Executive Override of Central Banks: A Comparison of the Legal Frameworks in the United States and the United Kingdom

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This Article examines executive branch powers to "override" the decisions of an independent central bank. It focuses in particular on the power and authority of a nation's executive branch to direct its central bank, thereby circumscribing canonical central bank independence. To investigate this issue, this Article compares two types of executive overrides: those found in the United States, exercised by the U.S. Treasury (Treasury) over the U.S. Federal Reserve (the Fed), and those in the United Kingdom, exercised by Her Majesty's Treasury (HM Treasury) over the Bank of England (the Bank). This Article finds that in the former, the power is informal and subject to minimal formal oversight, whereas in the latter, there are legal powers of executive override within an established and transparent legal framework.

This Article is the first piece of scholarship to undertake comparative analysis of the legal powers of executive override over these two leading central banks. The comparison is indeed striking—it juxtaposes the express, but limited, legal powers of HM Treasury to direct the Bank of England with the ad hoc and informal conventions of Treasury or presidential control of the Federal Reserve. The comparative analysis begs a paradoxical question in the conception of central bank independence: could a narrowly tailored set of override powers that authorize a treasury, with oversight from the legislature, to direct a central bank in exigent circumstances yield a sturdier form of central bank independence than a system which establishes few or limited legal mechanisms of executive override? Ultimately, this analysis prompts renewed examination of the way in which the law structures the Fed's independence vis-à-vis the Treasury and the President, informed by lessons from the U.K. design.

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INTRODUCTION

In November 2018, President Trump insinuated to the press that he would consider firing the sitting Chair of the Federal Reserve, Jerome Powell. As the President told reporters, "I'm not even a little bit happy with my selection of Jay. Not even a little bit. And I'm not blaming anybody, but I'm just telling you I think that the Fed is way off-base with what they're doing."[1] The President was, of course, referring to the Fed's decision to raise interest rates.[2] When pundits asked whether President Trump would be legally permitted to take such action, central

1. Philip Rucker, Josh Dawsey & Damian Paletta, *Trump Slams Fed Chair, Questions Climate Change and Threatens to Cancel Putin Meeting in Wide-Ranging Interview with The Post*, WASH. POST (Nov. 27, 2018, 9:44 PM), https://www.washingtonpost.com/politics/trump-slams-fed-chair-questions-climate-change-and-threatens-to-cancel-putin-meeting-in-wide-ranging-interview-with-the-post/2018/11/27/4362fae8-f26c-11e8-aeea-b85fd44449f5_story.html?utm_term=.4edc463016aa.

2. *See* Erik Wasson & Billy House, *Powell Told Democrats Fed Won't Bend to Pressure, Sources Say*, BLOOMBERG (Apr. 12, 2019, 10:22 AM), https://www.bloomberg.com/news/articles/2019-04-11/democrats-raise-concerns-on-fed-independence-before-powell-talk (noting how President Trump "has criticized the Federal Reserve's rate increases as it tried to gradually move them to a level that neither brakes nor stimulates growth").

bank experts were hard-pressed to provide a definitive answer.[3] Indeed, over the past few years, central bank scholars have begun to tease out the nonlegal components of a central bank's independence. This body of work has established that a central bank's independence is the outcome of a range of legal, political, and historical institutions and conventions.[4] This Article joins that academic effort to clarify the edges of central bank independence.[5] Specifically, it focuses on the legal power and de facto authority of executive and fiscal authorities to override the central bank. In turn, the Article reflects on how this power and authority impacts central bank independence.[6]

The core of this Article's analysis is descriptive, comparing the nature of HM Treasury's legal powers in the United Kingdom over the Bank of England with the U.S. Treasury's and President's power over the Federal Reserve.[7] That comparison unearths a paradox that challenges the theoretical ideal of central bank independence[8]: it suggests that a narrowly tailored set of override powers which legally authorize a treasury, with oversight from the legislature, to direct a central bank in exigent circumstances could yield a sturdier form of central bank independence than a system which establishes few or limited legal mechanisms of executive override.

The main tenets of the comparison are as follows. In the United Kingdom, the Bank of England operates in accordance with a statutory framework set by Parliament—a framework designed to ensure that the Bank is free from day-to-

3. *See, e.g.*, Peter Conti-Brown, *Can Trump Fire Jerome Powell? It's a Political Question*, WALL ST. J. (Dec. 10, 2018, 6:52 PM), https://www.wsj.com/articles/can-trump-fire-jerome-powell-its-a-political-question-1544485975.

4. *See, e.g.*, PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE, at xviii, xxi (2016) (arguing that we need to look to forces outside of law, such as politics and history, to fully appreciate the contours of the Fed's independence).

5. For other scholarship which engages the question of the Fed's relationship to other parts of the government, see, for example, SARAH BINDER & MARK SPINDEL, THE MYTH OF INDEPENDENCE: HOW CONGRESS GOVERNS THE FEDERAL RESERVE 26–27 (2017) (studying how the Fed's relationship with Congress since its founding has been a source of the central bank's strength); José Fernández-Albertos, *The Politics of Central Bank Independence*, 18 ANN. REV. POL. SCI. 217, 218, 229–30 (2015) (discussing the ways in which the Fed is a political institution with qualified independence); Jakob de Haan & Sylvester C.W. Eijffinger, *The Politics of Central Bank Independence* 2 (Tilburg: Dep't of Econ., Discussion Paper No. 2016-047, 2016) (providing a literature review on the political economy of monetary policy).

6. For further scholarship on central bank independence, see, for example, Charles Goodhart & Rosa Lastra, *Populism and Central Bank Independence*, 29 OPEN ECON. REV. 49 (2017); Rosa M. Lastra, *Central Bank Independence and Financial Stability*, 18 ESTABILIDAD FINANCIERA 49 (2010), https://www.bde.es/f/webbde/Secciones/Publicaciones/InformesBoletinesRevistas/RevistaEstabilidadFinanciera/10/May/Fic/REF201018.pdf [https://perma.cc/7ENZ-2VDC].

7. The aim in comparing the U.S. and U.K. systems is to create a new lens for examining how executive override powers can vary significantly even between two of the world's most well-known independent central banks, and to suggest some interesting implications can be drawn for the U.S. system in reflecting on the legal structure in the U.K.

8. The baseline, economic ideal of an independent central bank is one that exercises monetary policy decisionmaking independently from political pressures and stakeholders. At its core, this rationale rests on a view that independence is necessary to counter inflationary biases of politicians. *See infra* Section I.B.2.

day political influence and direction.[9] However, in specified circumstances, HM Treasury does have a set of backstop legal powers to override—specifically to "direct"—the Bank of England. This began life as sweeping in scope but has, in practice and over time, been winnowed down to a precise and narrow set of tailored powers accompanied by procedural safeguards to ensure that HM Treasury does not abuse these override powers.[10]

The powers are set out by Parliament in statute, and attempts have been made to establish *ex ante* the circumstances in which the powers can be used, specify over which of the Bank's functions they can be used, and provide an opportunity for the Bank to be consulted before they are used.[11] In practice, these powers have never been exercised, but if they were, oversight from the legislative branch—in the form of the U.K. Parliament and its influential Treasury Committee—would be expected in order to check their proper limits. Moreover, given that the powers of direction have an overtly legal basis, there is ultimately a role for the judicial branch in terms of settling any legal disputes that may arise in relation to their use and enforceability, including questions of interpretation and whether the executive's particular use of a power was lawful.

In the United States, meanwhile, Congress has similarly charged the Fed with pursuing a specific set of objectives. As regards monetary policy, these goals include maximum employment and price stability, which are often referred to as the "dual mandate" of the Fed.[12] To ensure that the Fed's monetary policy decisions are taken independently from executive branch influence, the Federal Reserve Act provides members of the Board and Federal Open Market Committee (FOMC) certain legal protections from political pressure.[13] Here, similarities in the shape of formal legal independence exist between the Fed and the Bank of England.

However, in contrast to the legal regime in the United Kingdom, the Federal Reserve Act does not afford the U.S. Treasury legal powers to override the decisions of the independent central bank. To be clear, there are legal provisions in the Federal Reserve Act that empower the Treasury to control the Fed in some cases; but those cases arise in regard to fiscal matters that are properly the Treasury's domain. In particular, section 10(6) of the Federal Reserve Act authorizes the Treasury to "supervise and control" the Fed in situations where their

9. For a more detailed description, see *infra* Section I.B.

10. *See infra* Section I.B.

11. These attempts have been more successful for certain powers than others. *See infra* Table 1.

12. Language requiring the Fed to "promote . . . the goals of maximum employment, stable prices, and moderate long-term interest rates" was added in 1977 in amendments to the Federal Reserve Act. Federal Reserve Act of 1913 § 2A, 12 U.S.C. § 225a (2012). Technically, it should be noted, there is a third piece to the Fed's mandate: to "maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run" production potential. *Id.*

13. *See infra* Part II. At this juncture, it bears noting that the Supreme Court precedent discussing agency independence did not come about until after the creation of the Federal Reserve System in 1913. Nevertheless, that precedent is applicable to a contemporary understanding of whether the Fed is an independent or executive agency—the essential point is that few, if any, lawyers or scholars would suggest the Fed is an executive branch agency given this body of precedent.

jurisdiction overlaps and conflicts of judgment arise.[14] Additionally, section 15 of that Act enables the Treasury to direct the Reserve Banks to act as its fiscal agent.[15] As their legislative history confirms, these provisions are intended to preserve the Treasury's ability to instruct the Fed in cases where the Fed is acknowledged to be acting as an agent on behalf of the Treasury (in the case of section 15), and as a backstop should the Fed stray into fiscal territory (in the case of section 10(6)). Accordingly, these legal powers are not analogous to the override powers in the U.K. system, which expressly enable the executive branch—in exigent circumstances—to override decisions that the legislature has otherwise delegated to an independent central bank (such as in relation to monetary policy).

More recently, and following the financial crisis of 2007–2008, the U.S. Treasury was given another power vis-à-vis the Federal Reserve. It now has legal authority to veto the use of the Fed's lender-of-last-resort power as extended to nonbank financial institutions.[16] The Treasury Secretary, through its lead position on the Financial Stability Oversight Council (FSOC), also has the power to steer the designation of nonbank financial institutions as systemically important and thereby to subject them to the Fed's regulatory and supervisory requirements.[17]

The comparison thus begs two highly nettling questions. For one, from an institutional-design standpoint, why would the Bank of England and Federal Reserve have developed such discrepant legal relationships with their fiscal authorities? More puzzling still, can it be said that the U.K. legal framework, under which the executive has explicit and well-defined override powers, ultimately offers the central bank a more robust form of legal protection from political interference than does the U.S. system? This Article sheds new light on these issues by comparing each legal system and concluding with a brief normative assessment.[18]

This Article's comparative analysis and discussion contribute to the wider discussion of how central bank independence should be legally articulated, which has traditionally been framed as containing four possible pillars.[19] First, a *quasi-*

14. *See infra* Section II.B.2.

15. *See* Federal Reserve Act of 1913 § 15.

16. *See infra* Section II.B.4.

17. *See infra* Section II.B.5.

18. For another interesting work comparing the U.S. and U.K. financial regulatory systems, where the lender-of-last-resort power is concerned, see generally Dan Awrey, *The Puzzling Divergence of the Lender of Last Resort Regimes in the US and UK*, 45 J. CORP. L. (forthcoming 2020).

19. *See* ROSA MARÍA LASTRA, INTERNATIONAL FINANCIAL AND MONETARY LAW 70–73 (2d ed. 2015) (noting the following elements of a law that "truly safeguards" central bank independence: a declaration of independence, organic guarantees and professional independence, functional or operational guarantees, the "economic test of independence," financial autonomy, and regulatory powers); *see also* EUR. CENT. BANK, CONVERGENCE REPORT 20 (2018) [hereinafter 2018 CONVERGENCE REPORT], https://www.ecb.europa.eu/pub/pdf/conrep/ecb.cr201805.en.pdf?ee1c3b309ded218fe2785c36ce4d65ba [https://perma.cc/PA7L-U5ZL] (describing "the concept of central bank independence" to include functional, institutional, personal, and financial independence). The ECB's annual convergence reports consider in detail the progress made by non-euro Member States toward achieving the criteria for adopting the euro, including the legal framework for central bank independence. *See Convergence Report*, EUR. CENT. BANK, https://www.ecb.europa.eu/pub/convergence/html/index.en.html [https://perma.cc/T26U-YSJZ] (last visited Feb. 7, 2020).

constitutional "declaration of independence.*"* This would be an entrenched legal provision[20] that declares in unambiguous terms that the central bank is independent from the executive and will not act under political instruction.[21] Second, *institutional independence*. This is the idea that there are legal safeguards for central banks as institutions that enable them to carry out their tasks without interference or instruction from the executive branch of government (or any other body).[22] Third, *personal independence*. These are legal protections for those individuals who assume decisionmaking responsibilities within a central bank,[23] in particular for those who assume the role of Governor.[24] Fourth, *financial and economic independence*. Even if a central bank has the other three protections described above, its independence could still be compromised if it could not avail itself of sufficient budgetary resources to achieve its mandate (financial independence), or if it could be pressured by the executive branch to engage in monetary financing, that is, the financing of government deficits—or other tasks that lie more properly with the fiscal authority—via central bank credit (economic independence).[25] This Article principally engages with the second (institutional independence) and third (personal independence) of these pillars, insofar as it examines the ability of the executive branches in the United States and United Kingdom to override decisions of the Federal Reserve and the Bank of England respectively.

This Article proceeds as follows. Part I explains the U.K. system and HM Treasury's formal powers of direction over the Bank of England. It also offers some observations on how these powers relate to or impact the notion of central bank independence. Part II turns to the U.S. case. It first explores the limited statutory powers of direction and control established in the Federal Reserve Act. It then explores the range of informal conventions of direction and control over the Fed's monetary policymaking, which have happened outside of that legal framework. It also briefly considers new powers of direction or control that affect the Fed's emergency lending and its regulatory perimeter. Part II's principal purpose is to illustrate the discrepancy between the law of executive override and the

20. That is, a provision that is difficult to repeal.

21. *See* LASTRA, *supra* note 19, at 70.

22. *See* 2018 CONVERGENCE REPORT, *supra* note 19, at 21–23; LASTRA, *supra* note 19, at 70.

23. These legal protections typically relate to appointments, term of office, and grounds for dismissal. *See* LASTRA, *supra* note 19, at 70. These are discussed later in this Article. Another relevant protection is the idea that central banks and their officials should be exempt from liability in damages for their action or inaction, although this is less relevant to the issue of independence from the executive branch. For further discussion on the issue of immunity, see generally Michael Salib, *The Bank of England's Statutory Immunity from Damages: Its Logic and Limits*, 2018 J. BUS. L. 606.

24. *See* 2018 CONVERGENCE REPORT, *supra* note 19, at 23–25; LASTRA, *supra* note 19, at 70.

25. *See* 2018 CONVERGENCE REPORT, *supra* note 19, at 25–28; LASTRA, *supra* note 19, at 72. The protection against executive pressure to engage in monetary financing is the "prohibition on monetary financing" that is most well-known in the E.U. context and encapsulated in Article 123 of the Treaty on the Functioning of the European Union. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 123, June 7, 2016, 2016 O.J. (C 202) 47, 99 [hereinafter TFEU]. It is expected to be retained in U.K. law after the United Kingdom leaves the European Union. *See* The European Union Budget, and Economic and Monetary Policy (EU Exit) Regulations 2019, SI 2019/484, art. 6, ¶ 1 (UK).

practice of executive control. To aid that claim, Part III considers in further detail the impact that these statutory and informal powers have on the Fed's independence from the Treasury.

In conclusion, this Article presents its key lesson learned from the comparison of the U.K. and U.S. systems: it is possible to reconcile executive override powers with central bank independence, provided they are reserved to narrowly prescribed circumstances, set out explicitly *ex ante* in law, and subject to transparency and legislative oversight to the greatest possible extent.[26]

I. THE UNITED KINGDOM: HM TREASURY'S POWERS TO DIRECT THE BANK OF ENGLAND

As the financial crisis began to erupt in the autumn of 2007, U.K. Chancellor Alistair Darling was deeply frustrated that he could not compel the Governor of the Bank of England, Mervyn King, to do what he wanted. The Chancellor's frustration stemmed from his belief that the Bank of England responded too slowly to the early stages of the crisis. The Chancellor thought that the U.K. financial system was in urgent need of liquidity—liquidity that could only be provided by the Bank in its capacity as lender of last resort. "I was so desperate," wrote Darling in his memoirs, "that I asked the Treasury to advise me as to whether or not we could order the Bank to take action" or "if there was a way of forcing the Governor's hand."[27]

Underlying this is a legal issue: precisely what powers does HM Treasury have to direct the Bank of England? What statutory provisions enable an executive *override* of the Bank's decisions or actions?

The answers to these questions are, in many ways, at the heart of the Bank of England's independence from HM Treasury. There is no grand "declaration of independence" protecting the Bank of England from political interference—no oath that its political masters must swear requiring them to respect central bank independence.[28] Such declarations do exist for other central banks. Most notably,

26. It has reasonably been observed that "override-mechanisms constitute the single most problematic feature in the institutional set-up of a central bank as they are arguably at odds with the notion of central bank independence." The Three Pillars of Central Bank Governance—Towards a Model Central Bank Law or a Code of Good Governance? 20 (2004) (unpublished manuscript), https://www.imf.org/external/np/leg/sem/2004/cdmfl/eng/amtenb.pdf [https://perma.cc/U96K-UXYE].

27. ALISTAIR DARLING, BACK FROM THE BRINK 23, 57–58 (2011).

28. Until relatively recently, this was also true in the context of judicial independence. This changed with the introduction of section 3 of the Constitutional Reform Act 2005, which requires all Ministers to "uphold the continued independence of the judiciary" and not to "seek to influence particular judicial decisions through any special access to the judiciary." Constitutional Reform Act 2005, c. 4, § 3(1)–(5) (UK), http://www.legislation.gov.uk/ukpga/2005/4/contents [https://perma.cc/5W3D-BSLE]. Moreover, section 17(1) requires the Lord Chancellor to swear an oath to actively defend the independence of the judiciary. *See id.* § 17(1). It is hard to imagine Chancellors of the Exchequer being required to swear a de jure oath to uphold the Bank of England independence, although they are certainly expected to do so in practice. But the idea is not farfetched: for E.U. Member States, political authorities are required to "*undertake to respect*" the principle of central bank independence and "not to seek to influence the members of the decision-making bodies of the [European Central Bank] or of the national central banks in the performance of their tasks." Protocol (No 4) on the Statute of the European System of Central

central bank independence has a quasi-constitutional basis across the European Union. The Treaty on the Functioning of the European Union provides that the European Central Bank (ECB) "shall be independent in the exercise of its powers" and "governments of the Member States shall respect that independence."[29] Significantly, this declaration of independence also extends to the *national* central banks of the EU Member States who must not "seek or take instructions" from their national governments.[30] The inclusion of these provisions in international treaty law mean that no individual E.U. Member State can unilaterally amend or repeal them.[31] But the United Kingdom sought and obtained a special derogation from these provisions during the Maastricht negotiations, so they never applied to the Bank of England.[32]

Reflecting the position of much of the British constitution, the Bank of England's independence from HM Treasury is a complicated affair, and one which has evolved over time in a piecemeal fashion. Its legal articulation can only be defined by looking across a range of different laws—laws which have been amended over the years to reflect the prevailing view of how much control HM Treasury should be able to exert in order to make the Bank do its bidding. It does not have the kind of higher "constitutionally enshrined" status that exists in the European Union.[33]

From a legal perspective, this means the Bank's independence is open to repeal by ordinary legislation, although there are other (nonlegal) considerations that would make it difficult to do so. Indeed, when Chancellor Nigel Lawson first seriously proposed to Prime Minister Margaret Thatcher the idea of introducing legislation to grant the Bank independence over monetary policy in 1988, he acknowledged that the United Kingdom had no written constitution, and that "it would in theory be open for any future Government to repeal the legislation."[34]

Banks and of the European Central Bank art. 7, June 7, 2016, 2016 O.J. (C 202) 230, 232 [hereinafter Protocol (No 4)] (emphasis added).

29. TFEU, *supra* note 25, art. 282(3), at 167.

30. *Id.* art. 130, at 104; *see also* Protocol (No 4), *supra* note 28, art. 7.

31. The principle of supremacy of European law over national law has long been established Court of Justice's case law. *See* Case 6/64, Costa v. ENEL, 1964 E.C.R. 587, 593.

32. The United Kingdom obtained this special derogation along with derogations from a host of other provisions relating to economic and monetary union. *See* Protocol (No 15) on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland art. 4, June 7, 2016, 2016 O.J. (C 202) 284, 284.

33. The U.K. constitution has traditionally been regarded as "flat" (in the sense that constitutional law is not hierarchically superior to other law). *See* Mark Elliott, *The UK's (Unusual) Constitution*, LONDON SCH. ECON.: CONSTITUTION UK (Mar. 26, 2014), https://blogs.lse.ac.uk/constitutionuk/2014/03/26/the-uks-unusual-constitution/ [https://perma.cc/4KZZ-D8XT]. However, in recent years, English judges have identified and treated certain "constitutional statutes" differently than "ordinary statutes" (for the purposes of the doctrine of implied repeal). *See* Farrah Ahmed & Adam Perry, *Constitutional Statutes*, 37 OXFORD J. LEGAL STUD. 461, 464 (2017). Examples of the former include the Magna Carta, the Bill of Rights 1689, the Act of Union 1707, the European Communities Act 1972, and the Human Rights Act 1998. *Id.* at 465.

34. Memorandum from Nigel Lawson, Chancellor of the Exchequer, HM Treasury, to Margaret Thatcher, Prime Minister, United Kingdom (1988), *in* NIGEL LAWSON, THE VIEW FROM NO. 11: MEMOIRS OF A TORY RADICAL 1060 (1992).

However, he went on to observe that "there would be a powerful market sanction against that: the mere announcement of the intention to do so would in itself be so damaging to market confidence that any Government would be extremely reluctant to attempt it."[35] This is useful in making the broader point that, although this Article is concerned with legal frameworks, a complete understanding of central bank independence rests on more than the law. Instead, it includes an array of wider political and economic considerations, as well as how the law is applied in practice.

The main focus of Part I concerns the most direct and forceful form of control: HM Treasury's legal powers to direct the Bank as an institution. In short, HM Treasury's legal ability to circumscribe institutional independence constitutes an executive override. This Article considers the four powers of direction HM Treasury has over the Bank of England, namely, HM Treasury's[36]:

(1) *General power of direction "in the public interest,"* introduced as part of the postwar legislation that took the Bank into public ownership in 1946;
(2) *Reserve power over monetary policy "in extreme economic circumstances,"* retained by the Treasury at the time the Bank was granted operational responsibility for monetary policy in 1998;
(3) *Power to direct the Bank to comply with E.U. law or other international obligations* in the field of firm supervision, granted in 2012; and
(4) *Specific power of direction as a crisis-management tool where public money is at risk*, introduced as part of postcrisis legislative reforms to address the concerns raised by Alistair Darling, explained at the start of Part I.[37] This Part devotes most of its attention to this power, given that it is the most recent and sophisticated of the powers of direction.

Part I also considers how these legal powers of executive override can be reconciled with the Bank of England's institutional independence from HM Treasury. But it first considers a closely related issue, namely, the legal protections from political interference that exist to secure the personal independence of the individuals who hold office as Governors of the Bank of England.

A. PERSONAL INDEPENDENCE AND THE OFFICE OF GOVERNOR

Before turning to HM Treasury's legal powers of direction that may impact the Bank's *institutional* independence, it is worth considering (albeit briefly) the legal protections from political interference that exist to secure the *personal* independence of the individuals who hold office as Governors of the Bank of England, whether as the Governor or one of the Deputy Governors of the Bank.[38] In

35. *Id.*
36. See *infra* Table 1 for a summary of HM Treasury's four powers of direction.
37. By this time, Chancellor Darling and the Labour party were out of office. These reforms were introduced by the Conservative–Liberal Democrat Coalition Government that took office in 2010.
38. The Deputy Governor positions include the Deputy Governor for Monetary Policy, Deputy Governor for Financial Stability, Deputy Governor for Markets & Banking, and Deputy Governor for

popular perception, these protections are most commonly referenced as the bulwarks of the Bank's formal independence.[39] The Bank of England Act 1998 provides for a range of protections in relation to qualification for appointment, remuneration, and security of tenure.

1. Appointment and Remuneration

The Governors are appointed by the Crown[40] on the advice and recommendation of the Chancellor of the Exchequer and the Prime Minister.[41] Although the detailed terms and conditions of the appointment are typically not set out in statute, there are some exceptions to this that are designed to safeguard the Governors' independence. In particular, a person is automatically disqualified from appointment as a Governor if he or she is a Minister or a person employed in a government department—Governors must vacate office if they ever take on such positions[42] and must "work exclusively for the Bank."[43] The Governors' remuneration is not determined by HM Treasury, but by a subcommittee of non-executive directors[44] of the Bank's "Court of Directors" (Court), the governing board of directors of the Bank.[45]

In relation to the United Kingdom's other main financial regulator—the Financial Conduct Authority (FCA)—there is a specific legislative requirement that the terms of the appointment for all the members of the governing board must "secure" that the individual "is not subject to direction by the Treasury."[46] There is, however, no such requirement in relation to the Governors of the Bank of England. This is presumably because it might be thought of as being inconsistent with the possibility that the powers of direction described in section I.B might be used by HM Treasury over the Bank.

Prudential Regulation. *See Governors*, BANK OF ENG., https://www.bankofengland.co.uk/about/people/governors [https://perma.cc/F7PT-422Z] (last visited Feb. 7, 2020). Although it is not a statutory office, the Bank also has a Chief Operating Officer, which is described on the Bank's website as having "status and remuneration equivalent to a Deputy Governor." *Id.*

39. *See infra* Section I.A.3.

40. *See* Bank of England Act 1998, c. 11, § 1 (UK), http://www.legislation.gov.uk/ukpga/1998/11/contents [https://perma.cc/4LPB-77MH].

