issue informal enforcement actions against supervised banks as part of their day-to-day monitoring.[76] It is this responsibility that has

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[73] *Id.* § 248(f) ("The Board of Governors of the Federal Reserve System shall be authorized and empowered . . . [t]o suspend or remove any officer or director of any Federal reserve bank, the cause of such removal to be forthwith communicated in writing . . . ."). The communication provision is similar to other language establishing for-cause removal protections. *See* Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. REG. 257, 302 (2015). The conflicting standards for the removal of Presidents—removable at will by their boards of directors but only removable for cause by the Board of Governors—potentially gives the Reserve Bank Presidents "two masters," with different standards for removal by each. *Id.*

[74] *See supra* note 71 and accompanying text.

[75] Thomas H. Stanton, *Bank Supervision: Unfinished Business from the Financial Crisis*, *in* 33 BANKING & FINANCIAL SERVICES POLICY REPORT 1, 4 (2014).

[76] *See infra* notes 86–90 and accompanying text.

generated concern about the connection between the Reserve Banks' governance regime and the potential influence of private interests in financial supervision.

A. Reserve Bank Supervision in Practice

The architecture of financial regulation is characterized by overlapping grants of authority between federal regulators, with the Office of the Comptroller of the Currency (the "OCC"), an independent division organized within the Department of the Treasury; the Federal Deposit Insurance Corporation (the "FDIC"); and the Federal Reserve sharing responsibility for the regulation of depository institutions.[77] Generally, the Federal Reserve acts as the primary supervisor for bank holding companies and state banks that are members of the Federal Reserve System, while the OCC has primary authority over national banks and savings associations.[78] Although the FDIC maintains primary supervisory responsibility over state nonmember banks, it also retains authority to supervise any institution with deposit insurance. As a result, the FDIC has overlapping backup authority to examine bank holding companies and financial companies supervised by the Federal Reserve.[79] The bulk of the Federal Reserve's remaining supervised entities consist of state member banks, savings and loan holding companies, financial holding companies, and foreign banks.[80]

77 *See* Eric J. Pan, *Organizing Regional Systems: The US Example*, *in* THE OXFORD HANDBOOK OF FINANCIAL REGULATION 188, 198–203 (Niamh Moloney et al. eds., 2015).

78 *See* BOARD OF GOVERNORS OF THE FED. RESERVE SYS., *Supervising and Regulating Financial Institutions and Activities, in* THE FEDERAL RESERVE SYSTEM PURPOSES & FUNCTIONS 72, 74–77 (2018), https://www.federalreserve.gov/aboutthefed/files/pf_5.pdf [https://perma.cc/K3YH-36AR]. The Federal Reserve also oversees a number of other financial entities, including foreign banking organizations, systemically important financial institutions, and savings and loan holding companies. *Id.* at 74–80.

79 12 U.S.C. § 1820(b)(3)(A) (2012).

80 *See* BOARD OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 78, at 74–80.

The Federal Reserve's authority to supervise bank holding companies on a consolidated basis, derived from Section 5 of the Bank Holding Company Act,[81] vests significant supervisory authority over the largest financial companies in the Federal Reserve System. As part of this authority, Reserve Banks exercise front-line supervision over bank holding companies located within their District.[82] At the Reserve Banks, prudential supervision of the largest bank holding companies is informal and continuous.[83] Reserve Bank staff can be dedicated to supervising particular financial institutions or to monitoring certain types of financial risk,[84] and largely engage in ongoing supervision rather than the historical practice of regular, annual examinations.[85] Such continuous monitoring includes meeting with bank management, reviewing internal firm data, and evaluating firms along several metrics, including capital, asset quality, and management.[86] To guard against assimilation into the

81 *See* FED. RESERVE BANK OF N.Y., STAFF REPORT NO. 729, SUPERVISING LARGE, COMPLEX FINANCIAL INSTITUTIONS: WHAT DO SUPERVISORS DO? 3 (2015), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr729.pdf [https://perma.cc/MF2Z-V6FR]; *see also* CONTI-BROWN, *supra* note 13, at 160–61.

82 FED. RESERVE BANK OF N.Y., *supra* note 81, at 7.

83 *See id.* at 10–13. Although the New York Fed's supervisory practices for large bank holding companies is likely not applicable across all Federal Reserve Banks, it accounts for the supervision of most the largest financial institutions, including JP Morgan Chase, the Goldman Sachs Group, Citigroup, and the Bank of New York Mellon Corporation. *Id.* at 11 n.9. Of the twelve firms currently in the Large Institution Supervision Coordinating Committee portfolio, which represent the "largest, most systemically important financial institutions in the United States," nine are located in the Second Federal Reserve District and are supervised by the New York Fed. FED. RESERVE BANK OF N.Y., *supra* note 81, at 11; *Large Institution Supervision Coordinating Committee*, BOARD GOVERNORS FED. RES. SYS., (Nov. 9, 2018), https://www.federalreserve.gov/supervisionreg/large-institution-supervision.htm [https://perma.cc/T9TX-BG7F].

84 FED. RESERVE BANK OF N.Y., *supra* note 81, at 11.

85 *Id.* at 22–23.

86 FED. RESERVE BANK OF PHILA., SUPERVISION, REGULATION, AND CREDIT ENFORCEMENT UNIT PURPOSE AND PRACTICES 8–9 (2007),

culture of the regulated entity (the problem of "regulatory capture"), supervisory staff regularly rotate between institutions.[87]

To correct deficiencies at financial institutions, the Federal Reserve issues informal and formal enforcement actions. Reserve Banks only have authority to issue informal enforcement actions—corrective actions voluntarily implemented by banks that range in severity from supervisory letters (the least severe informal action) to memoranda of understanding (the most severe).[88] Formal enforcement actions, by contrast, can only be undertaken by the Board of Governors, and address more significant institutional failures, including insufficient responses to informal actions or violations of laws or regulations.[89] Recent informal enforcement actions for large, important financial institutions taken by the New York Fed overwhelmingly involved matters requiring attention or matters requiring immediate attention, both of which identify supervisory concerns and require the regulated institution to submit corresponding corrective plans.[90]

B. Reserve Bank Supervision and the Board of Governors

The Reserve Banks, however, do not supervise in a vacuum. Their power is constrained by the authority of the Board of Governors and the informal nature of enforcement actions that Reserve Banks can administer. Additionally, the

https://www.phil.frb.org/-/media/bank-resources/publications/purpose_and_practices.pdf?la=en [https://perma.cc/54NR-HY3W].

87 FED. RESERVE BANK OF N.Y., *supra* note 81, at 16.

88 FED. RESERVE BANK OF PHILA., *supra* note 86, at 9–12.

89 *Id.* at 12–13.

90 FED. RESERVE BANK OF N.Y,, *supra* note 81, at 29–30. Matters Requiring Attention comprised 1340 of the over 1500 supervisory actions issued to large financial institutions by the New York Fed from 2011 to the end of 2014. *Id.* at 29, fig.7. Matters Requiring Immediate Attention, the second largest subgroup of informal enforcement actions, comprised fewer than 200 of the 1540 actions. *Id.*

Reserve Banks only exercise authority within the broader supervisory boundaries established by the Board of Governors, which retains the non-delegable responsibility to establish supervisory and regulatory policies for Federal Reserve-regulated institutions.[91]

Moreover, the Federal Reserve System has recently trended toward consolidating supervisory and regulatory authority with the Board of Governors. Title XI of the Dodd-Frank Act formally established a Vice Chairman for Supervision position on the Board of Governors, a position dedicated to financial supervision and regulation. The Dodd-Frank Act tasks the Vice Chairman with "develop[ing] policy recommendations for the Board regarding supervision and regulation of depository institution holding companies and other financial firms supervised by the Board, and . . . oversee[ing] the supervision and regulation of such firms,"[92] thus squarely locating Federal Reserve regulatory responsibility in one Governor.[93] The Vice Chairman for Supervision also publicly spearheads the Federal Reserve's regulatory efforts, including annual stress tests for the largest bank holding companies.[94]

Additionally, internal changes to the supervisory process have apparently stripped supervisory power over the largest

91 12 U.S.C. § 248(k) (2012).

