WHAT THE FEDERAL RESERVE BOARD TELLS US ABOUT AGENCY INDEPENDENCE

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In administrative law, the sine qua non of agency independence lies in the enabling statute. If the statute protects the agency's head from removal except "for cause," then the agency is considered insulated from presidential control and classified as independent. On the other hand, if the statute is silent on for-cause tenure protection, then the agency is classified as executive. This Note questions that central assumption by relying on the history of the Federal Reserve Board of Governors, arguably one of the most independent agencies in Washington. By tracing the Board's history from a limited institution in 1913 to the powerful central bank of today, this Note demonstrates that in at least some cases, the driving factors behind operative independence have more to do with the practical realities of governance than the formalities of administrative law. Indeed, even though the Fed's enabling statute is silent on the issue of for-cause tenure protection, the President has never fired the head of the agency. Even President Trump has declined to go so far. This Note addresses this paradox through a detailed look at the Board's history and the major inflection points in its rise. Throughout, this Note also highlights the active role that the Board played in its own ascendency, demonstrating the dynamic life of administrative agencies and the powerful role they can play in shaping their own futures.

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Introduction

"*I guess I'm stuck with you.*"
—Donald Trump to Jerome Powell, 2019[1]

At the end of 2018, Donald Trump was livid. Stock prices had just tumbled, wiping out all of the gains from that year,[2] and Trump was convinced that Jerome Powell was to blame.[3] As Chair of the Federal Reserve Board of Governors,[4] Powell oversaw the Board's earlier decision that month to raise interest rates[5]—a decision Trump considered a public rebuke to his warning that any rate hike would be "yet another mistake."[6] Not only was the President dismayed that the Board ignored his instruction, but he was also concerned that, left unchecked, the Board's repeated rate hikes would "turn [him] into Hoover."[7]

Trump's loud frustration with the Board prompted immediate reports that he was considering firing Powell, the individual he consid-

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[1] Nick Timiraos & Alex Leary, *Trump to Fed Chairman Powell: 'I Guess I'm Stuck With You*,*'* Wall St. J. (Apr. 2, 2019, 6:17 PM), https://www.wsj.com/articles/trump-to-fed-chairman-powell-i-guess-im-stuck-with-you-11554238931.

[2] Stephen Grocer & Karl Russell, *The Stock Market Has Wiped Out Its 2018 Gains. But If You Step Back, It's Still Riding High*, N.Y. Times (Dec. 14, 2018), https://www.nytimes.com/interactive/2018/12/10/business/dealbook/stock-market-correction-long-term.html.

[3] Binyamin Appelbaum, *Stock Market Rout Has Trump Fixated on Fed Chair Powell*, N.Y. Times (Dec. 23, 2018), https://www.nytimes.com/2018/12/23/us/politics/fed-chairman-trump-jerome-powell.html.

[4] The Federal Reserve is the central bank of the United States and is responsible for ensuring a strong economy. Its mandate includes stabilizing prices and employment, and ensuring moderate long-term interest rates. *What Economic Goals Does the Federal Reserve Seek to Achieve Through Its Monetary Policy?*, Bd. of Governors of the Fed. Reserve Sys., https://www.federalreserve.gov/faqs/what-economic-goals-does-federal-reserve-seek-to-achieve-through-monetary-policy.htm (last updated Aug. 19, 2016). One of the major ways the Fed executes its mandate is by buying or selling government securities to manipulate the supply of money in the economy. *Making Sense of the Federal Reserve: A Closer Look at Open Market Operations*, Fed. Reserve Bank of St. Louis, www.stlouisfed.org/in-plain-english/a-closer-look-at-open-market-operations (last visited Sept. 7, 2019); *see also infra* note 38 (discussing the role of the Federal Open Market Committee in adjusting the money supply). This Note uses the terms "Board," "Federal Reserve," and "Fed" interchangeably. By "Chair," this Note refers to the head of the Board of Governors, which is the central governing body for the Federal Reserve System.

[5] *See* Dominic Rushe, *Federal Reserve Raises Interest Rates Despite Pressure from Trump*, Guardian (Dec. 19, 2018, 6:16 PM), https://www.theguardian.com/business/2018/dec/19/federal-reserve-interest-rates-raised-trump.

[6] Larry Elliott, *Trump Heaps Pressure on Federal Reserve over Interest Rate Rise*, Guardian (Dec. 18, 2018, 1:36 PM), https://www.theguardian.com/business/2018/dec/18/trump-heaps-pressure-on-the-federal-reserve-over-interest-rate-rise.

[7] Appelbaum, *supra* note 3. This is a reference to President Herbert Hoover, who famously led the United States into the Great Depression. *Id.*

ered responsible for the market decline.[8] But almost as quickly as these reports surfaced, Trump's advisers scrambled to shut them down.[9] Treasury Secretary Steven Mnuchin stated that Trump "never suggested firing Chairman Jay Powell,"[10] and Acting Chief of Staff Mick Mulvaney said Trump "now realizes he does not have the authority" to do so.[11] Senators on both sides of the aisle also coalesced to defend the Board. Republican Senator Richard Shelby—a former Chairman of the Senate Banking Committee—told reporters that "[t]he independence of the Fed is the foundation of our banking system,"[12] while ranking member Democratic Senator Sherrod Brown said "any effort to remove Powell would hit the trifecta: unlawful, ineffective and damaging to the economy."[13] Remarkably, despite Trump's loud insistence that he was "not even a little bit happy" with appointing Powell to the chairmanship, his hands were tied.[14] When asked whether he would fire Powell, Trump was forced to say no.[15]

Trump's behavior is both unusual and predictable. It is unusual because Trump rarely hesitates to fire those who defy him. Indeed, he built his reputation with the line, "You're fired!,"[16] and his Administration has endured a steady series of public firings throughout, including that of FBI Director James Comey.[17] Yet

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8 *See* Jennifer Jacobs, Saleha Mohsin & Margaret Talev, *Trump Discusses Firing Fed's Powell After Latest Rate Hike, Sources Say*, BLOOMBERG (Dec. 21, 2018, 11:42 PM), https://www.bloomberg.com/news/articles/2018-12-22/trump-said-to-discuss-firing-fed-s-powell-after-latest-rate-hike ("President Donald Trump has discussed firing Federal Reserve Chairman Jerome Powell as his frustration with the central bank chief intensified following this week's interest-rate hike and months of stock-market losses . . . .").

9 Appelbaum, *supra* note 3.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 Matthew Boesler & Laurence Arnold, *What Trump Can (and Can't) Do to Steer Fed Policy*, BLOOMBERG (Apr. 12, 2019), https://www.bloomberg.com/news/articles/2019-04-12/what-trump-can-and-can-t-do-to-steer-fed-policy-quicktake.

15 *See* John Cassidy, *Donald Trump's Loco Attack on the Federal Reserve*, NEW YORKER (Oct. 12, 2018), https://www.newyorker.com/news/our-columnists/donald-trumps-loco-attack-on-the-federal-reserve.

16 *See, e.g.*, Dan Merica, *You're Fired! Or Not? How Trump Gets Rid of People*, CNN (July 26, 2017, 4:54 PM), https://www.cnn.com/2017/07/26/politics/trump-firing-people-jeff-sessions-contrast/index.html (explaining Trump's famous tagline from his reality television show, *The Apprentice*).

17 Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html. The Director of the FBI is not protected by for-cause tenure protection, though J. Edgar Hoover—who ran the agency for nearly 48 years—"was as near to a truly independent official in the federal government's Executive Branch as the Constitution allows." Lyle Denniston, *How Independent Is the FBI's Director?*, NAT'L CONSTITUTION CTR.: CONSTITUTION DAILY (Oct. 31, 2016), https://constitutioncenter.org/blog/how-

despite the significant media attention paid to the Trump-Powell clash—including a cover story in *The Economist*[18]—Trump has hesitated from firing the head of the Federal Reserve. To be sure, he has taken his frustration out in other ways, including public complaints that the Board was "going loco"[19] and that Powell was a "bigger enemy"[20] to the United States than the chairman of the Chinese Communist Party. But he has refrained from removing Powell from power, a remarkable move for a President who has otherwise openly flouted political norms.

In this respect, however, Trump is hardly unique. Throughout much of history, the President and the Federal Reserve Chair have been at odds.[21] The reasons are largely structural. While presidents are focused on the short-term, hoping to tout strong economic growth during their tenure, the Federal Reserve is concerned with the long-term, focusing in part on the inflationary effects of any short-term stimulus.[22] As one former Fed Chair put it, the job of the Fed is to "take away the punch bowl just as the party is getting good."[23] Presidential clashes with the heads of the Federal Reserve are thus predictable and recurring, and policy disagreements have been pervasive across history.[24] Yet in each iteration of this fight, the Federal Reserve

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independent-is-the-fbis-director (recognizing also that Hoover's "successors have not been as powerful, nor as independent").

18 *Interference Day: Central Banks in the Age of Populism*, ECONOMIST (Apr. 13, 2019), https://www.economist.com/printedition/2019-04-13.

19 Cassidy, *supra* note 15.

20 Donald Trump (@realDonaldTrump), TWITTER (Apr. 23, 2019, 11:29 AM), https://twitter.com/realdonaldtrump/status/1164914610836783104 ("My only question is, who is our bigger enemy, Jay Powell or Chairman Xi?"). Trump's ire came as Powell declined to state that the Fed would cut interest rates, while China announced tariffs against $75 billion in U.S. goods. Caitlin Oprysko, *Trump Asks if Fed's Powell or China's Xi Is the 'Bigger Enemy*,*'* POLITICO (Aug. 23, 2019), https://www.politico.com/story/2019/08/23/trump-powell-xi-china-enemy-1473633.

21 *See, e.g.*, Jim Tankersley, *Trump Takes a Rare Presidential Swipe at the Fed*, N.Y. TIMES (July 19, 2018), https://www.nytimes.com/2018/07/19/business/trump-fed-interest-rates.html. George Bush, Ronald Reagan, and Richard Nixon all tried to influence monetary policy; when Fed Chair Alan Greenspan neglected to lower interest rates at George Bush's private request, Bush said, "I reappointed him, and he disappointed me." *Id.*

22 This dynamic has aroused suspicion about a president's motivations for making Chair appointments. *See, e.g.*, WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY 22 (1989) (explaining how speculation about Jimmy Carter's choice to lead the Board "look[ed] like a clever plot intended to give President Carter political control over the independent central bank so it would pump up the economy for the campaign year").

23 Kevin Granville, *A President at War with His Fed Chief, 5 Decades Before Trump*, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/business/economy/a-president-at-war-with-his-fed-chief-5-decades-before-trump.html.