41. *See* HM TREASURY, CANDIDATE PACK: GOVERNOR, THE BANK OF ENGLAND, 2019, at 5 (UK), https://publicappointments.cabinetoffice.gov.uk/wp-content/uploads/2019/04/CANDIDATE-PACK-Governor-of-the-Bank-of-England.pdf [https://perma.cc/6L35-DHBG].

42. *See* Bank of England Act 1998 § 1, sch. 1, ¶¶ 5(1), 7(1).

43. *See id.* § 1, sch. 1, ¶ 1(4).

44. *See id.* § 1, sch. 1, ¶ 14(A1). This stands in contrast to the position of nonexecutive director of the Bank, whose remuneration is determined by the Bank with the approval of the Chancellor. *See id.* § 1, sch. 1, ¶ 15.

45. The court of directors is comprised of five executive members from the Bank and up to nine nonexecutive members. *See id.* § 1(2). All members are appointed by the Crown. *See id.* One of the nonexecutive members is selected by the Chancellor to act as "the chair of court." *See id.* § 1, sch. 1, ¶ 13(3)–(3A).

46. Financial Services and Markets Act 2000, c. 8, § 1A, sch. 1ZA, ¶ 3(4)(a) (UK), http://www.legislation.gov.uk/ukpga/2000/8/contents [https://perma.cc/B2R2-ZCTR]. This requirement does not apply to the Bank's Deputy Governor for Prudential Regulation, who is also on the Board of the FCA. *See id.* § 1A, sch. 1ZA, ¶ 3(7). A similar protection exists in relation to the *external* members of the Bank's Prudential Regulation Committee. *See* Bank of England Act 1998 § 30A, sch. 6A, ¶ 7(1)(a).

2. Grounds for Dismissal

The Governors can only be removed from office on grounds specified in law. Again, this is a process instigated by the Bank's Court, and not by HM Treasury. The Court may only remove Governors if satisfied that they have been absent from Court meetings for over three months (without the consent of the Court), that they have effectively become bankrupt, or that they are "unable or unfit" to discharge their functions as a member.[47] The significance of these arrangements is that, in the words of a former Chair of Court, Governors "cannot be removed simply because the government of the day dislikes what they are doing or saying—not at least until their terms expire."[48]

3. Term of Office

It is the issue of term of office that has attracted more attention in recent years and has been the subject of repeated legislative reforms designed to safeguard the independence of the Governor.

For the majority of the Bank of England's long history there was no term of office for Governors of the Bank. It has been observed that this caused some difficulties "in the 1920s and 1930s when Governors seemed to go on and on, to the chagrin of Chancellors of whatever political hue."[49] This is a specific reference to Governor Montagu Norman, who was in office for twenty-four years from 1920–1944, a period which saw eleven Chancellors of the Exchequer.[50] Statutory terms of office were only introduced with the Bank's nationalization in 1946;[51] this continued into the Bank of England Act 1998, which provided for a term of five years for Governors and Deputy Governors.[52] A decade later, this was amended to stipulate that a person could not be appointed for those roles more than twice, meaning that the maximum term that could be served by any individual was ten years.[53] But it was observed that the existence of the government's power *not* to renew the appointment had "the potential to create instability towards the end of [a Governor's] first term, as until the decision is made, speculation [would] surround the office of the Governor."[54]

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47. Bank of England Act 1998 § 1, sch. 1, ¶ 8(1).

48. TREASURY COMMITTEE, ACCOUNTABILITY OF THE BANK OF ENGLAND, 2010–12, HC 874, at 45 (UK), https://publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/874/874.pdf [https://perma.cc/6DJP-69RY].

49. DARLING, *supra* note 27, at 69.

50. *See Norman, Montagu, 1st Baron*, CHAMBERS BIOGRAPHICAL DICTIONARY (6th ed. 1997); *Past Chancellors of the Exchequer*, GOV.UK, https://www.gov.uk/government/history/past-chancellors [https://perma.cc/2J2P-XZV6] (last visited Feb. 8, 2020) (listing eleven different Chancellor terms from 1920 to 1944, with two terms served by both Neville Chamberlain and Philip Snowden).

51. *See* Bank of England Act 1946, 9 & 10 Geo. 6 c. 27, sch. 2, ¶ 1 (UK) (as originally enacted), https://www.legislation.gov.uk/ukpga/Geo6/9-10/27/contents/enacted [https://perma.cc/MX47-9JGV].

52. *See* Bank of England Act 1998, c. 11, § 1, sch. 1, ¶ 1(1) (UK) (as originally enacted), http://www.legislation.gov.uk/ukpga/1998/11/contents/enacted [https://perma.cc/6XYE-PE66].

53. *See* Banking Act 2009, c. 1, § 243(1) (UK), http://www.legislation.gov.uk/ukpga/2009/1/contents [https://perma.cc/ZSR7-M4X3].

54. TREASURY COMMITTEE, *supra* note 48, at 45–46.

This was not merely a theoretical issue. In 2008, there was considerable public speculation over whether Governor Mervyn King would be reappointed to serve a second term stemming from the testing relationship he had with then-Prime Minister Gordon Brown and Chancellor Alistair Darling during the early stages of the financial crisis.[55] The situation was only resolved after the Prime Minister, "with some reluctance," acquiesced to the Chancellor's recommendation that the Governor remain in post.[56] David Cameron, then-Leader of the Opposition, observed that:

> The problem is that people think that now the Bank of England is independent, the argument's done and dusted. It isn't. . . . [T]he Chancellor has the right to re-appoint the Governor of the Bank of England, and we've seen in recent weeks and months, that creates instability. I believe it's time to have a single, non-renewable term for the Governor to insulate him, or her, from political pressure.[57]

This belief was put into law when the Cameron Government came into office, and the Financial Services Act 2012[58] amended the Bank of England Act 1998 so that appointment to Governor is now for a single, nonrenewable eight-year term.[59]

4. Increased Parliamentary Oversight over Appointments

One of the most notable Parliamentary developments over the past decade has been the increased power and assertiveness of its select committees, in particular the Treasury Committee.[60] For example, in recent years the Treasury Committee has shown itself able to obtain access to information regardless of whether it has a strict statutory right to do so. This has included obtaining the minutes of the Bank's Court from the 2007–2008 crisis period,[61] minutes of private meetings

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55. *See* DARLING, *supra* note 27, at 69.

56. *Id.*

57. David Cameron, Leader of the Opposition, U.K. Parliament, Speech to British Chambers of Commerce (February 2008), *in* TREASURY COMMITTEE, *supra* note 48, at 46.

58. c. 21 (UK), http://www.legislation.gov.uk/ukpga/2012/21/contents [https://perma.cc/5VHB-UBQV].

59. *See* Bank of England Act 1998, c. 11, § 1, sch. 1, ¶¶ 1(1), (3)(a) (UK), http://www.legislation.gov.uk/ukpga/1998/11/contents [https://perma.cc/4LPB-77MH]. The position for Deputy Governors was unchanged, that is, they are appointed for a five-year term and cannot be appointed more than twice. *See id.* § 1, sch. 1, ¶¶ 1(2), (3)(b). It is open for a Governor to resign before the conclusion of their term. It is also possible for the Governor to serve for a shorter period, as was the case with Governor Mark Carney. *See Mark Carney: Biography*, BANK OF ENG., https://www.bankofengland.co.uk/about/people/mark-carney/biography [https://perma.cc/CX9N-2WB6] (last updated Aug. 9, 2019) (noting Governor Carney's term runs from July 1, 2013 to June 30, 2021).

60. *See* ANDREW TYRIE, CTR. FOR POLICY STUDIES, THE POODLE BITES BACK: SELECT COMMITTEES AND THE REVIVAL OF PARLIAMENT 2 (2015), https://www.cps.org.uk/files/reports/original/150617120024-ThePoodleBitesBack.pdf [https://perma.cc/V8BJ-GN5W].

61. *See* BANK OF ENG., TRANSPARENCY AND ACCOUNTABILITY AT THE BANK OF ENGLAND 4 (2014), https://www.bankofengland.co.uk/-/media/boe/files/news/2014/december/transparency-and-the-boes-mpc-response [https://perma.cc/6L58-M9UN].

between the Governor and the Chancellor,[62] and even the publication of a confidential report made to the FCA (notwithstanding the FCA's concerns about the legality of doing so).[63] This increased assertiveness of the Treasury Committee has been particularly notable in relation to the appointment of Governors.

Public appointments in the United Kingdom have been regarded, historically speaking, as a matter for the executive branch alone.[64] But there has been increased focus on Parliament's role, through its select committees, in such appointments, and a key part of the select committees' rationale for their expanded role is their ability to "assess the independence from government of candidates."[65]

Pre-appointment hearings for appointments to membership of the Bank's Monetary Policy Committee have taken place since 1998.[66] But in regard to the specific role of Governor, it was not until 2013 that the Treasury Committee held "what amounted to a pre-appointment hearing" with Mark Carney before he formally took up his new role as Governor.[67] In what was described as "an unprecedented event,"[68] the Chair of the Committee explained how approval from the Treasury Committee would "provide the new Governor with greater authority and independence from the day to day pressures of politics and politicians which will come with his enhanced role."[69]

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62. Minutes of certain meetings between the Governor and the Chancellor are required to be made public, in particular the minutes of meetings that take place shortly after the publication of the Bank's regular financial stability report. *See* Bank of England Act 1998 § 9X(1)–(2). The Treasury Committee, however, was able to access minutes of private meetings between the Governor and the Chancellor that took place ahead of the referendum to leave the European Union. This followed allegations from certain senior members of the Conservative Party that the Bank of England had coordinated its forecasts in a predetermined strategy with the Chancellor to influence the electorate against voting to leave the European Union. The Governor acceded to the Treasury Committee's request to scrutinize the minutes, provided that appropriate procedures were put in place for their review. *See* Caroline Binham, *Mark Carney Agrees to Release Notes on George Osborne Talks*, FIN. TIMES (July 12, 2016), https://www.ft.com/content/61058ae4-4822-11e6-8d68-72e9211e86ab.

63. As part of its inquiry into the RBS Global Restructuring Group, the Treasury Committee required the FCA to disclose a confidential skilled-person report to the Committee, which it then published in unredacted form. *See* PROMONTORY FIN. GRP., RBS GROUP'S TREATMENT OF SME CUSTOMERS REFERRED TO THE GLOBAL RESTRUCTURING GROUP (2016), https://www.parliament.uk/documents/commons-committees/treasury/s166-rbs-grg.pdf [https://perma.cc/UA6X-WZLD] (the skilled-person report); Commons Select Comm., *Treasury Committee Publishes RBS-GRG Report*, U.K. PARLIAMENT (Feb. 20, 2018), https://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news-parliament-2017/rbs-global-restructuring-group-s166-report-17-19/ [https://perma.cc/P4JL-EHTC] (reporting that the Treasury Committee required the FCA to disclose the report).

64. AKASH PAUN & DAVID ATKINSON, INST. FOR GOV'T, BALANCING ACT: THE RIGHT ROLE FOR PARLIAMENT IN PUBLIC APPOINTMENTS 6 (2011), https://www.instituteforgovernment.org.uk/sites/default/files/publications/Balancing%20Act.pdf [https://perma.cc/X8WQ-YUEZ].

65. *Id.*

66. *See id.* at 13.

67. TREASURY COMMITTEE, APPOINTMENT OF DR MARK CARNEY AS GOVERNOR OF THE BANK OF ENGLAND, 2012–13, HC 944, at 2 (UK), https://publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/944/944.pdf [https://perma.cc/A6VL-FSJG].

68. *Id.*

69. Commons Select Comm., *Pre-appointment Hearing with Dr Mark Carney*, U.K. PARLIAMENT (Nov. 26, 2012), https://www.parliament.uk/business/committees/committees-a-z/commons-select/

The Treasury Committee's involvement in the appointment process takes place on a nonstatutory basis, although the Committee has recommended that, "in order to safeguard his or her independence," the Treasury Committee be given "a statutory power of veto over the appointment and dismissal of the Governor of the Bank of England."[70] It has had success in this regard in other areas. Uniquely for a select committee, the Treasury Committee in 2011 obtained a statutory power of veto for the appointment and dismissal of the Chair of the Office for Budget Responsibility (OBR), a nondepartmental body established to provide independent forecasts and analyses of U.K. public finances.[71] And although short of a power-of-veto, in 2016, the Treasury Committee secured a legislative amendment that effectively ensures that nobody appointed as Chief Executive of the FCA by the Chancellor can take up the appointment before they have appeared before the Treasury Committee.[72]

The executive branch has resisted pressure to extend equivalent statutory provisions to the Bank, re-emphasising the orthodox position that Ministers should be "solely responsible and accountable for appointments to executive posts"—so voters can identify whom to hold accountable—and that there must be "a strong policy case for departing from this principle."[73] The difference with the OBR was justified on the basis that the purpose of the OBR is to assist Parliament in holding the executive accountable, thus providing a clear rationale for the Committee's right-of-veto.[74] In contrast, the Governor carries out executive functions on behalf of the State such that the general principle on public appointments should continue to apply.[75] The government also noted the constitutional distinction that, whereas the Chair of the OBR (and the Chief Executive of the FCA) are appointed directly by the Chancellor, the Governor is formally appointed by the Crown, on the advice of the Chancellor and Prime Minister.[76] The Treasury Committee, however, has been seeking a statutory role in the appointments

treasury-committee/news/treasury-committee-to-hold-a-pre-appointment-hearing-with-dr-mark-carney/ [https://perma.cc/4PBR-3L2Y].

70. TREASURY COMMITTEE, *supra* note 48, at 48.

71. *See* Budget Responsibility and National Audit Act 2011, c. 4, § 3, sch. 1, ¶¶ 1(1)(a), 6(3) (UK), http://www.legislation.gov.uk/ukpga/2011/4/contents [https://perma.cc/E579-K56E].

72. *See* Financial Services and Markets Act 2000, c. 8, § 1A, sch. 1ZA, ¶ 2A (UK), http://www.legislation.gov.uk/ukpga/2000/8/contents [https://perma.cc/B2R2-ZCTR]. The Treasury Committee sought this amendment after the 2015 resignation of the CEO of the FCA, after then-Chancellor George Osborne decided not to renew his fixed term of appointment. As noted, the introduction of a single, nonrenewable term of eight years for the Governor was designed to avoid the potential instability associated with renewable appointments. *See supra* Section I.A.3.

73. HM TREASURY, THE TREASURY COMMITTEE'S SCRUTINY OF APPOINTMENTS: GOVERNMENT RESPONSE, 2016, Cm. 9305, at 2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/535545/gov_response_treasury_2016_web.pdf [https://perma.cc/5WLS-TYSA]; *see also* TREASURY COMMITTEE, *supra* note 48, at 47 (quoting then-Chancellor Osborne as saying "I would be against giving the Treasury Select Committee a veto on the appointment of the Governor of the Bank" because "it is proper that the Government of the day chooses the Bank Governor, is held accountable for that choice").

74. *See* HM TREASURY, *supra* note 73, at 2.

75. *See id.*

76. *See id.* at 4.

process since the Bank was first granted independence over monetary policy,[77] and the pressure for this is likely to persist. As will be discussed, this contrasts with the U.S. experience where, reflecting the U.S. constitutional arrangements, Fed Governors are nominated by the executive branch (that is, the President) and confirmed by the Legislature (the Senate).

B. INSTITUTIONAL INDEPENDENCE AND HM TREASURY'S FOUR POWERS OF DIRECTION

Turning from individuals and toward institutions, it is important to start with an overview of the Bank–HM Treasury relationship, which may be particularly helpful for U.S. readers. It is also important to frame HM Treasury's powers of direction in their appropriate context. The Bank–HM Treasury relationship is one that depends on strong cooperation and coordination between the two institutions. Accordingly, there is a broad suite of formal and informal mechanisms to manage when different views on issues of policy or a course of action to be taken emerge. It is important to emphasize that this is the proper context against which to consider HM Treasury's four powers of direction over the Bank—the powers are far removed from the usual day-to-day Bank–HM Treasury relationship, and they are fundamentally backstop powers for when the other mechanisms for resolving differences have failed.

For much of the Bank's history, its relationship with HM Treasury was not heavily prescribed in law. In terms of its establishment, the Bank was created as a body corporate by a 1694 Act of Parliament and Royal Charter, which confer wide general powers and discretions on the Bank and effectively give the Bank the powers of a natural person.[78] This arrangement allowed the Bank's responsibilities to evolve over time by agreement of the government of the day without necessarily requiring primary legislation. In terms of its ownership, the Bank was in private hands for the first 252 years of its existence before being nationalized and having its capital stock transferred to HM Treasury in 1946.[79] In more recent years, the Bank's powers—and its relationship with HM Treasury—have increasingly been placed upon a statutory footing. For many of its most important functions, the Bank now operates within a detailed statutory framework set by Parliament. The broad intent underlying this framework is to ensure that the Bank is free from day-to-day political influence in carrying out its statutory functions. It is

77. *See* PAUN & ATKINSON, *supra* note 64, at 13.

78. *See* Bank of England Act 1694, 5 & 6 W. & M. c. 20, § 19 (Eng.), http://www.legislation.gov.uk/aep/WillandMar/5-6/20/contents [https://perma.cc/8227-R8YP]. Unless otherwise prohibited by statute, the 1694 Act did restrict the Bank's ability to trade in certain respects. *See id.* § 26.

79. *See* Bank of England Act 1946, 9 & 10 Geo. 6 c. 27, § 1(1) (UK), https://www.legislation.gov.uk/ukpga/Geo6/9-10/27/contents [https://perma.cc/6T5L-882F]. The shares are held by the Treasury Solicitor on behalf of HM Treasury. *See Who Owns the Bank of England?*, BANK OF ENG., https://www.bankofengland.co.uk/knowledgebank/who-owns-the-bank-of-england [https://perma.cc/FRM2-C427] (last visited Feb. 9, 2020). Confusingly, despite the name, the Treasury Solicitor does not sit within HM Treasury, but in fact heads the U.K. Government's Legal Department, which is entirely separate from HM Treasury.

sophisticated in its design and varies depending on the precise functions being exercised by the Bank, but at a high level it operates as follows[80]:

(1) *Parliament sets the Bank's statutory objectives in legislation*. The Bank then has operational independence to pursue these objectives, principally through its three statutory committees. First, through the Monetary Policy Committee (MPC), whose primary objective is to maintain price stability.[81] The MPC also has a secondary objective: to support the government's economic policy, "including its objectives for growth and employment."[82]

Second, the Bank operates through the Financial Policy Committee (FPC), whose primary objective is to identify, monitor, and take action to remove or reduce systemic risks, with a view to protecting the resilience of the U.K. financial system.[83] Like the MPC, the FPC also has a secondary objective to support the government's economic policy, including "its objectives for growth and employment."[84]

Third, through the Prudential Regulation Committee (PRC),[85] which is the governing body of the Prudential Regulatory Authority (PRA), the United Kingdom's microprudential regulator and part of the Bank. The PRA has the general objective of promoting the safety and soundness of the firms it regulates.[86]

In addition to those carried out by the three statutory committees, the Bank carries out a number of other important responsibilities, including acting as: a traditional central bank and lender of last resort (LOLR);[87] a regulator of financial-market infrastructure;[88] and a resolution authority responsible for managing the orderly failure of firms.[89]

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80. For further description of this framework, see, for example, BANK OF ENG., ANNUAL REPORT AND ACCOUNTS: 1 MARCH 2018–28 FEBRUARY 2019 (2019), https://www.bankofengland.co.uk/-/media/boe/files/annual-report/2019/boe-2019.pdf?la=en&hash=81B18F6F7CD3EB6F4DA476BA100B7811FF65BD80 [https://perma.cc/NH3C-6W4T].

81. *See* Bank of England Act 1998, c. 11, §§ 11(a), 13(1) (UK), http://www.legislation.gov.uk/ukpga/1998/11/contents [https://perma.cc/4LPB-77MH].

82. *See id*. § 11(b). This lexicographic ordering is different from the so-called "dual mandate" of the Federal Reserve, which "unambiguously places equal weight" on stable prices and maximum sustainable employment. Stanley Fischer, Vice Chairman, Bd. of Governors, Fed. Reserve Sys., The Independent Bank of England—20 Years On 3 (Sept. 28, 2017), https://www.federalreserve.gov/newsevents/speech/files/fischer20170928r.pdf [https://perma.cc/6LPZ-PZMY]. In practice, Vice Chairman Stanley Fischer has commented that he does not regard this difference to be significant. *See id*. at 4.

83. *See* Bank of England Act 1998 §§ 9B, 9C(1)(a), 9C(2).

84. *Id*. § 9C(1)(b).

85. *See* BANK OF ENG., *supra* note 80, at 12.

86. *See* Financial Services and Markets Act 2000, c. 8, §§ 2A, 2B(2) (UK), http://www.legislation.gov.uk/ukpga/2000/8/contents [https://perma.cc/B2R2-ZCTR]. The notion of "safety and soundness" is elaborated on in the statute and includes the need to minimize adverse effects on the stability of the U.K. financial system in the case of firm failure. *See id*. § 2B(3).

87. *See* BANK OF ENG., *supra* note 80, at 84.

88. *See id*. at 17.

89. *See id*.

(2) *Parliament empowers HM Treasury to elaborate on the Bank's statutory objectives*. In practice, this takes the form of letters[90] from the Chancellor to the statutory committees, which are issued and published on a regular basis. As one would expect, the scope of the letter varies depending on the committee.

The Chancellor's remit to the MPC, which must be issued at least once every twelve months, defines price stability (since the regime's inception, an inflation target) and specifies the economic policy of the government.[91] Since 1997, the remits have required an exchange of "open letters" between the Governor and the Chancellor if inflation moves away from the target by more than 1% in either direction.[92] HM Treasury has also used the remits to clarify the balance of objectives. Most notably, in 2013, HM Treasury conducted a review of the monetary-policy framework. The resulting remit recognized that the MPC might deploy "forward guidance" on the future path of interest rates and that large shocks could present the MPC with "significant trade-offs between the speed with which it [brings] inflation back to target and the consideration that should be placed on the variability of output."[93] The review also highlighted that the development of new unconventional instruments (such as Quantitative Easing)[94] "should include consideration with Government of appropriate governance and accountability arrangements" to ensure that the respective objectives of the government and central bank are clear and transparent.[95] The need for such fiscal central bank coordination in relation to such instruments is important because the instruments risk "blurring the line"[96] between monetary and fiscal responsibilities, as such policies can (1) involve credit risk (which ultimately has implications for the taxpayer as governments back the public sector balance sheet) and (2) influence credit allocation (which raises the question about the appropriate role of central banks in such decisions).[97]

90. These letters do not have the status of formal statutory instruments made by Ministers—that is, they are not directly legally binding—which means they are not legalistic and so are easier for the public to understand.

91. *See* Bank of England Act 1998, c. 11, § 12(1), (2)(b) (UK), http://www.legislation.gov.uk/ukpga/1998/11/contents [https://perma.cc/4LPB-77MH].

92. *See* HM Treasury, *HMT Open Letters Between the Governor of the Bank of England and the Chancellor of the Exchequer*, U.K. GOV'T, https://www.gov.uk/government/collections/inflationary-targets [https://perma.cc/5PLA-J9XU] (last updated Dec. 15, 2016).

93. HM TREASURY, REVIEW OF THE MONETARY POLICY FRAMEWORK, 2013, Cm. 8588, at 4–5 (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/221567/ukecon_mon_policy_framework.pdf [https://perma.cc/2KFQ-B6QS].

94. This involves the central bank buying long-term government bonds, which has the dual purpose of injecting money into the economy and lowering long-term bond yields.

95. HM TREASURY, *supra* note 93, at 30, 57–59, 61.

96. *Id.* at 57.

97. A practical example of such coordination is the public exchange of letters between the Bank and HM Treasury when the Bank commenced gilt purchases via its Asset Purchase Facility in 2009. *See* Letter from Alistair Darling, Chancellor of the Exchequer, HM Treasury, to Mervyn King, Governor, Bank of Eng. (Jan. 29, 2009), https://www.bankofengland.co.uk/-/media/boe/files/letter/2009/chancellor-letter-290109 [https://perma.cc/E357-AA6N]; Letter from Alistair Darling, Chancellor of the Exchequer, HM Treasury, to Mervyn King, Governor, Bank of Eng. (Mar. 3, 2009), https://www.bankofengland.co.uk/-/media/boe/files/letter/2009/

For the FPC, the remit specifies the economic policy of the government, makes recommendations about matters that the FPC should regard as relevant to the Committee's understanding of the Bank's financial-stability objective, and makes recommendations to the Committee about its responsibilities to support the government's economic policy.[98] Again, the remit must be issued at least once every twelve months.[99]

For the PRC, HM Treasury makes recommendations about aspects of the government's economic policy "to which the Committee should have regard."[100] These are mandated less frequently than the remits for the MPC and FPC in that they must be issued at least once in each Parliament (that is, at least once every five years).[101]

(3) *The Bank is accountable for its delivery on its objectives through a variety of different formal and informal avenues*. The most well-known of these are the requirement to publish formal minutes and reports—for example, minutes of the MPC's regular meetings and the Bank's *Inflation Reports* on a quarterly basis—and accountability to Parliament, principally through Bank officials having to appear before the influential Treasury Committee on a frequent basis.[102]

(4) *Finally, there is a wide range of supporting coordination mechanisms between HM Treasury and the Bank*, both specifically in relation to these three statutory committees and also more generally. For example, an HM Treasury official is permitted to attend and speak at MPC and FPC meetings (but cannot vote).[103] Additionally, there are formal memoranda of understanding explaining the Bank and HM Treasury's financial relationship[104] and their responsibilities

chancellor-letter-050309 [https://perma.cc/H58M-2UGZ]. The letters set out the monetary policy purposes and operation of the facility, and the delegation of the instrument of asset purchases financed by the issuance of central bank reserve to the MPC. HM Treasury also undertook that "the Government will not alter its issuance strategy as a result of the asset transactions undertaken by the Bank of England for monetary policy purposes." *Id.*

98. *See* Bank of England Act 1998 § 9E(1).