92 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1108(a)(1), 124 Stat. 1376, 2126 (codified at 12 U.S.C. § 242 (2012)).

93 *See* CONTI-BROWN, *supra* note 13, at 246–47 ("This is the broadest grant of authority to an individual in the Federal Reserve Act—greater than even the explicit authority given to the Fed chair."). The position remained unfilled through the Obama administration, although it was effectively staffed by Governor Daniel Tarullo. *See* Binyamin Applebaum, *Fed's Proponent for Regulation to Depart, Leaving 3 Vacancies*, N.Y. TIMES (Feb. 10, 2017), https://www.nytimes.com/2017/02/10/us/politics/daniel-tarullo-federal-reserve.html [https://perma.cc/RFZ9-3U35].

94 *See, e.g.*, Randal K. Quarles, Vice Chairman for Supervision, Bd. Of Governors of the Fed. Reserve Sys., A New Chapter in Stress Testing (Nov. 9, 2018) (transcript available at https://www.federalreserve.gov/newsevents/speech/quarles20181109a.htm [https://perma.cc/3N44-M527]).

financial institutions away from the Reserve Banks and centralized it with the Board of Governors.[95] Thus, as the Board of Governors has consolidated regulatory and supervisory authority of the Federal Reserve System and diminished the authority of the Reserve Banks, it now maintains the core neurological functions of regulation and supervision, even if the Reserve Banks continue to act as the "eyes and ears" of the System.

C. The Problem of Financial Supervision by the Reserve Banks

In spite of the Reserve Banks' subordinate relationship with the Board, the representation of financial interests in the governance structure of the Reserve Banks continues to raise concern about the role of Reserve Banks in financial supervision.[96] For example, in the fallout from the financial crisis, legislators initially sought to eliminate the role of the boards of directors in selecting some Reserve Bank Presidents. Ultimately, however, Congress settled on merely reducing the role that financial interests play in the process rather than eliminating it altogether.[97] Yet high-profile regulatory controversies have continued to recur, including the aforementioned outcry aimed at the New York Fed, as well as the substantial trading losses incurred at JPMorgan

95 *See* CONTI-BROWN, *supra* note 13, at 168 ("In 2010, however, it appears that the Board of Governors has worked to move the Reserve Banks increasingly out of the business of supervising the largest banks in the financial system.").

96 *See id.* at 167 ("In the geography of Fed power, the complexities and proximities of bank supervision give private banks greater control over Fed policy than the rest of the general public.").

97 Initial proposals in the Dodd-Frank Act included making the New York Fed President a Presidential appointee, subject to Senate confirmation. *See* Sewall Chan, *Reform Bill Adds Layers of Oversight*, N.Y. TIMES (Mar. 15, 2010), https://www.nytimes.com/2010/03/16/business/16regulate.html [https://perma.cc/K56N-VELB]. Ultimately, however, the Act settled with eliminating the role of Class A directors in the selection process. *See* Pub. L. No. 111-203, § 1107, 124 Stat. 1376, 2126 (codified at 12 U.S.C. § 341 (2012)).

Chase, which occurred while JPMorgan Chase CEO Jamie Dimon sat on the New York Fed board.[98]

Notwithstanding the control that the Board of Governors exercises over the quasi-private Reserve Banks, the unease behind Reserve Bank governance is understandable. The appointment process for Reserve Bank Presidents vests private citizens (including, until recently, those directly representing regulated entities) with the power to select Reserve Bank Presidents,[99] providing fodder for the criticism that the Presidents are "essentially hired and serving at . . . if not the will, at least with the influence of those [they] regulate."[100] Even after Dodd-Frank eliminated the role of Class A directors in selecting Reserve Bank Presidents, the continued authority of Class B directors (who are similarly selected by financial institutions) and other private citizens in the appointment process has left concerns about potential industry capture unresolved.[101] Moreover, the potential influence of banks in the appointment process is exacerbated by the unique arrangement of the Federal Reserve Banks, in which regulated banks are Reserve Bank stockholders. Such an arrangement leaves the Federal Reserve Banks prone to criticism that their institutional arrangement encourages

98 *See supra* notes 11–13 and accompanying text; William Alden, *Dimon Leaves New York Fed Board as His Term Ends*, N.Y. TIMES (Jan. 8, 2013), https://dealbook.nytimes.com/2013/01/08/dimon-leaves-new-york-fed-board-as-his-term-ends/ [https://perma.cc/R9MC-CV78] ("There is an undeniable perception problem . . . It is damaging the legitimacy of the Federal Reserve." (internal quotation marks omitted)).

99 *See* CONTI-BROWN, *supra* note 13, at 256 ("[T]he basic problem of appointment at the Reserve Banks is the dramatically disproportionate influence that regulated banks have on the people who become their overseers. From the perspective of democratic accountability, banker influence at the appointment threshold is the real issue.").

100 *Hearings*, *supra* note 11, at 10 (statement of William C. Dudley, President and Chief Exec. Officer, Fed. Reserve Bank of N.Y.).

101 *See, e.g.*, *id.* at 11 ("Your Class B directors are essentially chosen by the banks, and that is not lost on anyone.").

greater proximity between the regulator and regulated, to the detriment of effective financial regulation.[102]

More fundamentally, the insulation of the Federal Reserve Bank Presidents from the political process, while central to the Federal Reserve framers' goal of insulating monetary policy from governmental influence, raises accountability problems. In other words, discrepancies between the regulatory preferences of the Reserve Banks and other agencies or Congress may hinder effective coordination of financial regulation.[103] Furthermore, financial regulation, as an arguably "inherently executive function," could be a particularly inappropriate responsibility of the Reserve Banks, considering their political insulation and their institutional links to regulated member banks.[104] Indeed, Peter Conti-Brown has argued that Congress' decision to grant expanding supervisory authority to the Federal Reserve System is particularly inappropriate given the central bank's political insulation, as only monetary policy, not financial regulation more generally, was intended to be free from political influence.[105]

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102 *See* Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 L. & CONTEMP. PROBS. 129, 136 (2015) ("Private banks that hold stock in regional Federal Reserve banks largely select the regional Feds' boards of directors . . . . fuel[ing] concerns that financial regulators are too easily captured by the entities that they regulate and advance those entities' interests at the expense of the public.").

103 *See* Peter Conti-Brown, *The Twelve Federal Reserve Banks: Governance and Accountability in the 21st Century* 16 (Hutchins Ctr. on Fiscal and Monetary Policy at Brookings, Working Paper No. 10, 2015) ("[T]here is evidence that the New York Fed's views of good bank supervisory practices don't match those in Congress.").

104 *See* CONTI-BROWN, *supra* note 13, at 170 ("[B]ank supervision is not only an inherently executive function we would want to place within inherently executive bureaus . . . [but] the supervisory function is primarily lodged in the part of the Federal Reserve System with the greatest and most opaque political power: the Federal Reserve Banks.")

105 *Id.* ("There is simply no theory offered that justifies the legal insulation of the Fed from a variety of political pressures—for example, in the form of complete budgetary autonomy, the structure of the FOMC—for bank supervision.").