24 *See infra* Part I.

has emerged relatively unscathed. Indeed, in the broader arc of its institutional history, the agency has actually grown in importance. To date, no President has removed a sitting Chair from office. [25]

The notion of the Federal Reserve's independence is clearly an entrenched one in politics. This Note intends to study that notion as part of a broader exploration of the mechanics of agency independence. In traditional legal scholarship, agency independence is considered to originate in Congress: If the agency's enabling statute grants the agency's head for-cause removal protection—meaning the President cannot fire the head without "cause"[26]—then the agency is considered independent. Otherwise, the agency is deemed "executive" and its head is subject to removal by the President at will. Thus, in the traditional taxonomy of administrative agencies, agency independence is based on the terms of the enabling statute. It originates with the existence or absence of for-cause protection and is based entirely on an external endowment from Congress, who becomes the ultimate arbiter of independence.

This framing, however, simplifies the realities of agency evolution in a dynamic political environment. It treats agencies as static institutions whose identities are entirely grounded in their enabling statute, ignoring both internal and external changes that can make an institution take on a life of its own. As the above narrative indicates, the sanctity of the Chair's independence is now beyond question; any suggestion that Trump would fire Powell because of policy disagreements generates panicked explanations to the contrary. Yet for an institution that is often mentioned as the archetypal independent agency, the head of that institution—the Chair of the Board of Governors—does not actually enjoy formal for-cause protection.[27] There is no provision in the Federal Reserve Act protecting the Chair from removal at will, even though such protection is available for members of the Board.[28]

[25] *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1163, 1196 (2013).

[26] "Cause" has been understood to mean cases of "inefficiency, neglect of duty, or malfeasance in office." Humphrey's Executor v. United States, 295 U.S. 602, 623 (1935).

[27] *See* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 182 (2016) ("The Federal Reserve Act is clear that, in her capacity as governor, the Fed chair can be fired only for a good reason. The statute is silent, however, about whether the president can fire the Fed chair."); *see also* Vermeule, *supra* note 25, at 1166 ("Contrary to a widespread belief, no rule of written law prevents Presidents from firing the Chair of the Federal Reserve . . . , the nation's independent central bank.").

[28] 12 U.S.C. § 242 (2012) (specifying term limits for the Chair of the Board of Governors, and providing that "any appointive member of the Federal Reserve Board . . . shall hold office for a term of fourteen years . . . unless sooner removed for cause by the President," but not indicating whether the Chair in her capacity as Chair also has for-cause removal protection).

What this means is that any explanation of the real world fact of agency independence cannot come exclusively—or even primarily—from the formal existence or absence of for-cause protection. Rather, there must be something else contributing to the well-respected cone of independence that now defines the Board of Governors.

This Note posits a different origin story for Federal Reserve independence. Rather than assuming agency independence stems entirely from the enabling statute, this Note will use the history of the Federal Reserve Board to demonstrate that in at least some cases, independence was built from within. In particular, this Note will argue that structural reorganizations, symbolic victories, and regulatory power—factors it terms "evolution features"—were more relevant in securing operative independence than the presence or absence of for-cause protection. To make its case, this Note will draw from legislative history and historical accounts of the Board, shedding light on the internal working life of perhaps the most independent agency in Washington. In this retelling, the modern-day sanctity of the Board's independence has less to do with the formalities of administrative law and more to do with the political realities of governance and the phenomenon of institutional entrenchment. This was accomplished with the help of leaders within the agency. Indeed, at each step in the Board's evolution, there were committed bureaucrats working behind the scenes to carve out new spaces where the Board could operate without interference. In the Board's early years, the primary goal was formal independence; as it restructured its internal hierarchy and settled into that role, it then sought implicit independence through the respect of its peers and the President.[29] As it grew even more comfortable, it would move from a defensive to offensive posture, seeking not merely to guard its domain—monetary policy—but also to secure regulatory authority that would make the agency too important to control.[30] These different eras demonstrate that the parameters of agency independence can have as much if not more to do with political realities and the need for governing flexibility than they do with the enabling statute.

This Note will also demonstrate how independence can originate from the agency itself, reasserting a level of autonomy into administrative agencies that properly recognizes the role these institutions can play in their own ascendency. To the extent that agencies are not frozen in time, it is important to understand the behind-the-scene maneuvers that provoked key inflection points in the agency's evolu-

[29] *See infra* Section II.A, II.B.
[30] *See infra* Section II.C.

tion. In the case of the Board, internal players proactively navigated political waters to secure additional authority in pursuit of the agency's mission of monetary stability. Their persistent efforts provide an on-the-ground account that fills several gaps in administrative law scholarship. First, it sheds light on the role that agencies can play in their own development, a facet of agency evolution that has been overlooked in academic literature. Second, it demonstrates that when it comes to agency power, institutional design is an important but not dispositive step in the ultimate life of the institution. While Congress may establish an agency with a particular set of features in mind, those features are mutable and can evolve as social and political conditions change.[31] Indeed, as the history of the Fed shows, the agency may acquire responsibilities that far exceed its original paradigm but are nevertheless embraced as necessary adjustments in the iterative process of governing. Finally, this Note provides a detailed, archival study of the mechanics behind agency evolution. This is important because by exploring how the Board was able to develop and grow into its independence, it establishes an understanding of agency evolution that better reflects reality. Indeed, institutional settlement can play a larger role in protecting norms and securing independence than legal formalities. But developing this understanding requires both explanation and justification. This Note offers the case history of the Board to provide a framework for such an assessment.

This Note is divided into three parts. Part I will describe the inevitable conflict between the Board and the President, highlighting how pervasive this phenomenon has been throughout history. This Part will also explore the limits of for-cause protection as an analytic tool for understanding independence. Part II will turn to the Federal Reserve Board in particular, tracing its rise from a subsidiary organization of the Treasury Department to what has essentially become the "fourth branch" of U.S. government.[32] It will explore three critical inflection points in the Board's history, illustrating how, in each of these moments, there were motivated agency employees who seized incremental victories to help the Board evolve into what it is today. This Part will also describe each era's role in securing the Board's

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[31] Of course, Board officials are cognizant of the formal role of Congress, and this Note recognizes that Congress has an important role to play. *See, e.g.*, GREIDER, *supra* note 22, at 68 ("Fed officials were constantly, sometimes obsessively, sensitive to the fact that, in theory, Congress and the President could at any time abolish their privileged sanctuary. If the Fed went too far, . . . [Congress] could simply rewrite the laws and make the Federal Reserve directly subservient to Congress or the executive branch.").

[32] *See, e.g.*, BERNARD SHULL, THE FOURTH BRANCH: THE FEDERAL RESERVE'S UNLIKELY RISE TO POWER AND INFLUENCE (2005).

operative independence, whether through control over the agenda after internal restructurings, symbolic victories that garnered respect in Washington, or an accumulation of regulatory authority that made the institution too powerful to control. Finally, this Part will address the political realities that helped secure these milestones. Part III will then consider what this means for administrative law scholarship and offer suggestions to help the literature more accurately reflect reality. Overall, this Note hopes to complicate traditional assumptions about agency independence, both debunking the notion that independence can only come ex ante from Congress and recognizing the powerful role that agencies—in furtherance of their mission—can play in charting their own paths forward.

I
The Inevitable Conflict Between the President and the Board

The Federal Reserve is widely viewed as the archetypal independent agency.[33] Indeed, numerous instances from history illustrate the extent to which the Chair has clashed with the President and come out on top. But this was not always the case. To fully appreciate the significance of the Board's self-driven climb towards independence, it is important to acknowledge how ingrained this notion has become in society. This Part will illustrate the depths of that independence, demonstrating the inevitability of a clash that is in many ways structural. For instance, while the President is term-limited and thus focused on short-term growth, the Board has a responsibility to look beyond the ebbs and flows of the political cycle.[34] This engenders a tug of war between the two institutions that has existed since the earliest days of the republic.

After Andrew Jackson was elected in 1828, he famously fought with and later dissolved the Second Bank of the United States, headed by Nicholas Biddle.[35] As Jackson said at the time, "The Bank . . . is

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[33] *See generally* Alan S. Blinder, Opinion, *An Independent Fed Isn't 'Loco,' It's Effective*, Wall St. J. (Jan. 23, 2019), https://www.wsj.com/articles/an-independent-fed-isnt-loco-its-effective-11548288127 ("[T]he Federal Reserve is perhaps the most independent agency of government."); Granville, *supra* note 23 (describing how Lyndon B. Johnson's Treasury Secretary once observed that there are apparently "two quarterbacks" running the economy: the President and the Chairman of the Board of Governors).

[34] *See supra* note 22.

[35] *See* Tim Todd, Fed. Reserve Bank of Kan. City, The Balance of Power: The Political Fight for an Independent Central Bank, 1790 - Present 3, 5, 8 (2d ed. 2012), https://www.kansascityfed.org/publicat/balanceofpower/balanceofpower.pdf; *see also* Andrew Jackson, *Veto Message (July 10, 1832)*, *in* A Compilation of the Messages and Papers of the Presidents (1879), http://avalon.law.yale.edu/19th_century/ajveto01.asp.

trying to kill me. But I will kill it."[36] Nearly a century later, that same clash would recur dramatically in Lyndon B. Johnson and Fed Chair William McChesney Martin, as the two fought over monetary policy at the height of the Vietnam War. Johnson wanted the Board to delay raising interest rates, beseeching Martin to remember that "my boys are dying in Vietnam, and you won't print the money I need."[37] But when Martin decided to lead the Federal Open Market Committee (FOMC) to vote for a rate increase,[38] the President was enraged, saying that if Martin "wants to be Biddle—have a fight like that," then he was "prepared to be Jackson."[39] The President later summoned Martin to his Texas ranch to explain his defiance. When Martin refused to yield, Johnson angrily pushed him up against the wall and told him, "You've got me in a position where you can run a rapier into me and you've done it. . . . [A]nd I just want you to know that's a despicable thing to do."[40]

But even the notoriously temperamental Johnson recognized the need to maintain public appearances.[41] Despite telling Treasury Secretary Henry Fowler he was prepared for a "Biddle-Jackson fight," Johnson acknowledged he "[didn't] want [to do] that in public."[42] Instead, he privately told Fowler to look "around the clock" for a "real, articulate, able, tough guy that can take this Federal Reserve place."[43] But when Johnson turned around and asked his attorney general whether he could fire Martin over policy disagreements, he

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[36] TODD, *supra* note 35, at 8.

[37] Granville, *supra* note 23.

[38] The FOMC is the "monetary policymaking body of the Federal Reserve System." *What Is the FOMC and When Does It Meet?*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., https://www.federalreserve.gov/faqs/about_12844.htm (last updated Jan. 30, 2019). It consists of the Board of Governors and, on a rotating basis, five of the Reserve Bank presidents. *Id.* The FOMC is the body that adjusts short-term interest rates and buys government securities in an effort to affect the supply of money and thus the rate of borrowing in the American economy. *Id.*

[39] Granville, *supra* note 23. At the time, the President reportedly wondered how he could "run the country and government if [he] ha[s] to read on a news-service ticker that Bill Martin is going to run his own economy?" *Id.* (based on audio recordings from the LBJ Presidential Library in Austin, Texas).