99. *See id.* § 9D(1), (2)(b).

100. *Id.* § 30B(1). Specifically, these recommendations pertain to when the PRC considers both how to advance the objectives of the PRA, and "the application of the regulatory principles set out" in the Financial Services and Markets Act 2000. *Id.*

101. *See id.* § 30B(2).

102. *See* BANK OF ENG., *supra* note 80, at 1, 10.

103. *See* Bank of England Act 1998 § 9B, sch. 2A, ¶ 11 & § 13, sch. 3, ¶ 13. In the case of the FPC, the HM Treasury representative is a formal member of the Committee. *See id.* § 9B(1)(f). In contrast, the HM Treasury representative is not a formal member of the MPC, *see id.* § 13(2), although the representative "may attend, and speak at, any meeting of the Committee," *id.* § 13, sch. 3, ¶ 13. This difference reflects an expectation that HM Treasury's representative ought to have a greater role in contributing to policy debates on issues of financial stability than issues of monetary policy, where the latter role has been described more as that of an "observer." *See, e.g.*, Alvaro Angeriz & Philip Arestis, *Monetary Policy in the UK*, 31 CAMBRIDGE J. ECON. 863, 864 (2007).

104. *See, e.g.*, HM TREASURY, FINANCIAL RELATIONSHIP BETWEEN HM TREASURY AND THE BANK OF ENGLAND (2018), https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/financial-relationship-between-hmt-and-the-boe-memorandum-of-understanding.pdf [https://perma.cc/9XXN-BZFV]. This explains how the Bank of England is able to fund itself, including how it can levy industry (in accordance with primary legislation) to recover the costs of various supervisory functions,

regarding resolution planning and financial crisis management.[105]

The foregoing provides an overview of the broader Bank–HM Treasury relationship and the mechanisms for managing that relationship that prevail in the ordinary state of the world. The next section turns to consider HM Treasury's four powers of direction over the Bank that serve as a backstop when other mechanisms for resolving differences have failed.

1. General Power of Direction "In the Public Interest"

As noted above, shortly after the end of World War II, the Bank was nationalized[106] through the Bank of England Act 1946, which transferred its entire capital stock to the Treasury.[107] The stated purpose of the 1946 Act was to bring the Bank "into public ownership and . . . public control,"[108] and the Act was described by Labour Chancellor Hugh Dalton as "a streamlined Socialist statute" with "a minimum of legal rigmarole."[109] Nowhere was this more evident than section 4 of the Act, which provided for the Treasury's first—and most general—legal power to direct the Bank. It stated simply: "The Treasury may from time to time give such directions to the Bank as, after consultation with the Governor of the Bank, they think necessary in the public interest."[110]

This provision remains on the statute book today, albeit subsequent amendments have clipped its wings in two significant ways, as discussed below. To the best of the authors' knowledge, the provision has never been used. But one would not necessarily even know if it *had* been used, for there is no legal requirement that a Treasury direction be brought to the public's or Parliament's attention.[111] During the third reading of the bill in the House of Commons, Chancellor Dalton was asked about this and whether he thought the Official

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and how it can finance its monetary and financial policy functions through the so-called Cash Ratio Deposit (CRD) Scheme. *See id.* at 7–8. Under the CRD Scheme, banks and building societies are required to place an interest-free deposit at the Bank, which is a ratio of their eligible liabilities. The Bank then invests those deposits in interest-yielding assets, generating income to fund its policy functions. The CRD Scheme was placed on a statutory footing by the Bank of England Act 1998, and the CRD requirements are set by HM Treasury through a statutory instrument at least every five years. These were last set in May 2018 following a review led by a joint HM Treasury–Bank steering group. BANK OF ENG., *supra* note 80, at 28.

105. *See* HM TREASURY, MEMORANDUM OF UNDERSTANDING ON RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT (2017) [hereinafter RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU], https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/resolution-planning-and-financial-crisis-management.pdf [https://perma.cc/R88P-P3T9]. This MoU is discussed further below.

106. "I never use the word 'nationalisation,'" then-Governor Thomas Catto told an American audience in October 1946. "'Public ownership' sounds so much better." DAVID KYNASTON, TILL TIME'S LAST SAND: A HISTORY OF THE BANK OF ENGLAND 1694–2013, at 401 (2017).

107. *See* Bank of England Act 1946, 9 & 10 Geo. 6 c. 27, § 1 (UK), https://www.legislation.gov.uk/ukpga/Geo6/9-10/27/contents [https://perma.cc/6T5L-882F].

108. *Id.* pmbl.

109. KYNASTON, *supra* note 106, at 395 (internal quotation marks omitted).

110. Bank of England Act 1946, 9 & 10 Geo. 6 c. 27, § 4(1) (UK) (as enacted), https://www.legislation.gov.uk/ukpga/Geo6/9-10/27/contents/enacted [https://perma.cc/MX47-9JGV].

111. In 2011, Chancellor George Osborne confirmed that previous Chancellors had "never used the power." TREASURY COMMITTEE, *supra* note 48, at 50.

Secrets Act[112] should apply to issued directions. He responded that in most cases he would expect the direction to be public, but that the legislative position was adopted for an "extreme situation" such as "the case of a state of war, or a state of serious international tension, in which it might be felt by all responsible people that these matters were best kept quiet for the time being."[113] It would be interesting to see how Parliament would receive such comments today, given that it has demanded and been given oversight over HM Treasury's subsequent powers of direction in relation to monetary policy and crisis management.

There was an implicit understanding within HM Treasury that it would show considerable restraint in ever resorting to the power and that "directions could only be properly made on matters of major policy in respect of which no Governor could fail to acknowledge the right of the Government to decide."[114] But in its original form, section 4 set absolutely no limits as to the scope of any directions that might be given to the Bank. It thus captured the full breadth of the Bank's functions, from gold custody to note issuance, from lender of last resort to monetary policy. The breadth of the provision was no doubt informed by the fact that the Bank, at that time, had a wide range of nonstatutory functions (which it no longer has) over which HM Treasury naturally wanted to maintain close oversight and control. In particular, the Bank had greater involvement in the United Kingdom's industrial strategy[115] and was also responsible for managing the Government's stocks (which form the bulk of the national debt).[116] Until the Bank was granted independence over monetary policy through the Bank of England Act 1998,[117] this general power of direction underpinned the Chancellor's ultimate ability to determine U.K. interest rates, on advice from the Bank. Although no Chancellor ever had to resort to exercising it, the power ensured that in the event of any disagreement with the Bank over monetary policy, the Chancellor would have the upper hand.

Other than being "in the public interest," which is left undefined, section 4 does not explicitly require particular circumstances to arise—such as an emergency or a risk to public money—before the Treasury can use the general power

112. The Act provides the main legal protections in the United Kingdom against espionage and the unauthorized disclosure of official information.

113. 417 Parl Deb HC (5th ser.) (1945) col. 1353–54 (UK).

114. Memorandum from HM Treasury to the Select Committee on Nationalised Industries 1 (Apr. 1969), *in* BANK OF ENG., FIRST REPORT FROM THE SELECT COMMITTEE ON NATIONALISED INDUSTRIES, HC 258, at 352 (UK).

115. In 1974, for example, this included the controversial rescue of Burmah Oil Company Limited on behalf of the government and the establishment of a "Finance for Industry" scheme to provide finance for investment by British industry. *See* BANK OF ENG., REPORT AND ACCOUNTS FOR THE YEAR ENDED 28TH FEBRUARY 1975, at 8 (1975), https://www.bankofengland.co.uk/-/media/boe/files/annual-report/1975/boe-1975 [https://perma.cc/T52H-DJW2].

116. Responsibility for the former is now regarded as a matter for the government, and responsibility for debt management was transferred to the Debt Management Office, an executive agency of HM Treasury, in 1998. *See About the DMO*, U.K. DEBT MGMT. OFF., https://www.dmo.gov.uk/about/who-we-are/ [https://perma.cc/7KZF-V6L8] (last visited Feb. 15, 2020).

117. *See infra* Section I.B.2.

of direction.[118] However, whether Parliament intended this to cover *any* matter of public interest—such as issues of defense or foreign policy—or rather to cover a narrower sense of the public interest more within *HM Treasury's* competence to assess—that is, issues of economic policy and stability—may be questioned. This implicit limitation was recognized within the Bank itself. When the power was first introduced, then-Governor Thomas Catto wrote to his counterpart at the U.S. Federal Reserve to explain that, notwithstanding that directions had no specified limits on scope, "it may be accepted as the intention that they will cover only questions of financial policy and not internal organisation and administration."[119] And this limitation would be moderated by the requirement for the Governor to be consulted, which he regarded "as of prime importance." [120]

This consultation requirement is the only express process requirement for use of the general power of direction.[121] During the proceedings of the Select Committee on the bill, the Chancellor explained that the phrase had been

> deliberately drafted in this way, to make sure that we are not legislating here for a state of affairs in which the Governor of the Bank . . . will find himself faced some morning with an instruction from the Treasury as to what he is to do which he may not himself find wise or satisfactory, and upon which he would have wished to be consulted, [or] to review the position and tender his advice before any such direction becomes effective.[122]

Since its original enactment, two important limits on section 4's scope have been introduced. First, in 1998, the power of direction was amended to include a limiting caveat: "except in relation to monetary policy."[123] These six words are partly how—in legal terms—the Bank of England was granted operational independence[124] over monetary policy. In place of the general power of direction, HM Treasury was given a tightly constrained "reserve power" in the field of monetary policy.[125] Second, since 2017, HM Treasury is precluded from using the 1946 power of direction in relation to the Bank's functions as the Prudential Regulation Authority.[126] This means to enshrine the principle that the Bank should not be subject to HM Treasury direction in its capacity as microprudential

118. The absence of both publicity requirements and any kind of circumstantial triggers is a striking contrast to the Treasury's other powers of direction, discussed below. *See infra* Sections I.B.2–4.

119. KYNASTON, *supra* note 106, at 394.

120. *Id.*

121. *See* Bank of England Act 1946 § 4(1). The 1946 Act does not even require that the consultation be in writing; in principle, a telephone call might suffice.

122. 5 Parl Deb HC (5th ser.) (1945) col. 750 (UK).

123. Bank of England Act 1998, c. 11, § 10 (UK), http://www.legislation.gov.uk/ukpga/1998/11/contents [https://perma.cc/4LPB-77MH].

124. The 1998 Act itself uses the phrase "operational responsibility" rather than "operationally independent," but in policy terms and in practice the MPC is often described as being "operationally independent" (for example, in HM Treasury's remit letters to the MPC).

125. *See infra* Section I.B.2.

126. *See* Bank of England and Financial Services Act 2016, c. 14, § 16, sch. 2, ¶ 23(b) (UK), http://www.legislation.gov.uk/ukpga/2016/14/contents [https://perma.cc/3ABU-QMEZ].

supervisor of individual financial institutions. It further reflects the international standards promulgated by the Basel Principles for Effective Banking Supervision, which provide that operational independence of supervisors should be prescribed in legislation and that there should be no government interference that comprises the operational independence of supervisors.[127]

Over the years, HM Treasury has resisted pressure from U.K. Parliamentarians to use its general power of direction over the Bank. These pressures have related to three perennial issues of: (1) transparency—with calls in the 1960s for HM Treasury to direct the Bank to publish the Governors' salaries;[128] (2) accountability—with demands in 1995 that the Governor be forced to appear as a witness in inquiries into the Barings bank collapse;[129] and (3) proper remit of the Governors—with pressure applied over the decades for HM Treasury to compel the Bank's Governors to refrain from making "public controversial statements"[130] or "giving their views on highly controversial political matters which ought not to be their prime concern."[131] There were also idiosyncratic calls to use the power in the context of other quintessentially British matters of public life. In 1953, for example, a Member of Parliament wanted HM Treasury to direct the Bank of England to speed up its banknote replacement program so that the Queen's portrait would appear on the notes in time for her coronation.[132] As an aside, it should be noted that HM Treasury has faced far less political pressure from Parliamentarians to use its other three powers of direction, which set a higher bar for their use than merely being "in the public interest."[133] This leads to an interesting observation, namely that a more constrained power of direction also serves to insulate the *executive* from political pressures of this kind. For example, say the independent central bank takes a decision unpopular with constituents and Parliamentarians: it is far easier for the executive to shrug sympathetically and say, "the decision was out of my hands—it was a decision for the independent central bank" where it does not retain a sweeping power to direct the central bank "in the public interest."

As noted above, during the 2007–2008 financial crisis, Chancellor Alistair Darling instructed his officials to advise him whether he could use the 1946 general power of direction over the Bank in its capacity as LOLR. In his memoirs, Darling reported that he was advised that using this power "might be legally

127. *See* BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CORE PRINCIPLES FOR EFFECTIVE BANKING SUPERVISION 22 (2012), https://www.bis.org/publ/bcbs230.pdf [https://perma.cc/LW4G-QZMK].

128. *See* 737 Parl Deb HC (5th ser.) (1966) col. 51 (UK).

129. *See* 256 Parl Deb HC (6th ser.) (1995) col. 607 (UK).

130. 583 Parl Deb HC (5th ser.) (1958) col. 537 (UK).

131. 524 Parl Deb HL (5th ser.) (1990) col. 726 (UK). The record of the Hansard debate indicates some Peers were concerned with comments made by then-Governor Robin Leigh-Pemberton in a television interview in which, in the Peer's words, the Governor "said that he had a preference for being governed by an independent central bank sitting somewhere in Europe, rather than being controlled by politicians sitting in Parliament." *Id.*

132. 510 Parl Deb HC (5th ser.) (1953) col. 518–19 (UK).

133. *See infra* Sections I.B.2–4.

possible," but that he was concerned "that there would be wider implications of such an action," in particular that "a public row between myself and Mervyn [King, then-Governor of the Bank] would have been disastrous, particularly at this time."[134] In short, even in times of acute crisis, the power was perceived as too blunt and crude a tool to be used in practice. It was regarded as a "nuclear option."[135] Chancellor Osborne later commented that "overruling the central bank Governor in the middle of a financial crisis would have added to the sense of chaos rather than diminished the sense of chaos."[136] And even though there is no publicity requirement specified in law, it was recognized that it would be challenging to keep secret any use of the power for any period of time. Because of this, a more sophisticated and tailored power of direction was introduced as part of the postcrisis reforms.[137]

Although the general power of direction lies unused, it has not been abandoned. It is notable that when additional powers of direction were granted in the aftermath of the financial crisis, the generality of the power of direction in the 1946 Act was expressly preserved.[138] As will be seen, however, the existence of these narrower and more calibrated powers will likely mean that HM Treasury's ability to resort to the general power of direction will be curtailed in practice.

2. Reserve Power of Direction over Monetary Policy in "Extreme Economic Circumstances"

By 1997, the sheer breadth of HM Treasury's general power of direction had become problematic for the incoming Blair–Brown Labour Government and their plans to grant the Bank independence over monetary policy.

During the late 1980s and first half of the 1990s, there was significant focus among policymakers and academics on how to best tackle the perennial problem that governments often come under pressure[139] to deliver short-term economic growth at the expense of longer-term inflationary costs. Known in the economics literature as the "time-consistency problem[],"[140] there was considerable interest in developing analytical models to solve this dilemma. Rogoff suggested as a possible solution the appointment of a "conservative central banker" predisposed toward keeping inflation low and stable.[141] The Rogoff model was extended by Lohmann, who showed the social welfare benefits if the executive retains an

134. DARLING, *supra* note 27, at 57–58.

135. TREASURY COMMITTEE, *supra* note 48, at 50.

136. *Id.*

137. *See infra* Section I.B.4.

138. *See* Financial Services Act 2012, c. 21, § 61(7) (UK), http://www.legislation.gov.uk/ukpga/2012/21/contents [https://perma.cc/5VHB-UBQV] ("Nothing in this section limits the powers conferred by section 4(1) of the Bank of England Act 1946 . . . ."); Banking Act 2009, c. 1, § 247 (UK), http://www.legislation.gov.uk/ukpga/2009/1/contents [https://perma.cc/ZSR7-M4X3] ("Nothing in this Act affects the generality of section 4 of the Bank of England Act 1946 . . . .").

139. For example, for electoral gain.

140. *See, e.g.*, Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q. J. ECON. 1169, 1177 (1985).

141. *See id.*

ability, at a political cost (for example, by having to disclose its actions), to override the independent central bank in the event of large supply shocks to secure more effective output stabilization.[142] In framing more precisely what was meant by "independence," Debelle and Fischer drew an important distinction between *goal independence*—that is, a central bank being free to set its final monetary policy goals—and *instrument independence*—where the central bank is free to choose the means by which it achieves its goals—and argued in favor of the latter.[143] Walsh's "performance contract" model viewed central banks as entering into a "contract" with the government whereby the central bank is rewarded with instrument independence, provided it meets inflation targets set by the government.[144] However, should it miss those targets, the government retains the ability to impose costs or sanctions on the central bank.[145]

Against this backdrop, by the mid-1990s there had emerged a broad consensus about the economic benefits of granting central banks instrument independence over monetary policy and limiting the power of executive override.[146] In order to rapidly establish its economic credentials, the Blair–Brown Government made it the centrepiece of its economic policy to grant the Bank of England independence in the field of monetary policy, something the Federal Reserve already long had.[147] Having such a wide-ranging and sweeping power of direction on the statute book was inconsistent with that policy goal. Moreover, the Blair–Brown Government had also expressed an intention to join the European single currency, provided that certain economic criteria were met.[148] As noted, E.U. treaty requirements specified that the national central banks of countries in what would become the Eurozone needed to be statutorily protected from political instruction.[149] By providing a legal basis for granting the Bank independence in the field of

142. *See* Susanne Lohmann, *Optimal Commitment in Monetary Policy: Credibility Versus Flexibility*, 82 AM. ECON. REV. 273, 277, 280–81 (1992).

143. *See* Guy Debelle & Stanley Fischer, *How Independent Should a Central Bank Be?*, *in* GOALS, GUIDELINES, AND CONSTRAINTS FACING MONETARY POLICYMAKERS: PROCEEDINGS OF A CONFERENCE HELD IN JUNE 1994, at 195, 197 (Jeffrey C. Fuhrer ed., 1994).

144. *See* Carl E. Walsh, *Optimal Contracts for Central Bankers*, 85 AM. ECON. REV. 150, 151–52 (1995).

145. *See id.*

146. Ed Balls et al., *Central Bank Independence Revisited: After the Financial Crisis, What Should a Model Central Bank Look Like?* 13–14 (Harvard Kennedy Sch. Mossavar-Rahmani Ctr. for Bus. & Gov't, Working Paper No. 67, 2016), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/67_central.bank.v.2.pdf [https://perma.cc/QYZ5-L827].

147. *See* Larry Elliott & Michael White, *Brown Gives Bank Independence to Set Interest Rates*, GUARDIAN (May 7, 1997, 12:32 PM), https://www.theguardian.com/politics/1997/may/07/economy.uk [https://perma.cc/838P-BFLG] (reporting that the Blair–Brown Government handed control of interest rates to the Bank of England within its first 100 hours of office, effectively giving the Bank "'operational control' of monetary policy"). As discussed further in Part II, U.S. monetary policy independence in the post-World War II era is regarded as dating from the Fed–Treasury Accord of 1951. *See infra* Section II.B.3.b.

148. HM TREASURY, UK MEMBERSHIP OF THE SINGLE CURRENCY: AN ASSESSMENT OF THE FIVE ECONOMIC TESTS, 2003, Cm. 5776, at 4–6 (UK).

149. *See* TFEU, *supra* note 25, art. 130, at 104.

monetary policy, the Blair–Brown Government would make the U.K. statute book more consistent with these E.U. treaty requirements.

The Bank of England Act 1998 sought to address these issues. As noted, the Bank was given statutory objectives for maintaining price stability and, subject to that, supporting the government's economic policy.[150] And, in pursuit of those objectives, the MPC was created within the Bank with instrument independence in "formulating monetary policy."[151] What is less known is a single-sentence provision in the Act—entitled "Operational responsibility"—carved out monetary policy from HM Treasury's general power of direction.[152] In its place, a highly constrained "reserve power" was introduced.[153] The Chancellor at the time, Gordon Brown, explained that he expected the override power "to be exercised rarely, if at all."[154]

In striking contrast to the general power in the 1946 Act, the reserve power introduced in section 19 of the 1998 Act is subject to stringent trigger, procedural, and transparency requirements. It provides that HM Treasury, after consultation with the Bank, may direct the Bank with respect to monetary policy only if HM Treasury is satisfied that the direction is required "in the public interest and by *extreme economic circumstances*."[155] The Act demands Parliamentary accountability in that the direction must take the form of a statutory instrument—a form of delegated legislation—which must be laid before Parliament.[156] The direction can be immediately effective, but it is time-limited. It ceases to be law within twenty-eight days[157] unless both Houses of Parliament hold a debate and each approve it by resolution, and even then, the direction can only last for a maximum period of three months.[158] While the direction is in effect, the statutory objectives regarding monetary policy do not have effect.[159] The direction can also be used to make consequential modifications to the legislation to relieve the MPC from

150. *See* Bank of England Act 1998, c. 11, §§ 11, 13 (UK), http://www.legislation.gov.uk/ukpga/1998/11/contents [https://perma.cc/4LPB-77MH]. As noted above, the Chancellor is responsible for specifying the definition of price stability (currently set at 2% above the Consumer Price Index) and the government's economic policy objectives on an annual basis. *See id.* § 12; *Inflation and the 2% Target*, BANK OF ENG., https://www.bankofengland.co.uk/monetary-policy/inflation [https://perma.cc/8QAB-Q8CM] (last updated May 10, 2019). The wording of the objectives is inspired by Article 105 of the Maastricht Treaty, which provides that: "The primary objective of the [European System of Central Banks] shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community . . . ." Treaty on European Union art. 105, July 7, 1992, 1992 O.J. (C 191) 14.

151. Bank of England Act 1998 §§ 10, 13(1).

152. *Id.* § 10.

153. *Id.* § 19.

154. 294 Parl Deb HC (6th ser.) (1997) col. 509 (UK).

155. Bank of England Act 1998 § 19 (emphasis added).

156. *See id.* § 19(3).

157. *See id.* § 19(4)–(5) (counting days only on which Parliament sits).

158. *See id.* § 19(6).

159. *See id.* § 19(7).

having to comply with its usual procedural requirements, which may be a hindrance in a time of crisis.[160]

What constitutes an "extreme economic circumstance" has intentionally been left undefined, presumably leaving the courts (if needed) to interpret the phrase according to its plain and ordinary meaning. The use of the word "extreme" suggests the existence of a very severe economic emergency or crisis, of the "once in a lifetime" variety.[161] It therefore sets a much higher bar than "in the public interest." During the Parliamentary debates on the 1998 Bank of England bill, the government was pressured to provide specific examples of what "extreme economic circumstances" would mean in practice.[162] This included asking the responsible Treasury Minister to run through major economic events over the past twenty-five years (from 1972–1997) and explain whether they met the test.[163] Although understandably circumspect, the Minister did offer her judgement that she did *not* think that the United Kingdom's dramatic exit from the European Exchange Rate Mechanism in 1992 (which precipitated "Black Wednesday") would have met the test.[164] However, she did indicate that an event such as the Gulf War, which had "extreme economic consequences" in terms of its impact on oil supplies, might potentially trigger the test.[165] In any event, that the statute provides for a subjective rather than objective test—in that it is for HM Treasury to be satisfied—means that a court faced with a question of interpretation would likely be slow in substituting HM Treasury's view with its own.

Unlike the 1946 power of direction, there is no public indication that HM Treasury ever seriously considered resorting to the reserve power during the 2007–2008 financial crisis. If the power were ever to be used, the Treasury Committee has indicated that it would expect to take evidence, as a matter of urgency, from both the Chancellor and the Governor and to make that evidence available to Parliament, presumably to inform the Parliamentary debates on whether to approve the direction.[166]

To summarize, the judgment reached for how monetary policy should be conducted in the U.K. constitutional and legal order is as follows: (1) Parliament sets

160. *See id.* § 19(2).

161. In financial regulation, it is common to test firms' capital requirements against "extreme but plausible" scenarios, such as the "1-in-200-years" stress event in insurance regulation. *See* Andreas A. Jobst et al., *Macroprudential Solvency Stress Testing of the Insurance Sector* 28, 39 (IMF, Working Paper No. 14/133, 2014), https://www.imf.org/external/pubs/ft/wp/2014/wp14133.pdf [https://perma.cc/S2YX-JC6C] (noting the importance of utilizing "extreme but plausible" scenarios to assess capital adequacy under stress, and how the European Insurance and Occupational Pension Authority conducts E.U.-wide stress tests of insurance companies that account for largest maximum probable loss for a 1-in-200 years event).

162. *See* TREASURY COMMITTEE, ACCOUNTABILITY OF THE BANK OF ENGLAND, 1997–98, HC 282, at xiii–xiv (UK) (noting that "our [Treasury] Committee might wish to ask for examples of the kind of 'extreme economic circumstances' the Chancellor had in mind").

163. *See* 2 Dec. 1997, Parl Deb HC (1997) (UK), https://publications.parliament.uk/pa/cm199798/cmstand/d/st971202/pm/71102s10.htm [https://perma.cc/DN9E-AB8S].

164. *See id.*

165. *See id.*

166. *See* TREASURY COMMITTEE, *supra* note 162, at xiv.

the Bank the goal of maintaining price stability; (2) Parliament empowers HM Treasury to define this on an annual basis; (3) the Bank has operational independence in setting policy to achieve price stability (and is accountable to HM Treasury and Parliament for doing so); (4) yet this operational independence is not immutable and can be overridden by HM Treasury in extreme economic circumstances; (5) but should HM Treasury wish to do so, it can only do so transparently and with the approval of Parliament.

3. Power of Direction to Secure Compliance with International Obligations

Although the Bank of England can enter into nonbinding arrangements with foreign regulators, only the government can commit the United Kingdom to legal obligations on the international plane, and, ultimately, is legally responsible for ensuring that compliance with those obligations is achieved.[167] HM Treasury, therefore, has a particular interest in having a backstop mechanism for ensuring that the U.K. regulators comply with the country's obligations under international law.