Although the framers of the Federal Reserve System crafted an institutional framework deliberately insulated from politics, the Federal Reserve's regulatory responsibilities almost uniformly expanded after its initial creation.[106] This subsequent coupling of supervisory and monetary policy authority arguably does not reflect a careful consideration of the political independence of the Federal Reserve but instead "reflects path dependency and historical inertia."[107] As a result, the vesting of financial supervisory authority in the Federal Reserve has combined supervisory and monetary policy authority in an institution whose unique governance arrangement potentially leaves it prone to industry influence.

D. Responses to Criticism of Reserve Bank Supervision

In spite of its structural peculiarities, the Federal Reserve's arrangement of quasi-private regulation does not necessarily mean that the Reserve Banks are uniquely susceptible to capture. Self-regulation is not uncommon in the financial industry, which widely relies on intra-industry policing through entities like the Financial Industry Regulatory Authority.[108] Indeed, self-regulation may be particularly effective in the field, considering the complexities of banking and the incentives of market participants to insist

[106] *Id.* at 160–63.

[107] *Id.* at 170.

[108] Professor Gillian Metzger has commented on this norm in the financial services industry, noting that:

> Reliance on private actors is a central and recurring theme of financial regulation. Supervisory responsibilities are delegated to private self-regulatory organizations, like the Financial Industry Regulatory Authority (FINRA), which oversees the securities industry . . . The inclusion of representatives of private member banks in the Fed's institutional structure is another manifestation of this incorporation of private actors into public financial regulation.

Metzger, *supra* note 102, at 139.

on more stringent supervision of industry members.[109] Ideally, if bank customers bear the costs of misbehavior by financial institutions through overpaying for financial products (rather than benefiting themselves from such misbehavior), financial institutions are incentivized to police the behavior of competitors.[110] Consequently, the presence of financial interests in the governing board of the Reserve Banks may be less problematic than it initially appears. Additionally, although the issuance of Federal Reserve Bank stock to regulated member banks appears to give them a direct interest in the Reserve Banks,[111] the ownership of stock does not necessarily correlate to effective control by the stockholding banks.[112] Finally, accusations of capture by financial interests are not unique to the Federal Reserve, and are also levied against more politically accountable regulators. The now-defunct Office of Thrift Supervision notoriously advertised itself as a "less antagonistic" regulator and supervised some of the least-sound institutions prior to the financial crisis.[113]

More broadly, the combination of supervisory and monetary policy authority in the Federal Reserve may not be undesirable from either a theoretical or practical perspective. Secrecy and political insulation in institutional design is not

109 *See* William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 5, 8–12 (2013) ("[Self-regulation] is the seemingly sensible approach to financial regulation . . . . Industry professionals have strong incentives to police their own, since many of the costs of misbehavior are born by all members of the profession while the benefits inure only to the misbehaving few."); *see also* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 94 (2010) ("Financial policy took on the trappings of a branch of engineering, in which only those with hands-on experience on the cutting edge of innovation were qualified to comment.").

110 *See* Birdthistle & Henderson, *supra* note 109, at 8–11. Such self-regulation is not only theoretically beneficial, but is also arguably successful in practice. *See id.* at 12 ("Whatever the theoretical limitations upon financial self-regulation, no other arena of vital economic activity in this country has regulated itself for so long or so comprehensively.").

111 *See* Metzger, *supra* note 102.

112 *See* MELTZER, *supra* note 42.

113 JOHNSON & KWAK, *supra* note 109, at 96–97.

only beneficial in monetary policy, where knowledge of undisclosed policy rates could allow for market manipulation, but in regulation as well, where disclosure of financial trouble at an institution can spur a run on the distressed bank.[114] Additionally, the political accountability of other executive branch financial regulators does not necessarily translate into greater insulation from financial interests. Indeed, the structure of executive branch agencies may provide alternative opportunities for regulatory capture, given their reliance on fees levied on the institutions they regulate.[115] Accusations of regulatory capture that focus on the institutional structure of financial regulators, therefore, are not limited to the Federal Reserve, and its lack of transparency and political insulation may even have salutary effects on financial supervision.

Nevertheless, the role that private interests play in the selection of Reserve Bank Presidents will continue to spark criticism that the Reserve Banks are prone to capture by the entities they regulate, particularly if high-profile supervisory lapses recur. The next section turns to the constitutional challenges raised against the Reserve Banks' governance arrangements, before outlining the limitations of the argument.

IV. RESERVE BANKS IN THE CONSTITUTIONAL DESIGN

The Federal Reserve, among administrative agencies, represents the "apogee of independence that is the traditional hallmark of financial regulation."[116] It owes its independence to a number of features, including the lengthy tenure of its

[114] *See* Gary Gorton, *The Development of Opacity in U.S. Banking*, 31 YALE J. REG. 825, 826–27 (2014).

[115] Such fees can lead to fee-shopping from banks and a "'race to the bottom,' in which agencies attract 'customers' by offering relatively lax regulatory enforcement." JOHNSON & KWAK, *supra* note 109, at 96.

[116] *See* Metzger, *supra* note 102, at 134.

Governors,[117] its budgetary autonomy,[118] the potential consequences of untoward political interference,[119] and broader norms about the desirability of an apolitical central banking system.[120] One of the most visible ways in which the Federal Reserve is insulated from political control, however, is through the "opaque and pretty byzantine"[121] process by which the regional Bank Presidents are selected—a process that, as outlined above, leaves the Federal Reserve particularly prone to criticisms of financial industry capture.[122] This appointments process, coupled with the removal protections afforded to Reserve Bank Presidents, raises concern that the Presidents are unduly insulated under constitutional requirements for agency accountability.

A. The Appointments and Removal Problem with Reserve Bank Presidents

The authority that regional Federal Reserve Banks' boards of directors exercise over the selection and removal of Reserve Bank Presidents likely runs afoul of constitutional requirements for the appointment and removal of executive branch officials. Over a series of canonical administrative law decisions, the Supreme Court has delineated the scope of permissible restrictions on Presidential authority over executive agency officers. Because of the peculiar structure of

117 *See* 12 U.S.C. § 242 (2012) ("[E]ach member shall hold office for a term of fourteen years . . . .").

118 *See* Conti-Brown, *supra* note 73, at 273–86 ("The Federal Reserve is the only truly autonomous budgetary entity in the entire federal government, including Congress and the President.").

119 *See* Vermeule, *supra* note 45, at 1198 ("[I]t seems highly plausible to think that the political opposition could inflict serious damage on the President by charging that Fed independence had been compromised on disreputable political grounds.").

120 *See* Conti-Brown, *supra* note 73, at 263 ("[C]entral bank independence . . . lashes [] politicians (usually the President) to the mast to give society the outcome that everyone would ultimately prefer, but that is very hard to achieve . . . .").

121 Casselman, *supra* note 6.

122 *See supra* Section III.C.

the Federal Reserve—and the formal authority of their boards of directors (albeit authority that is circumscribed by legislative and internal constraints)—the Federal Reserve System has faced sharp constitutional criticism.[123] Although, as outlined below, the Federal Reserve System's governance almost certainly violates doctrinal requirements for administrative agency governance, the practical effect of this arrangement has been to elevate internal Federal Reserve interests rather than to privilege private entities.

1. The Scope of Presidential Appointment and Removal Authority

The Appointments Clause of Article II "prescribes the exclusive process by which the President may appoint 'officers of the United States.'"[124] The Clause contemplates two sorts of officers: principal and "inferior."[125] Only the President, with Senate advice and consent, can appoint principal officers.[126] By default, inferior officers are appointed through the same Senate advice-and-consent process, but *can* be appointed, as Congress provides, by "the President alone," "the Courts of Law," or "the Heads of Departments."[127] Distinguishing between the two turns on whether the officer's "work is directed and supervised . . . by others who were appointed by

123 *See, e.g.*, Conti-Brown, *supra* note 73, at 300–03.