[40] Helen Fessenden, *1965: The Year the Fed and LBJ Clashed*, ECON FOCUS, (Third/Fourth Quarter 2016), https://www.richmondfed.org/publications/research/econ_focus/2016/q3-4/federal_reserve; *see also* Granville, *supra* note 23.

[41] *See* Granville, *supra* note 23 (describing how Johnson acknowledged that any rate hike was going to "hurt my pride, and it's going to hurt my leadership, and it's going to hurt the best champion business has got in this country").

[42] *Id.*; *see also supra* note 35 and accompanying text.

[43] Granville, *supra* note 23 (quoting from audio recordings from the LBJ Presidential Library).

was told no.[44] Further, Johnson was told that in the "Fed's fifty-one years of existence, no attempt had ever been made to remove a sitting Fed governor." Johnson let the matter drop.[45]

This pattern has been consistent through history. In 1951, when Harry Truman clashed with Thomas McCabe over monetary policy during the Korean War, he did not fire McCabe but instead negotiated for his resignation.[46] Truman had played a similar game with McCabe's predecessor, declining to reappoint Marriner Eccles to the position of Chair instead of firing him on the spot. [47] Likewise, when Jimmy Carter wanted William Miller to leave his post due to his perceived failure to manage inflation, Carter did not fire Miller, but instead made him the new Secretary of the Treasury—a politically safe way to keep Miller out of the institution. [48] And when Ronald Reagan grew frustrated that Arthur Burns rejected his "vote of confidence for lower interest rates and more money,"[49] Reagan did not fire Burns, but instead spread false rumors that he was seeking a huge pay increase.[50] Similarly, Trump's public fight with Powell has not escalated into a firing, though Trump has used other methods, such as waging a "Fed influence campaign" and nominating loyalists to the Board.[51] As history demonstrates, presidents have gone to extensive lengths to avoid a public firing, despite the fact that there is no statutory protection for the Chair of the Board of Governors. Even though these creative pathways may have occasionally ousted certain Fed

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44 Robert P. Bremner, Chairman of the Fed: William McChesney Martin Jr. and the Creation of the Modern American Financial System 203 (2004).

45 *Id.*

46 *See infra* Section II.B.

47 Conti-Brown, *supra* note 27, at 33 (explaining how Truman offered Eccles the role of Vice Chair, believing that "such a public and obvious demotion would cause the proud millionaire to return to his business interests in Utah").

48 *Id.* at 183–84 (describing how this strategy of "fire by promotion" gave Carter political cover to have Miller removed from his position). Carter then appointed Paul Volcker to replace Miller, expecting that Volcker would be a better ally to fight inflation. Art Pine & John M. Berry, *Fed Chairman, Carter Adviser Named*, Wash. Post (July 26, 1979), https://www.washingtonpost.com/archive/politics/1979/07/26/fed-chairman-carter-adviser-named/12b65755-b20d-476a-b598-d2d276e830a6.

49 Tankersley, *supra* note 21.

50 *Id*.

51 Craig Torres & Jennifer Jacobs, *Trump Steps Up Fed Influence Campaign with Second Loyalist Pick*, Bloomberg (Apr. 4, 2019), https://www.bloomberg.com/news/articles/2019-04-04/trump-steps-up-fed-influence-campaign-with-second-loyalist-pick (discussing the nomination to the Board of Herman Cain, a pizza executive, and Stephen Moore, an economist with the Heritage Foundation, a conservative think tank). Cain withdrew from consideration a few weeks later. *See* Paul Kiernan, *Herman Cain Withdraws from Federal Reserve Board Nomination Process*, Wall St. J. (Apr. 22, 2019), https://www.wsj.com/articles/herman-cain-asks-trump-not-to-nominate-him-for-federal-reserve-board-11555950147.

Chairs, they are meaningfully different from a direct firing because they are more burdensome, less transparent, less structured, and are not formally entrenched as a regular institutional tool that the President has to exert control.

These accounts of the Fed-Executive clash serve two purposes. First, they highlight the deeply rooted conflict between the central bank and the Executive, helping contextualize precisely how embedded Board independence has become over time. This is reinforced by the fact that this inevitable conflict has never culminated in a firing. Second, they run counter to prevailing administrative law theory, which presumes that agency heads without for-cause protection necessarily answer to the President. Indeed, even though the Chair of the Board lacks tenure protection,[52] the notion of Board independence has become so entrenched that Executive dismissal is functionally precluded. Even Trump, who has not been shy to deviate from long-standing norms,[53] has adhered to this particular practice around the Board.

This phenomenon raises important questions about the source of an agency's independence. Much has been written about this topic. In general, the idea is that agency independence originates in the enabling statute and turns on whether Congress granted statutory for-cause tenure protection for the agency's head.[54] To be sure, academics

52 *See supra* notes 26–28 and accompanying text.

53 Diana Panke & Ulrich Petersohn, *President Donald J. Trump: An Agent of Norm Death?*, 72 INT'L J. 572 (2017) (surveying the different domestic and international norms that Trump has violated); Holman W. Jenkins, Jr., Opinion, *Norm Violations Are Now the Norm*, WALL ST. J. (Oct. 4, 2019), https://www.wsj.com/articles/norm-violations-are-now-the-norm-11570224910 ("The glory of our system is that it can throw up a candidate who is willing to be out of sympathy with the establishments of both parties [and] who plainly pronounces that he will not conform . . . .").

54 *See, e.g.*, Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000) ("The critical element of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except 'for cause.'"); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610 (2010) ("[W]hat gives agencies their independence or what otherwise distinguishes them from their executive-branch counterparts . . . [is that] the President lacks authority to remove their heads from office except for cause."); Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) ("Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause."); *see also* Patrick M. Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637, 696 (2017) (examining how various political factors, such as the President's approval ratings, affect Congress's willingness to establish independent agencies); Vermeule, *supra* note 25, at 1165 ("It is often said that the legal touchstone of agency independence is whether the agency head or heads are dischargeable at will, or only for cause.").

have identified other structural features underlying independence, including specified terms of tenure, multimember governing boards, bipartisan membership, exemption from cost-benefit analysis for the Office of Information and Regulatory Affairs, as well as authority over the budget, congressional communication, litigation, and adjudication.[55] But the general consensus among legal academics is that for-cause tenure protection is the "sine qua non of agency independence."[56] The rationale is straightforward: Because for-cause tenure protection insulates the agency's head from indiscriminate removal by the President, that agency is free to pursue policy goals independent of Executive directives. This separation is especially important for central banks. Since presidents have an incentive to "goose the economy artificially," the head of the Federal Reserve Board is particularly vulnerable to presidential influence and needs the flexibility to "pursue a long-term policy—price stability—even in the face of short-term pressures from the other direction."[57]

Despite the abundance of scholarship on agency independence, the Federal Reserve's unique status has been largely overlooked. To the extent that scholars write about the Federal Reserve at all, they usually take for granted the centrality of for-cause tenure protection. To be sure, there is a growing body of academic literature questioning the validity of the for-cause framework.[58] Adrian Vermeule argues that the linchpin of agency independence is "a network of statutory provisions and hoary conventions," not for-cause tenure protection.[59] Rachel Barkow cautions against the "obsessive focus on removal as the touchstone of independence."[60] Instead, Barkow suggests design features that can better protect an agency from partisan capture, such as an agency's funding source, employment qualifications, post-employment restrictions, and the agency's relationship with other

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55 *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 15 (2010) (describing exemption from cost-benefit analysis for the President's Office of Information and Regulatory Affairs as a factor); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013) (describing the other factors).

56 Vermeule, *supra* note 25, at 1168 ("Commentators broadly agree that for-cause tenure protection is the sine qua non of agency independence.").

57 Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REG. 257, 263 (2015).

58 *See, e.g.*, Vermeule, *supra* note 25, at 1168 ("The legal test that courts deem central to agency independence is neither necessary nor sufficient for operative independence in the world outside the courtroom. The legal test, which focuses on for-cause tenure protection, does not capture the observable facts of agency independence in the administrative state.").

59 Vermeule, *supra* note 25, at 1176.

60 Barkow, *supra* note 55, at 17.

state and federal agencies.[61] Meanwhile, Peter Conti-Brown argues that the operative independence of the Board is more a product of historical contingency and external forces than what the text of the enabling statute actually prescribes.[62]

This Note is distinct from the above approaches for several reasons. First, unlike Vermeule, who places norms at the center of Board independence, this Note posits that the story is also and perhaps more fundamentally about power. In other words, presidents respect the Board's operative independence not merely out of deference to existing conventions, but also out of necessity. Given the Board's influence over the economy, the President has little choice but to recognize the agency's independence. These forces are not mutually exclusive, however, and while this Note puts forth a story that centers more on political realities than norm adherence, it recognizes that one can inform the other. Second, to the extent that this story does implicate norms, it differs from Vermeule's thesis in an important way: It provides an exploration of *how* certain norms can develop, examining the behind-the-scenes maneuvers that agencies adopt that can generate certain norms in the first place. In other words, while Vermeule takes as a starting point the existence of norms, this Note looks into their origins. Third, unlike Barkow, who focuses on institutional design features that are present at an agency's establishment, this Note centers on what it has termed evolution features, which are factors that were behind the agency's change over time and were equally critical in developing its ultimate independence. Fourth, unlike Conti-Brown, who provides an illuminating account of the various external forces contributing to the Board's operative independence, this Note looks at the internal story. It demonstrates that agencies can be a crucial player in their own evolution and are not wholly at the mercy of their initial statutory authorization.

Broadly speaking, this Note recognizes that institutional growth occurred not just because of things that happened *to* the Fed, but equally because of things that happened *because* of the Fed. Rather than sit passively, the Board during several key moments in its history took its future into its own hands, lobbying both the President and Congress for changes that it knew would consolidate its own

61 Barkow, *supra* note 55, at 18, 42. Barkow also mentions political tools that can amplify the agency's public interest mission, such as recruiting benefactors or incorporating public advocates into the agency's structure. *Id.*

62 *See* Conti-Brown, *supra* note 57, at 257 (explaining how the Board's independence is more about the "life of the Act"—how the statute's terms are interpreted, how economic and political contexts change, and how individual personalities shape policymaking—than about the text of the statute itself).

authority. Crucially, the Board acted not out of pure self-aggrandizement, but instead out of a recognition that it would need greater authority in order to fulfill its mission of monetary stability. Recognizing the mechanics by which the Board fulfilled its objectives offers a new understanding of agency independence—one that exists not because Congress provided for-cause protection in the enabling statute, but because the agency itself navigated political waters to claim new responsibilities that would bolster its operative independence and far outstrip its humble beginnings.