In legal terms, this has been achieved by granting HM Treasury a power to direct the U.K. regulators[168]—the Bank[169] and the Financial Conduct Authority[170]—*not to take* proposed action if it appears to HM Treasury that the action would be incompatible with EU or other international obligations.[171] HM Treasury can also require the U.K. regulators *to take* action (that they have the power to take[172]) where that action is required for the purpose of implementing any such obligation.[173] The direction applies to the Bank only in its role as a microprudential regulator of individual financial institutions—in particular, in its role as the PRA[174] and as regulator of financial market infrastructure.[175]

167. *See* RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU, *supra* note 105, at 8.

168. As well as U.K.-based recognized market infrastructure, such as investment exchanges and clearing houses. *See* Financial Services and Markets Act 2000, c. 8, § 410(4)(c)–(d) (UK), http://www.legislation.gov.uk/ukpga/2000/8/contents [https://perma.cc/B2R2-ZCTR].

169. This includes the Prudential Regulation Authority. *See id.* § 410(4)(aa)–(ab).

170. *See id.* § 410(4)(a).

171. *See id.* § 410(1); Banking Act 2009, c. 1, § 206B (UK), http://www.legislation.gov.uk/ukpga/2009/1/contents [https://perma.cc/ZSR7-M4X3] (both as amended by the Financial Services Act 2012, c. 21, §§ 47, 105 (UK), http://www.legislation.gov.uk/ukpga/2012/21/contents [https://perma.cc/5VHB-UBQV]).

172. *See* Financial Services and Markets Act 2000 § 410(2) (providing that HM Treasury may direct a regulator to take action "which a [regulator] *has power to take*" (emphasis added)). Therefore, one important limitation to the scope of HM Treasury's power is that if the regulators do not believe that they are empowered to do what is directed, then they cannot do it. If HM Treasury and a regulator disagree about the regulator's powers, then it might be necessary to refer the question to a court to decide.

173. *See id.* § 410(2).

174. *See id.* § 410(4)(aa). This role includes supervising banks, building societies, insurers, and certain investment firms.

175. *See id.* § 410(4)(ab) (providing that the power of direction applies to the Bank of England "when exercising functions conferred on it by Part 18"); *id.* §§ 285–313 (providing the Bank's Part 18 functions, which includes supervising recognized payment systems, recognized clearing houses, and central securities depositories).

Although relevant to any "international obligation," the main purpose of the provision was to secure compliance with E.U. law, and the power was designed to provide a speedy mechanism to mitigate the possible risk of the European Commission bringing infraction proceedings against the United Kingdom for failing to implement EU law.[176] By design, HM Treasury's power can be deployed with minimal process and its direction is enforceable, on application by HM Treasury to the High Court, by means of a mandatory injunction,[177] which would likely result in the direction coming into the public domain. This provision is uniquely positioned within the four powers of direction in that it expressly sets out how a direction could be enforced by HM Treasury (presumably to demonstrate compliance to the Commission); if HM Treasury did ever need to enforce the use of any of its other powers of direction, HM Treasury would presumably issue a similar application for a mandatory injunction.

Legislative changes made in light of the United Kingdom's withdrawal from the European Union will give the power a degree of new relevance in the context of any future trade agreements between the United Kingdom and other countries. Currently, the European supervisory authorities (ESAs) have the ability to make binding technical standards, which are essentially detailed rules that sit beneath EU Regulations and Directives.[178] Following the United Kingdom's withdrawal from the European Union (and the associated transitional period for withdrawal), these legislative functions will be transferred to the U.K. regulators, and any standards made will need to be approved by HM Treasury.[179] In particular, HM Treasury has expressly reserved its right to refuse approval if doing so would be incompatible with *existing* international obligations. Moreover, HM Treasury can refuse approval if it would "prejudice any current or proposed *negotiations* for an international agreement between the United Kingdom and one or more other countries [or] international organisations."[180] If a regulator is overridden in this way, transparency is required: HM Treasury is obliged to explain its reasons in writing and lay them before Parliament, alongside the regulator's explanation as to why it wanted to make the instrument.[181]

176. The Explanatory Notes to the provision gave the following example: "[I]f the Authority's rules on capital requirements were such that the UK's obligations under [European] law were not being met, this section would allow the Treasury to direct the Authority to change their rules so as to ensure compliance." Financial Services and Markets Act 2000, c. 8, Explanatory Notes ¶ 728 (UK), http://www.legislation.gov.uk/ukpga/2000/8/notes/data.pdf [https://perma.cc/L8ZN-MF9X].

177. *See id*. § 410(3)(b). An injunction is an order of the court requiring a person to do something. A person who fails to comply with an injunction order may be held in contempt of court.

178. *See Regulatory Process in Financial Services*, EU COMMISSION, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-reforms-and-their-progress/regulatory-process-financial-services/regulatory-process-financial-services_en#level-2-measures [https://perma.cc/H9GD-92FD] (last visited Feb. 12, 2020).

179. *See* The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018, SI 2018/1115, art. 7, ¶ 8 (UK), https://www.legislation.gov.uk/uksi/2018/1115/contents/made [https://perma.cc/N3SL-7CME] (providing that a "standards instrument may be made only if it has been approved by the Treasury").

180. *Id*. (emphasis added).

181. *Id*.

This arrangement is unusual in the U.K. regulatory rulemaking framework in that rules made by the independent financial regulators are not normally subject to HM Treasury approval. But it does faithfully reproduce the pre-existing European arrangements, where the (technocratic) agencies can only make technical standards with (executive) Commission approval.[182]

4. The Postcrisis Power of Direction to Address Threats to Financial Stability

The fourth and final power of direction is the most recent and the most significant. Drawing directly on Chancellor Alistair Darling's experiences during the 2007–2008 crisis, and in particular the reluctance to rely on the 1946 general power of direction because of the risk it would add to the "sense of chaos,"[183] Parliament's Treasury Committee recommended that the Chancellor be given a new and discrete power of direction in times of crisis that is "separate from the general power under the 1946 Act" and "free of the problems associated" with that general power.[184]

The financial crisis resulted in sweeping legislative reforms to the entire system of financial regulation in the United Kingdom. As part of this overhaul, HM Treasury was granted a new executive override power over the Bank in section 61 of the Financial Services Act 2012. If the 1946 power was intended to be simple, broad, and secretive, the 2012 power was designed to be sophisticated, constrained, and transparent. This is reflected in the circumstantial triggers for use of the power, the limits on the nature of directions that can be made, and its elaborate procedural requirements. These are considered in turn below.

a. Specified Circumstantial Triggers.

The 2012 power of direction can only be triggered in two situations. These situations are designed to reflect the fundamental principle that the Chancellor and HM Treasury should have sole responsibility for any decision on whether and how to use public funds.

The first situation relates to *potential risks* to public funds.[185] In particular, (1) the Bank must have formally notified HM Treasury of a material risk to public funds, and (2) HM Treasury must be satisfied that a direction is necessary to "resolve or reduce a serious threat" to U.K. financial stability.[186] In regard to (1), there was a lingering concern from some quarters that the Bank had a tendency to drag its heels in notifying HM Treasury of potential risks to public money, a concern that could be traced back to the Johnson Matthey crisis in 1984

182. *See Regulatory Process in Financial Services*, *supra* note 178 (noting that the ESAs submit to the Commission their drafts of the "technical standards").

183. *See supra* note 136 and accompanying text.

184. TREASURY COMMITTEE, *supra* note 48, at 54–55.

185. Although the Bank of England is publicly owned, lending against its balance sheet would not constitute use of public funds in this context. The concern here is with what might colloquially be called "taxpayers' money" or, more particularly, use of money that can only be drawn or spent with the authority of HM Treasury, such as the Consolidated Fund or the National Loans Fund.

186. Financial Services Act 2012 § 61(1)(a), (3)(a).

when the Chancellor was notified of a risk to public funds only on the morning that the crisis struck.[187] The 2012 Act aimed to create an early warning system by placing the Bank under a statutory obligation to notify HM Treasury immediately when it perceives there to be a material risk of circumstances arising in which public funds might be put at risk—a so-called public-funds notification.[188] These circumstances include where, for example, HM Treasury might reasonably be expected to provide "financial assistance" to a financial institution, such as where the Bank has provided emergency liquidity assistance to an ailing firm and has obtained an indemnity from HM Treasury in relation to the lending.[189] In regard to (2), the need for HM Treasury to be satisfied that the direction is necessary to resolve or reduce a "serious threat" to U.K. stability is a high bar (notwithstanding that it is a subjective test). It is in fact the same legal test which must be met before HM Treasury can take a failing bank into "temporary public ownership" (that is, nationalize a failing bank).[190]

The second situation is focused on when the crisis has *already* hit, and where HM Treasury has been forced to commit public funds by providing financial assistance.[191] For the power to be triggered, HM Treasury must be satisfied that a direction is needed to resolve or reduce a serious threat to financial stability,[192] or, if financial assistance has been provided for that purpose already, it must be satisfied that a direction is "necessary to protect the public interest in connection with the provision of that assistance."[193]

The 2012 Act requires there to be a Memorandum of Understanding on Crisis Management (MoU) between HM Treasury and the Bank.[194] Although the MoU is only nine pages long, the words "public funds" appear no fewer than fifty-three

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187. The rescue of Johnson Matthey was highly controversial at the time. The Bank considered that the firm needed to be rescued, as there was concern that its failure would undermine confidence in other bullion banks and result in contagion to the wider British banking system. However, as a former Bank official has written:

> [T]his rescue was going to cost a significant amount of public money. The then Chancellor, Nigel Lawson, was only told about the emergency early in the morning of the crucial day, and was thus faced with an unattractive *fait accompli* for which he would have to take responsibility. His angry reaction was not surprising, especially as he was misinformed about the amount of public money involved.

SIR MARTIN JACOMB, CTR. FOR POLICY STUDIES, RE-EMPOWER THE BANK OF ENGLAND 4 (2009); *see also* TREASURY COMMITTEE, *supra* note 48, at 52–53.

188. Financial Services Act 2012 § 58.

189. *See id.* §§ 58(3), 60(5)(a), 67(3), 67(5).

190. Banking Act 2009, c. 1, § 9(1)–(2) (UK), http://www.legislation.gov.uk/ukpga/2009/1/contents [https://perma.cc/ZSR7-M4X3].

191. *See* Financial Services Act 2012 §§ 60(3), 61(1)(b), (3)(b).

192. *See id.* § 61(3)(b).

193. *Id.* § 61(4)(b).

194. *See* RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU, *supra* note 105. The MoU is required under § 65 of the 2012 Act. *See* Financial Services Act 2012 § 65. The MoU itself is not legally binding. It is publicly available at: https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/resolution-planning-and-financial-crisis-management.pdf [https://perma.cc/R88P-P3T9].

times, highlighting the critical importance the concept plays in delineating the responsibilities of HM Treasury and the Bank in a crisis.[195] In particular, the MoU sets out the axiom that the greater the risk to public funds, the greater involvement HM Treasury will have in managing a crisis. At one end of the spectrum, the MoU is clear that, where public funds are not at risk, "[o]perational responsibility for mitigating and managing risks to financial stability rests with the Bank," which should have autonomy in exercising its responsibilities.[196] Once notified of a risk to public funds, however, much closer coordination with HM Treasury is required[197]—"Treasury's involvement after notification will increase in proportion to the magnitude of the risk to public funds" until the other end of the spectrum is reached and the Chancellor becomes entitled to exercise the power of direction over the Bank.[198] Moreover, even if HM Treasury does not exercise the power of direction, the Bank is obliged to seek HM Treasury's consent before using any stabilization power that might put public funds at risk,[199] which provides the Bank with additional incentive to closely involve HM Treasury in its contingency planning arrangements.

b. Limits on the Nature of Direction That Can Be Made.

In designing the power, there was a divergence of views concerning whether, once the circumstances for triggering the power had arisen, the Chancellor should then be empowered with a general power of direction or, alternatively, the Chancellor should be constrained as to the nature of direction that might be issued. The Treasury Committee was of the former view, arguing that "[t]he extent of the Chancellor's authority should not, in a crisis, be restricted to certain instruments of crisis management. He or she must have a general power to direct the Bank when public funds are at risk."[200] The Bank, however, argued that the power of direction should be limited to particular instruments of crisis management.[201] Parliament ultimately came down on the Bank's side of the argument—the 2012 Act limits directions to the Bank's crisis responsibilities as the United Kingdom's LOLR and its wide-ranging stabilization powers to manage or "resolve" failing firms in its capacity as the United Kingdom's resolution

195. *See* RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU, *supra* note 105.
196. *Id.* ¶ 21.
197. Indeed, there is a statutory obligation on HM Treasury and the Bank to coordinate the discharge of their respective functions, which is enhanced once public funds are at risk. *See* Financial Services Act 2012 § 64.
198. RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU, *supra* note 105, ¶¶ 37–38.
199. *See* Banking Act 2009, c. 1, § 78(1) (UK), http://www.legislation.gov.uk/ukpga/2009/1/contents [https://perma.cc/ZSR7-M4X3].
200. TREASURY COMMITTEE, FINANCIAL SERVICES BILL, 2012–13, HC 161, ¶ 32 (UK), https://publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/161/161.pdf [https://perma.cc/XUL8-B6RY].
201. *Id.* ¶ 33.

authority.[202] In particular, the legislation itself states that the Chancellor may only provide directions relating to:

(a) the provision by the Bank to one or more financial institutions of financial assistance other than ordinary market assistance offered by the Bank on its usual terms;
(b) the exercise by the Bank of any of its so-called stabilisation powers, which include the ability to bail-in a failing bank's investors and creditors, or transfer the bank or its business to a commercial purchaser; or
(c) the exercise by the Bank of its powers to put a failing bank into administration.[203]

The MoU further elaborates on the use of the power of direction and explains that, once the circumstantial triggers are met, HM Treasury has the ability to direct the Bank to:

(a) "conduct special support operations for the financial system as whole, in operations going beyond the Bank's published frameworks;"[204]
(b) "provide [emergency liquidity assistance] in a support operation going beyond the Bank's published frameworks to one or more firms that are *not* judged by the Bank to be solvent and viable."[205] This is significant because it is a well-established and fundamental principle that an independent central bank, in its role as a nation's lender of last resort, should only lend to firms that are *solvent*. Any lending to *insolvent* firms is regarded as fiscal policy and thus is the responsibility for the fiscal authority as both a matter of law and policy.[206] The MoU also

202. *See* Financial Services Act 2012, c. 21, § 61(2) (UK), http://www.legislation.gov.uk/ukpga/2012/21/contents [https://perma.cc/5VHB-UBQV]. The Bank's functions as a microprudential supervisor are required by law to be operationally independent from its functions as resolution authority. *See* Bank of England Act 1998, c. 11, § 30B (UK), http://www.legislation.gov.uk/ukpga/1998/11/contents [https://perma.cc/4LPB-77MH]. This is the so-called structural separation requirement, which stems from Article 3(3) of the Bank Recovery and Resolution Directive 2014/59. See Directive 2014/59, art. 3(3), of the European Parliament and of the Council of 15 May 2014 Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and Amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council, 2014 O.J. (L 173) 190, 219 (EU). There is a discrete executive override to police structural separation: if it appears to HM Treasury that any action proposed by the Bank would be incompatible with the requirement, then HM Treasury can direct the Bank not to take that action. *See* Bank of England Act 1998 § 30C.

203. Financial Services Act 2012 § 61(2). *See also* Banking Act 2009 § 1(4) (describing the Bank's "stabilisation powers" under Financial Services Act 2012 § 61(2)(b)).

204. RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU, *supra* note 105, ¶ 38.

205. *Id*. (emphasis added).

206. *See* Paul Tucker, Solvency as a Fundamental Constraint on LOLR Policy for Independent Central Banks: Principles, History, Law 3, 10 (Mar. 30, 2019) (unpublished manuscript), http://paultucker.me/wp-content/uploads/2019/04/Solvency-As-A-Fundamental-Constraint-On-Lolr-Policy.pdf [https://perma.cc/26NX-3X84]. In the E.U. legal framework, should an independent central bank lend to an insolvent

clarifies that *any* emergency liquidity assistance provided by the Bank must be authorized by HM Treasury;[207]

(c) "provide [emergency liquidity assistance] in a support operation going beyond the Bank's published frameworks to one or more firms on terms other than those proposed by the Bank; and

(d) implement a particular . . . stabilisation option" to resolve a failing institution.[208]

Significantly, where HM Treasury directs the Bank to conduct a liquidity-support operation, the MoU expressly states that the Bank will act as HM Treasury's "agent"—that is, no longer as an independent central bank.[209] In keeping with this, any such support would be provided through a special purpose vehicle indemnified by HM Treasury.[210]

Although the 2012 Act appears to give equal attention to the Bank's role as LOLR and resolution authority, the balance of emphasis in the MoU is on LOLR. Regarding the Bank's role as resolution authority, the MoU states that it is a "backstop power, and it is not anticipated that its use will be considered in the majority of crisis situations."[211] Rather, its main purpose is to "put beyond legal

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firm, this would likely violate the monetary-financing prohibition and amount to "State aid." *See* Eur. Cent. Bank, *Agreement on Emergency Liquidity Assistance*, § 5.4 (May 17, 2017), https://www.ecb.europa.eu/pub/pdf/other/Agreement_on_emergency_liquidity_assistance_20170517.en.pdf [https://perma.cc/F4F4-D6F7] (providing that emergency liquidity assistance for insolvent institutions violates the prohibition on monetary financing); *Communication from the Commission on the Application, from 1 August 2013, of State Aid Rules to Support Measures in Favour of Banks in the Context of the Financial Crisis ('Banking Communication')*, ¶ 62, COM (2013) 216 final (July 30, 2013) (noting that support to an insolvent credit institution may constitute "State aid").

207. *See* RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU, *supra* note 105, ¶ 6.

208. *Id.* ¶ 38. The use of "implement" in the MoU might suggest a narrower scope than the statutory provision, which provides that HM Treasury can give a direction "relating to" the exercise of the stabilization powers. Financial Services Act 2012 § 61(2). The latter makes clear that HM Treasury would not be limited merely to the choice of stabilization options (for example, the sale of the failing firm to a private-sector purchaser), but also would be able to specify the purchaser, the terms of the sale, or both. Although this confers on HM Treasury a broad degree of discretion, use of the power of direction would be constrained by basic principles of administrative law, in particular that the power should only be used for a proper purpose. This means that exercise of the power should be reasonably related to the triggers for the use of the power, that is, the direction must be intended to reduce the risks to public funds or U.K. financial stability.

209. RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU, *supra* note 105, ¶ 39.

210. *See id.* Paul Tucker has recalled the importance attached to these constraints: "Following what Mervyn King described to me, in I think almost perfectly recalled words," "the most important work we will ever do together," the government agreed the following constraints on its directive power: any such lending would be undertaken as agent, booked in a special-purpose vehicle not on the Bank's balance sheet, indemnified by the government and funded by the Bank rather than by the government only if the Monetary Policy Committee could control any consequent monetary expansion. Given that the government's concern was to ensure the Bank would lend when appropriate, they would have done much better to enact a statutory LOLR purpose for the Bank. *See* PAUL TUCKER, UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE (2018). The Bank's LOLR responsibilities, unlike the Fed's, are largely not set out in statute. *See* Awrey, *supra* note 18.

211. RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU, *supra* note 105, ¶ 42.

doubt the Chancellor's ability to require the Bank to take specific action when public funds are at risk."[212]

The MoU also clarifies the areas where the power of direction does *not* apply, making clear that the power is not available in relation to: "(1) supervisory decisions taken by the PRA or by the rest of the Bank in its regulation of systemic post-trade infrastructure; (2) policy decisions made by the MPC and FPC; [and] (3) changes to the Bank's published framework for providing liquidity support to the financial system."[213]

Restricting the power of direction in this way reflects the policy intent that it should be focused solely on the Bank's crisis management powers that might foreseeably need to be deployed in a future financial crisis. But the Treasury Committee retained a residual concern that "[a] future crisis, many years hence, may require tools not currently considered appropriate, such as those given to the FPC, nor even yet developed."[214]

c. Detailed Procedural Requirements.

Finally, the procedural requirements under the 2012 Act are more sophisticated in their design than those associated with any of the other powers of direction. As with the general power of direction, HM Treasury must consult the Bank before giving a direction.[215] But unlike the general power, as soon as practicable after giving a direction, HM Treasury is obliged to lay a copy of the direction before Parliament, unless doing so "would be against the public interest."[216] This gives rise to the perennial question of what is meant by the "public interest"; but in this case, the MoU attempts to give an answer by noting, "[t]he only circumstance in which the direction would not be immediately laid before Parliament will be when such disclosure would reveal the existence of a support operation that the Treasury has decided needs to be covert in order to preserve financial stability."[217] Although not a strict legal obligation, under the MoU, HM Treasury is required to notify in confidence the Chairs of the Treasury Committee and Public

212. *Id*.

213. *Id*. ¶ 46.

214. TREASURY COMMITTEE, *supra* note 200, ¶ 34. In any event, the Financial Services Act 2012 expressly provides that nothing in the new power limits the general power of direction in the Bank of England Act 1946. *See* Financial Services Act 2012, c. 21, § 61(7) (UK), http://www.legislation.gov.uk/ukpga/2012/21/contents [https://perma.cc/5VHB-UBQV].

215. *See* Financial Services Act 2012 § 62(2).

216. *Id*. § 63.

217. RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU, *supra* note 105, ¶ 45. The need to keep emergency liquidity assistance secret for it to be effective explains why firms have a special ability to delay their market disclosure obligations in such circumstances, provided that they have regulatory approval to do so. *See* Regulation 596/2014, art. 7(5), of the European Parliament and of the Council of 16 April 2014 on Market Abuse (Market Abuse Regulation) and Repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC, and 2004/72/EC, 2014 O.J. (L 173) 1, 25 (EU).

Accounts Committee immediately, thus providing a degree of Parliamentary accountability and oversight.[218]

For its part, the Bank is obliged to produce a written report to HM Treasury on how it is complying or intends to comply with the direction,[219] which HM Treasury is obliged to lay before Parliament in the same way as the direction itself.[220] In principle at least, this provides a mechanism for Parliament to oversee the interactions—and any potential disagreements—between HM Treasury and the Bank.

In sum, when, in the 2007–2008 financial crisis, Chancellor Alistair Darling felt compelled to ask his lawyers to dust off HM Treasury's general power of direction, the practical and political difficulties of exercising it meant its use was not deemed credible: it was perceived as a "nuclear option" with no established procedure for its use.[221] This experience resulted in a new power, of careful and sophisticated design, which sought to address the perceived failings associated with the general power of direction. The power of direction in the 2012 Act seeks to set out *ex ante*: the circumstances in which the power might be used, the manner in which it might be used, and, crucially, an in-built mechanism to secure Parliamentary accountability for when it is used. That mechanism can be said to introduce political or "audience costs"[222] such that the executive branch is discouraged from abusing the power, but at the same time enhances the credibility of using the power if needs demanded.

C. EXECUTIVE OVERRIDE AND BANK OF ENGLAND INDEPENDENCE

As noted, it has been reasonably observed that powers of executive override pose a "problematic feature" for the institutional independence of central banks.[223] In the U.K. context, there thus may be a question about how the Bank's independence from HM Treasury can be neatly reconciled with the latter's four powers of direction over the former. But, on closer inspection, it is possible to see not only how they can be made consistent, but also

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218. *See* RESOLUTION PLANNING AND FINANCIAL CRISIS MANAGEMENT MOU, *supra* note 105, ¶ 45. A similar arrangement applies to covert emergency liquidity assistance. *See* TREASURY COMMITTEE, REPORTING CONTINGENT LIABILITIES TO PARLIAMENT, 2009–10, HC 181, at 4–5, ¶ 6 (UK), https://publications.parliament.uk/pa/cm200910/cmselect/cmtreasy/181/181.pdf [https://perma.cc/L2LR-4FUU].

219. *See* Financial Services Act 2012 § 62(3).

220. *See id.* § 63(1).

221. *See supra* note 135 and accompanying text.

222. For arguments along these lines, see TUCKER, *supra* note 210, at 421; J. Lawrence Broz, *Political System Transparency and Monetary Commitment Regimes*, 56 INT'L ORG. 861, 867–69 (2002), and Susanne Lohmann, *Why Do Institutions Matter? An Audience-Cost Theory of Institutional Commitment*, 16 GOVERNANCE: INT'L J. POL'Y, ADMIN., & INSTITUTIONS 95, 95–100 (2003).

223. Dr. Fabian Amtenbrink, The Three Pillars of Central Bank Governance—Towards a Model Central Bank Law or a Code of Good Governance? 20 (2004) (unpublished manuscript), https://www.imf.org/external/np/leg/sem/2004/cdmfl/eng/amtenb.pdf [https://perma.cc/U96K-UXYE].

how they can in fact help secure the legitimacy of the Bank's independence.

1. Reconciling Executive Override and Central Bank Independence

Three particular factors have a significant bearing in this context: (1) the circumstances triggering the override, (2) the particular functions over which the override is exercised, and (3) the procedural safeguards for use of the override.

First, circumstances matter. If the purpose of delegating power to an independent agency is to insulate it from the day-to-day politics of government, it follows that the agency should be insulated from political direction *in normal circumstances*. But this does not mean insulation in *all* circumstances. There may be situations—for example, states of emergency or situations where public money is at risk—where it may be entirely appropriate, given the inherently controversial political nature of the issues, for the executive branch to intervene and for the buck ultimately to stop with the executive. A targeted and appropriately exercised intervention may also bring benefits in preserving the central bank's legitimacy for normal times. These potential benefits were unquestionably part of the rationale underlying the 2012 power.[224] On the day Chancellor George Osborne published the Financial Services bill, he gave a speech in Davos, in which he sought to justify this new power of direction over the Bank:

> *Independent central banks should not be put under pressure to do what governments do not have the courage to do on their own account.*
>
> There will be no ambiguity about who is in charge.
>
> *During normal times* the independent Bank of England will be responsible for prudential regulation and systemic stability, accountable to Parliament.
>
> *But in a crisis, when taxpayers' money is at risk, both the responsibility and crucially the power to act will rest with the Chancellor of the day.*[225]

Second, functions matter. Even if one subscribes to the principle of making an agency "independent," if that agency is being delegated a range of different functions, it is possible to adopt a different view on the scope or nature of any executive override retained by the government, *depending on the precise function being exercised*.[226] This is reflected in HM Treasury's powers of direction.