124 NLRB v. SW Gen., Inc., 137 S. Ct. 929, 945 (2017) (Thomas, J., concurring).

125 U.S. CONST. art. II, § 2, cl. 2. Members of the executive branch can also come in a third variety, "mere employees," who are "part of the broad swath of 'lesser functionaries' in the Government's workforce." Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (internal citation omitted). Although the distinction between officers and employees defies easy characterization, *see id.* at 2051–52, courts have placed Reserve Bank Presidents within the officer side of that divide, *cf.* Melcher v. Fed. Open Mkt. Comm., 644 F. Supp. 510, 519–20 (D.D.C. 1986), *aff'd on other grounds*, 836 F.2d 561 (D.C. Cir. 1987).

126 U.S. CONST. art. II, § 2, cl. 2.

127 *Id.*

Presidential nomination with the advice and consent of the Senate."[128]

Such procedural requirements are, according to the Supreme Court, "more than a matter of 'etiquette or protocol,'" but instead rank "among the significant structural safeguards of the constitutional scheme."[129] The Supreme Court has identified at least three interests protected by the two-tiered Appointments Clause scheme, largely related to preserving the separation of powers and ensuring greater accountability for the appointments process: first, it "prevents congressional encroachment upon the Executive and Judicial Branches"; second, it "assure[s] a higher quality of appointments" as the President is "less vulnerable to interest-group pressure and personal favoritism"; and, finally, it "ensure[s] public accountability for both the making of a bad appointment and the rejection of a good one."[130]

In addition to the requirements imposed by the Appointments Clause, the Supreme Court has policed removal protections of agency officers to safeguard "the President's ability to ensure that the laws are faithfully executed" and promote the "public's ability to pass judgment on [the President's] efforts[,]" thereby maintaining separation of powers values.[131] Article II of the Constitution tasks the

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128 Edmond v. United States, 520 U.S. 651, 663 (1997). Previously, in *Morrison v. Olson*, the Supreme Court outlined a more multifaceted approach to delineate the divide between principal and inferior officers, looking to an officer's removability by higher-level executive officials, as well as limits on the officer's duties, jurisdiction, and tenure. 487 U.S. 654, 671–73 (1988). More recently, the Supreme Court has followed *Edmond*'s formulation in determining the distinction between the two. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010).

129 *Edmond*, 520 U.S. at 659.

130 *Edmond*, 520 U.S. at 659–60. Preventing congressional encroachment over presidential appointments while simultaneously retaining congressional approval over the President's appointments, however, may be two goals in irreconcilable tension with one another. Similarly, the accountability justification for Senate confirmation locates much of the responsibility for appointments outside the executive branch, envisioning public accountability for both the President and the Senate.

131 *Free Enter. Fund*, 561 U.S. at 498.

President with "tak[ing] Care that the laws [are] faithfully executed."[132] Over a series of canonical cases, the Supreme Court has identified the removal power as integral to this duty and to the separation between the legislative and executive branches.[133] After asserting a broad scope of presidential removal authority in *Myers v. United States*,[134] the Supreme Court has subsequently permitted some insulation of agency officials from at-will removal. For example, in *Humphrey's Executor v. United States*,[135] the Supreme Court permitted for-cause removal requirements for officers of independent agencies.[136] Later, in *Morrison v. Olson*,[137] the Court blessed removal protections for inferior officers from their executive branch superiors.[138]

Further safeguards against removal, however, can undermine the separation of powers and the President's duty to "take Care that the Laws be faithfully executed."[139] In *Free Enterprise Fund v. Public Co. Accounting Board*,[140] the Supreme Court held that double for-cause removal protections—wherein lower-level executive branch officers were removable only for cause by superiors who were likewise afforded for-cause removal protection—violated Article II of the Constitution, and, as a result, the constitutional principle of the separation of powers.[141] This second layer of removal protection, according to the *Free Enterprise Fund* Court, impermissibly insulated agency officials and undermined the President's ability to "oversee the faithfulness of the officers who execute" the law, an outcome "contrary to Article II's

132 U.S. CONST. art II, § 3.

133 *See Free Enter. Fund*, 561 U.S. at 513–14.

134 Myers v. United States, 272 U.S. 52, 117 (1926).

135 Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

136 *Id.* at 629 (upholding for-cause removal constraints for officers of "quasi legislative or quasi judicial agencies").

137 Morrison v. Olson, 487 U.S. 654 (1988).

138 *Id.* at 692–93.

139 U.S. CONST. art. II, § 3.

140 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

141 *Id.* at 495–98.

vesting of the executive power in the President."[142] Moreover, blessing two levels of removal protection, according to the *Free Enterprise Fund* Court, risked permitting congressional aggrandizement at the expense of the executive branch by subverting "perhaps *the* key means" of "resist[ing] encroachments" by the legislative branch—the President's removal authority.[143]

2. Reserve Bank Presidents: An Uneasy Constitutional Fit

Although the Constitution contemplates two sorts of officers, this distinction likely does not make a difference in assessing the validity of the Federal Reserve Bank appointments process under existing law. As Peter Conti-Brown argues, "it does not matter whether the Reserve Bank presidents are considered principal officers or inferior officers; their appointment procedure violates the constitutional requirements in either context."[144] By vesting the appointment authority for Reserve Bank Presidents in the Reserve Banks' boards of directors, rather than in "the President alone, in the Courts of Law, or in the Heads of [a] Department[]" (namely, the Board of Governors), the appointment process meets neither the standard for principal nor inferior officers.[145] Although this Appointments Clause

142 *Id.* at 484. Despite anchoring its analysis on the parties' stipulation that Securities and Exchange Commission (the "SEC") Commissioners themselves enjoy for-cause removal protection, *see id.* at 487, this central premise of *Free Enterprise Fund* is not explicitly commanded by the SEC's governing statute. *Id.* at 545–47 (Breyer, J., dissenting). For an argument that the *Free Enterprise Fund* Court's focus on two levels of removal protection failed to capture the primary separation of powers problem implicated in the case, see Peter L. Strauss, *On the Difficulties of Generalization—*PCAOB *in the Footsteps of* Myers*,* Humphrey's Executor*,* Morrison*, and* Freytag, 32 CARDOZO L. REV. 2255, 2278 (2011) (arguing that the nesting of one independent agency (the Public Company Accounting Oversight Board) within another (the SEC) was "virtually unique" among administrative agencies).

143 *Free Enter. Fund*, 561 U.S. at 501 (internal citation omitted).

144 Conti-Brown, *supra* note 73, at 302.

145 *Id.* at 301 (internal quotation marks omitted).

problem spurred a spate of litigation in the D.C. Circuit challenging the constitutionality of the FOMC in the 1980s, the cases were instead decided on standing grounds or, in challenges brought by legislators, on the availability of relief through the political process.[146]

While the private appointment of the Federal Reserve Bank of New York President is the most constitutionally troubling, given the New York Fed President's permanent seat on the FOMC, their role as Vice Chairman of the FOMC, and the Bank's responsibility for the implementation of monetary policy,[147] the issue extends beyond New York.[148] All Reserve Bank Presidents are appointed subject to the same board-of-directors-initiated process, and each can serve as a voting member of the FOMC—a responsibility in which they have no overseer.[149]

In addition to the constitutional problem associated with the private appointment of Federal Reserve Bank Presidents, the removal protections afforded to the Presidents raises

146 *See* Melcher v. Fed. Open Mkt. Comm., 836 F.2d 561, 565 (D.C. Cir. 1987) (dismissing based on *Riegle*); Comm. for Monetary Reform v. Bd. of Governors of the Fed. Reserve Sys., 766 F.2d 538, 544 (D.C. Cir. 1985) (dismissing for lack of standing); Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 882 (D.C. Cir. 1981) (dismissing legislator complaint based on availability of relief through congressional action); Reuss v. Balles, 584 F.2d 461, 471 (D.C. Cir. 1978) (dismissing for lack of standing as either legislator or bondholder). *See also* Conti-Brown, *supra* note 73, at 305–07 ("[L]egal doctrines that have nothing to do with the Federal Reserve Act have created a kind of hedge around Fed independence that is simultaneously a legal and non-legal mechanism.").