II
The Board's Evolution

This Part will highlight three inflection points in the Board's history that bolstered its independence, focusing in particular on the role that internal agents played in securing those changes for the agency. Notably, this Part will recognize that even though the Federal Reserve "regarded its own survival as a preeminent political goal," it did so "not solely as a matter of self-interest, but because its officials sincerely believed . . . that their functions were vital to the nation's well-being."[63] Overall, this Part aims to emphasize how little work the enabling statute was doing in defining the parameters of the Board's independence. Indeed, these key moments represent important changes in the Board's authority but are not captured by the formalities of administrative law. Instead, they are the result of political realities, demonstrating that, as the Board gradually grew more confident and sophisticated, its independence had more to do with the leadership and strategy of internal stakeholders than with the originating statute. Though this Part focuses on the history of the Board to provide a concrete case study of an agency's evolution, it reflects general dynamics within Washington that are arguably generalizable to the administrative state writ large.

A. *Independence Through Internal Reorganization: The Banking Act of 1935*

When the Federal Reserve System was first formed, it was intentionally weak. The institution was the product of compromise between factions with "very different purposes in mind,"[64] and its early decen-

[63] Greider, *supra* note 22, at 67–68.

[64] 1 Allan H. Meltzer, A History of the Federal Reserve: 1913-1951, at 65 (2003) [hereinafter Meltzer Volume 1]. Proponents had wanted a strong central monetary authority, but opponents were worried that a central bank would merely represent private banking interests. *Id.* at 65–66; *see also* Joseph J. Ellis, Passionate

tralized structure reflected that tension. There would be a politically appointed central Board in Washington, D.C. and twelve Reserve Banks established around the country.[65] The Board would represent public interests while the Reserve Banks would stand for the private industry.[66]

Initially, there was no clear division of authority between the two centers. Indeed, early signs suggest that the Board was subordinate to the Reserve Banks: Board members in D.C. earned less than their Reserve Bank counterparts,[67] and at least one member of the Board left D.C. to lead the Federal Reserve Bank of Atlanta.[68] The Board also had very little policymaking authority.[69] Each Reserve Bank could set its own discount rate, control its own open market operations, and decide for itself what securities to purchase and at what price.[70] When coordination problems arose, the Reserve Banks created an ad hoc committee—later called the Open Market Policy Conference (OMPC)—to manage joint purchases and sales.[71] Since the OMPC was a voluntary arrangement, however, it left the Reserve Banks free to deviate from common policy or withdraw from the conference altogether.[72]

The lines between the Board and the Executive Branch were equally asymmetric, with the Board occupying a "subsidiary role—the backseat [to the Treasury]."[73] The Board met in the Treasury Department's office and the Secretary of the Treasury served as its ex officio chair, presiding over all meetings.[74] For Charles Hamlin, the first leader of the Board, it was difficult to take charge. Unlike the

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SAGE: THE CHARACTER AND LEGACY OF JOHN ADAMS 161 (1993) (noting an instance in which John Adams described bankers as "swindlers and thieves").

65 MELTZER VOLUME 1, *supra* note 64, at 67, 76.

66 *See id.* (noting that while political appointees run the Federal Reserve Board in Washington, bankers run the regional Reserve Banks).

67 DONALD R. WELLS, THE FEDERAL RESERVE SYSTEM: A HISTORY 25 (2004).

68 CONTI-BROWN, *supra* note 27, at 27.

69 *See* WELLS, *supra* note 67, at 25 (observing that the Board's policymaking authority is constrained by the presence of the Secretary of the Treasury and the Comptroller of the Currency as ex officio members).

70 *Id.*; Gary Richardson et al., *Banking Act of 1935*, FED. RES. HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/banking_act_of_1935.

71 Richardson et al., *supra* note 70.

72 *Id.*

73 MELTZER VOLUME 1, *supra* note 64, at 415.

74 WELLS, *supra* note 67, at 25. The Comptroller of the Currency was also an ex officio member. *Id.* It wasn't until 1936 that the Secretary was removed. *See* Harold James Kress, *The Banking Act of 1935*, 34 MICH. L. REV. 155, 165 (1935) ("[A]fter January 31, 1936 . . . [t]he Governor of the Federal Reserve Board is to replace the Secretary of the Treasury as Chairman and is to take that title . . . .").

modern-day Chair, who is seen as the leader of the U.S. economy,[75] Hamlin was considered more of a "leader of a discussion group," nominally in charge but practically powerless to deviate from the Treasury's objectives.[76] For example, when the Board wanted to reduce the number of Reserve Banks from twelve to eight, Hamlin insisted on tabling discussions while the Treasury Secretary was out sick.[77] The early Board was thus a passive institution, wary about stoking mistrust, confused about the limits of its authority, and plagued by internal tensions and institutional chaos.[78] It had little influence on either the Reserve Banks or the Treasury, and it was excluded from major decisions about banking.[79]

Within its first twenty years, however, the Board dramatically increased in influence. Much of this was because of Marriner Eccles, one of the most influential Chairs in the Board's history and a key figure in this phase of the agency's evolution.[80] As the primary architect behind the 1935 Banking Act—the legislation that set the stage for the modern-day structure of the Fed—Eccles managed to transform the Board from a lesser-included part of the Federal Reserve System to a first among equals.[81] He suggested changes to the Fed's organizational hierarchy that elevated the Board vis-à-vis the Reserve Banks, and he took steps to disentangle the agency from the domina-

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75 *See, e.g.*, Rana Foroohar, *Janet Yellen: The Sixteen Trillion Dollar Woman*, TIME (Jan. 20, 2014), http://content.time.com/time/subscriber/article/0,33009,2162267,00.html.

76 WELLS, *supra* note 67, at 26–27.

77 *Id.*

78 *See, e.g.*, MELTZER VOLUME 1, *supra* note 64, at 75 ("Tension between the Board and the reserve banks began before the System opened for business."); *see also* 2 ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE: 1951-1969, at 2 (2009) [hereinafter MELTZER VOLUME 2] ("The founders of the Federal Reserve intended a passive but responsive institution with limited powers."). Because the Federal Reserve Act of 1913 had not specified the balance of power between the Board and Reserve Banks, rivalries arose among competing factions. CONTI-BROWN, *supra* note 27, at 23. Benjamin Strong, the head of the New York Federal Reserve Bank, is a representative example; to him, the "twelve reserve banks [were] eleven too many. The appropriate number was one." MELTZER VOLUME 1, *supra* note 64, at 76.

79 *See, e.g.*, MELTZER VOLUME 2, *supra* note 78, at 415 ("Congress and the Treasury made the important decisions about gold, silver, and banking legislation."); WELLS, *supra* note 67, at 26–27 (noting that Hamlin was advised by the Attorney General that "the board had no power to reduce the number of district Banks").

80 As a testament to his influence, Congress in 1982 named the Fed's Board of Governors building after him. *History of the Marriner S. Eccles Building and William McChesney Martin, Jr. Building*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., https://www.federalreserve.gov/aboutthefed/aroundtheboard/history-buildings.htm (last updated Nov. 21, 2016).

81 *See* Richard H. Timberlake, *The Tale of Another Chairman*, FED. RES. BANK OF MINNEAPOLIS (June 1, 1999), https://www.minneapolisfed.org/publications/the-region/the-tale-of-another-chairman (explaining that Eccles was a principle author of the Banking Act of 1936, which "effectively remodeled the Federal Reserve System").

tion of the Executive branch. Most notably, he convinced Franklin D. Roosevelt that enhanced independence was necessary if the President wanted an agency that could properly pursue its mission of monetary stability.[82] To achieve this, Eccles suggested features that had nothing to do with for-cause protection. Instead, he recommended pragmatic changes to both the form and substance of the Fed, including restructuring the Fed's internal hierarchy and assigning powerful new responsibilities to the Board to emphasize its preeminence. Eccles also made presidential support for these changes a prerequisite to his employment in government, telling Roosevelt that he "would not touch the position of governor [of the Federal Reserve Board] with a ten-foot pole unless fundamental changes were made in the Federal Reserve System."[83]

Eccles believed that the most powerful functions should go to the unit that represented the public interest. To that end, he wanted to restructure the Fed to concentrate authority in a centralized Board.[84] In a three-page blueprint submitted to Roosevelt, Eccles suggested giving the Board exclusive control over open market operations as well as veto power over the appointment of Reserve Bank leaders.[85] He also emphasized the need for clarity in the institution's administrative structure, lamenting that the existing system made it "almost impossible to place definite responsibility anywhere."[86] After Roosevelt accepted his blueprint, Eccles joined the Board and began to work with Congress to shepherd his proposal from the inside.[87]

For the next year, Eccles worked closely with the Roosevelt Administration to enact his suggestions into law. The timing worked in their favor. The Roosevelt Administration was in the midst of the Second New Deal, and the Banking Act proved to be the "least controversial" piece of legislation before Congress.[88] During congressional debates, Eccles managed to stave off major opposition to his changes, defeating an attempt by Senator Carter Glass—the "father of

[82] CONTI-BROWN, *supra* note 27, at 27–28.

[83] *Id.* at 27; SIDNEY HYMAN, MARRINER S. ECCLES: PRIVATE ENTREPRENEUR AND PUBLIC SERVANT 154–55 (1976).

[84] *See* MELTZER VOLUME 1, *supra* note 64, at 467 (noting that Eccles urged President Roosevelt to shift power from the regional Reserve Banks, which represented the private interest, to the Board, which represented the public interest).

[85] *See* HYMAN, *supra* note 83, at 157.

[86] CONTI-BROWN, *supra* note 27, at 28.

[87] *Id.*

[88] CONTI-BROWN, *supra* note 27, at 29. In that legislative session, Congress also passed the Social Security Act, the Wagner Act, the Public Utility Holding Company Act, and the Revenue Act—the last of which was colloquially known as the "Soak the Rich" bill. *Id.*

the Federal Reserve"[89]—to preserve the Fed's decentralized structure by letting Reserve Banks opt out of any open market operations.[90] Though Eccles did have to make one major compromise—he agreed to let the Reserve Banks serve on the FOMC on a rotating basis—he managed to ensure that the Board would always retain a permanent majority.[91] When the 1935 Banking Act passed, Roosevelt nominated Eccles to become the first Chair of the newly revamped Board of Governors.[92]

The Banking Act of 1935 ushered in a new era for the Federal Reserve. It clarified the division of authority between the Board and the Reserve Banks, and in this new iteration, it made clear that the Board was firmly on top.[93] The Board had a permanent majority on the FOMC, and it gained the ability to set reserve requirements and interest rates for deposits at member banks.[94] Because the FOMC would direct open market operations as a unit, the Reserve Banks lost the ability to manage their own open market operations independently. Moreover, the central governing institution was renamed from the "Federal Reserve Board" to "the Board of Governors of the Federal Reserve System,"[95] a move that automatically elevated each Board member to the title of "governor."[96] The head of the Board of Governors would be known as the "chairman."[97] By contrast, the heads of the Reserve Banks were demoted from "governor" to "president," a title considered less prestigious in the world of central banking.[98]

The Act also began to formalize the separation between the Board and the Executive Branch. It removed the Treasury Secretary from his ex officio position as Chair, and it specified that going forward, the chairmanship would be filled by a member of the Board of

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89 David Page, *Carter Glass: A Brief Biography of the Man Who Shaped the Federal Reserve Act*, Fed. Reserve Bank of Minneapolis (Dec. 1, 1997), https://www.minneapolisfed.org/publications/the-region/carter-glass.