224. *See supra* Section I.B.4.

225. George Osborne, Chancellor of the Exchequer, HM Treasury, Speech to the Davos CBI British Business Leaders Lunch (Jan. 27, 2012) (emphasis added), https://webarchive.nationalarchives.gov.uk/20120306232828tf_/http://www.hm-treasury.gov.uk/speech_chx_270112.htm [https://perma.cc/662M-J9AG].

226. This point is illustrated by the political fathers of the Bank of England's "independence" in the field of monetary policy, Gordon Brown and Ed Balls, who have argued that, in the field of macroprudential policy, the Bank should be *less* independent and subject to greater HM Treasury

Unsurprisingly, the area where HM Treasury's executive override is most limited is the area where Bank "independence" is most well-established—monetary policy. In the field of microprudential supervision there is also a considerable degree of insulation from political direction, although this insulation is somewhat uneven[227] and (rightly) dependent on the Bank's compliance with the United Kingdom's international obligations. In a serious crisis, where public funds could be at risk, HM Treasury has more involvement and ultimately has the ability to intervene and direct the Bank in its functions as the United Kingdom's lender-of-last-resort and resolution authority.

Third, procedure matters. In fact, it is the procedural safeguards that accompany the use of an executive override that largely determine the impact on central bank independence.[228] In his recent and detailed account of how power should be delegated to independent agencies, Sir Paul Tucker, a former Deputy Governor of the Bank, concludes that executive overrides and agency independence are not necessarily inconsistent, provided that procedural safeguards are in place: "What matters for any *override* is that it be transparent, subject to legislative scrutiny, constrained by clear criteria, and in practice rare."[229]

Although procedural safeguards can be established by custom and practice, they are more robust if underpinned by law. The most obvious considerations being: Does the statute book define *ex ante* the circumstances for when the power can be used? Does it specify over which functions the power can be used? Does it provide an opportunity for the central bank to be consulted or make representations? Does it provide for an approval or review mechanism by the legislature?

As summarized in the table below, judged against these considerations, three of HM Treasury's four powers of direction over the Bank score reasonably well:

oversight. *See* Gordon Brown, Former Chancellor of the Exchequer, HM Treasury, Remarks at the Independence—20 Years On Conference (Sept. 23, 2017), *in* Bank of England, *Past and Present, AM Session—Independence Conference 28/09/2017*, YOUTUBE (Sept. 28, 2017), https://www.youtube.com/watch?v=0ZKU2TUAxvw&feature=youtu.be [https://perma.cc/DWS8-HVPM] (relevant section beginning at 2:56:50). *See also* Ed Balls et al., *supra* note 146, at 2, 25 (distinguishing political from operational independence and noting the relative unimportance of the former). Even European Central Bank officials have recognized that the very high standard of independence set out in Article 130 of the TFEU does not apply equally to all the ECB's post-crisis functions. *See* Yves Mersch, Member of Exec. Bd., Eur. Cent. Bank, Keynote Address at the Symposium on Building the Financial System of the 21st Century: An Agenda for Europe and the United States (Mar. 30, 2017).

227. Although the PRA's supervisory functions are carved out of the general power of direction, the Bank's supervisory functions over financial market infrastructure are not.

228. *See, e.g.*, Amtenbrink, *supra* note 223, at 16.

229. TUCKER, *supra* note 210, at 125.

TABLE 1

	Power of Direction	In Statute?	Circumstantial Triggers?	Specified Functions?	Consultation with the Bank?	Parliamentary Review/Approval?
1.	**General power of direction (1946 Act)**	Yes	Where necessary in the public interest	Express carveout for monetary policy and the PRA's functions (as microprudential supervisor), but otherwise would appear to cover a broad range of the Bank's functions	Yes	Not express, but likely in practice (for example, through notification to the Treasury Committee)
2.	**Reserve power over monetary policy (1998 Act)**	Yes	Where required in the public interest *and* by extreme economic circumstances	Only over monetary policy functions	Yes	Yes—direction is time-limited for 28 days unless it is approved by both Houses of Parliament
3.	**Compliance with international obligations (FSMA 2000)**	Yes	Where required to secure compliance with international obligations	Only over the PRA's and the Bank's micro-prudential functions	Not express, but likely in practice	Not express, but likely in practice (for example, through notification to the Treasury Committee)
4.	**Crisis management power of direction (2012 Act)**	Yes	Where public funds are at risk and necessary to resolve/reduce serious threat to financial stability	Only over LOLR and resolution functions	Yes	Yes—duty to lay before Parliament a copy of the direction and a report by the Bank on its compliance

However, the general power of direction in the 1946 Act would score poorly—with only a general "public interest" criterion and no clear mechanisms for scrutiny of its use. This is unsurprising, given that the power was conceived in an era well before central bank independence had become a norm. Indeed, to the contrary, it was an era when the Governor of the Bank of England felt comfortable openly informing a gathering of fellow central bankers that he was "an instrument of the Treasury."[230] This sentiment is a far cry from more recent comments from the Governor that the Bank was "not going to take instruction on our policies from the political side."[231]

In any event, the present effect of the general power of direction in the 1946 Act has been significantly moderated in three ways. First, through the de jure carve-outs and subsequent discrete powers of direction introduced by the legislature (which in practice have made it more challenging for HM Treasury to justify resorting to the 1946 power of direction). Second, although the power confers on HM Treasury a broad degree of discretion (including setting a subjective test for what constitutes

230. WILLIAM BERNHARD, BANKING ON REFORM: POLITICAL PARTIES AND CENTRAL BANK INDEPENDENCE IN THE INDUSTRIAL DEMOCRACIES 84 (2002) (quoting former-Governor Montagu Norman).

231. Nathalie Thomas, *Carney: BoE Will Not Take Policy Instruction from Politicians*, FIN. TIMES (Oct. 14, 2016), https://www.ft.com/content/793379a9-580f-3b30-9d54-91a3ecbac50c. The comments were made shortly after Prime Minister Theresa May was regarded by some as being critical of the Bank's policy of quantitative easing in a speech at the Conservative Party Conference in October 2016.

the public interest), use of the power of direction would be constrained by basic principles of administrative law—such as that the power should only be used for a proper purpose[232]—and it is noteworthy that the judiciary has, in recent years, shown itself to be increasingly robust in questioning the executive branch's assertion of what is "in the public interest."[233] Third, the has been moderated through de facto and studious restraint in exercising the power by HM Treasury.[234] Both are important because a wide range of significant responsibilities entrusted to the Bank—such as macroprudential policy, gold custody, and banknote issuance—are, in theory, within the scope of the general power of direction. Thus, Bank "independence" in those areas is reliant on HM Treasury's resistance to the temptation to exercise the power in practice.

2. The Evolving Response to the Prevailing Political and Economic Climate

As illustrated by this Part, HM Treasury's powers of direction over the Bank have changed in discrete ways at key moments in the United Kingdom's economic history. Each of the four powers can and should be seen as a response to the unique political and economic environment and the relationship between the two institutions that prevailed at the time: (1) HM Treasury's general power of direction was perceived as a necessary result of the Bank being taken into public ownership;[235] (2) HM Treasury's retention of an emergency override was seen as essential in it ceding operational responsibility over monetary policy to the Bank;[236] (3) with an

232. For example, as noted, it may be questioned whether Parliament intended "public interest" to cover *any* area of public interest—such as issues of Defence or Foreign Policy—or rather whether it intended only to cover a narrower sense of the public interest more within *HM Treasury's* competence to assess—that is, the furtherance of issues of economic policy and stability. *See supra* Section I.B.1. The constraint of general administrative law is true for the use of any of the powers of direction. See *supra* note 208 for further discussion in the context of the crisis-management power of direction.

233. In particular, see the U.K. Supreme Court's controversial decision in *R (Evans) v. Attorney General* [2015] UKSC 21, [2015] 1 AC 1787 (appeal taken from Wales). In that case, a journalist made a Freedom of Information Act request seeking the disclosure of the Prince of Wales' correspondence with government ministers. *See id.* at 1806–07. Government departments refused on the ground that it would not be in the public interest to disclose certain letters. *See id.* at 1807. The Information Commissioner agreed, but on appeal the Upper Tribunal ordered their disclosure. *See id.* To block their disclosure, the Attorney General exercised a statutory power—known as the ministerial veto—to override the decision of the Tribunal. *See id.* It was widely believed that this veto ensured that the Attorney General's view of the public interest could ultimately prevail over that of the Tribunal. The Attorney General's exercise of the power was challenged and ultimately quashed by the U.K. Supreme Court by a 5–2 majority. *See id.* at 1788. In this case, the executive was overriding a decision of a judicial tribunal (rather than a regular public authority), which does in some part explain the interventionist stance of a number of the judges who raised fundamental constitutional concerns and demanded robust justification for the use of the power. *See id.* at 1818, 1827–28. Even so, the decision generated significant controversy, with accusations of judicial overreach into the affairs of the executive branch. For further discussion of the case, see RICHARD EKINS & CHRISTOPHER FORSYTH, POLICY EXCHANGE, JUDGING THE PUBLIC INTEREST: THE RULE OF LAW VS. THE RULE OF COURTS (2015), https://policyexchange.org.uk/wp-content/uploads/2016/09/judging-the-public-interest.pdf [https://perma.cc/9NZK-97AE].

234. *See supra* Section I.B.1 (noting that to the best of anyone's knowledge, the general power of direction has never been used).

235. *See supra* Section I.B.1.

236. *See supra* Section I.B.2.

increasing internationalization—and in particular Europeanization—of financial regulation, HM Treasury needed a mechanism for policing the U.K. regulators' compliance with the United Kingdom's international obligations;[237] and (4) following the financial crisis, where significant amounts of public money were put at risk, it was deemed imperative to put beyond legal doubt the Chancellor's ability to direct the Bank in its use of its crisis-management powers, in particular as LOLR.[238] Although these powers cannot entirely preclude the risk of informal and unwarranted political inference in the Bank's discharge of its mandated responsibilities, their existence serves to mitigate that risk by at least allowing the Bank, Parliament, and the Courts to reference them as the clear and appropriate mechanism of executive override. Furthermore, by explicitly prescribing the powers of HM Treasury over the Bank of England in law, and by doing so at an institutional (rather than individual) level, Parliament has to some degree diluted the salience of the interpersonal relationship between the incumbent Chancellor and the Governor of the day. As discussed in Part II, this interpersonal dynamic can take on greater significance in a system where the executive's ability to override the central bank operates in a more informal environment.

II. THE UNITED STATES: THE TREASURY'S CONTROL OVER THE FEDERAL RESERVE

It is a common refrain among U.S. central bankers and Treasury officials that the Fed is "independent" from the U.S. Treasury.[239] But what makes it so? Much as in the United Kingdom, there is no grand "declaration of independence" announcing the Fed's independence from the U.S. Treasury. In fact, the original Federal Reserve Act of 1913 was explicit that the Treasury would exercise significant control over the institution's decisionmaking by placing the Treasury Secretary and the Comptroller of the Currency as ex officio members of the Board.[240] And indeed, as discussed below, the Treasury did heavily influence much of the Fed's affairs in the central bank's early days. As renowned Fed historian Allan Meltzer remarked in his history of the Fed, between the years 1917 and 1951, "[t]he Treasury dominated the Federal Reserve more than half the time."[241]

Quite like the Bank of England, the Fed's legal independence evolved during its early years of existence. As its first significant step toward independence, the

237. *See supra* Section I.B.3.

238. *See supra* Section I.B.4.

239. For recent statements to this effect, see, for example, *Semiannual Monetary Policy Report to the Congress: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. (2019) (statement of Jerome H. Powell, Chairman, Bd. of Governors of the Fed. Reserve Sys.) ("Congress has given us an important degree of independence so that we can effectively pursue our statutory goals based on objective analysis and data."); Joint Press Release, Bd. of Governors of the Fed. Reserve Sys. & U.S. Dep't of the Treasury, The Role of the Federal Reserve in Preserving Financial and Monetary Stability: Joint Statement by the Department of the Treasury and the Federal Reserve (Mar. 23, 2009), https://www.federalreserve.gov/newsevents/pressreleases/monetary20090323b.htm [https://perma.cc/N8RY-YT5V] ("The Federal Reserve's independence with regard to monetary policy is critical for ensuring that monetary policy decisions are made with regard only to the long-term economic welfare of the nation.").

240. 1 ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE: 1913–1951, at 4 (2003).

241. *Id.* at 11.

Banking Act of 1935[242] required the Treasury Secretary to resign from the Board of Governors.[243] Incidentally, the Banking Act of 1935 also moved the physical location of the Fed's meetings from the Treasury Department to another building, further underscoring that the 1935 Act was in part intended to augment the Fed's status as a body independent from the Treasury.[244]

The Fed's legal independence was solidified again, a few decades later, in the so-called Fed–Treasury Accord (Accord) of 1951. The Accord was born from the Fed's desire for greater—more formally enshrined—independence from Treasury's desires. At that time, the Treasury had for some years been pressuring the Fed to support the price of government securities.[245] The Accord was drafted to release the Fed from any such formal or informal obligation and to thereby relieve the tension that had developed between the two institutions.[246]

However, in significant contrast to the U.K. legal system, U.S. law affords no carefully circumscribed legal powers of direction that empower the Treasury to override decisions taken by the independent central bank. The U.S. legal framework is silent on such executive override powers. Although the Federal Reserve Act sets out two powers of direction for the U.S. Treasury, these powers do not authorize the Treasury to override the Fed's independent decisions. Rather, these powers enable the Treasury to supervise and control, or direct, the central bank when the Fed is intruding into fiscal matters or acting on behalf of the fiscal authority, respectively. In formal legal terms, the absence of express override powers would appear to strengthen the relative institutional independence of the Fed from the Treasury, as compared to the position of the Bank of England. Yet despite any clear basis in law, various Treasury secretaries and presidents have sought to influence monetary policy decisions, from the Fed's founding through the present day. This discrepancy between law and practice in the United States begs the question considered in Part III: whether express but carefully constrained powers of direction could, counterintuitively, help bolster central bank independence relative to a legal system that is silent about executive branch overrides.

Like Part I, Part II explores the law and practice that constricts the Fed's independence. In particular, Part II measures the explicit, legal powers that the Treasury has to direct the Fed against the informal or customary exercises of direction by the Treasury Secretary and President. By juxtaposing law with practice, Part II illustrates a significant divergence between the practice of executive override and the legal authority to do so. Ultimately, by comparing the U.S. law and experience with U.K. law, Parts I and II together pose an interesting paradox: could a more complete set of formalized, legal powers of executive branch

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242. Banking Act of 1935, ch. 614, 49 Stat. 684.

243. *See id.* § 203.

244. *See* Gary Richardson et al., *Banking Act of 1935: August 23, 1935*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/banking_act_of_1935 [https://perma.cc/J6JU-VQFJ].

245. *See* Allan Sproul, *The "Accord"—A Landmark in the First Fifty Years of the Federal Reserve System*, 58 ECON. POL'Y REV. 227, 233 (1964).

246. *See id.*

override in fact support institutional independence—relative, at least, to a legal system which does not formalize these override powers?

A. PERSONAL INDEPENDENCE AND THE OFFICE OF THE GOVERNOR

Before turning to the executive branch's ability to constrain Fed independence, this section provides important context by explaining how legislatures and courts have attempted to create and strengthen Fed independence in the first place. In the U.S., the legal framework for protecting institutional and personal independence is not as clearly delineated as in the United Kingdom. The debate on the Fed's independence from political intrusion usually focuses exclusively on the provisions in the Federal Reserve Act that confer personal independence on the Governors of the Fed. Accordingly, this section provides an overview of those legal structures of independence that ensure that the Fed Board and FOMC members are protected from executive branch interference when making decisions about monetary policy.

1. Appointments and Grounds for Dismissal

The process of appointments is meant to confer independence on the Fed. The Board of Governors has seven members that are nominated by the President and confirmed by the Senate.[247] A Governor's term lasts fourteen years, and these terms are staggered among the Board.[248] Meanwhile, the Board Chair—the Fed Chair—is appointed for a four-year term.[249] Any elected officials or any other members of the Administration may not serve as Governor.[250]

The process of removal is also a key legal structure undergirding formal independence—and most importantly, as regards the Fed's Chair. Although the President can remove a Fed Chair, this power is limited and its extent uncertain. The Federal Reserve Act itself is silent with respect to the removability of the Fed Chair (and other statutory leaders at the Board).[251] In many circumstances, the presidential removal power is a thorny constitutional issue. The President has most power over executive branch officers, such as cabinet secretaries.[252] Where

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247. *See Structure of the Federal Reserve System*, BOARD OF GOVERNORS OF FED. RES. SYS., https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-board.htm [https://perma.cc/3WY9-P3RH] (last updated Feb. 3, 2020).

248. *See id.*

249. *See id.*

250. *See FAQs: What Does It Mean That the Federal Reserve Is "Independent Within Government"?*, BOARD OF GOVERNORS OF FED. RES. SYS., https://www.federalreserve.gov/faqs/about_12799.htm [https://perma.cc/D855-RWRU] (last updated Mar. 1, 2017). The FOMC has twelve members, and seven of the twelve are members of the Board of Governors; the other five are Federal Reserve Bank presidents. *See Federal Open Market Committee*, BOARD OF GOVERNORS OF FED. RES. SYS., https://www.federalreserve.gov/monetarypolicy/fomc.htm [https://perma.cc/F68T-54HQ] (last updated Jan. 29, 2020).

251. *See* Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REG. 257, 292 (2015).

252. *See* Myers v. United States, 272 U.S. 52, 134 (1926) (noting how the "duties of the heads of [executive branch] departments and bureaus in which the discretion of the President is exercised . . . are the most important in the whole field of executive action of the Government," and thus the President should have "unrestricted power to remove" these officials).

such executive officers are concerned, the Supreme Court long-ago held in *Myers v. United States* that these officers serve at the pleasure of the President and can therefore be removed at will.[253] At issue in *Myers* was a postmaster, who the Supreme Court concluded was a position that involved the performance of "executive functions."[254]

The President's power is much more limited in regard to other kinds of government officers. In particular, those officers of the government that can be said to be performing quasilegislative or quasijudicial functions may be removed only "for cause," as the Supreme Court decided in *Humphrey's Executor v. United States*.[255] At issue in that case was a Commissioner of the Federal Trade Commission.[256] Section 1 of the Federal Trade Commission Act (FTC Act) provided that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office . . . ."[257] The question in *Humphrey's Executor* was whether, if at all, that clause limited the scope of the President's removal powers, as had been discussed in *Myers* a decade before.[258]

The Court concluded that it did. This statutory language meant that Congress intended to curtail the President's powers to remove these kinds of officers, whose "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[259] These kinds of officers are "called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'"[260] Accordingly, the Court held that there could be no presidential removal except for one of the causes enumerated in the statute.[261] As this line of precedent evolved, it has come to define—above the other structures discussed—an agency's status as "independent." Where an agency's officers are removable only for cause, that agency is typically said to be independent from the executive branch.

The Fed probably falls into this category, though it is somewhat of a grey area. On the one hand, the Federal Reserve Act states that the President can remove a member of the Board (including, presumably, the Chair) "for cause," suggesting that the *Humphrey's Executor* standard applies.[262] Still, some ambiguity remains. The Federal Reserve System does not completely fit the mold of the typical U.S. administrative agency. The Board of Governors of the Federal Reserve is an independent government agency, and the Federal Reserve Banks are "agents" of the government.[263]

253. *See id.* at 176.
254. *Id.* at 116.
255. 295 U.S. 602, 629 (1935).
256. *See id.* at 618.
257. *Id.* at 619 (internal quotation marks omitted).
258. *See id.*
259. *Id.* at 624.
260. *Id.* (quoting Ill. Cent. R.R. Co. v. Interstate Commerce Comm'n, 206 U.S. 441, 454 (1907)).
261. *Id.* at 626.
262. Federal Reserve Act of 1913 § 10, 12 U.S.C. § 242 (2012).
263. *See* United States v. Wells Fargo & Co., 943 F.3d 588, 601 (2d Cir. 2019). Before this opinion, whether the Reserve Banks were public or private was a source of dispute. Many viewed these banks as private. *See Who Owns Reserve Banks?*, FED. RES. BANK ST. LOUIS, https://www.stlouisfed.org/in-

But even assuming the *Myers–Humphrey's Executor* paradigm applies, the content of the term "for cause" in the Federal Reserve Act is a subject of some debate. Unlike the FTC Act at issue in *Humphrey's Executor* and other similar statutes,[264] the Federal Reserve Act does not use the language of "inefficiency, neglect of duty, or malfeasance in office"—it is thus much less clear what "cause" might be in the case of a Fed Governor (and hence its Chair).

Could "cause" include the failure to set interest rates according to the President's economic agenda, or according to the Treasury's prerogatives for government securities? Inasmuch as the law is unclear, so, too, is the precedent of practice. No president has ever formally fired a sitting Fed Chair. President Lyndon Johnson wanted to fire then-Fed Chair William Martin, but the Attorney General at the time, Nicholas Katzenbach, advised that "termination for cause did not include disagreement with administration policies, and that in the Fed's fifty-one years of existence no attempt had ever been made to remove a sitting Fed governor."[265] Apparently, President Johnson then let the matter lie.[266] Fed Chair Thomas McCabe was effectively fired by President Truman, but technically, he resigned.[267] Most recently, President Trump reportedly expressed his wishes to fire Fed Chairman Jerome Powell, but the President seems to have backed down from that stance after having been advised that such action would disrupt the markets, and perhaps be struck down by the courts.[268]

Before turning to the Fed's funding as a source of its legal independence, it is worth pausing to note some key points of contrast with the United Kingdom concerning removals. Unlike the U.S. system, a Bank of England Governor can only be removed for reasons explicitly set out in statute;[269] "cause" is not an open-ended concept. And although the President can in theory remove a Fed Chair, the Chancellor of the Exchequer does not have such power. Lastly, as Part I explained, the law was changed in the United Kingdom to give the Bank of England Governor an eight-year nonrenewable term, so as to remove the

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plain-english/who-owns-the-federal-reserve-banks [https://perma.cc/653C-PY98] (last visited Feb. 13, 2020). The Reserve Banks are "set up like private corporations," in that they have corporate charters and have stock held by private financial institutions. *Id.* But that stock is not like most stock; for example, it has limited voting rights and is not transferable, and holding this stock is a condition of a financial institution's membership in the Federal Reserve System. *See id.*

264. *See, e.g.*, Shurtleff v. United States, 189 U.S. 311, 313 (1903) (concerning the Customs Administrative Act, which provided for removal by the President "for inefficiency, neglect of duty, or malfeasance in office").

265. ROBERT P. BREMNER, CHAIRMAN OF THE FED: WILLIAM MCCHESNEY MARTIN JR. AND THE CREATION OF THE AMERICAN FINANCIAL SYSTEM 203 (2004) (internal quotation marks omitted).

266. *See id.*

267. *See* CONTI-BROWN, *supra* note 4, at 182–83.

268. *See* John Heltman, *Cheat Sheet: Can Trump Actually Fire Fed's Powell?*, AM. BANKER (Dec. 22, 2018, 2:40 PM), https://www.americanbanker.com/opinion/cheat-sheet-can-trump-actually-fire-feds-powell [https://perma.cc/H2R6-HEEF] (reporting that President Trump's advisers have "warned the president he lacks the legal power to fire the Fed chair and attempting to do so would plunge already volatile markets into further disarray"); Jennifer Jacobs et al., *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.

269. *See supra* Section I.A.2.

uncertainty around whether the Governor would be reappointed after the initial five-year term.[270] In contrast, in the United States, the Fed Chair must be reappointed every four years—creating potential speculation and market uncertainty.

2. Funding

The Fed is also independently funded. To be clear, the Fed's funding is distinct from personal and institutional independence, which are the predominant focus of this Article. Still, it is briefly considered here because the Fed's unique funding structure has featured so prominently in scholarly and popular notions of Fed independence.[271]

As central banking scholar Peter Conti-Brown points out, the Fed is unique among U.S. agencies in that it is completely autonomous when it comes to funding.[272] Unlike other agencies, which are funded through congressional appropriations, the Fed funds itself almost entirely through interest on the government securities that it acquires through its open market operations.[273] Importantly, the Fed creates money to buy the Treasury securities (known as "seigniorage"), and can thus profit from the difference between the cost to produce the currency and the interest it earns on the securities. It also receives some modest income from interest on foreign currency instruments, fees it receives from banks for services rendered (such as check clearing, fund transfers, and other clearing operations), and interest on the loans it makes to depository institutions.[274]

At face value, these legal structures—particularly those concerning the Office of the Chair—would suggest a strong bulwark against unwarranted political pressure, from either the Treasury or a President advancing an economic agenda. But in practice, history suggests that they do not preclude Treasury and presidential encroachment into central bank affairs, in particular on issues of monetary policy. This is discussed in further detail below.[275]

B. INSTITUTIONAL INDEPENDENCE AND THE U.S. TREASURY'S POWER OF DIRECTION

Until this point, Part II has discussed a number of ways in which the law confers formal independence on the Fed. This section considers the inverse: how law empowers the Treasury to constrain the Fed. But before taking up that issue, this section will

270. *See supra* Section I.A.3.

271. Somewhat obliquely, part of the Fed's funding independence does relate to its personnel. Congress added a provision to the Federal Reserve Act in 1933 giving the Board autonomy to set compensation, leave, and expenditure policies according to its own regulations (and whatever else applies from the Federal Reserve Act). This makes the Fed independent from the corpus of federal statutes that would otherwise be applicable to employment. *See* Howard H. Hackley, The Status of the Federal Reserve System in the Federal Government 199 (1972) (unpublished manuscript), https://fraser.stlouisfed.org/files/docs/meltzer/hacsta72.pdf [https://perma.cc/UNA2-S2RC].