147 *Monetary Policy Implementation*, FED. RESERVE BANK N.Y., https://www.newyorkfed.org/markets/domestic-market-operations/monetary-policy-implementation [https://perma.cc/53N4-9WAV].

148 *See* PETER CONTI-BROWN, *supra* note 13, at 257–58; Conti-Brown, *supra* note 73, at 301. Conti-Brown also raises the concern that some financial institutions, including Wells Fargo and Bank of America, are not supervised by the Federal Reserve Bank of New York, and that other banks can "move their identity to a more sympathetic Federal Reserve District where they could have a say in selecting their regulatory overseer." CONTI-BROWN, *supra* note 13, at 258.

149 *See* Conti-Brown, *supra* note 73, at 300–02.

further constitutional concerns. Although the Reserve Bank Presidents are removable at will by their boards of directors, they are removable only for cause by the Board of Governors, who are likewise insulated with for-cause protection.[150] Consequently, this arrangement may run afoul of the separation of powers boundary demarcated in *Free Enterprise Fund*: two layers of for-cause removal protection, which "subverts the President's ability to ensure that the laws are faithfully executed."[151] Although the authority of the Reserve Bank boards of directors, who can remove the Presidents at will, may alleviate the *Free Enterprise Fund* problem associated with these layered removal protections, it is likely insufficient to remedy the separation of powers concerns implicated by the process for removing Reserve Bank Presidents—ultimate removal authority is still vested in another entity that does not answer to the President.[152]

B. The Limitations of the Appointments and Removal Framework

While the appointment and removal procedures for the Reserve Bank Presidents, coupled with the decreasing importance of the Reserve Banks within the Federal Reserve System, may render the Reserve Banks "vestigial" and unconstitutional,[153] the effects of the Reserve Banks' institutional features are potentially more complicated than prior treatment has indicated. As outlined above, challenges to the constitutionality of the appointments procedure for Federal Reserve Bank Presidents were decided without any constitutional resolution, creating a "judicial hedge around Fed independence."[154] This pattern of dismissing the

150 *See* 12 U.S.C. §§ 242, 248(f) (2012).

151 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 498 (2010). *See also* Conti-Brown, *supra* note 73, at 302–03.

152 *See Free Enter. Fund*, 561 U.S. at 496 (invalidating an arrangement where "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board").

153 Conti-Brown, *supra* note 103, at 1, 14.

154 Conti-Brown, *supra* note 73, at 305.

challenges without resolving the central constitutional issue potentially flows from the uneasy fit of monetary policy in administrative law. That is, an overarching emphasis on independence in central banking has long spurred unusual institutional arrangements. Not only was it a preoccupying concern of the framers of the National Monetary Commission, the precursor of the Federal Reserve, but the First Bank of the United States, created in the wake of the founding, similarly bore private trappings.[155] Indeed, the evasive judicial treatment of the constitutionality of the Federal Reserve may be a recognition of the historical practice of insulating monetary policy from politics and the longstanding rationale for doing so.[156]

Both historical practice and persistent concerns over the potential for political influence over monetary policy could suggest that the quasi-private structure of the Reserve Banks, and the role of non-political actors in selecting their Presidents, is necessary for independent central banking.[157] The governance structures of other international central banks, some of which include private ownership interests, indicate that institutional insulation from direct public control is not uncommon internationally.[158] Although these historical and practical justifications for insulation are

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155 *See* NAT'L MONETARY COMM'N, *supra* note 22, at 14; Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 117 (1994). Dellinger and Powell argue that a modern assessment of the constitutionality of the Bank would raise serious concerns under the Appointments Clause. *Id.* at 131–32. The proximity of the Bank Bill to the founding could suggest, however, that the framers of the Bank Bill may have had an alternative understanding of the applicability of the Appointments Clause.

156 *See* Melcher v. Fed. Open Mkt. Comm., 644 F. Supp. 510, 521–22 (D.D.C., 1986) *aff'd on other grounds*, 836 F.2d 561 (D.C. Cir. 1987) (detailing the "subtle and conscious balance of public and private elements" that has governed "the regulation of the nation's monetary systems . . . [e]ver since the birth of this nation").

157 *See supra* note 18 at 4–5.

158 *See* BANK FOR INT'L SETTLEMENTS, ISSUES IN THE GOVERNANCE OF CENTRAL BANKS 63–65 (2009), https://www.bis.org/publ/othp04.pdf [https://perma.cc/6NCG-BQZL].

difficult to reconcile with the aforementioned constitutional issues, the proliferation of other government-affiliated entities that are not wholly public or private—so-called "boundary organizations"—illustrates that the problem stretches far beyond the Federal Reserve Banks.[159] Like the Federal Reserve, a number of other familiar entities exist at the public-private boundary, including Amtrak, the Federal Home Loan Mortgage Corporation, and the Federal National Mortgage Association.[160]

Moreover, the most recent decision to squarely confront the delegation of monetary policy authority to Reserve Bank Presidents, *Melcher v. Federal Open Market Committee*, upheld the constitutionality of Reserve Bank Presidents serving on the FOMC.[161] In upholding the validity of the FOMC and the exercise of monetary policy authority by private citizens, the *Melcher* court noted the "unusual degree of debate and reflection" that led to the "exquisitely balanced approach" of the Federal Reserve.[162] Finding that the separation of powers problems implicated by other congressional attempts to insulate executive branch officers from Presidential control—namely, legislative aggrandizement at the expense of the executive branch—were absent when Congress (and the President) voluntarily devolved public power on private citizen Reserve Bank Presidents, the *Melcher* court viewed the Appointments Clause as permitting a regime where the appointment of would-be principal officers occurred entirely outside the political branches.[163] The *Melcher* court cautioned that its

159 See Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014), for an account of quasi-governmental entities that exist at the "boundaries" of the federal government. O'Connell notes that such "boundary organizations" raise a host of legal classification questions, including the application of the Appointments Clause. *Id.* at 902–06.

160 *Id.* at 856–61.

161 *Melcher*, 644 F. Supp. at 523–24. See Mark F. Bernstein, Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 133–37 (1989) for the opposite view.

162 *Id.* at 524.

163 *Id.* at 520–22.

reasoning was "necessarily narrow," and that the "history of private participation" in monetary policy "may well make a significant difference in terms of any attempted delegation" in another sphere of governmental authority.[164] On appeal, the D.C. Circuit affirmed the district court's dismissal of the case, but avoided ruling on the merits of the Appointments Clause challenge by citing the "insurmountable barrier" of equitable discretion and the fact that the congressman who had brought the suit "could obtain substantial relief from his fellow legislators" through the legislative process.[165]

While the *Melcher* court thus found the tension between the Appointments Clause and the quasi-private Reserve Banks reconcilable, the possibility that such a holding would recur today, more than three decades later, is likely slim. The Supreme Court and D.C. Circuit's recent treatment of another quasi-governmental "boundary organization," Amtrak, demonstrates the application of constitutional standards to other government-created private entities. In *Department of Transportation v. Ass'n of American Railroads*, the Supreme Court held that Amtrak was a governmental entity for the purposes of the nondelegation doctrine.[166] In a concurring opinion, Justice Alito questioned the validity of the process for appointing both the arbitrator tasked with resolving regulatory disagreements between Amtrak and the Federal Railroad Administration and Amtrak's President.[167] On remand, the D.C. Circuit invalidated the appointment procedure for the arbitrator tasked with resolving performance metrics and standards disputes between Amtrak and the Federal Railroad Administration, as the arbitrator

164 *Id.* at 523.