90 Wells, *supra* note 67, at 68.

91 In the twelve-person FOMC, the Board occupies seven of the seats permanently. The New York Federal Reserve Bank also has a permanent seat, while the remaining eleven Reserve Banks share four seats on a rotating basis. Wells, *supra* note 67, at 68; *About the FOMC*, Bd. of Governors of the Fed. Reserve Sys., https://www.federalreserve.gov/monetarypolicy/fomc.htm (last updated Dec. 20, 2019).

92 Timberlake, *supra* note 81.

93 Richardson et al., *supra* note 70.

94 Wells, *supra* note 67, at 68; Richardson et al., *supra* note 70.

95 *See* Conti-Brown, *supra* note 27, at 29.

96 Richardson et al., *supra* note 70.

97 *Id.*

98 Conti-Brown, *supra* note 27, at 29–30 ("[I]n banking lingo, a 'governor' was an august title reserved to the central bank; a mere 'president' could be any Joe from the corner savings and loan."); Richardson et al., *supra* note 70.

Governors.[99] The Act gave the seven governors of the Board staggered fourteen-year terms, preventing any President from dominating the Board with his appointees.[100] Finally, the Board made plans to move out of the Treasury's offices, marking its physical separation from the Department. Shortly after the passage of the Act, construction began on a new building that would house the newly revamped Board of Governors;[101] two years later, the Board and the rest of its staff moved in.[102] The Board's new home—an impressive, classical-style building on Constitutional Avenue—marked a physical representation of the institution's growing clout and independence.[103] Indeed, the physical space helped the Board gain credibility as it tried to establish itself within Washington political circles. As William McAdoo, former Treasury Secretary and the first ex officio chair of the Board noted in his memoirs, the Board considered itself the "Supreme Court of Finance" and felt it deserved to be treated as such: The bankers did not want to be "pale and distant stars, lost in a Milky Way of obscure officialdom; they must swim in the luminous ether close to the sun!"[104] Having its own, impressive space would help secure this clout.

Recounting the Board's early history indicates just how quickly the institution grew in confidence. Already, the enabling statute that gave rise to the Federal Reserve was becoming obsolete, outstripped by new understandings of the appropriate parameters of a central bank's authority. After the 1935 reorganization, the Board gained more authority over its agenda. Not only could it guarantee control over national monetary policy through its majority vote on the FOMC, but it was also beginning to entrench itself within Washington political circles as an equal. Importantly, its growing influence had little to do with the formalities of for-cause protection. Instead, it was operational changes, such as the Fed's reorganized structure, combined with pragmatic issues, such as having its own building, that drove the agency's early transformation. In other words, it was the

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99 Kress, *supra* note 74, at 165 ("The Secretary of the Treasury and the Comptroller of the Currency will no longer be ex officio members of the Board . . . ."). Then-Secretary Henry Morgenthau, Jr. insisted that if he had to go, so did the Comptroller of the Currency. WELLS, *supra* note 67, at 68.

100 WELLS, *supra* note 67, at 69.

101 *See History of the Marriner S. Eccles Building and William McChesney Martin, Jr. Building*, *supra* note 80.

102 *See id.*

103 *See id.*

104 CONTI-BROWN, *supra* note 27, at 40 (quoting WILLIAM GIBBS MCADOO, CROWDED YEARS: THE REMINISCENCES OF WILLIAM G. MCADOO 286 (1931)).

evolution features, rather than statutory for-cause tenure protection, that grounded the day-to-day realities of this agency in Washington.

But despite these formal markers of independence, the modern-day norm surrounding the Board's independence had not yet taken shape. The Board was not fully accepted as a separate, independent unit of government, and there was still a lingering expectation that it would coordinate its decisions with the Executive branch. In this next phase of the Board's evolution, agency members would try to reverse this operative dependency. They recognized that in order for the Board to fulfill its mission of maintaining price stability, it would need free rein to make decisions on its own, untethered by the goals of the Executive branch. Once again, committed leaders within the Fed would take the initiative to lead this effort. And, once again, they would achieve their goals outside the statutory framework. Rather than relying on statutory language, Board members focused on political victories that they knew would go further in securing practical independence than what the formalities of administrative law might have predicted.

B. Independence Through Symbolism: The Fed-Treasury Accord of 1951

In this era of the Board's evolution, the agency faced a different set of institutional priorities. Though it had secured some level of formal independence, the Board was not yet embedded in the fabric of the American economy and did not enjoy the full level of control that it does today. This Section will highlight the Board's success in entrenching itself as an independent agency in Washington. In particular, it will trace the Board's role in escalating a conflict with the President that would force both sides to negotiate the parameters of the agency's operational freedom. Ultimately, this sequence of events led to a symbolic victory that the Board leveraged to engender a culture of respect for its independence among the political elite.[105]

At the start of this period, the Board set interest rates in coordination with the Executive branch. Despite its success in securing formal independence from the Treasury Department in the decade prior, the agency decided that in light of U.S. entry into World War II, it was more important to unite against the "common enemies of economic depression and fascism" than fight with the other agencies in

[105] For a more detailed history of the politics that drove federal regulation in the New Deal and Great Society era, see Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

government.[106] The Board was thus operationally intertwined with the Administration, and it described its "primary duty" at the time as "the financing of military requirements and of production for war purposes."[107] As a result, during his early years as Chair, Eccles was functionally an "assistant secretary of the Treasury for monetary affairs."[108] The Board pegged interest rates to maintain cheap credit, and Eccles himself later admitted that he "went along with a cheap-money policy during the war years."[109]

After World War II ended, however, Eccles grew increasingly uneasy with the Board's operative dependency on the Treasury. He complained that his position was a "routine administrative job . . . . [T]he Federal Reserve merely executed Treasury decisions."[110] And, as he had in the 1930s, Eccles responded by organizing a concerted lobbying effort to disentangle the Board from its practical reliance on the Treasury. He complained to fellow Board members,[111] and at the same time, drummed up public discontent about the inflationary risks of continuing with the status quo.[112] When Roosevelt's successor, Harry Truman, declined to reappoint Eccles as Chair,[113] Eccles used this period to advocate more forcefully for monetary independence, making "full speeches in something of a crusade to warn the country of the dangers of the inflationary pressures . . . ."[114]

Eccles' loud campaign aggravated tensions between the Board and the Truman Administration. Truman was in the midst of the Korean War and had expected the Board's continued cooperation, telling then-Fed Chair Thomas McCabe that he had a responsibility to help "combat Communist influence on many fronts."[115] Eccles' efforts threatened that goal. Indeed, Eccles made enough noise that there was significant speculation in the media about the future of the pegged interest rate. In an effort to intimidate the FOMC into cooper-

106 *See* CONTI-BROWN, *supra* note 27, at 32–33 ("Despite the Fed's refounding in 1935 as an agency unto itself, the war brought it squarely under presidential control.").

107 MELTZER VOLUME 1, *supra* note 64, at 579.

108 Timberlake, *supra* note 81.

109 MARRINER S. ECCLES, BECKONING FRONTIERS: PUBLIC AND PERSONAL RECOLLECTIONS 481 (Sidney Hyman ed.) (1951).

110 MELTZER VOLUME 1, *supra* note 64, at 579.

111 Eccles managed to find an ally in Allan Sproul, the president of the powerful Reserve Bank of New York. During an FOMC meeting, both agreed that if the System were "to survive as an agency with any independence whatsoever [it] should exercise some independence." Robert L. Hetzel & Ralph F. Leach, *The Treasury-Fed Accord: A New Narrative Account*, ECON. Q., Winter 2001, at 33, 37.

112 MELTZER VOLUME 1, *supra* note 64, at 579, 580 n.1; CONTI-BROWN, *supra* note 27, at 34.

113 CONTI-BROWN, *supra* note 27, at 33.

114 *Id.* at 34. Still, Eccles remained on the Board as a Governor. *See id.*

115 Hetzel & Leach, *supra* note 111, at 44–45.

ation, Truman summoned its members to the Oval Office for a presidential dressing-down.[116] In a subsequent letter to McCabe, the President warned that the FOMC should "not allow [the] bottom to drop from under our securities [which would be] . . . exactly what Mr. Stalin wants," and he implored the FOMC to maintain the current rate for the duration of the Korean War.[117] This bold step is a remarkable demonstration of prevailing attitudes towards the Fed at that time. That the President felt empowered to call the FOMC into his office, lecture its members on their jobs, and expect the Committee to comply reveals a great deal about how the President viewed his authority over the Fed. It shows that the Board had not yet earned the respect of Washington's political elite or fully embedded itself within the Washington political scene. That would eventually change. Truman's audacious move marked the first time a President had ever exercised such a demonstrable show of authority—and it would be the last.[118]

Truman's efforts to dominate the Fed did not end there. After the FOMC meeting, he instructed his staff to issue an immediate press release stating that the Fed had pledged its support and would maintain interest rates during the war.[119] In reality, the Fed had done no such thing.[120] Instead, Truman issued a false and preemptive statement to tie the Committee's hands, hoping to avoid any contradictory policy decisions.[121] The conflict escalated even further when Truman released letters that purported to thank McCabe for his assurance that the "market on government securities will be stabilized and maintained at present levels."[122] Once again, McCabe had done no such thing, and in response to Truman's strong-arm tactics, Eccles leaked internal FOMC memos that publicly disputed the White House's account.[123] This conflict became known as the "Treasury-Fed dispute,"[124] and it represented the last time a President would venture into such a conflict with the Fed and expect to win. As McCabe would

[116] *See id.*
[117] *See id.* at 40.
[118] *Id.* at 44.
[119] *See id.* at 45.
[120] *Id.*
[121] *Id.*
[122] *Id.* Truman had also deployed other questionable tools, including engineering newspaper leaks to discredit McCabe in order to urge him to leave. *Id.* at 39 ("Within the FOMC, President Truman had an ally who used newspaper leaks to discredit Chairman McCabe.").
[123] *See* Conti-Brown, *supra* note 27, at 35; *see also Marriner S. Eccles*, Fed. Reserve History, https://www.federalreservehistory.org/people/marriner_s_eccles (last visited Nov. 5, 2019).
[124] *Id.*

later observe, "[T]he ['Dear Tom'] letter was the final move in a Treasury attempt to impose its will on the Federal Reserve."[125] Eccles later recalled his time during the Truman Administration with regret, characterizing that period as "years of frustration and failure, as I tried, in my limited capacity, to influence public thought and government policy."[126]

The dramatic public showdown forced both sides to the negotiating table. As part of a compromise, Eccles[127] and McCabe[128] reportedly agreed to step down from the agency if the Treasury promised to give the Board more breathing room. After much back-and-forth, this led to the 1951 Fed-Treasury Accord, a watershed agreement that is now considered the "start of the modern Federal Reserve System."[129] The Accord itself was simple, stating in one dense sentence: "The Treasury and the Federal Reserve System have 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."[130] After the Accord was signed, Eccles and McCabe upheld their end of the bargain: Eccles departed back to Utah and McCabe resigned as Chair.[131]

It is difficult to overstate the importance of the Accord in the growth of the Fed as a truly independent agency. In just one sentence, the Accord codified a separation between the Executive branch's priorities and monetary policy, giving the Fed the flexibility it needed to become its own agency.[132] This is important because at this stage in the Fed's evolution, the agency needed a symbolic win as much as it did a substantive one. The Board had gained a level of formal separation thanks to the 1935 Banking Act, but it still struggled to instill a culture of Fed independence that the President and the Treasury

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125 Hetzel & Leach, *supra* note 111, at 45.