272. *See* Conti-Brown, *supra* note 251, at 274.

273. *See id.*

274. *See id.* at 274–75.

275. *See infra* Section II.B.1.

consider how the Fed and Treasury cooperate voluntarily "in a spirit of collegiality."[276]

The first and probably most important area of Fed–Treasury cooperation relates to the coordination of fiscal and monetary policy.[277] In ordinary times, this coordination may be informal and happen at a working level.[278] For example, the Fed and Treasury may both choose to adopt stimulative policies to forcefully boost the economy.[279] Or, the Fed Board and FOMC may simply observe the fiscal path that the Treasury is forging at a given time, and take this trajectory into consideration when making monetary policy decisions.[280]

Fiscal and monetary policies are probably more likely to be formally coordinated in times of emergency or crisis.[281] The financial crisis of 2008 is a prime example, where both Fed and Treasury officials made public their view that "it is natural and desirable that the Federal Reserve should play a central role, in cooperation with the Department of the Treasury and other agencies, in preventing and managing financial crises."[282]

Another example of friendly coordination is in the area of foreign-exchange (FX) intervention. Both the Fed and Treasury have the power to intervene in FX markets,[283] and they have typically intervened "jointly, with the Fed conducting

276. *See* Owen F. Humpage, *Warehousing: A Historical Lesson in Central-Bank Independence*, ECON. COMMENT. (Fed. Reserve Bank of Cleveland, Cleveland, Ohio), Aug. 11, 2017, at 1, https://www.clevelandfed.org/en/newsroom-and-events/publications/economic-commentary/2017-economic-commentaries/ec-201712-warehousing-a-historical-lesson-in-central-bank-independence.aspx [https://perma.cc/3K3N-4P7J].

277. The notion that fiscal and monetary policies should fit together is almost as old as the Fed itself. In 1936, John Maynard Keynes wrote: "[I]t seems unlikely that the influence of [monetary] policy on the rate of interest will be sufficient by itself . . . . I conceive, therefore, that a somewhat comprehensive socialisation of investment will prove the only means of securing an approximation to full employment . . . ." JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 378 (11th ed. 1957).

278. *Cf.* MARC LABONTE, CONG. RESEARCH SERV., MONETARY POLICY AND THE FEDERAL RESERVE: CURRENT POLICY AND CONDITIONS 11–12 (2019), https://fas.org/sgp/crs/misc/RL30354.pdf [https://perma.cc/4D83-J8QV] (noting that the Fed and Congress may choose compatible fiscal and monetary policies).

279. *See id.*

280. *See* Ben S. Bernanke, *The Fed and Fiscal Policy*, BROOKINGS (Jan. 13, 2017), https://www.brookings.edu/blog/ben-bernanke/2017/01/13/the-fed-and-fiscal-policy/ [https://perma.cc/8VQP-SBKR].

281. *See infra* notes 435–37 (discussing emergency lending to nonbanks and use of quantitative easing during the financial crisis).

282. Joint Press Release, Bd. of Governors of the Fed. Reserve Sys. & U.S. Dep't of the Treasury, The Role of the Federal Reserve in Preserving Financial and Monetary Stability: Joint Statement by the Department of the Treasury and the Federal Reserve (Mar. 23, 2009, 4:30 PM), https://www.federalreserve.gov/newsevents/pressreleases/monetary20090323b.htm [https://perma.cc/N8RY-YT5V].

283. The Fed's basis of authority is probably found in section 14 of the Federal Reserve Act, which deals with open-market operations. *See* Federal Reserve Act of 1913 § 14, 12 U.S.C. § 353 (2012). As longtime central banker Edwin Truman explained in his oral history, the Fed has historically relied on this provision—and its power to engage in "cable transfers"—as the legal basis of authority to engage in foreign currency transactions. *See* Interview by David H. Small et al. with Edwin M. Truman, Former Staff Dir., Div. of Int'l Fin., in Washington, D.C. 106 (Nov. 30, 2009 & Dec. 22, 2009), https://www.federalreserve.gov/aboutthefed/files/edwin-m-truman-interview-20091130.pdf [https://perma.cc/KV62-FQQP]. Former Fed Board General Counsel Howard Hackley likewise pointed to section 14 for FX intervention authority—specifically, section 14's language regarding foreign transactions. *See* Tim Sablik, *The Fed's Foray Into Forex*, ECON. FOCUS (Fed. Reserve Bank of Richmond, Richmond, Va.),

operations on Treasury's and its own behalf."[284] The Federal Reserve Bank of New York acts as fiscal agent for both the FOMC and the Treasury in foreign exchange transactions.[285]

Historically, FX interventions have been limited, made only "when required to counter disorderly market conditions."[286] Examples of "disorderly market conditions" included the U.K. sterling crisis of 1964–1967. In 1966, the Fed intervened in the sterling market—massively increasing its swap facility[287]—to help stymie that speculative crisis.[288] And after the Bretton Woods system collapsed in 1971, the Fed and Treasury again used various FX interventions to reduce exchange-rate volatility and to counter market uncertainty about the exchange rate's relationship to fundamental economic conditions.[289] Today, however, FX interventions are quite rare. Since 1996, there have been only three Fed–Treasury FX interventions—a purchase of Japanese yen in 1998, a purchase of euros in 2000, and a sale of yen in 2011.[290]

Regardless of whether policies are coordinated tacitly (in normal times) or intentionally (during crisis), the basis of this Fed–Treasury policy coordination appears to be informal and not based on statutory authority. Precisely as then-Board General Counsel Howard Hackley noted in a 1972 paper, there are "informal procedures designed to coordinate monetary policies of the Federal Reserve with fiscal policies of the Treasury."[291]

Q2 2017, at 4–5, https://www.richmondfed.org/-/media/richmondfedorg/publications/research/econ_focus/2017/q2/federal_reserve.pdf [https://perma.cc/D9WH-JCQE] (explaining that, when the issue arose in the early 1960s, Board Counsel Howard Hackley interpreted section 14 language regarding foreign transactions as the legal authority to engage in foreign-exchange swaps transactions, at the request of the Treasury).

284. MARC LABONTE & MARTIN A. WEISS, CONG. RESEARCH SERV., U.S. DOLLAR INTERVENTION: OPTIONS AND ISSUES FOR CONGRESS 1 (2019), https://fas.org/sgp/crs/misc/IF11296.pdf [https://perma.cc/EZ7R-CZ7Y]. "Although the Fed has consistently held that it has independent authority to undertake foreign exchange operations, in practice the Fed works closely with the Treasury in conducting them." J. Alfred Broaddus, Jr. & Marvin Goodfriend, *Foreign Exchange Operations and the Federal Reserve*, 82 FED. RES. BANK RICHMOND ECON. Q. 1, 2 (1996).

285. *See Foreign Exchange Operations*, FED. RES. BANK OF N.Y., https://www.newyorkfed.org/markets/international-market-operations/foreign-exchange-operations [https://perma.cc/PQV5-CW2C] (last visited Feb. 14, 2020).

286. *Id.* However, as Broaddus and Goodfriend point out, that term has never been defined operationally. *See* Broaddus & Goodfriend, *supra* note 284, at 9. For other examples of FX interventions, see Peter Conti-Brown & David Zaring, *The Foreign Affairs of the Federal Reserve*, J. CORP. L. (forthcoming 2020) (manuscript at 29–33), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3169870 [https://perma.cc/25VH-JJMH].

287. These are reciprocal currency agreements: "Swap facilities are, in effect, short-term lines of credit giving central banks access to one another's currencies." Broaddus & Goodfriend, *supra* note 284, at 10.

288. *See* Michael D. Bordo et al., *Sterling in Crisis, 1964–1967*, 13 EUR. REV. ECON. HIST. 437, 442 (2009); Bd. of Governors of the Fed. Reserve Sys., *Treasury and Federal Reserve Foreign Exchange Operations*, 52 FED. RES. BULL. 316, 316–18 (1966), https://fraser.stlouisfed.org/files/docs/publications/FRB/1960s/frb_031966.pdf [https://perma.cc/8CVC-D8JS].

289. *See Foreign Exchange Operations*, *supra* note 285.

290. *Id.*

291. Hackley, *supra* note 271, at 202.

Although such collegial coordination seems to characterize much Fed–Treasury interaction, as in the U.K. system, the Federal Reserve Act does give the Treasury two different statutory bases for directing the Fed.

1. Power to Direct the Reserve Banks to Act as Fiscal Agents

One of these powers resides in section 15 of the Federal Reserve Act. It provides that "Federal Reserve banks . . . when required by the Secretary of the Treasury, shall act as fiscal agents of the United States . . . ."[292] Historically, the scope of this power has been straightforward; the Reserve banks' role as fiscal agents has typically involved the provision of various financial services for the Treasury, [293] such as redeeming government securities, processing payments to and from the federal government, monitoring collateral for Treasury funds, maintaining the government's bank account, and keeping records of these activities.[294] During the First and Second World Wars, this role also involved issuing, redeeming, and servicing war bonds.[295]

It is difficult to characterize or construe this power of direction as a power to "override." After all, by definition, an agent does not act independently from its principal. In this case, insofar as the regional banks are acting in their capacity as fiscal agent, then those actions are not 'independent' from the executive branch's desires. Of course, lawyers and policymakers may well debate what duties and obligations are legitimately in scope of this particular principal-agent relationship.

2. Power to "Control and Supervise" in Cases of Conflict

As earlier discussed, the U.S. legal system does not provide powers of executive override that are directly analogous to those that HM Treasury possesses over the Bank of England. The sole power of override is found in section 10(6) of the Federal Reserve Act, which power allows the Treasury Secretary to override Fed decisions in cases where their jurisdiction or power overlaps.[296] Specifically, section 10(6) is said to "reserve" certain powers for the Secretary of the Treasury. It provides that "wherever any power vested by this Act in the Federal Reserve Board or the Federal reserve agent appears to conflict with the powers of the Secretary of the Treasury, such powers shall be exercised subject to the

292. Federal Reserve Act of 1913 § 15, 12 U.S.C. § 391 (2012).

293. The Bank of England also provides a range of similar services to HM Treasury (and other government departments and bodies), including the provision of banking services (including holding the principal accounts of the government) and managing the Exchange Equalisation Account as HM Treasury's agent (which holds the United Kingdom's reserves of gold, foreign currency assets, and IMF Special Drawing Rights). *See* HM TREASURY, EXCHANGE EQUALISATION ACCOUNT: REPORT AND ACCOUNTS, 2018–19, HC 2551, ¶¶ 6–7 (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818270/EEA_Annual_Report_and_Accounts_2018-19_.pdf [https://perma.cc/JM76-YP3N]; BANK OF ENG., *supra* note 80, at 136.

294. *See* Donna A. DeCorleto & Theresa A. Trimble, *Federal Reserve Banks as Fiscal Agents and Depositories of the United States in a Changing Financial Environment*, 2004 FED. RES. BULL. 435, 436–37.

295. *See id.* at 436.

296. Federal Reserve Act of 1913 § 10(6), 12 U.S.C. § 246 (2012).

supervision and control of the Secretary." [297] By its terms, the Treasury has the power to control the Fed when the Fed is on its fiscal turf.

The power does not appear to be relied upon as a legal basis for Treasury policy action today. The academic and policy literature is nearly silent on the provision, so there is little to learn of its current or recent usage. It does seem clear, however, that Congress did not originally intend for section 10(6) to give the Treasury any power to intrude into the Fed's decisionmaking over monetary policy affairs. Indeed, there is strong evidence in the legislative history that Congress originally intended 10(6) to safeguard the *Treasury's* independence and autonomy from the Fed, and that it is probably now obsolete.

Section 10(6) was in fact not in the original draft of the Federal Reserve Act. Rather, it was added as an amendment by Senator Owen in H.R. 7837. Senator Owen's report shows that the originally proposed amendment by Senator Hitchcock would have limited section 10(6) to just its first part: "Nothing in this act contained shall be construed as taking away any powers heretofore vested by law in the Secretary of the Treasury which relate to the supervision, management, and control of the Treasury Department and the bureaus under such department."[298] Senator Owen added the override language: ". . . and wherever any power vested by this Act in the Federal Reserve Board or the Federal reserve agent appears to conflict with the powers of the Secretary of the Treasury, such powers shall be exercised subject to the supervision and control of the Secretary."[299]

Historical context, here, is important to consider. The Federal Reserve Act was drafted in the wake of the banking crisis of 1907, which implicated the Treasury's failure to "secure an efficient and stable banking and credit system."[300] The view at the time, then, was that "[w]hat was needed was a government authority better informed about banking and credit conditions as they existed in the various sections of the country"—that is, the Fed.[301] Senator Owen was part of a faction in Congress that saw this tide turning against the Treasury in monetary matters, and which favored a greater degree of executive branch control over the Fed.

According to Fed historians, two provisions in particular bothered Senator Owen, and section 10(6) was to be the compromise. The first related to the Comptroller of the Currency's responsibility to supervise the issuance of national bank notes. Section 10(8) of the Act would require the Comptroller to do this "under the general supervision of the Federal Reserve Board" *and* "under the general directions of the Secretary of the Treasury."[302] As Jerome Clifford put it

297. *Id.* As will be discussed in greater detail below, the legislative history shows that this provision was added in the Senate version of the bill, and it survived in the conference version. *See* H.R. 7837, 63d Cong. (1913) (enacted) (amending the House version of the bill to include this provision).

298. S. REP. NO. 63-133, pt. 1, at 121 (1913).

299. S. DOC. NO. 63-264, at 26 (1913).

300. A. JEROME CLIFFORD, THE INDEPENDENCE OF THE FEDERAL RESERVE SYSTEM 73–74 (1965).

301. *Id.* at 74.

302. Federal Reserve Act of 1913, Pub. L. No. 63-43, § 10(8), 38 Stat. 251, 261.

aptly, "Truly, he might have to become a Janus, watching over the doorway to the nation's currency: one face toward the Board and one face toward the Treasury."[303] Section 10(6) could settle disputes where any conflict arose.

The Comptroller was also to be responsible for supervising national banks, which would become member banks in the new Federal Reserve System. But what if there was disagreement over the standards for national banks? In cases where the Comptroller's views about which institutions were duly authorized as national banks fell short of those held by the Board, again section 10(6) could override the Board's objections and compel the Board to accept those banks as member banks.[304]

The addition of section 10(6) may also have been motivated by some jealously over the guardianship of public funds. In 1913, the Treasury operated a sub-treasury system to deposit government funds, using national banks. The Federal Reserve Act would disrupt this with the creation of Federal Reserve banks, which would then act as depositories of these public funds. The question was whether the Treasury would be forced to use the Reserve banks for this purpose, or whether it could continue its sub-treasury system if it so chose. The Act as originally drafted required the Treasury to do so: "[A]ll moneys now held in the general fund of the Treasury . . . *shall*, upon the direction of the Secretary of the Treasury, be deposited in Federal reserve banks, which banks shall act as fiscal agents of the United States . . . ."[305]

But Senator Owen wanted to ensure that the Treasury would be able to distribute government deposits as it saw fit. In his words, "It has been deemed of the highest importance to maintain the independent Treasury of the United States and not compel the Secretary of the Treasury to deposit every dollar of the public funds in the Federal reserve banks, but to provide that he may do so."[306] Accordingly, the Owen amendment changed the "shall" to "may," so the new provision would read: "The moneys held in the general fund of the Treasury . . . *may*, upon the direction of the Secretary of the Treasury, be deposited in Federal reserve banks, which banks, when required by the Secretary of the Treasury, shall act as fiscal agents of the United States . . . ."[307] In sum, this legislative history makes quite clear that, though section 10(6) was rather broadly worded, its drafters did not have monetary policy functions in mind, which were to belong solely to the Federal Reserve and exercisable without political interference.

Contemporaneous legal interpretations of section 10(6) further confirm that it was only ever intended to bulwark the Treasury's independence against the newly created (and empowered) Fed. The Treasury itself supported that view. After section 10(6) was drafted and adopted, then-Treasury Secretary, William Gibbs McAdoo, asked then-Attorney General of the United States, Thomas Watt Gregory, for his legal opinion regarding the purpose of section 10(6). In

303. CLIFFORD, *supra* note 300, at 77.
304. *See id.* at 77–78.
305. S. REP. NO. 63-133, pt. 1, at 125 (1913) (emphasis added).
306. *Id.* at 26–27.
307. S. DOC. NO. 63-264, at 36 (1913).

Gregory's opinion, section 10(6) should not be construed to undermine the Fed's independent status:

> It is evident that, while the purpose of this clause was, amongst other things, to insure the preservation and supremacy of all existing powers of the Secretary of the Treasury in all cases where it might be claimed that such powers overlapped or conflicted with those of the Federal Reserve Board, nevertheless by this very provision the act clearly recognized the existence of powers of the board independent of the Secretary in cases where no such conflict existed.[308]

And indeed, Congress would have surely been confused if it had intended for section 10(6) to impinge on the Fed's independence where monetary policy is concerned. Such encroachment would have conflicted with its intention behind section 14 of the Federal Reserve Act, which requires the Federal Reserve banks to buy Treasury securities only in the open market, precisely to safeguard its independence from Treasury.

In short, by all of these contemporaneous legislative and legal accounts, section 10(6) was never intended to touch the Fed's monetary policy decisionmaking.

And indeed, future Congresses have tried to remove the provision as obsolete. In a 1956 review of certain legislative provisions before the Senate Committee on Banking and Currency, it was recommended that section 10(6) be repealed. The reasons, well-stated and instructive as to section 10(6)'s meaning, are worth quoting at length:

> This provision was included in the original Federal Reserve Act in 1913, which provided for a Federal Reserve Board on which the Secretary of the Treasury and Comptroller of the Currency were members ex officio. The provision appears to reflect some uncertainty on the part of Congress in 1913 as to the possibility of overlapping authority between the Treasury and the Federal Reserve System. However, the meaning and intent of the language suggested for repeal are not at all clear. The language apparently refers only to powers of the Secretary relating to the supervision, management, and control of the Treasury Department and its bureaus, although it is possible to interpret it as applying to other powers vested by the original Federal Reserve Act in the Federal Reserve Board and the Federal Reserve agent. It is not believed that Congress intended that this provision should be more broadly interpreted and, in any event, the removal of the Secretary of the Treasury and the Comptroller of the Currency from membership on the Federal Reserve Board by the Banking Act of 1935 clearly indicated an intent that the Board should perform its functions according to its own best judgment. Moreover, so far as is known, this provision has never had any significant effect on any of the operations or authority exercised by the Federal Reserve System or of the Secretary of the

308. FED. RESERVE BD., FIRST ANNUAL REPORT OF THE FEDERAL RESERVE BOARD: FOR THE PERIOD ENDING DECEMBER 31, 1914, at 57 (1915).

> Treasury. It is believed that it is in the category of obsolete or unnecessary provisions and should be repealed.[309]

In sum, there are a few reasons why Congress may have added section10(6) to the Federal Reserve Act in 1913. It may be that section 10(6) was intended to protect the Treasury from Fed domineering. Or perhaps Congress in 1913 desired a belt-and-suspenders approach to avoid accidentally giving away power to the Fed that should have remained with the Treasury. Regardless of which reason actually motivated Congress (perhaps it was both), it would be a highly strained reading of section 10(6)—at any point in the Fed's history—to interpret it as a legal tool for executive override, influence, or control of the Fed's traditional monetary policy function.

Still, such influence and control did occur.

3. Informal Direction over Monetary Policy

Indeed, the Treasury Secretary has a long history of controlling central bank decisions regarding monetary policy—first, somewhat formally as an ex officio member of the Board, then later, through the Washington convention of hierarchy among agencies and the authority conferred by the implicit backing of the President.

a. The Fed's Founding Through the Postwar Years.

In the early days of the Fed, wartime exigencies pressed the Fed into the Treasury's service. Historical accounts agree that the Treasury controlled the Fed during World War I.[310] As Meltzer describes, "[d]uring the war, the Treasury's financial demands controlled monetary policy."[311]

Essentially, this control involved assisting the Treasury in its campaigns to sell war bonds—called Liberty Loans.[312] Initially, in 1917, the Secretary of the Treasury "notified the Federal Reserve" that it wanted to float wartime bonds "at a rate well below the market."[313] The Treasury and Fed eventually reached a "working entente" where the Fed agreed to ensure the success of the bond drives by making attractive funding options available to would-be buyers of the bonds (that is, the private banks).[314] In that regard, the Fed offered two types of specialty loans. One was a short-term loan, which the Fed offered at preferential discount rates to those banks that would use the borrowed funds to buy the Treasury

309. *Study of Banking Laws: Hearing to Consider the Legislative Recommendations of the Federal Supervisory Agencies Before the S. Comm. on Banking & Currency*, 84th Cong. 187 (1956).

310. *See, e.g.*, 1 MELTZER, *supra* note 240, at 16; Conti-Brown, *supra* note 251, at 278 (referring to the Fed during this time as "government-controlled"); Sproul, *supra* note 245, at 227. Notably, the New York Fed *wanted* to do away with independence to become an official fiscal agent for the government. *See* 1 MELTZER, *supra* note 240, at 85. The New York Fed was ultimately designated fiscal agent in 1920. *See id.*

311. 1 MELTZER, *supra* note 240, at 16.

312. *See id.* at 85.

313. Sproul, *supra* note 245, at 227.

314. *See id.*; *see also* 1 MELTZER, *supra* note 240, at 85.

certificates between bond drives.[315] Similarly, the second was part of a program known as "borrow and buy," which would also enable buyers to finance the purchases of their Treasury bonds.[316] To be clear, these loan programs fell wholly outside the ordinary purview of Fed lending to banks, and constituted special programs engineered at the request of the Treasury.

As the program operated on the acquiescence of the Fed—not via a legal order or direction—the Fed eventually found it a difficult commitment to escape. The preferential rates remained for one year after the armistice in November 1918.[317] As a result, the Fed was hamstrung in its ability to address postwar inflation through the unencumbered use of its monetary policy tools. As once-President of the New York Fed, Allan Sproul, later recollected, these arrangements "were an increasing source of friction between the Treasury and the System as inflationary pressures built up in the postwar economy."[318]

In 1919, the Fed's bind to the Treasury's wishes regarding the discount rates became acutely felt by its leaders, as inflation pressed on. In November of that year, New York Fed President Benjamin Strong tried to lean on the Fed's formal legal authority to break free: he informed Treasury Secretary Carter Glass that he would raise the discount rate even without the full Board's approval.[319] Strong informed the Treasury Secretary that he intended to rely on section 14 of the Federal Reserve Act, which he claimed authorized the district banks to set the discount rate.[320] In return, Strong faced intense backlash from the Treasury. At this point, Carter Glass threatened to ask the President to remove Strong from office[321]—only to be talked down from this attempt by a formal opinion from the Department of Justice that the "Federal Reserve Board has the right, under the powers conferred by the Federal Reserve Act, to determine what rates of discount should be charged from time to time by a Federal Reserve Bank."[322] By the end of World War I, the Governors' concern about Treasury dominance over the Fed was on high alert.[323]

As discussed earlier, thanks to the Banking Act of 1935, the Fed got some relief from Treasury control during the interwar years.[324] It will be recalled that Act required the Treasury Secretary to resign from the Board of Governors of the Federal Reserve.[325] The legislative history suggests that the forced removal of the Treasury Secretary was intended precisely in order to make the Fed more

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315. *See* 1 MELTZER, *supra* note 240, at 85.

316. *See id.* at 85–86.

317. *See* Sproul, *supra* note 245, at 227.

318. *Id.*

319. *See* 1 MELTZER, *supra* note 240, at 102.

320. *See id.*

321. *See id.*

322. *Id.*

323. *See id.* at 103 ("The Federal Reserve System had shown itself divided, hesitant, and unable to move promptly against inflation in the face of Treasury opposition . . . .").

324. Banking Act of 1935, ch. 614, 49 Stat. 684.

325. *See id.* § 203.

independent from the executive—and largely so that the Board could perform its newly acquired monetary policy functions without political bias.

During congressional hearings on the bill, then-Fed Chairman Marriner Eccles advocated that the Board be given responsibility and authority over the nation's monetary policy (and in what form).[326] Apparently, section 12A of the Federal Reserve Act had originally provided a mandate that was much more limited than the one that was ultimately adopted. This alternative drafting provided that:

> The time, character, and volume of all purchases and sales of paper described in section 14 of this act as eligible for open-market operations shall be governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country.[327]

But that language was stricken and, as summarized by Governor Eccles in the hearings, replaced with a mandate that would include "the promotion of conditions conducive to business stability and the mitigation of unstabilizing influences in the general level of production, trade, prices, and employment, so far as may be possible within the scope of monetary action."[328]

Senator Hollister seemed perplexed as to how such powers could be granted to an institution that was *not* "Government-controlled."[329] Governor Eccles's response to Senator Hollister gives us a good clue about the motivation behind the statute's removal of the Treasury Secretary from the Board:

> The Board will not be more governmentally controlled. The Board will be given more power. What I am contending for is not a governmentally controlled central bank at all. What I am contending for is a central body, charged with responsibility for monetary control, in the public interest. Now, whether it is the Federal Reserve Board or some other board is a thing for Congress to decide. But what I am advocating is that the power and the responsibility for monetary policy be placed in a central body that is charged with the public interest, and if it is felt that the Federal Reserve Board is a political board and will be dominated by political expediency, let us say, rather than public interest, in monetary policy, then, certainly, there should be some changes. But I do not think that the Federal Reserve Board under this legislation should be considered a body that will act in connection with its monetary policies, by reason of political expediency rather than in the public interest.[330]

In fact, Governor Eccles emphasized the Board's need for executive branch freedom a few times throughout the hearing. In his view, the Board "should not be considered a political body. The law makes the Board a nonpartisan body, on

326. *Hearing on H.R. 5357 Before the H. Comm. on Banking & Currency*, 74th Cong. 373 (1935) (statement of Marriner S. Eccles, Governor, Federal Reserve Board).