165 Melcher v. Fed. Open Mkt. Comm., 836 F.2d 561, 562–63 (D.C. Cir. 1987) (citing Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873 (D.C. Cir. 1981) (internal quotation marks omitted).

166 Dep't of Transp. v. Assoc. of Am. R.Rs., 135 S. Ct. 1225, 1233 (2015).

167 *Id.* at 1236–40 (Alito, J., concurring). Justice Alito argued that the non-Presidentially appointed arbitrator, if a public official, "would be making law without supervision"—and "an officer without a supervisor must be principal." *Id.* at 1238. Justice Alito further contended that the appointment procedure for Amtrak's president met neither the standard for principal nor inferior officers. *Id.* at 1239–40.

was not directed or supervised by a Senate-confirmed principal officer.[168]

Thus, in recent cases where the appointment process for other quasi-governmental entity officials faced judicial scrutiny, both the Supreme Court and D.C. Circuit have proven willing to apply constitutional requirements to such "boundary organizations." As a result, given the doctrinally tenuous status of the Reserve Banks, examining whether their organizational structure privileges private interests is necessary. Should the makeup of the Reserve Bank Presidents indeed reflect undue influence of industry, remedying the constitutional shortcomings of their appointments procedure would be even more pressing. This Note thus concludes by examining the central critique lobbed at the Reserve Banks: that their institutional arrangement increases the risk of private industry capture by involving private citizens in the selection of their Presidents.

V. AGAINST THE GRAIN: THE RESULTS OF FEDERAL RESERVE BANK APPOINTMENTS

A. Reserve Bank Presidential Appointments in Practice

Although the constitutional issues raised by Reserve Bank Presidential appointments and removal are consequential, the link between them and the potential for undue influence by financial interests is less clear. Most notably, for a process criticized as beholden to private interests—the interests of regulated entities, no less—recent Reserve Bank appointments have almost overwhelmingly been drawn not from finance or the private sector more generally, but from within the Federal Reserve itself.

Indeed, only two current Reserve Bank Presidents are veterans of the financial industry: Robert Kaplan, President of the Federal Reserve Bank of Dallas and Neel Kashkari,

168 Assoc. of Am. R.Rs. v. U.S. Dep't of Transp., 821 F.3d 19, 39 (D.C. Cir. 2016).

President of the Federal Reserve Bank of Minneapolis.[169] Nearly all of the remaining Reserve Bank Presidents, by contrast, were former Federal Reserve employees prior to assuming their post as President.[170] Some Presidents, including John Williams, whose appointment spurred the public consternation outlined in the Introduction, have spent

169 Both had previously worked at Goldman Sachs. *See Robert S. Kaplan*, FED. RES. BANK DALLAS, https://www.dallasfed.org/fed/bios/kaplan.aspx [https://perma.cc/8UNH-T823] (last visited Jan. 10, 2019); *President Neel Kashkari*, FED. RES. BANK MINNEAPOLIS, https://www.minneapolisfed.org/about/president [https://perma.cc/J8LH-RRRS] (last visited Jan. 10, 2019).

170 *See Raphael Bostic: President and Chief Executive Officer*, FED. RES. BANK ATLANTA (Jan. 30, 2019), https://www.frbatlanta.org/about/atlantafed/officers/executive_office/bostic-raphael.aspx [https://perma.cc/2D5P-TQRC]; *Office of the President*, FED. RES. BANK BOSTON, https://www.bostonfed.org/people/bank/eric-rosengren.aspx [https://perma.cc/R6NM-AX62] (last visited Jan. 10, 2019); *Charles Evans: President and Chief Executive Officer*, FED. RES. BANK CHICAGO, https://www.chicagofed.org/people/e/evans-charles [https://perma.cc/CG2H-T2JG] (last visited Jan. 10, 2019); *Loretta J. Mester: President and Chief Executive Officer*, FED. RES. BANK CLEVELAND (2019), https://www.clevelandfed.org/people-search?pid=51d503bc-e964-4f3a-b26e-5c472e868348 [https://perma.cc/8UHW-NGVB]; *President Esther L. George*, FED. RES. BANK KAN. CITY, https://www.kansascityfed.org/esthergeorge [https://perma.cc/D5GU-MMUE] (last visited Jan. 15, 2019); *Office of the President*, FED. RES. BANK N.Y., https://www.newyorkfed.org/aboutthefed/orgchart/Williams [https://perma.cc/Y2Y2-ELF6] (last visited Jan. 15, 2019); *Our District: Leadership*, FED. RES. BANK S.F. (Oct. 2018), https://www.frbsf.org/our-district/leadership/office-of-the-president/ [https://perma.cc/FN4Y-YP29]; *James Bullard*, FED. RES. BANK ST. LOUIS, https://www.stlouisfed.org/~/media/files/pdfs/bullard/vita/bullard_vita.pdf?la=en [https://perma.cc/Y2CE-ZS6W] (June 22, 2019). The two remaining Presidents who are neither financial industry nor Federal Reserve System veterans have spent their careers in higher education and consulting. '*See Executive Leadership: Patrick T. Harker, President and Chief Executive Officer*, FED. RES. BANK PHILADELPHIA, https://www.philadelphiafed.org/about-the-fed/senior-executives/harker [https://perma.cc/VQW8-FGCH] (last visited Jan. 15, 2019); *Our Leadership & Governance: Thomas I. Barkin*, FED. RES. BANK RICHMOND, https://www.richmondfed.org/about_us/our_leadership_governance/president_2 [https://perma.cc/QNT9-JF6T] (last visited Jan. 15, 2019).

their entire career in the Federal Reserve System.[171] Although Williams was characterized as a "consummate central-bank insider" after assuming the New York Fed post,[172] six other Presidents had similarly spent the majority of their careers within the Federal Reserve before assuming the President post.[173] And this trend is not limited to the current slate of Reserve Bank Presidents—the majority of the preceding generation of Reserve Bank Presidents, nearly all of whom were appointed prior to Dodd-Frank's elimination of Class A voting interests, were Federal Reserve System veterans as well.[174]

171 *John C. Williams: Curriculum Vitae*, FED. RES. BANK OF N.Y. (Aug. 2019), https://www.newyorkfed.org/medialibrary/media/research/economists/williams/cv-williams [https://perma.cc/84AC-ZSZ9].

172 Timiraos, *supra* note 5.

173 *See Office of the President*, *supra* note 170; *Charles Evans: President and Chief Executive Officer*, *supra* note 170; *Loretta J. Mester: President and Chief Executive Officer*, *supra* note 170; *President Esther L. George*, *supra* note 170; *Office of the President*, *supra* note 170; *Our District: Leadership*, *supra* note 170; *James Bullard*, *supra* note 170.