126 CONTI-BROWN, *supra* note 27, at 33.

127 *See* Hetzel & Leach, *supra* note 111, at 46 (noting that Eccles had drafted a resignation letter but decided to postpone because he "did not intend to leave Washington with the Federal Reserve under the control of the Treasury").

128 *See id.* at 51 (noting that McCabe "conditioned his resignation on the requirement that his successor be acceptable to the Fed"); *see also* CONTI-BROWN, *supra* note 27, at 182 ("McCabe fell on his sword as part of the Fed-Treasury Accord.").

129 *Id.* at 33, 37.

130 CONTI-BROWN, *supra* note 27, at 35.

131 *See Biographies: Marriner Stoddard Eccles (1890–1977)*, FED. RESERVE BANK OF RICHMOND, https://www.richmondfed.org/publications/research/special_reports/treasury_fed_accord/bios/eccles (last visited Nov. 5, 2019); *see also* CONTI-BROWN, *supra* note 27, at 182.

132 Jessie Romero, *Treasury-Fed Accord*, FED. RESERVE HISTORY, https://www.federalreservehistory.org/essays/treasury_fed_accord (last visited Dec. 6, 2019).

Department could respect. The Accord helped develop this culture, giving the Board something concrete it could leverage to defend itself against future efforts to influence its decisions.

The Accord has enjoyed success in part because agency leaders also worked to define its ultimate significance. In the years after the Accord, Fed leaders extracted as much from the Accord as they could, relying on the agreement to deny any attempt at Executive influence over the agency. William McChesney Martin, who took part in the Accord as a Treasury staffer and would later become the next Chair of the Fed, "quickly established that the Fed-Treasury Accord did not mean what Truman thought it meant."[133] In fact, Martin made it clear that the Accord granted the Fed exclusive control over all issues of monetary policy.[134] His perceived defection from the Treasury's point of view outraged Truman so much that the next time the President saw Martin in person, he had just one word to say: "Traitor!"[135]

The Accord highlights several themes that have recurred throughout this Note. For one, it provides yet another example of the agency gaining control through political forces instead of the enabling statute. When the Board wanted to assert greater autonomy, it did not turn to the Federal Reserve Act, but instead looked to contemporary political players who inhabited the day-to-day of the agency's existence. Second, it demonstrates yet again the role that internal agents played in securing the Fed's operative independence. As in the 1930s, the Fed in the 1940s and 1950s did not just sit patiently within the confines of the drafters' original vision. Rather, as the external landscape shifted, the Board began to maneuver Washington's political landscape on its own. Third, this account reiterates the fact that the Board's efforts towards independence were driven by a fidelity to its original mission. Given the end of the war and risk of subsequent inflationary pressures, the agency recognized that unless it could forge ahead independently, it would always be vulnerable to a President whose interests were bound to conflict with its own. Finally, the Accord is relevant for this narrative because of what it did despite what it is not: The Accord was not a statute or regulation, nor was it

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133 Conti-Brown, *supra* note 27, at 36; *see also* Melody Petersen, *William McChesney Martin, 91, Dies; Defined Fed's Role*, N.Y. Times (July 29, 1998), http://www.nytimes.com/1998/07/29/business/william-mcchesney-martin-91-dies-defined-fed-s-role.html (quoting Alan Greenspan, then-chairman of the Federal Reserve, as saying, "Crucially, Chairman Martin moved the Federal Reserve from being an adjunct of the Treasury Department . . . to the independent status . . . [of] today").

134 *See* Conti-Brown, *supra* note 27, at 37 (noting that the Accord "forms the basis in perception and in fact of the idea that the Fed's monetary policy is institutionally separate from the economic policies of the president").

135 *Id.* at 36.

binding law enforceable in court.[136] In fact, it was little more than an informal agreement between the two agencies. Nonetheless, it has enjoyed remarkable staying power. The strength of this informal agreement is a testament to the primacy that shared understandings of a political arrangement can have over the text of that arrangement itself.

At the same time the Board engineered this symbolic victory, it was also lobbying for enhanced regulatory authority. In the postwar years, there had been growing concern about the rise of large banking organizations capable of skirting regulations meant to curb interstate banking activity.[137] The Board recognized in these organizations both a threat to the economic welfare of the country as well as an opportunity to embed itself further in the fabric of the American economy. The next Section traces the Board's efforts in this space, narrating its decades-long plan to lobby for regulation on the matter and, once it had gained Congress's ear, to position itself as the best choice for regulator.

C. Independence Through Power: The Bank Holding Company Act of 1956

If the above narrative demonstrates independence through symbolic victories, this next one is about independence through power. Here, the Board's strategy for operative independence centered on securing regulatory control that would make the agency too important to intimidate. But though this effort took a slightly different approach, it, too, underscored the role that evolution features played in promoting the Board's growth over time.

This narrative begins where the prior one left off. After Martin took over as Chair, he continued his predecessors' efforts to fill a gap in banking regulation. At the time, the U.S. commercial banking landscape was dominated by two types of organizations: unit banks, which consolidated banking services in one location, and branch banks, which conducted business out of branch locations as well as the main office.[138] Unit banks enjoyed the support of their local community, while branch banks were viewed suspiciously; opponents thought they violated the American spirit of a local bank personally invested in its

136 *See id.* at 37.

137 *See* MARCUS NADLER & JULES I. BOGEN, THE BANK HOLDING COMPANY: A STUDY OF AMERICA'S LEAST-KNOWN TYPE OF BANK ORGANIZATION 11 (1959).

138 *See id.* at 5.

community.[139] As a result, state legislators passed regulations limiting their ability to expand across state lines.[140] This made bank holding companies increasingly popular, since the holding company vehicle provided a way to enter new markets without technically establishing branch banks.[141]

But as bank holding companies expanded, public opposition to them grew. Representatives of independent unit banks and trade associations argued that they engaged in risky business practices, held monopolistic control over regional banking industries, and violated the dual banking system.[142] The Board noticed this public appetite for regulation and saw an opportunity to embed itself further in the American economy.[143] Before long, it began appearing before Congress to urge banking legislation, subtly positioning itself as the ideal choice for regulator.

By this point, the Board was more settled in Washington. It had signed the Accord just two years prior and its new Chairman, William McChesney Martin, was already a well-respected government figure.[144] The Board's testimony before the Senate Committee on Banking and Currency reveals its growing sophistication. During a June 1953 hearing, Martin and his colleague, Fed Governor James Robertson, appeared before the Committee to give testimony on two proposed bills to regulate bank holding companies. The proposed bills were similar in many ways: Both required banks to divest from their nonbanking assets after a specified period of time, mandated banks consider the views of State banking authorities before acquiring bank

139 *See id.* at 8 (noting that the United States has maintained a strong preference for "local autonomy" in banking, because local banks can best know and understand the needs of their communities).

140 *See id.* at 9 (noting state laws that limit branch banking to a single state).

141 *See id.* at 10.

142 *See, e.g.*, *Providing for Control and Regulation of Bank Holding Companies: Hearing on S. 829 Before the S. Comm. on Banking and Currency*, 80th Cong. 44 (1947) (statement of Ben Du Bois, Secretary of the Independent Bankers Association, warning against the "present trend toward greater destruction of our system of free enterprise through the use of holding companies").

143 For example, Glass-Steagall was passed in 1933, and Roosevelt called for the effective abolition of bank holding companies in 1938. *See* CONTROL OF BANK HOLDING COMPANIES, S. REP. NO. 84-1095, at 2, 3 (1955). Separately, in 1948, the Federal Reserve Board launched proceedings against Transamerica Corporation, alleging that the company had violated the antitrust laws of the Clayton Act. *See* Transamerica Corp. v. Bd. of Governors of Fed. Reserve Sys., 206 F.2d 163, 164 (3d Cir. 1953). Though the Third Circuit found the complaint unfounded, arguing that the Board "paints with an exceedingly broad brush" in claiming that Transamerica lessened competition, the case reflects the general wariness toward bank holding companies at the time. *Id.* at 169.

144 Martin previously served as the assistant secretary of the Treasury and as president of the New York Stock Exchange. Petersen, *supra* note 133; Obituary, *William Martin*, ECONOMIST (Aug. 6, 1998), http://www.economist.com/node/171026.

stocks, and shared administering authority across the Board and Comptroller of the Currency.[145] Though Martin agreed with the need for regulation, he forcefully opposed sharing authority among three different agencies. In his testimony, Martin said he felt "strongly that administration of any such legislation should be vested in a single Government agency,"[146] and that any division of responsibility "would inevitably result in duplication of effort and possibly in conflicts in policies and procedures."[147] At the same time, Martin insisted that he "ma[de] no recommendation as to what agency should be selected to administer the legislation."[148] Martin's colleague, Robertson, was similarly emphatic about the need for a single regulating agency. Though Robertson demurred when asked whether the Fed should be the regulator,[149] he did acknowledge that "[i]f the Congress were to impose the job on the Board, [the Fed] would do it . . . ."[150] As Robertson pointedly observed, "[i]n the past . . . the Federal Reserve Board was given the job of administering the bank holding company laws to the extent that holding companies are regulated today. I suppose it is only for that reason that people look to the Board, perhaps, as the agency to administer it."[151]

In a testament to the Board's growing confidence, Martin and Robertson came to the hearings armed with much more than their words. Shortly after Martin finished testifying, Robertson produced, unprompted, a separate bill that he had drafted on his own accord.[152] This came as a surprise. As Senator Homer E. Capehart (R-Ind.) observed, "I do not know what prompted [the Board] to write the bill and bring it up here. I did not ask them to do it. . . . It would be quite usual for them to offer amendments to existing bills, but to write a bill and bring it up here was a little unusual . . . ."[153] Nonetheless, the Committee took a look at Robertson's draft. Known informally as the "Federal Reserve Bill," the draft diverged from the other two bills in several ways; most notably, it called for regulatory authority to be

145 *See Bank Holding Legislation: Hearing on S. 76 and S. 1118 Before the S. Comm. on Banking and Currency*, 83d Cong. 88–90 (1953) (comparing the main features of the bills under consideration).