327. *Id.*

328. *Id.*

329. *Id.* at 374.

330. *Id.*

which political parties . . . are not represented."[331] Legally, then, the Treasury Secretary had from that point on no formal position of authority in the Federal Reserve System.

But in practice, this statutory development changed little. Much as in World War I, the Fed was conscripted into supporting the market for government securities. The Fed's assistance to the Treasury began in April 1937, when the newly created FOMC announced in that, "with a view to exerting its influence toward orderly conditions in the money market [] it was prepared to make open market purchases of United States Government securities, for the account of the Federal Reserve Banks, in such amounts and at such times as may be desirable."[332] This acceptance of responsibility for the smooth functioning of the government-securities market "hardened into a compact" with the Treasury to maintain a "pattern of rates" in treasuries.[333] Again, this agreement to maintain a low-interest-rate peg on government bonds during wartime, at the Treasury's request, stiffened the Fed's ability to deploy monetary policy against inflation.[334]

At this point, it bears pausing to note that the Fed's submission to the Treasury's demands was very much a factor of the personalities in charge—neither Henry Morgenthau, the Treasury Secretary appointed in 1934, nor Marriner Eccles, the Fed Chair from 1934–1948, respected the boundary between the Treasury and the Fed. As Meltzer describes, Secretary Morgenthau "would not tolerate the slightest increase in market interest rates," and "[t]he Fed mostly acceded to his demands and frequent threats to use the profit from devaluing the dollar to purchase debt."[335] Fed Chair Eccles may have disliked Treasury interference, but "he did little to prevent it."[336]

After World War II, the Fed found itself in a similar situation as it did in 1919. In 1945, the Fed desired to break free from its commitment to the interest-rate peg in order to check the availability of credit and control inflation.[337] But, "on the basis of seniority in the Washington hierarchy, the Treasury assumed the role of final decision. The System wished to discontinue before the end of 1945 its preferential discount rate . . . [but] Treasury acquiescence was not forthcoming until April 1946."[338] "The hesitations and refusals of the Treasury meant that the defrosting of the wartime 'pattern of rates' took place distressingly slowly."[339]

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331. *Id.* at 236.

332. Sproul, *supra* note 245, at 228 (internal quotation marks omitted).

333. *Id.*

334. *See Background on the Accord*, FED. RES. BANK OF RICHMOND, https://www.richmondfed.org/publications/research/special_reports/treasury_fed_accord/background [https://perma.cc/Y6CD-4PR4] (last visited Feb. 14, 2020).

335. Allan H. Meltzer, Speech at the American Enterprise Institute: The Power and Independence of the Federal Reserve (May 11, 2016), https://www.aei.org/research-products/speech/the-power-and-independence-of-the-federal-reserve/ [https://perma.cc/AXM5-ZRU8].

336. 1 MELTZER, *supra* note 240, at 7.

337. *See* Sproul, *supra* note 245, at 228.

338. *Id.*

339. *Id.*

The pressure on the Fed to control inflation increased with the onset of the Korean War. Maintaining the interest-rate peg was contributing to inflation by breeding monetary expansion.[340] As a history prepared by the Richmond Fed describes, "[a] fierce debate between the Fed and the Treasury then ensued as both vied for control over interest rates and U.S. monetary policy."[341]

These postwar events throw into sharp relief the power of an aligned President and Treasury over the Federal Reserve. President Harry Truman, who succeeded Roosevelt as President in 1945, appointed Treasury Secretary John Snyder in 1946. Secretary Snyder and President Truman shared an economic agenda. Both supported the low-interest-rate peg.[342] In particular, the President felt that it was his duty to support the value of the bonds purchased during the war; raising interest rates would have made those securities worth less.[343]

Secretary Snyder supported that view. He believed it was the duty of the Fed to submit to the President's and Treasury's agenda. As Snyder expressed in an oral history taken in 1969 (but not released until years later), "When you stop to think about it, the Federal Reserve Bank system is fiscal agent for the Treasury. They handle all of our fiscal matters. They are our paying agent; they are our distributing agent for currency and for specie . . . ."[344] Presumably, Secretary Snyder had imagined a much more expansive reading of section 15 and the Treasury's power to direct the Reserve Banks as fiscal agents. Snyder applauded the pliant attitude of Fed Chair Eccles and bemoaned the postwar efforts of the New York Fed to raise rates.

In Snyder's view, Fed Chair Eccles "had cooperated very splendidly with the Government to help hold the cost of the debt down" during the War.[345] But Snyder bemoaned the New York Fed's efforts to pressure the Board to raise interest rates: the "[New York Federal Reserve Bank] had always liked to feel that its officers up there were really the dictators of the monetary policy, credit policy, in the United States, and they began to press for higher interest rates."[346]

The dispute between the Fed on one side and the Treasury and President on the other came to a head in August 1950 when the Fed raised rates, with Fed Chair Thomas McCabe at the helm. At that time, "[t]he Federal Reserve felt that it was under the compulsions of statutory responsibility to meet a present danger, and that it had exhausted the possibilities of devising a mutually agreeable program with the Treasury which would have permitted credit policy and debt

340. *See Background on the Accord*, *supra* note 334.

341. *Id.*

342. *See id.*

343. *See id.*

344. Interview by Jerry N. Hess, Harry S. Truman Library & Museum, with John W. Snyder, Former Sec'y, U.S. Treasury, in Washington, D.C. 5 (May 7, 1969), https://www.richmondfed.org/~/media/richmondfedorg/publications/research/special_reports/treasury_fed_accord/historical_documents/pdf/snyder_interview.pdf [https://perma.cc/CSA7-X4GY].

345. *Id.* at 2.

346. *Id.*

management to go forward in tandem."[347] This decision marked a significant departure from the previous status quo of Fed–Treasury interactions. Before, the Fed would:

> [P]resent[] its views concerning an appropriate combination of credit policy and debt management to the Treasury; the Treasury had decided what it was going to do and had then informed the Federal Reserve; and the Federal Reserve had followed along, attempting to adjust its open market operations, as best it could, to the debt management decisions of the Treasury.[348]

The Fed's decision to raise rates shocked Secretary Snyder and set off a firestorm. As Secretary Snyder later relayed to his interviewer:

> Much to my amazement one morning Mr. McCabe and the president of the New York Bank, came into my office in the Treasury, and stated that they had not bothered to tell me about it, but they were announcing that day that the rate was going up. Well, this was a body blow, this was a real shock to me for I definitely had a very clear understanding with Mr. McCabe that this would not happen. . . . Well, anyway, that really set fire to the problem, because they went through with what they said they were going to do, and I announced that we were going to issue the new bonds at the rate agreed on.[349]

In great political drama, Secretary Snyder responded to the proposed rate hike in a January 1951 speech in New York. He stated his belief that it was "delusion[al]" to think that raising rates would curtail inflation and insinuated that the Fed would, indeed, continue to adhere to the pattern of rates.[350] The public dispute between the Treasury and the Fed, with the Treasury bristling from its slipping control, spurred presidential involvement. President Truman asked the members of the FOMC to come to the White House on January 31, 1951.[351] After the meeting, the White House leaked to the press that the Fed had agreed to the Treasury's demand to support government securities prices.[352] The FOMC balked: it disavowed that any such agreement had been made. In a public letter to the President on February 7, 1951, the FOMC wrote:

> You as President of the United States and we as members of the Federal Open Market Committee have unintentionally been drawn into a false position before the American public—you as if you were committing us to a policy which we believe to be contrary to what we all truly desire, and we as if we were questioning you and defying your wishes as the chief executive of the country in this critical period. . . . [I]n accordance with our assurance to you,

347. Sproul, *supra* note 245, at 230.
348. *Id.*
349. Hess, *supra* note 344, at 3.
350. Sproul, *supra* note 245, at 231.
351. *See id.*
352. *See id.*

> we shall seek to work out with the Secretary of the Treasury as promptly as possible a program which is practical, feasible and adequate in the light of the defense emergency, which will safeguard and maintain public confidence in the values of outstanding Government bonds and which, at the same time, will protect the purchasing power of the dollar.[353]

b. The Fed–Treasury Accord.

This state of affairs between the Treasury, seeking to exert extralegal control over the Fed, and the Fed, becoming increasingly emboldened to resist, could not continue. As will be recalled, it is at this point that a formal agreement was struck in 1951—the Accord—which released the Fed from its obligations to the Treasury to support prices of government securities.[354] The bargain struck was that the Fed would continue to support the price of five-year notes for a bit longer, but after that, the market would control prices.[355] Its language was brief and somewhat turgid. It simply states:

> 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.[356]

Technically, the Accord has no real binding legal status; it is neither a statute nor a regulation.[357] Yet the Accord continues to be perceived as an authoritative source of the Fed's independence from the Treasury.[358]

Despite this new badge of independence—a commitment memorialized in an accord—executive branch control over the Fed continued in the decades to come. The source of that control, however, changed. In particular, from the postwar years through the present, *presidential* control over the Fed appears to have supplanted that of the Treasury. Though speculative, it is certainly plausible that the locus of this pressure shifted—from the Treasury to the Office of the President—precisely because of the Fed–Treasury Accord. As a presidential appointee, the Treasury Secretary is, in a sense, committed to furthering the goals of the

353. *Id.* (internal quotation marks omitted).

354. *See id.* at 232–33.

355. *See id.* at 233.

356. Press Release, Sec'y of Treasury & Chairman of Bd. of Governors of Fed. Reserve Sys., Joint Announcement by the Secretary of the Treasury and the Chairman of the Board of Governors, and of the Federal Open Market Committee, of the Federal Reserve System (Fed–Treasury Accord) (Mar. 4, 1951).

357. *See* CONTI-BROWN, *supra* note 272, at 37 ("The Fed–Treasury Accord is purely informal. It is not a statute or regulation, nor binding law enforceable in any court.").

358. *See, e.g.*, *id.* 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"); Broaddus & Goodfriend, *supra* note 284, at 6 ("The Accord reasserted the principle that monetary policy should be used for macroeconomic stabilization, the fiscal concerns of the Treasury notwithstanding.").

President and his Administration. But with a visible commitment to stand down from pressuring the Fed, the Treasury would indeed back off, leaving future presidents to continue pressing for Fed monetary policy that was consistent with the Administration's economic objectives.

c. The Postwar Years Through the Present.

The extent to which presidents have sought to direct or control the Fed—and the success of that effort—has depended on the personality of the incumbent President and the sitting Fed Chair. The following describes three President–Fed Chair relationships in the last seventy years, where the former exercised some manner of control over the latter.

i. Johnson–Martin.

One of the most interesting President–Fed Chair relationships to consider is that between Fed Chair William ("Bill") McChesney Martin and President Lyndon Johnson. Here, we see that Bill Martin was a strong supporter of the Fed's independence, but at great cost to him personally and professionally.

During the 1960s, President Johnson and Bill Martin had differing concerns and objectives. Martin was a fiscal conservative and worried about inflation from the President's "guns-and-butter economic policies."[359] Inflation, for Martin, was the enemy, and he viewed the role of the Federal Reserve as obliged to "take away the punch bowl just when the party gets going."[360] But the Johnson Administration had other views. After a January 1964 meeting between Martin, President Johnson, and the President's economic advisers, the Administration wrote in its annual economic report: "A strong upswing in the economy need not bring tight money or high interest rates."[361] Martin's biographer, Robert Bremner, referred to this as a "highly visible warning."[362] There are other accounts of an "arm-twisting" meeting between Johnson and Martin in May 1964 over this very issue.[363]

The years 1964 and 1965 presented difficult times for Martin in defending the Fed's independence. Martin feared that inflation was on the horizon in mid-1964.[364] Moreover, events in the United Kingdom increased economic uncertainty. In October 1964, Britain elected its first Labour Party government in fifteen years; the election and fear over the Party's socialist agenda spurred a

359. James Pethokoukis, *What's Wrong With Imposing Political Pressure on the Fed*, AM. BANKER (July 26, 2018, 9:47 AM), https://www.americanbanker.com/opinion/whats-wrong-with-imposing-political-pressure-on-the-fed#.

360. Melody Petersen, *William McChesney Martin, 91, Dies; Defined Fed's Role*, N.Y. TIMES (July 29, 1998), https://www.nytimes.com/1998/07/29/business/william-mcchesney-martin-91-dies-defined-fed-s-role.html.

361. BREMNER, *supra* note 265, at 189 (internal quotation marks omitted).

362. *Id.*

363. *Id.* at 191.

364. *See id.* at 193.

"flood of sterling selling."[365] The Bank of England informed Martin that it would raise its discount rate, and Martin felt that the Fed should do the same to ward off a sudden outflow of funds from the United States to the United Kingdom.[366] At news of this, the President "erupted"—"He demanded to know how the Fed and the Treasury 'would guarantee that the higher rates [would] not hurt the economy' . . . ."[367]

Martin drew further ire from the President with the contents and tone of a speech he gave to graduates of Columbia University in June 1965. Martin warned about an overheating economy, comparing the current state of economic play to the run-up to the Great Depression.[368] The doomsday speech also drew considerable public commentary.[369] Ultimately, it prompted President Johnson to ask the Attorney General if he could fire Martin.[370] But Martin was intent on braking the economy, especially in light of the uptick in government spending on the Vietnam War. In a December 3, 1965 meeting of the FOMC, Martin said to the Committee: "There is the question whether the Federal Reserve is to be run by the administration in office. . . . Many people in the market with whom I have talked are convinced that the Federal Reserve has been prevented from taking action on the discount rate."[371] The FOMC then indeed voted to increase the discount rate, at Martin's urging.[372] As Bremnar later wrote, "For Martin, the essential reason to move now [on interest rates] was to decisively remind the world of the Fed's independent status."[373]

That decision precipitated the infamous Texas ranch confrontation. After the rate raise, President Johnson asked Martin to meet him at his Texas ranch. According to historical accounts of the meeting, Johnson pushed Martin against a wall, saying, "[M]y boys are dying in Vietnam, and you won't print the money I need."[374] Martin replied:

> I've never implied that I'm right and you're wrong. But I do have a very strong conviction that the Federal Reserve Act placed the responsibility for interest rates with the Federal Reserve Board. This is one of those few occasions where the Federal Reserve Board decision has to be final.[375]

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365. *Id.* at 194.

366. *See id.*

367. *Id.* at 194–95. Notably, here, Treasury Secretary Dillon agreed with Martin's proposed course of action. *See id.* at 194. So, this incident would not fit a theory of presidential control that mirrors what would otherwise be control exerted by the Treasury.

368. *See id.* at 202–03.

369. *See id.* (describing the substantial public commentary, including criticism from members of Congress, Fed Governor James L. Robertson, the *New York Times*, and even the Russian official newspaper).

370. *See id.* at 203.

371. *Id.* at 208 (internal quotation marks omitted).

372. *See id.* at 209.

373. *Id.* at 208.

374. Pethokoukis, *supra* note 359 (internal quotation marks omitted).

375. BREMNER, *supra* note 265, at 210.

Reflecting on Martin's time at the Fed, including his role in orchestrating the Fed–Treasury Accord, Alan Greenspan later said, "Crucially, Chairman Martin moved the Federal Reserve from being an adjunct of the Treasury Department . . . to the independent status we know today."[376] Although it seems uncontroverted that Martin was a champion of Fed independence, resisting both Treasury and presidential control, this kind of extra-legal pressure and control would continue throughout subsequent presidencies.

ii. Nixon–Burns.

Arthur Burns was Fed Chair from 1970 to 1978, during the period of the so-called Great Inflation of the 1970s. Richard Nixon was President. Work done by Professor Burton Abrams uncovered the extent to which Nixon pressured Burns to run an expansionary monetary policy to aid his campaign and election.[377] This evidence exists in the recordings of Nixon's meetings and phone calls in the Oval Office.[378] As Professor Abrams discusses, Nixon used a variety of ways to pressure Burns—among them, face-to-face meetings and leaks to the press that the President was considering either expanding the size of the Fed's membership or giving the White House more legal control over monetary policy.[379]

Burns generally acceded to the President's requests. As just one example, in a December 10, 1971 tape, Nixon and Burns are recorded conversing as follows:

> Burns: "I wanted you to know that we lowered the discount rate . . . got it down to 4.5 percent."
>
> Nixon: "Good, good, good . . . You can lead 'em. You can lead 'em. You always have, now. Just kick 'em in the rump a little."
>
> Burns: "Time is getting short. We want to get this economy going."[380]

There are several other examples similar to this.[381]

Experts believe that Burns's decision to run an expansionary monetary policy generated a vicious period of inflation. The economy fell into a recession in 1973, which lasted until March 1975.[382] Even thereafter, inflation continued and was not brought to heel until after the 1980–1982 recessions.[383]

376. Petersen, *supra* note 360 (internal quotation marks omitted).
377. *See, e.g.*, Burton A. Abrams, *How Richard Nixon Pressured Arthur Burns: Evidence from the Nixon Tapes*, 20 J. ECON. PERSP. 177, 178 (2006).
378. *See id.*
379. *See id.* at 185.
380. *Id.* at 181 (internal quotation marks omitted).
381. *See id.* at 180–85.
382. *See id.* at 187.
383. *See id.*

iii. Trump–Powell.

Fast-forwarding to present day, controversy surrounding presidential pressure—outside of a formal legal framework—has arisen again. As earlier described, President Trump has publicly expressed his dissatisfaction with Powell's decision (more accurately, the FOMC) to raise interest rates, and suggested that Powell might be fired for doing so.[384] Powell initially seemed impervious to these pressures. But in January 2019, the Fed abruptly changed course and announced that it would not be raising rates again. Just a month prior, Powell had taken the public position that the rest of the Board would likely raise rates at least two more times in 2019.[385] In connection with the decision to maintain the target range of the federal funds rate, the January announcement referenced a strengthening labor market, rising economic activity, strong household spending, and "moderated" growth of business fixed investment.[386] It also referenced "global economic and financial developments and muted inflation pressures" in its decision to be "patient" in deciding where rates would go next.[387] Still, the *Wall Street Journal* referred to this about-face as a "breathtaking pivot."[388] Shortly thereafter, in early February 2019, a press release announced that Powell had a dinner meeting with President Trump and the Treasury Secretary at the White House.[389]

Although there is nothing inherently nefarious about such meetings, it raises the question of what goes on behind closed doors.[390] Experts and commentators have also voiced concern over President Trump's recent nominations to the

384. In a tweet, Trump remarked, "The only problem our economy has is the Fed. . . . They don't have a feel for the Market . . . . The Fed is like a powerful golfer who can't score because he has no touch—he can't putt!" Michael Burke, *Trump Compares Federal Reserve to Golfer That Can't Putt as Market Extends Slide*, HILL (Dec. 24, 2018, 11:36 AM) (internal quotation marks omitted), https://thehill.com/homenews/administration/422743-trump-compares-federal-reserve-to-golfer-that-cant-putt-as-market [https://perma.cc/5SG9-E6BG].

385. Greg Ip, *The Fed's Mysterious Pause*, WALL ST. J. (Jan. 30, 2019, 7:06 PM), https://www.wsj.com/articles/the-feds-mysterious-pause-11548893175.

386. Press Release, Fed. Reserve Sys., Decisions Regarding Monetary Policy Implementation (Jan. 30, 2019), https://www.federalreserve.gov/monetarypolicy/files/monetary20190130a1.pdf [https://perma.cc/NXG8-B2WQ].

387. *Id.*

388. Ip, *supra* note 385.

389. *See* Press Release, Bd. of Governors of the Fed. Reserve Sys., Statement on Chair Powell's and Vice Chair Clarida's Meeting with the President and Treasury Secretary (Feb. 4, 2019), https://www.federalreserve.gov/newsevents/pressreleases/other20190204a.htm [https://perma.cc/HKA2-KZ3N].

390. It bears noting that there are plenty of President–Fed relations that exemplify just the opposite, that is, a President supporting the Fed Chair. For example, President Reagan famously supported Paul Volcker's campaign to tighten monetary policy. Despite considerable pressure from business, Reagan stood behind Volcker's decisions. As George Shultz, Secretary of State under President Reagan, put it:

> Well, to do something difficult, even if you are the independent Federal Reserve, it makes a huge difference if the president is on your side and is strong and understands the problem, and when things get tough he doesn't go the other way and denounce you, but holds in there. That was one thing about President Reagan: He understood these major developments, and he wanted to be president because there were things he wanted to do as president. And so when he took actions that he thought were right, knowing that there could be difficulties, he stuck with them, he didn't run away.

Federal Reserve Board, given the nominees' conspicuous political views and the ever-present fear that when monetary policy bends to politics, high levels of inflation may follow.[391]

As this section has shown, from the Fed's 1913 founding to the present day, there have been several periods in U.S. history during which the Treasury or President attempted to control or influence the Federal Reserve informally, beyond what would have been legally permissible under the Federal Reserve Act. The next two sections briefly consider two additional powers that Congress gave the Treasury after the financial crisis of 2008, in amendments to section 13(3) of the Federal Reserve Act and through new provisions in the Dodd–Frank Act. Neither relates to monetary policy, but are nonetheless interesting to consider as new specimens of override that may have shifted the balance of power slightly, from the Fed to the Treasury.

4. Emergency Lending

The first of these postcrisis powers relates to the Fed's use of its LOLR power, that is, its power to extend the discount window in section 13 of the Federal Reserve Act. During the crisis, the Fed resurrected section 13(3) of the Federal Reserve Act to lend to nonbank financial institutions under its LOLR authority.[392] Section 13(3) authorizes the Fed to lend to nonbank firms in "unusual and exigent circumstances," [393] but the power had not been used since the Depression.[394] This distressed Congress, both because it suggested the specter of an expanded public backstop and because it was used to rescue specific firms that had previously been outside the Fed's regulatory perimeter. Hence Congress amended section 13(3) in the Dodd–Frank Act to curtail the LOLR power as regards nonbanks.[395]

The amendments made two significant changes. For one, a lending facility has to have "broad-based eligibility," to prevent loans to individual firms.[396] Second, and most relevant for this study, Congress gave the Treasury a veto power over any nonbank loans. Now, "[t]he Board may not establish any program or facility under this paragraph without the prior approval of the Secretary of the

Interview with George Shultz, Former Sec'y of State, U.S. State Dep't (Oct. 2, 2000), https://www.pbs.org/wgbh/commandingheights/shared/minitext/ufd_reaganomics_full.html [https://perma.cc/Q6WD-86K6].

391. *See, e.g.*, Gina Heeb, *Trump's Latest Fed Picks Have Experts Worried About Central Bank Independence. Here's What That Means and Why It Matters*, BUS. INSIDER (Apr. 9, 2019, 2:21 PM), https://markets.businessinsider.com/news/stocks/why-is-the-federal-reserve-independent-2019-4-1028097729 [https://perma.cc/D799-FRWK]; Balazs Koranyi, *ECB's Draghi Worried About Fed's Independence*, REUTERS (Apr. 13, 2019, 1:29 PM), https://www.reuters.com/article/us-imf-worldbank-ecb/ecbs-draghi-worried-about-feds-independence-idUSKCN1RP0K9 [https://perma.cc/24WT-RXH2].

392. *See* MARC LABONTE, CONG. RESEARCH SERV., FEDERAL RESERVE: EMERGENCY LENDING 1 (2016), https://fas.org/sgp/crs/misc/R44185.pdf [https://perma.cc/UFY8-J2PT].

393. Federal Reserve Act of 1913 § 13(3)(A), 12 U.S.C. § 343(3)(A) (2012).

394. *See* LABONTE, *supra* note 392, at 2.

395. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1101, 124 Stat. 1376, 2113 (2010) (amending 12 U.S.C. § 343 (2006)).

396. *Id.* § 1101(a)(4).

Treasury."[397] The veto conferred a remarkable increase in the Treasury's formal legal powers over the Fed. As Dean Glen Hubbard of Columbia Business School wrote, the veto is "a startling expansion of Treasury power over the Fed's use of liquidity facilities in classic lender of last resort situations—that is, where there was adequate collateral."[398]

The Dodd–Frank Act does not set parameters regarding the circumstances under which the Treasury could exercise the veto. For example, there are no provisions about whether firms would have the opportunity to contest the decision. This may not be so troubling from a rule-of-law perspective, however, as a firm would not be entitled to such lending in the first place. Additionally, one might wonder whether the Fed should have an opportunity to make its case for lending to Congress. But then again, Congress may not be well-suited to hear pleadings on how to respond to a crisis (that is, whether money should be lent to a firm in an emergency situation).

The perceived problem with a lack of checks-and-balances on the use of the veto power is that it may risk politicizing emergency lending. It has been noted that the potential for veto may increase market uncertainty in times of financial panic—as Professor Charles Calomiris and his co-authors have pointed out, "[a] general requirement of the approval of the Treasury Secretary, without placing that requirement within a clear framework . . . would delay and politicize lending decisions, increase uncertainty among holders of short-term debt and potentially raise borrowing costs."[399] At the same time, regardless of the veto, the provision of emergency lending by the central bank will likely inevitably be an inherently controversial decision, and having the political cover that an authorization from the Treasury would provide may in fact be beneficial from the perspective of preserving the central bank's legitimacy.

5. Microprudential Regulation and Supervision

Finally, the Dodd–Frank Act arguably increased the Treasury's role in microprudential supervision indirectly, by virtue of its creation of the FSOC. To be clear, this statutory addition is not a direct power of direction or control by the Treasury; however, because it has the effect of giving Treasury some role in deciding which banks fall within the Fed's supervisory remit, we will briefly consider it here for completeness.

397. Federal Reserve Act of 1913 § 13(3)(B)(iv), 12 U.S.C. § 343(B)(iv) (2012).

398. Glenn Hubbard et al., *The Federal Reserve's Independence Is at Risk*, BROOKINGS INST. (Aug. 20, 2009), https://www.brookings.edu/opinions/the-federal-reserves-independence-is-at-risk/ [https://perma.cc/SYH9-QQ2C]. Although this surprised the U.S. scholar quoted here, the arrangement is not entirely dissimilar from that in the United Kingdom. As discussed in Part I, under the U.K. system any form of Emergency Liquidity Assistance by the Bank of England would be expected to be authorized by the Chancellor, who would also retain a backstop legal power to direct the Bank (as an agent) when there is need to resolve a serious threat to financial stability and public funds are at risk.