174 *See* Fed. Reserve Bank of Bos., *Cathy E. Minehan*, FED. RES. HIST., https://www.federalreservehistory.org/people/cathy_e_minehan [https://perma.cc/677Y-24MX] (Boston, 1994–2007); Fed. Reserve Bank of Cleveland, *Sandra Pianalto*, FED. RES. HIST., https://www.federalreservehistory.org/people/sandra_pianalto [https://perma.cc/QAX9-CWT8] (Cleveland, 2003–14); Fed. Reserve Bank of Kansas City, *Thomas M. Hoenig*, FED. RES. HIST., https://www.federalreservehistory.org/people/thomas_m_hoenig [https://perma.cc/CCZ6-EJUH] (Kansas City, 1991–2011); Fed. Reserve Bank of Minneapolis, *Naryana Kocherlakota*, FED. RES. HIST., https://www.federalreservehistory.org/people/narayana_kocherlakota [https://perma.cc/CLE8-QTEU] (Minneapolis, 2009–15); Fed. Reserve Bank of Richmond, *Jeffrey M. Lacker*, FED. RES. HIST., https://www.federalreservehistory.org/people/jeffrey_m_lacker [https://perma.cc/5WX6-ZVS8] (Richmond, 2004–17); Fed. Reserve Bank of S.F., *John C. Williams*, FED. RES. HIST., https://www.federalreservehistory.org/people/john_c_williams [https://perma.cc/3KV2-ZKC2] (San Francisco, 2011–18); Fed. Reserve Bank of St. Louis, *William Poole*, FED. RES. HIST., https://www.federalreservehistory.org/people/william_poole [https://perma.cc/3C59-8AW5] (St. Louis, 1998–2008). William Dudley, New York Fed President prior to Williams, worked at the New York Fed

Furthermore, the process for appointing Federal Reserve Bank Presidents has shifted away from any direct involvement of regulated entities. Both the statutory elimination of Class A directors' roles in selecting Reserve Bank Presidents[175] and Reserve Bank-specific bylaws prohibiting the involvement of thrift institutions in the process have effectively eliminated the direct influence of regulated entities in selecting Reserve Bank Presidents. Moreover, although the selection of Reserve Bank Presidents is not formally vested in the Chair of the Federal Reserve System or in the Board of Governors, the Board's apparent role in recent appointments has been widely noted. The appointment of John Williams, a member of Federal Reserve Chair Jerome Powell's "inner circle," is illustrative of the potentially influential role of the Chair in selecting future FOMC colleagues, particularly those with the most consequential voices among Reserve Bank Presidents.[176]

Thus, the makeup of Reserve Bank Presidents seemingly cuts against any contention that the results of the process would be appreciably different under a regime where a different, public entity selects Reserve Bank Presidents. The prevalence of Federal Reserve System veterans serving as Presidents assuages concerns that banks can "seek[] more sympathetic regulatory treatment by changing their seat of incorporation out of New York and into another district."[177] As a result, although the role of the board of directors in appointments may continue to pose accountability

immediately before assuming the Presidency, but spent the majority of his prior career at Goldman Sachs. Fed. Reserve Bank of N.Y., *William C. Dudley*, FED. RES. HIST., https://www.federalreservehistory.org/people/william_c_dudley?WT.si_n=Search&WT.si_x=3 [https://perma.cc/4R45-ZDNR].

175 12 U.S.C. § 341 (2012). Of course, regulated institutions continue to play an indirect role, as they select any eligible Class B directors who are not affiliated with thrift institutions.

176 *See* Smialek et al., *supra* note 6; Smialek & Boesler, *supra* note 8 ("Some Fed watchers question how much influence Powell has exerted and whether that's biased the New York selection process toward an insider.").

177 CONTI-BROWN, *supra* note 13, at 258.

problems,[178] it is unclear that vesting the appointment power in a public actor would necessarily alter the result of the current appointment regime—the elevation of Federal Reserve System veterans, including some who have spent the bulk of their careers at one Reserve Bank, to the President post.[179] Indeed, the practice and results of recent appointments may resemble—at least informally—Peter Conti-Brown's suggested alteration to the appointments procedure of Reserve Bank Presidents: placing the power of appointment and removal in the Board of Governors, "essentially turn[ing] [the Federal Reserve Banks] into branch offices of the Federal Reserve in the twelve cities where they are located."[180]

Of course, these practical consequences do little to eliminate the doctrinal shortcomings of the process for appointing and removing Federal Reserve Bank Presidents.[181] But functionally, they illustrate the potentially benign results of that arrangement. Insulation from presidential control has not undermined the "quality of appointments," despite the potential for "interest-group pressure" at the Reserve Banks.[182] As a result, the consequence of the constitutional shortcomings of Reserve Bank governance is far less problematic in practice.

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178 *See* CONTI-BROWN, *supra* note 13, at 119.

179 *See, e.g.*, *President Esther L. George*, *supra* note 170; *Office of the President*, *supra* note 170.

180 CONTI-BROWN, *supra* note 13, at 258. To solve the constitutional deficiencies associated with the two-layer removal protections for the Reserve Bank Presidents, the current for-cause restrictions on Reserve Bank President removal by the Board of Governors would have to be eliminated. *Id.* at 255–56. Conti-Brown also advocates, as a "natural extension" of vesting the appointment and removal power of Reserve Bank Presidents in the Board of Governors, removing Presidents from the FOMC, including the permanent position of the New York Fed President as Vice Chair of the FOMC. *Id.* at 258–59. Such an arrangement would remove the last instance in which Reserve Bank Presidents exercise unsupervised policy discretion, thereby eliminating the constitutional problems currently implicated by their presence on the FOMC.

181 *See supra* Section IV.A.

182 Edmond v. United States, 520 U.S. 651, 663 (1997).

B. Remedying the Appointment Process for Greater Transparency and Accountability

Thus, an alternative conception of how to remedy the appointments process of Reserve Bank Presidents is necessary. Given the potential involvement of the Board of Governors in selecting Presidents and the pattern of promoting Reserve System insiders, some of the concerns associated with the role of Reserve Bank boards of directors appear to be unfounded. This homogeneity of Reserve Bank Presidents, however, raises other important issues.

After the appointment of New York Fed President John Williams, some criticized the selection of an insider as furthering the trend toward homogeneity within Federal Reserve.[183] The New York Fed recently faced criticism that its organizational culture was "marked by insufficient individual initiative"[184] and "ruled by groupthink."[185] After the financial crisis, some pointed to the insularity of the Federal Reserve as a potentially exacerbating cause.[186] Looking beyond the regulatory sphere, the lack of dissenting votes on the FOMC may further indicate homogeneity within the System.[187] To the extent that the politically insulated process for appointing Federal Reserve Bank Presidents further entrenches this trend, the practical effects on regulation may be undesirable.

Additionally, the dominance of monetary policy experience among Federal Reserve Bank Presidents may be ill-suited to

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183 *See* Casselman, *supra* note 6 ("The problem with picking a longtime Fed insider is it just amplifies the risk of groupthink . . . [which] has proven to be a very serious threat at the Fed.").

184 *See* FED. RES. BANK OF N.Y., *supra* note 13, at 3.

185 *Inside the New York Fed*, *supra* note 12.

186 *See* JOHNSON & KWAK, *supra* note 109, at 103 (recounting the triumph of the "Greenspan doctrine" over external calls to reconsider the connection between deregulation, innovation, and economic risk). After the appointment of John Williams, some raised similar concerns. *See* Casselman, *supra* note 6 ("[T]here are also risks to picking an insider. Fed officials failed to appreciate the risks posed by the housing bubble in the mid-2000s, for example, even as some outside voices tried to raise the alarm.").