146 *Id.* at 17.

147 *Id.* at 40.

148 *Id.*

149 *Id.* at 18.

150 *Id.*

151 *Id.*

152 *See id.* at 20 (statement of Governor Robertson) ("To see whether or not the views which we have expressed can be put into statutory language, I have prepared a bill which the rest of the Board has not seen."). While Governor Robertson wrote the draft, the bill aimed to represent the views of the entire Board of Governors. *See id.*

153 *Id.* at 140.

vested in a single agency.[154] Though Robertson denied that the Board was the agency he had in mind, his bold move set the tone for the rest of the hearing. By the end of the discussions, one of the Senators, A. Willis Robertson (D-Va.), revised his proposed bill to include nearly all of the Federal Reserve's suggestions.[155] Not only did the Senator accept the Board's suggestion to vest authority in a single agency, but he also read between the lines of the Board's testimony and named the Board as the regulator in charge.[156] The Senator's actions added a nice harmony to the Board's story: He had inherited Carter Glass' seat in the Senate,[157] so to the extent that Glass was considered the "father of the Federal Reserve,"[158] Senator Robertson could now also claim parentage. After all, his actions helped transform the Board from an institution focused solely on credit and monetary policy into a powerful regulator of the largest financial institutions in the country.

The Board's bold move reveals its increased sophistication in Congress. Energized by the success of this endeavor, the agency continued to remain an active part of congressional discussions. In later hearings, the Board would return to Capitol Hill to praise Senator Robertson's version of the bill, saying that it accorded "with [the Board's] best judgment" and "effectively and equitably" provided the minimum regulation needed to control bank holding companies.[159] Throughout these debates, Martin insisted that there be only one regulator.[160] When lawmakers pressed Martin to name the agency that should inherit the mantle, Martin repeatedly stated that the Board did not take a position on that question.[161] But when asked whether the Board would be a "receptive candidate," Martin pointedly responded, "The Federal Reserve Board would accept it, but we are not trying to make a grab for power here."[162] Legislators seemed to doubt Martin's sincerity. Indeed, when Fed Governor Robertson gave his testimony,

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154 *See id.* at 34, 88, 140.

155 *Id.* at 254 (statement of Sen. A. Willis Robertson) ("After studying the statement prepared by the Federal Reserve Board . . . I decided that I could properly accept and incorporate in my bill practically all of the suggestions made by the Board as to amendments which would bring it into conformity with the Board's ideas.").

156 *Id.* (statement of Sen. A. Willis Robertson) (noting that one of the "substantive changes" in his bill is to "vest[] authority in the Board of Governors of the Federal Reserve System to administer the act").

157 *See, e.g.*, *Robertson, Absalom Willis, (1887–1971)*, Biographical Directory of the U.S. Cong., http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000317 (last visited Jan. 6, 2020).

158 Page, *supra* note 89.

159 *See Control of Bank Holding Companies: Hearing on S. 880, S. 2350, and H.R. 6227 Before the S. Comm. on Banking and Currency*, 84th Cong. 44, 46, 285 (1955).

160 *Id.* at 45.

161 *Id*.

162 *Id.*

he was interrupted by Senator Paul Douglas (D-Ill.), who asked, somewhat incredulously, whether the Governor had "changed [his] hat" on the choice of regulator.[163] As Senator Douglas reminded the Governor, "[as Assistant Comptroller] you testified that the Comptroller of the Currency should have policymaking powers. . . . Am I justified in drawing a conclusion that the change in office becomes a change in viewpoint? Wherever one is, one desires control for the agency with which one is affiliated or dominates?"[164] Robertson denied the accusation, saying that regulatory responsibility was "not a delightful task to have."[165] And, though Senator Douglas eventually let the matter drop, his overt accusation represents a rare moment of transparency in the Board's interactions with Congress, and it helps illustrate the Board's ulterior motives in championing bank holding company regulation. Moreover, it demonstrates the careful balancing act the Board had to play as it tried to expand into the regulatory space.

As it had in prior eras, the Board ultimately found success. After repeated rounds of debate, Congress eventually passed the Bank Holding Company Act of 1956, which Dwight Eisenhower signed into law shortly after.[166] This important piece of legislation gave the Board the exclusive ability to approve new bank holding companies, set eligibility requirements, and serve as the de facto regulator of the largest financial institutions in the country. As one stakeholder observed, the Act transformed the Board from an agency centered on credit and monetary issues into a "cop on the beat," giving the agency the power to police the boundaries of banking in the postwar American economy.[167] In the six years after the passage of the Act, the Board would use its authority judiciously, approving forty-seven applications to form a bank holding company and denying fourteen.[168]

There are several key takeaways from the Board's behavior in this era. For one, it shows the consistency of the Board's efforts to secure independence even as the agency's own composition changed and it faced a different set of institutional actors. The Board in the mid-1950s was much more settled than the anemic institution of 1913,

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163 *Id.* at 66.
164 *Id.* at 66–67.
165 *Id.* at 67.
166 Statement by the President Upon Signing the Bank Holding Company Act of 1956, 99 PUB. PAPERS 484 (May 9, 1956).
167 *See Control of Bank Holding Companies: Hearing on S. 2577 Before the S. Comm. on Banking & Currency*, 84th Cong. 85 (1956) (statement of F.N. Belgrano, Jr., President, Transamerica Corporation).
168 *See* Jules Backman, *The Bank Holding Company Act of 1956*, C.J. DEVINE INST. FIN., June 1963, at 3, 5–6.

but it was still aware of the risks to its "privileged sanctuary" and determined to preserve its institutional interests.[169] Second, this narrative shows how the Board's strategy evolved even as it pursued that same mission of independence. Indeed, rather than remain complacent after fending off attacks to its domain—monetary policy—the Board in this era went on the offensive, proactively carving out a new role for itself that would make the agency too powerful to control.

The Board's narrative helps demonstrate the dynamic nature of agencies writ large. In contrast to the static image often presented in administrative law theory—in which an agency's defining characteristics are fixed in the enabling statute—the Board has shown how an agency can grow and evolve over time. This is an institution that went from being an adjunct of the Treasury Department and bullied by the President into one bold enough to bring its own draft bill to Congress—and get away with it. That these dramatic changes took place outside of the enabling statute illustrates how little work the statute is doing in defining the agency's operative independence. Furthermore, the Board's efforts to pass the Bank Holding Company Act are an example of independence accumulated through power. Because the Act made the Board the exclusive regulator of massive financial institutions, it gave the agency an outsized say in the development of the American economy.[170] The Board could unilaterally determine the shape and proliferation of bank holding companies. In an era in which these institutions were pushing the boundaries of what it meant to be a bank, the Act essentially gave the Board the power to police the boundaries of banking.

III
Implications for Administrative Law

Exploring the operative realities behind the Board's evolution yields several important implications for administrative law. First, it undercuts the doctrinal assumption that the sine qua non of agency independence is statutory for-cause tenure protection. As the history of the Federal Reserve Board makes clear, the operative independence of this particular agency—arguably the most independent in Washington—had more to do with the realities of governing and what it would take to maintain a stable economy than with the text of the

169 Greider, *supra* note 22, at 67–68.

170 For more on the history, scope, and importance of the Act, see *The Bank Holding Company Act of 1956*, 7 Duke L.J. 1, 1 (1957), which explains that "[t]he Bank Holding Company Act of 1956, designed principally to regulate the expansion of bank holding companies and to insure the separation of banking and nonbanking enterprises, is perhaps the most important banking legislation of the past two decades."

enabling statute itself. Indeed, by as early as 1935, the Board had already managed to extricate itself formally from the Executive branch, a phenomenon brought about through the careful, strategic politicking of agency bureaucrats rather than any formalistic reliance on the enabling statute.[171]

Second, this Note demonstrates the limits of institutional design. Despite early congressional visions of the Board as a limited institution, the agency managed to surpass its original parameters within the first few decades of its existence. It did so by convincing Washington's power brokers of the need for enhanced, centralized authority in order to effectuate its purpose of maintaining monetary stability. Initially, the Board started small, asking for formal independence and a building of its own so it could conduct its business away from the watchful eye of the Treasury Department. As the Board grew in confidence, it sought a symbolic victory, hoping this would engender a culture of respect for its independence that would deter future attempts by the President to influence monetary policy. In the last stage, the Board angled for greater regulatory power, expecting that its consolidation of supervisory control over the country's largest financial institutions would make the agency simply too powerful to control.

Altogether, these factors—which this Note has termed evolution features—have contributed to an institution that, in response to a changing American economy, has managed to pilot its own growth and go well beyond its statutory framework. This shows that despite Congress's best efforts at agency design, there may be unforeseen circumstances that shift control over an agency's future away from the hands of Congress and into the arms of the agency. In other words, what might begin as a story about institutional design may ultimately turn into a story about institutional evolution. Current academic literature does not reflect this phenomenon.[172] This Note attempts to do so. It uses the case history of the Federal Reserve Board to show how agency independence can be as much of, if not more, a function of agency evolution and adaptation as it can be of agency design, and it urges academics to adopt this perspective when evaluating what it means to be an independent agency.

More specifically, this could mean that instead of looking only at statutory factors to analyze agency independence, scholars might focus on the practical life of the agency itself. For example, scholars can examine the agency's structural organization; its public reputation;

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171 *See supra* Section II.A.

172 To the extent that scholars do recognize non-statutory bases for independence, they have focused on other factors. *See supra* notes 58–62 and accompanying text.

its treatment in the media; how often it is invited to testify before Congress; its physical space, measured in terms of both size and location; and its operative control over segments of society that are too important to warrant interference from other government actors. Overall, this Note offers an evolution-based approach to studying agencies that recognizes that the iterative process of governing often forces players in Washington to adapt. Indeed, agencies are not fixed in time, but are rather dynamic units that will respond and react to changes in their internal and external environments.

Third, this Note is an argument for a functional, individualistic approach to the study of administrative law. It is functional because it has looked to the actual practice of independence across history, and it is individualistic because it has done so through the lens of one particular agency—indeed, arguably the most independent agency in Washington. This turns the traditional model of studying agencies on its head. In general, administrative law takes a one-size-fits-all approach.[173] It starts with a broad theoretical framework that it then applies to each institution, treating them the same notwithstanding significant differences in mission, substance, and actual operation.[174] This Note has taken the opposite approach. Rather than beginning with a general principle and applying that principle to each agency, this Note has started small, looking at the actual history and operation of one agency before gleaning from it broader lessons about agency evolution and independence. As such, this Note is also an argument about methodology. It demonstrates that we can learn as much, if not more, from a bottoms-up study of administrative agencies, and it invites other scholars to do the same to see what lessons may be drawn about the administrative state writ large.

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[173] *See generally* John F. Manning & Matthew C. Stephenson, Legislation and Regulation: Cases and Materials (3d ed. 2017) (discussing the role of administrative agencies, in general, within the federal government).

[174] For instance, this approach means administrative law has categorized the National Labor Relations Board (NLRB) as independent because its members enjoy statutory for-cause tenure protection. National Labor Relations Board, 29 U.S.C. § 153(a) (2018) (specifying that NLRB members "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause"). But the NLRB is widely considered to be one of the most politicized agencies in Washington, and its members are "routinely described as 'union-side' or 'management-side.'" Vermeule, *supra* note 25, at 1179–80 (citing Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 Ohio St. L.J. 1361, 1453 (2000) ("[T]he practice of appointing management and union-side representatives to the Board has become so well-entrenched as to make any reversion to . . . [impartiality] . . . all but inconceivable.")). For suggested reforms to the NLRB, see Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L.J. 2013, 2077–85 (2009).

Finally, and relatedly, this Note is an invitation for further research into the evolution of other administrative agencies. In theory, the Fed's story is generalizable across the administrative state. To the extent that any other agency could also lobby lawmakers for increased power or prestige, or reorganize its internal structure and employ committed leaders, then this self-driven account of agency independence might apply to agencies beyond the Federal Reserve Board. If that is the case, then the Fed's story would be an instructional one, presenting a blueprint for other administrative agencies similarly interested in breaking free of political influences. At the same time, however, the Board has unique features that might make its narrative less representative. For instance, the Board's early responsibility for stabilizing the American economy might have given it enhanced political leverage, as the economy is often considered too important to risk disruption.[175] There is a general consensus that central banks must be independent in order to function properly.[176] Similarly, the Board's ability to fund itself through interest on government securities—acquired through its open market operations—might give the institution built-in freedom from the political branches of government, as the Board can avoid the congressional budget process that constrains other agencies.[177] Though it is beyond the scope of this Note to conclude whether the Board's story can be replicated elsewhere, this Note

[175] For an example of how central the U.S. economy can be in political life, Bill Clinton's successful 1992 presidential campaign is often attributed to the mantra, "[I]t's the economy, stupid." *See, e.g.*, *Politics with Amy Walter: The Trump Administration Hopes "It's the Economy, Stupid" Holds True in 2020*, PUB. RADIO INT'L: THE TAKEAWAY (May 3, 2019), https://www.pri.org/programs/takeaway/politics-amy-walter-trump-administration-hopes-its-economy-stupid-holds-true-2020 (interviewing James Carville, a Democratic strategist who coined the phrase while working on Clinton's campaign as a reminder that "people vote with their pocketbooks").

[176] *See The Independence of Central Banks Is Under Threat from Politics*, ECONOMIST (Apr. 13, 2019), https://www.economist.com/leaders/2019/04/13/the-independence-of-central-banks-is-under-threat-from-politics (emphasizing the importance of central bank independence in economic stability); *see also* James Forder, *Why Is Central Bank Independence So Widely Approved?*, 39 J. ECON. ISSUES 843, 843 (2005) (recognizing global consensus on the need for central bank independence).

[177] For more on how the Board funds itself, see *What Does It Mean that the Federal Reserve Is "Independent Within the Government"?*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., https://www.federalreserve.gov/faqs/about_12799.htm (last updated Mar. 1, 2017). For more literature on the relationship between self-funding and independence, see Charles Kruly, Essay, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1737 (2013), which examines the relationship between self-funding and agency independence, and arguing that self-funding also insulates agencies from executive control. *See also* Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1824 (2012) (evaluating the strength of congressional and presidential influence on agencies that can self-fund).

has provided the groundwork for future study on this subject by analyzing the practical origins of agency independence. Future scholars could explore the evolution of the other agencies in Washington, such as the Securities and Exchange Commission (SEC) or the Consumer Financial Protection Bureau (CFPB). Like the Board, for example, the SEC lacks statutory for-cause tenure protection but has long been considered an independent agency,[178] while the CFPB enjoys both for-cause protection as well as budgetary independence.[179] Studying these agencies' changes over time might help isolate the key factors that underlie operative independence and illuminate the extent to which the Board's rise to power could be replicated in these institutions as well.[180]

Conclusion

Since the Bank Holding Company Act, the Board's influence has only continued to grow. Perhaps most prominently, the Board took

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178 *See, e.g.*, Note, *The SEC Is Not an Independent Agency*, 126 Harv. L. Rev. 781, 781 & n.3 (2013) (documenting an extensive series of statutes, cases, and scholarship in which the SEC has been classified as an independent agency, as well as outrage from political commenters when presidential candidate John McCain suggested he would fire the Chairman of the SEC). In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, Justice Stephen G. Breyer also noted that "[i]t is certainly not obvious that the SEC Commissioners enjoy 'for cause' protection. . . . [T]he statute that established the Commission says nothing about removal. It *is silent* on the question." 561 U.S. 477, 514, 546 (2010) (Breyer, J., dissenting).

179 *See* 12 U.S.C. § 5497(a)(1)–(2) (mandating that the CFPB's budget come from "the combined earnings of the Federal Reserve System" and that the agency's funding be exempted from review by the House and Senate Appropriations Committee); Kruly, *supra* note 177, at 1734 ("The political fight over the CFPB's structure was largely focused on the Bureau's for-cause-protected, single-member head, which Congress combined with the Bureau's exclusion from the congressional appropriations process.").

180 There is currently an active debate about the constitutionality of granting for-cause tenure protection to the Director of the CFPB. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 84 (D.C. Cir. 2018) (en banc) (upholding for-cause tenure protection for the CFPB's Director), *rev'g* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 37 (D.C. Cir. 2016) (finding that the CFPB's structure is unconstitutional because it is "an independent agency headed by a single Director," which is distinct from agencies run by multi-member commissions). In October 2019, the Supreme Court granted certiorari on this issue in a related case from the Ninth Circuit. Consumer Fin. Prot. Bureau v. Seila Law, 923 F.3d 680 (9th Cir.), *cert. granted*, 140 S.Ct. 427 (2019) (No. 19-7) (directing the parties to prepare arguments on the question of whether 12 U.S.C. § 5491(c)(3) can be severed from the Dodd-Frank Act if the CFPB is found unconstitutional). Regardless, studying the evolution of the CFPB may be more difficult as the CFPB is a relatively new institution created in response to the Great Recession. *See Creating the Consumer Bureau*, CFPB, https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau (last visited Sept. 27, 2019) (explaining that the CFPB was created in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act and is "focused on one goal: watching out for American consumers in the market for consumer financial products and services").

center stage during the 2008 financial crisis, employing a series of both conventional and unconventional tools to address the Great Recession.[181] These included slashing the federal funds rate, launching a program of "quantitative easing," and issuing FOMC policy statements to provide forward guidance on the future direction of the federal funds rate.[182] When the credit market collapsed, the Fed exercised its lender of last resort powers, letting banks borrow from its discount window.[183] And when the surviving investment banks including Goldman Sachs and Morgan Stanley needed access to cheap credit, the Fed persuaded Congress to let them reclassify as bank holding companies.[184] Not only did this regulatory reorganization give the banks access to much-needed credit, but it also brought these massive financial institutions into the Federal Reserve's control, further enhancing the agency's regulatory power.[185]

Throughout the crisis, the Board found its authority relatively unquestioned. Indeed, even though the Board came under fire for the way it handled the 2008 crisis,[186] the disagreement centered on *how* the Board exercised its authority—not whether it had such authority in the first place. Moreover, as President Trump has discovered, the sanctity of the Board's ability to make policy decisions on its own has become an enduring characteristic of the agency, despite the continued absence of for-cause tenure protection.

As demonstrated above, the Board's road to operative independence was not a straight line. Indeed, it is the result of incremental victories that were grounded in three different approaches towards

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181 *See* Robert Rich, *The Great Recession: December 2007–June 2009*, FED. RESERVE HISTORY, https://www.federalreservehistory.org/essays/great_recession_of_200709 (last visited Sept. 27, 2019).

182 *See id.* For a more detailed analysis of the Great Recession, see ADAM TOOZE, CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD (2018).

183 *Discount Window Lending*, GOVERNORS FED. RESERVE SYS., https://www.federalreserve.gov/regreform/discount-window.htm (last updated June 28, 2019).

184 Stanley Fischer, Vice Chairman, Bd. of Governors of the Fed. Reserve Sys., The Lender of Last Resort Function in the United States (Feb. 10, 2016), https://www.federalreserve.gov/newsevents/speech/fischer20160210a.htm; Matthew Yglesias, *The Fed and the 2008 Financial Crisis*, VOX (May 13, 2015, 12:20 PM), https://www.vox.com/2014/6/20/18079946/fed-vs-crisis; *see also The Fed's Actions in 2008: What the Transcripts Reveal*, N.Y. TIMES (Feb. 21, 2014), https://www.nytimes.com/interactive/2014/02/21/business/federal-reserve-2008-transcripts.html.

185 *See* Yglesias, *supra* note 184 (describing the Fed as one of the only institutions responsible for regulating banks after the financial crisis); *see also The Fed's Actions in 2008: What the Transcripts Reveal*, *supra* note 184.

186 *See, e.g.*, Neil Irwin, *The Policymakers Saved the Financial System. And America Never Forgave Them*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/upshot/financial-crisis-recession-recovery.html (arguing that conservatives criticized the quantitative easing program for risking "currency debasement and inflation," while liberals criticized its failure to nationalize the banks).

independence: internal reorganizations, symbolic independence, and, perhaps most fundamentally, regulatory power. At each of these inflection points, the agency owed its success to the commitment of its leaders, the strength of its political maneuvering, and a strategic focus on victories that would embed the Board further into the U.S. economy. The modern iteration of the Board thus enjoys a unique level of independence not because of its enabling statute, but because motivated actors inside the agency lobbied for changes that would slowly, but surely, entrench the institution into the Washington political scene and eventually make it a force too powerful to control.

This Note has focused on the case history of the Federal Reserve Board as one example of dynamic agency change and institutional settlement. The Board's evolution shows the mechanics of how an agency can ultimately control its own fate. It illustrates the notion that although agencies are creatures of the law, they are not defined by it; once created, they become dynamic, living entities adept at navigating the political system in pursuit of their own institutional mission and may ultimately exceed the original parameters envisioned by their legislative creators. While the Fed's story presents a fascinating case of one agency's evolution from the ground up, future research will demonstrate whether it is also a story about the administrative state writ large. After all, to the extent that agencies are created and populated by people, they are always subject to the dynamic changes inherent in human-driven endeavors. For the most part, legal theory has not yet explored this possibility. This Note represents a budding attempt to do so.