187 *See* CONTI-BROWN, *supra* note 13, at 121–22.

achieve the goal of effective financial supervision. For example, the appointment of John Williams raised some concern that Williams lacked the financial experience commensurate to the task of supervising the banks in the New York Fed's district.[188] More generally, economists dominate among Reserve Bank Presidents, undermining any contention that "the current governance structure produces a valuable range of intellectual diversity."[189] This further illustrates the problems associated with combining monetary and supervisory responsibility within the Federal Reserve.

Trends toward centralization in the appointments process may only serve to exacerbate these problems. Although the potential involvement of Federal Reserve Chair Powell in the recent selection of the New York Fed President may mitigate accountability concerns raised by the pronounced involvement of regional boards of directors, it resulted in the elevation of a member of the Chair's "inner circle" to "build[] out the leadership team for a new Federal Reserve chairman who isn't an economist."[190] And because of the opacity of the Reserve Bank President appointment process, the public received scant information regarding the actual criteria of selection or the relative influence of the Board of Governors, the Reserve Banks' boards of directors, or other involved parties in the appointment process.

Thus, although greater involvement of the Board of Governors in the selection of Reserve Bank Presidents may alleviate concerns about industry capture, the selection of another Federal Reserve insider to a Reserve Bank Presidency points to a different problem in Reserve Bank

188 *See* Heather Long, *John Williams Tapped to Lead New York Fed, Frustrating Progressives and Worrying Some on Wall Street*, WASH. POST (Apr. 3, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/04/03/john-williams-tapped-to-lead-new-york-fed-frustrating-progressives-and-worrying-some-on-wall-street/?utm_term=.4721c5408426 [https://perma.cc/W63R-52CT] ("Some on Wall Street are also concerned that Williams, a Stanford economist who has spent most of his career at the central bank, does not have enough experience with markets.").

189 CONTI-BROWN, *supra* note 13, at 261.

190 *See* Timiraos, *supra* note 5.

governance and demands an alternative solution. Without more systemic transparency in the selection process, efforts at public engagement, including the New York Fed's recent attempt to "emphasize[] an unusual amount of transparency" in their selection process,[191] may do little to counter public dissatisfaction over the legitimacy of the appointment process and insularity of the selection.[192] Legislative changes suggested after the most recent New York Fed appointment included requiring the New York Fed President to testify before Congress and making the New York Fed President a Presidential appointment.[193] More ambitious and far-reaching reforms remain possible (if unlikely), ranging from formally vesting appointment and at-will removal power in the Board of Governors, to stripping the Reserve Banks of their private status entirely.[194]

The longstanding historical foundations of the quasi-private Federal Reserve and the failure of similarly ambitious bills following the financial crisis, however, suggest that systemic reforms aimed at Federal Reserve Bank governance are unlikely. Instead, reforms adopted by the Reserve Banks themselves are likely the more promising avenue for change. The New York Fed's recent commitment to transparency, though ultimately leaving many unsatisfied, provides a roadmap for future reforms that could be adopted and expanded throughout the Federal Reserve System.

First, the identification of consulted "stakeholders" in the Presidential search process would better illuminate the relative influence of Reserve Bank boards of directors and the Board of Governors, and clarify the role of the Board of

191 *See* Smialek & Boesler, *supra* note 8.

192 *See* Timiraos, *supra* note 5 ("Those frustrations amplified objections over a search process that happens out of public view . . . '[s]uch an opaque process harms the Fed's legitimacy and undermines its credibility and effectiveness in serving the public . . . .'").

193 *See* Smialek & Boesler, *supra* note 8.

194 *See* CONTI-BROWN, *supra* note 13, at 258; Binyamin Applebaum, *Two Federal Reserve Openings Provide One Chance to Counter Trump*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/politics/federal-reserve-trump.html [https://perma.cc/8RS4-XURA].

Governors in selecting Reserve Bank Presidents.[195] As argued above, the opacity of Reserve Bank governance does not necessarily privilege financial interests, but it can instead mask involvement by the Board of Governors. Formal identification of consulted parties in the search process, as well as information on the frequency and timing of consultation (particularly with the Board of Governors), would promote greater transparency in appointments.

Second, allowing a formal window for public input, and actively soliciting public involvement within that time period, would allow for greater and more focused participation in the search process. The New York Fed, for example, solicited only generalized feedback about the search process online by requesting public nominations for potential candidates and allowing for the opportunity for general feedback via email.[196] Although the lack of general transparency surrounding the most recent New York Fed President selection makes any effort to discern the impact of public participation difficult, it is unlikely that these minimal measures provided sufficient avenues for public engagement in the search process. While some limitations on public feedback are likely necessary to preserve an efficient process, a greater commitment to meaningful public comment would serve to both heighten transparency in the appointments procedure and ensure that public participation can be focused towards specific nominees being seriously considered for the role.

Finally, identification of candidates prior to a final selection would further serve to elicit more fruitful public comment during the process, rather than limiting involvement to post-hoc criticism. To the extent that identified candidates remain veterans of the Federal Reserve System,

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195 *See Presidential Search Frequently Asked Questions*, FED. RES. BANK N.Y. https://www.newyorkfed.org/medialibrary/media/aboutthefed/presidential-search/faqs.pdf [https://perma.cc/XL67-EMP8] (identifying consulted stakeholders as "representatives from academia, community and economic development organizations, not-for-profits, industry, small businesses, minority and women-owned businesses, manufacturing and labor").

196 *Presidential Search Frequently Asked Questions*, *supra* note 198.

public identification would provide an adequate opportunity for criticism at a time when it could prove most effective. Moreover, such identification would also serve to increase communications from Reserve Banks throughout the selection process, offering more meaningful transparency prior to an appointment. A greater commitment to procedural transparency could satisfy public opinion about the ultimate selection, no matter the result.

Of course, the aforementioned solutions do not guarantee that future selections will buck the trend of appointing Federal Reserve System veterans. As previously argued, however, the appointment of insiders is less worrisome than fears of financial industry influence in Reserve Bank governance.[197] Transparency reforms thus may not serve to change the ultimate results of the process, but could demonstrate to the public that, in the words of a former Federal Reserve Bank President, future search committees and boards of directors "looked sufficiently outside the realm of people they know" and fully accounted for public input, even if the process ultimately "le[d] them back to a Fed insider."[198] Additionally, a greater commitment to public participation in the appointments process could buttress the Federal Reserve's legitimacy in the subsequent exercise of its supervisory and monetary policy functions—responsibilities which, as argued above, require some opacity and insulation from the public eye.

More drastic solutions advanced by those wary of the role of financial interests in Reserve Bank governance fail to account for the practical results of Reserve Bank appointments and the feasibility of large-scale reform. Recognizing the actual nature of the process instead indicates that any future solutions should be framed around a commitment to achieve greater procedural transparency and increased public input. Although more comprehensive legislative reforms aimed at the Reserve Banks remain possible—and, in light of the aforementioned constitutional

197 *See supra* Section V.A.

198 Smialek & Boesler, *supra* note 8.

infirmities of the Reserve Banks, worthwhile—a sustained commitment to transparency could answer many of the recurring concerns in the Reserve Bank President selection process.

VI. CONCLUSION

There is no question that the Federal Reserve Banks are an anomaly within the federal government. Given the unusual features of their governance structure and the role that private interests—including, until recently, financial interests—play in the selection of their Presidents, it is unsurprising that their existence has sparked concerns about the influence of regulated entities in financial supervision and the constitutional shortcomings of the Reserve Banks' institutional design. The practice of Federal Reserve Bank President appointments, however, has recently been marked by the involvement of Presidential appointees and widespread elevation of Federal Reserve staff to President posts. As a result, any reforms aimed at the appointment process for Federal Reserve Bank Presidents should account for the current reality of the process, which differs markedly from the popular account that the selection process privileges financial interests.