399. Charles W. Calomiris et al., *Establishing Credible Rules for Fed Emergency Lending*, 9 J. FIN. ECON. POL'Y 260, 262 (2017).

Ordinarily, the Fed regulates and supervises bank holding companies and financial holding companies.[400] Thus, by virtue of a firm's decision to organize as one of these two entities, the institution essentially opts into Fed supervision. However, motivated by the events of the 2008 financial crisis—and, specifically, the central role of nonbank financial institutions—the Dodd–Frank Act created a new financial interagency regulatory body, the FSOC,[401] and put the Treasury Secretary at the helm.[402] This contrasts with the macroprudential authority in the United Kingdom—the Financial Policy Committee—which, as noted, is a statutory committee within the Bank of England, chaired by the Governor of the Bank, with HM Treasury officials able to attend and speak as nonvoting members.

Congress tasked the FSOC with monitoring the financial system for systemic risk and, importantly, identifying any nonbank financial institutions that should be designated as systemically important.[403] Specifically, Dodd–Frank section 113 authorizes the FSOC "to determine that a nonbank financial company's material financial distress—or the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities—could pose a threat to U.S. financial stability."[404] That statutory provision thus allows the FSOC to decide, in view of a range of statutory and discretionary criteria, that a nonbank company primarily engages in "financial activities" and, in doing so, poses a threat to financial stability sufficient to render it "systemically important." Colloquially, these firms have come to be known as "nonbank SIFIs," or systematically important financial institutions.[405] The impact of a designation is to port any designated nonbank SIFI into

400. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 74 (10th ed. 2016), https://www.federalreserve.gov/aboutthefed/files/pf_complete.pdf [https://perma.cc/QU57-RGJE]. The Gramm–Leach–Bliley Act of 1999 permits bank holding companies that meet certain criteria to become financial holding companies, also falling within the Fed's supervisory and regulatory authority. *See id.* These entities can own broker–dealers engaged in securities underwriting and dealing and business entities engaged in merchant banking, insurance underwriting, and insurance agency activities. *See id.* at 74–75. In those cases, the Fed coordinates its supervisory efforts with the subsidiary's functional regulator (that is, SEC and state insurance regulators). *See id.* at 75–76.

401. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. I, subtit. A, 124 Stat. 1376, 1392–1412 (2010) (codified in scattered sections of 12 U.S.C.). The FSOC was charged with focusing on nonbanks given that the crisis had demonstrated that "financial distress at certain nonbank financial companies contributed to a broad seizing up of financial markets and stress at other financial firms." Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637, 21,637 (final rule and interpretive guidance Apr. 11, 2012) (codified at 12 C.F.R. pt. 1310).

402. Dodd–Frank Wall Street Reform and Consumer Protection Act § 111(b)(1)(A), 12 U.S.C. § 5321(b)(1)(A) (2012).

403. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act § 113(a), 12 U.S.C. § 5323 (a); *see also* Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 369 (2013) (noting that the FSOC's section 113 power is its "most important substantive function").

404. *Financial Stability Oversight Council: Nonbank Financial Company Designations*, U.S. DEP'T OF TREASURY, https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx [https://perma.cc/CK9M-9RXW] (last updated Dec. 9, 2019).

405. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 400, at 65–66.

the Fed's supervisory and regulatory perimeter. So it is somewhat curious that the power was not given directly to the Fed.[406]

As a prima facie case, any designated nonbank SIFI is regulated as if it were a bank holding company with over $50 billion in assets (institutions which are presumed to be systemically risky).[407] For both sets of institutions, Dodd–Frank section 165 requires the Fed to apply a "heightened" set of prudential standards, which includes, as a default, risk-based and leverage-capital requirements, liquidity requirements, risk-management requirements, resolution planning, credit-exposure reporting, and concentration limits.[408] The Fed is also then required to stress test these institutions. The Fed must design bespoke regulations for each new nonbank SIFI on its own or pursuant to a recommendation from the FSOC.[409]

It bears stating what may already be obvious: because the FSOC is spearheaded by the Treasury, it is likely to follow the lead set by the administration's economic and regulatory prerogatives.[410] Consider, for example, that each of the four nonbank SIFIs designated were de-designated[411] shortly after the election of President Trump, who had a deregulatory agenda.[412]

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406. It is important to note, however, that the FSOC has currently stepped away from its power under Dodd–Frank to designate nonbank entities as systemically important, instead favoring an approach that focuses on the systemic riskiness of activities. In lieu, it has embraced its statutory power to make nonbinding recommendations to the appropriate financial regulators regarding any activity in the nonbank financial sector that may create systemic risk. *See* 12 U.S.C. § 5330(a) (2012). In particular, the FSOC may identify an activity for heightened regulation if it determines that "the conduct, scope, nature, size, scale, concentration, or interconnectedness of such activity or practice could create or increase the risk of significant liquidity, credit, or other problems" in the financial sector. *Id.*; *see also* Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 84 Fed. Reg. 9028, 9028 (proposed interpretive guidance and request for public comment Mar. 13, 2019) (to be codified at 12 C.F.R. pt. 1310).

407. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act § 165(a), 12 U.S.C. § 5365.

408. *Id.* §§ 115(b)(1), 165(b)(1)(A), 12 U.S.C. §§ 5325(b)(1), 5365(b)(1)(A); *see also* Hilary J. Allen, *Putting the "Financial Stability" in Financial Stability Oversight Council*, 76 OHIO ST. L.J. 1087, 1123 (2015) ("[S]ection 115 encourages the Federal Reserve to apply heightened prudential requirements that are reminiscent of typical bank regulatory tools to the non-bank financial institutions that have been designated as SIFIs."). *But see* Insurance Capital Standards Clarification Act of 2014 § 2, 12 U.S.C. § 5371(c)(1) (2016) (clarifying that the Fed is not required to apply section 117 risk-based and leverage capital requirements to an entity engaged in the business of insurance where the entity is acting "in its capacity as a regulated insurance entity").

409. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act §§ 115, 165, 12 U.S.C. §§ 5325, 5365.

410. FSOC voting members include the Secretary of the Treasury (Chair of the FSOC); the heads of the banking agencies (that is, the Federal Deposit Insurance Corporation, Federal Reserve Board, Office of the Comptroller of the Currency, and National Credit Union Administration); the Chair of the Securities and Exchange Commission; the Chair of the Commodity Futures Trading Commission; the Director of the Federal Housing Finance Agency; the Director of the Consumer Financial Protection Bureau; and an independent insurance expert appointed by the President. *See id.* § 111(b)(1), 12 U.S.C. § 5321(b)(1).

411. *See Financial Stability Oversight Council: Nonbank Financial Company Designations*, *supra* note 404.

412. However, the reader should note that one of the de-designations—MetLife—happened prior to Trump's election. That firm won its case in federal court, arguing that the FSOC's designation was "arbitrary and capricious." MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 242

In its current form, there may also be some rule-of-law questions with the FSOC's designation power. To start, as one of us has argued elsewhere, the designation power risks politicizing the regulation of financial institutions.[413] Rather than apply regulation to a class of firms, a designation necessarily singles out individual firms based on those firms' specific mix of activities and balance sheet. It is also a binary decision—a firm is either systemically risky or it is not, operating like a regulatory on–off switch.[414] Accordingly, by empowering the Treasury Secretary to have the ultimate say on which firms must enter into the Fed's regulatory perimeter, Congress may have indirectly given the Treasury some power to choose regulatory "winners" and "losers."

Additionally, as others have pointed out in connection with legal action to compel the de-designation of MetLife, as drafted in the statute, the new designation power is relatively unmoored from firm criteria that can be objectively applied.[415] An FSOC determination that a particular firm's failure would threaten financial stability almost invariably involves speculation and prediction (with no express requirement, at present, for quantitative cost–benefit analysis)—which, in administrative law terms, can be "arbitrary," and thus, unlawful.[416]

III. EXECUTIVE OVERRIDE AND FED INDEPENDENCE

Overall, Part I and Part II compared two legal frameworks to shed light on the question of how formal powers of executive branch override impact a central bank's independence. Part I described how HM Treasury has a set of backstop legal powers to override the Bank of England in exigent circumstances, including over areas such as monetary policy. Parliament set out the powers in statute, and attempts have been made to both establish *ex ante* the circumstances in which the powers can be used and set out procedural safeguards for their use, including oversight from the legislative branch to ensure they are not abused.

The U.S. framework discussed in Part II, meanwhile, contrasts in several key respects. The U.S. Treasury does not possess a set of well-defined and highly accountable legal powers to direct the Fed in the same way that HM Treasury has to direct the Bank. Although powers of direction do exist in law, the Treasury has not leaned on them where it wished to influence monetary policy; instead, it has relied on ad hoc and informal conventions.

(D.D.C. 2016). Still, the Treasury had some impact on the finality of the de-designation. The government had initially appealed the district court's decision, but following President Trump's election, that appeal was dropped. *See* Ryan Tracy, *MetLife Cements Legal Victory in Shedding 'Systemically Important' Label*, WALL ST. J. (Jan. 18, 2018, 9:09 PM), https://www.wsj.com/articles/metlife-and-fsoc-file-motion-to-dismiss-appeal-in-sifi-litigation-1516325850.

413. *See* Christina Parajon Skinner, *Regulating Nonbanks: A Plan for SIFI Lite*, 105 GEO. L.J. 1379, 1384 (2017).

414. *See id.* at 1381.

415. *See supra* note 412.

416. Precedent from the district court currently suggests that a cost–benefit analysis should be conducted should the FSOC designate again. *See MetLife*, 177 F. Supp. 3d at 239–42.

Part III considers how these explicit and informal powers stand to impact the Fed's independence. It first considers how the three powers of direction in the Federal Reserve Act—found in sections 15, 10(6), and 13(3)—and one added by Dodd–Frank, impact or have the potential to impact the Fed's independence from the Treasury. This Part argues that these powers are not significant threats to Fed independence given their narrow scope and limited potential to serve as true powers of executive override. The more meaningful threat to Fed independence stems, in fact, from the absence of clearer, firmer statutory powers of override.

Taken together with Part II, it seems that in the U.S. case, the deepest threat to Fed independence comes not from the explicit, statutory powers of override, but rather from the informal, extra-legal pressure exerted by the Treasury Secretary or the President. Drawing out the Article's comparison, this Part therefore concludes that the United Kingdom's system of formalized powers of direction may have a comparative advantage over the United States. Herein lies the paradox that this Article points out: a narrowly tailored set of override powers that authorizes a treasury, with oversight from the legislature, to direct a central bank in exigent circumstances has potential to yield a sturdier form of central bank independence than a system that establishes few or limited legal mechanisms of executive override. In other words, it is possible that although such powers may make a central bank less legally independent, they could enhance independence overall.

A. POWERS, POLITICS, AND FED INDEPENDENCE

Perhaps most innocuous for Fed independence are the newest Treasury powers. Although the veto power in section 13(3) and the SIFI designation power in Dodd–Frank section 113 have certainly enlarged the Treasury's role in the Fed's emergency lending and regulatory affairs, the impact on the Fed's independence, here, may be quite limited. As far as extension of the discount window to non-banks is concerned, it may be reasonable to give the Treasury an override power, as such lending can implicate the public fisc.[417] It also gives the central bank political cover for what could be a controversial decision. The important question is whether the veto power will be "transparent, subject to legislative scrutiny, constrained by clear criteria, and in practice rare."[418] As to the frequency of its use, given that section 13(3) has been used sparingly in U.S. history,[419] it seems reasonable to predict that the power will be used rarely. As to clear criteria, the veto also fares relatively well. Based on the structure of section 13, the Treasury may be expected to consider the nature of the collateral the borrower is offering, as well as the nature of the emergency. As for legislative scrutiny, although the

417. *See* United States v. Wells Fargo & Co., 943 F.3d 588, 593–94 (2d Cir. 2019) (describing how the Fed loaned an amount in the "tens of billions of dollars" to Wells Fargo through an extension of its discount window).

418. TUCKER, *supra* note 210, at 125.

419. *See supra* note 395.

statute does not specifically say, as a practical and political matter, congressional scrutiny seems relatively certain to follow from any use of this nuclear option.

The SIFI designation power seems even more benign to Fed independence. As earlier discussed, this power has not been given directly to the Treasury Secretary, but rather to an interagency council headed by the Secretary. That, itself, provides some check on the ability of the Secretary to unilaterally control the process. Additionally, SIFI designations are reviewable in federal court, as the statute itself makes clear and which the MetLife case makes evident. Accordingly, even though the FSOC process may be subjective in some regards, there is some mechanism (that is, judicial review) to check arbitrary applications of subjectivity. Accordingly, with both the section 13(3) veto and the section 113 designation, it may be fair to say that the only genuine threat to Fed independence is the potential for Treasury involvement to politicize the Fed's lending and supervisory functions, respectively. To the extent that these powers remain transparent and subject to congressional or judicial review, that risk can be minimized (at least in an ideal world).[420]

Similarly, the ordinary usage of section 10(6) and section 15 seems to have limited impact on Fed independence. Again, as Part II made plain, neither text nor purpose of these powers styles them as bona fide override powers. Instead, they are tools the Treasury may use to restrain the Fed from intervening into its fiscal affairs. Stated simply, they are tools of Treasury defense, not offense.

Still, to say that these provisions have *no* impact on independence might be overly sanguine. They may have some latent power that stems from their opacity. First consider section 10(6). The provision does not provide clear criteria for deciding when a conflict between the Fed and Treasury may exist. As such, one cannot be certain how it would be interpreted in cases that seem on the border between fiscal and monetary policy.

Quantitative easing (QE) might be an example. Some, after all, have made the argument that QE implicates the fiscal function of the government insofar as it involves the allocation of credit to the mortgage markets.[421] To be clear, this is by no means a well-settled view, and is probably not accepted by most Fed central bankers. Section 10(6) might then have some traction as a backstop or reserve power, which the Treasury could deploy to rein the Fed in when taking these kinds of fiscal-looking actions. But the statute provides no guidance as to which authority, and on what criteria, the Treasury would decide that the Fed was engaged in a fiscal activity in the first place. One may well be concerned about

420. There are some general mechanisms of legislative oversight that would apply in these cases. For example, Congress could investigate the Treasury's actions in a given situation; if the Treasury makes rules pursuant to its new powers, the Congressional Review Act requires that they be submitted to Congress for approval. *See* Dylan Scott, *The New Republican Plan to Deregulate America, Explained*, VOX (Apr. 25, 2018, 9:30 AM), https://www.vox.com/policy-and-politics/2018/4/25/17275566/congressional-review-act-what-regulations-has-trump-cut [https://perma.cc/HJH9-SYFR].

421. *See* Marco Di Maggio et al., *How Quantitative Easing Works: Evidence on the Refinancing Channel* 37–38 (Harvard Bus. Sch., Working Paper No. 2016-08, 2016), https://perma.cc/D2RF-9RKG.

attempts to characterize as fiscal an activity that the Treasury simply wished to supervise or control.

Interventions in foreign exchange markets may be an even better example.[422] The Treasury can direct the New York Fed to undertake foreign exchange transactions on its behalf, using the Treasury's own Exchange Stabilization Funds (ESF), as its fiscal agent—in the ordinary case this would not be a use of an override power insofar as the New York Fed is the Treasury's *agent*.[423]

But there are times when the Treasury asks the Fed for help in "warehousing" foreign exchange transactions in order to augment its limited ESF funds.[424] In the past, the Fed has done so on a voluntary basis—that is, not as part of the role as fiscal agent.[425] Were the Fed to decline to warehouse foreign currency for the Treasury, the line between agency and override could become blurred. Indeed, experts appear divided as to whether warehousing falls within the scope of the

422. Though perhaps a far-fetched hypothetical scenario, it might be possible for section 15 to be used in political expedience, where foreign exchange transactions are concerned. Foreign exchange interventions can be used to further a national economic agenda. *See* LABONTE & WEISS, *supra* note 284, at 1. For example, a weaker dollar should in theory boost U.S. exports, with associated political advantage.

423. The equivalent U.K. arrangements are summarized in the May 1997 letter from Chancellor Gordon Brown, which set out Bank independence over monetary policy. *See* Letter from Gordon Brown, Chancellor of the Exchequer, HM Treasury, to Sir Eddie George, Governor, Bank of Eng. 3 (May 1997), https://www.bankofengland.co.uk/-/media/boe/files/letter/1997/chancellor-letter-060597.pdf?la=en&hash=35B56F77E7F04FE4AAF9EED832D485C9CDE56017 [https://perma.cc/FTJ2-5NJM] [hereinafter May 1997 Letter from Gordon Brown]. The May 1997 Letter explains how the Bank of England acts as HM Treasury's *agent* in managing the U.K. government's foreign currency reserves, as part of the Exchange Equalisation Account *See supra* note 293. In relation to the government's foreign exchange reserves, HM Treasury is able to instruct the Bank to intervene in foreign exchange markets by buying or selling the reserves. As the May 1997 Letter confirmed, all such intervention is "automatically sterilised"—that is, offsetting changes to the money supply. The May 1997 Letter also explains how the Bank also has its own *separate*—and much smaller—pool of foreign exchange reserves, which it can "use at its discretion to intervene in support of its monetary policy objective." May 1997 Letter from Gordon Brown, *supra*, at 3. In a subsequent Parliamentary debate on the issue, a Treasury Minister elaborated on the arrangements, explaining why sterilization was need and that any intervention using the Bank's reserves would be a matter for the MPC. *See* 611 Parl Deb HL (5th ser.) (2000) col. 730 (UK). In particular, the Minister explained that "unsterilised intervention is effectively equivalent to changing interest rates, and so it would act against the Monetary Policy Committee's responsibility to set interest rates to meet the Government's inflation target, damaging the credibility of the UK monetary policy framework" and that, for the Bank to intervene using its separate reserves, the MPC would need to be satisfied that the intervention would support its monetary policy objectives—that is, of maintaining price stability and, subject to that, supporting the government's economic policy on growth and employment. *See id.*

424. In essence, warehousing allows the Treasury to engage in foreign exchange purchases beyond what resources it has in the ESF. Warehousing "resemble[s] a loan from the Fed to the Treasury, undertaken at the latter's behest and outside of the congressional appropriations process." Humpage, *supra* note 276, at 1. For further historical context: In 1962, the Fed agreed to establish swaps with nine other central banks and the Bank for International Settlements, and in 1963, it agreed to warehouse foreign currencies held by the Treasury's ESF. *See* Broaddus & Goodfriend, *supra* note 284, at 2. The Treasury encouraged the Fed to start participating in foreign exchange operations so that the Fed would be in a position to supplement the ESF's limited capacity to purchase foreign currency. *See id.* at 11.

425. *See* Humpage, *supra* note 276, at 1 (noting that the Fed has "no legal obligation to comply with a Treasury request to warehouse," but that "it does so in a spirit of collegiality").

section 15 power.[426] Could section 10(6) be called upon to break such a policy tie?[427]

The legal picture in the United States, then, shows a central bank that has a very high degree of legal independence from the executive branch. But as Part II set out, Treasury secretaries and presidents have sought to control the Fed from its founding, and even after the Fed won its formal badge of independence in the Fed–Treasury Accord. That pressure, influence, and control have been channeled through informal practice, personality, and convention.

This can be quite problematic for the institution's independence. For one, it is difficult for lawmakers or the public to check informal uses of executive branch power. Restraint comes down to the personality of the people in power. As was seen, some Fed chairs were strong and capable of holding steady against the pressure, but others were not. Moreover, informal influence is not often highly visible. Treasury Secretary meetings or phone calls with the Fed Chair may not be explained in detail to the public.[428] Often, a brief press release will report the occurrence of such a meeting, but detailed meeting minutes are not typically published.[429] It can take decades for the true course of events to come to light, with the publication of memoirs, biographies, or the delayed release of archival material. Not only does this opacity make it difficult to identify improper executive intrusions into the Fed's territory, but it also makes the preliminary task of line drawing nearly impossible. Without a full and clear picture of these institutional relations, the public may not be able to contemporaneously determine the line between acceptable—indeed, socially and economically beneficial—collaboration and undue and unwanted influence. In summary, the law's silence as regards executive branch overrides may not, in fact, be that helpful to Fed independence.

This kind of power is not only problematic for independence, but it is also bad for the economy. The financial markets attribute economic value to the independence of central banks, as that independence tends to yield conditions of stability and deliberateness, which are efficient for market transactions. As such, ambiguity as to whether the Fed can be—or will be—influenced by opaque pressure from the

426. *See id.* at 1, 3 (opining that the Fed has no legal obligation to warehouse FX, but also noting that Alan Greenspan once argued to the FOMC that as fiscal agent for the Treasury, the Fed had no choice but to warehouse foreign currency for the ESF).

427. The 1934 Gold Reserve Act gave the Treasury primary responsibility for FX policy. And the FOMC's foreign currency directive requires FX operations be conducted "in close and continuous consultation and cooperation with the United States Treasury." Broaddus & Goodfriend, *supra* note 284, at 1. *Id.* at 2 (quoting Owen F. Humpage, *Institutional Aspects of U.S. Intervention*, 30 FED. RES. BANK. CLEVELAND ECON. REV. 2, 3–4 (1994)). On the other hand, both the Fed and Treasury have legal power to conduct foreign exchange transactions. As discussed, the apparent basis of authority for engaging in foreign exchange transactions comes from section 14 of the Federal Reserve Act. *See supra* note 283.

428. For the position regarding meetings between the Governor and the Chancellor in the U.K. system, see *supra* Section I.A.4 and note 62 in particular.

429. The Government in the Sunshine Act requires that minutes of meetings be published, but only in cases where a formal agency meeting is held. *See* Government in the Sunshine Act § 3(a), 5 U.S.C. § 552b (2012). The statute defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." 5 U.S.C. § 552b(a)(2).

Treasury or the President can manifest in real economic harms.[430] One may even go so far as to say that, at least in the case of the Federal Reserve, the central bank's legitimacy in the eyes of the market (and, to a lesser extent, the public) is what ultimately preserves its independence.

In summary, it bears repeating the paradox that this United States–United Kingdom comparison of override powers presents: legal overrides may make a central bank less legally independent, but they may enhance institutional independence overall. Although the Bank of England is subject to lawful overrides, it does have visible and concrete exit routes from any HM Treasury direction, and it has a recourse through Parliament and the courts in cases of any out-of-bounds use of HM Treasury's power. Meanwhile, such limits and checks are mostly absent in the United States, arguably leaving the Fed's independence in a more vulnerable state.

B. SHOULD U.S. POWERS OF DIRECTION BE ON LEGAL FOOTING?

There may, therefore, be some benefits to providing the U.S. Treasury with express override powers. For one, such powers can allow Congress to set out *ex ante* the conditions around which the powers can be used. They can also establish procedural safeguards surrounding the use of the powers, including mechanisms for legislative oversight.

Such powers would, as in the United Kingdom, be delimited to specific situations. For instance, a highly limited power of direction over monetary policy—exercisable *only in extreme and exigent circumstances*—might be desirable by both Fed and Treasury officials. At least, with a power of direction, markets could predict and expect when monetary policy could be serving goals other than price stability and maximum employment, such as the goals of financial stability.[431] This kind of power of direction would establish an appropriate legal path for the Treasury to override the Fed in setting interest rates. But, importantly, it would also set limits on the use of that power and provide an established route to end the Treasury's involvement.

Perhaps most compelling is the case for giving the Treasury a power of direction exercisable during emergencies, like wartime and financial crises. There have been periods in U.S. history when the Fed and Treasury cooperated well during exigencies, outside of any formal legal arrangement to do so. One of these

430. "If you value economic stability, then you probably don't want the president using political pressure to influence the U.S. central bank." Pethokoukis, *supra* note 359. Indeed, in June 2019, analysts predicted a ten percent drop in markets should Trump "demote" Powell, as he suggested he might on the eve of the Fed's decision regarding interest rates. *See Markets Could Drop 10% in a Day if Trump Demoted Powell: Expert*, CNBC (June 18, 2019), https://www.msn.com/en-us/money/video/markets-could-drop-10percent-in-a-day-if-trump-demoted-powell-expert/vp-AAD4hZS [https://perma.cc/8X24-X5Z3].

431. *See generally* Jeremy C. Stein, Governor, Bd. of Governors of the Fed. Reserve Sys., Remarks at the International Research Forum on Monetary Policy: Incorporating Financial Stability Considerations into a Monetary Policy Framework (Mar. 21, 2014), https://www.federalreserve.gov/newsevents/speech/files/stein20140321a.pdf [https://perma.cc/R3L9-GYLL] (discussing how to explicitly incorporate financial stability considerations into a monetary policy framework).

examples is the Asian Currency Crisis in the late 1990s. Treasury Secretary Robert Rubin, Deputy Treasury Secretary Larry Summers, and Fed Chairman Alan Greenspan famously collaborated to stymie the global economic chaos that followed from the collapse of Thailand's currency in July 1997.[432] The three had both personal and professional chemistry, which seems to have facilitated their partnership in steering the U.S. (and global) economy through the difficult time. As one *Time* cover story described it:

> They may not finish one another's sentences, but they clearly can finish one another's thoughts. And there is tremendous camaraderie. . . .
>
> Greenspan has a theory about what holds them together: In analytical people self-esteem relies on the analysis and not on the conclusions. That must be it. The three men have a mania for analysis that has bred a rigorous, unique intellectual honesty.[433]

In general, the three's free-market ideology united the Fed and Treasury on how to approach the crisis (and work with, and through, the IMF).[434]

Again, during the 2008 financial crisis, both Fed and Treasury officials agreed that coordination was economically necessary.[435] In the midst of the crisis, the Fed and the Treasury issued a joint statement that: "it is natural and desirable that the Federal Reserve should play a central role, in cooperation with the Department of the Treasury and other agencies, in preventing and managing financial crises."[436] The Fed offered loans and credit protection to financial firms in coordination with the Treasury. It also attempted to reduce long-term interest rates through large-scale asset purchases, which came to be known as QE.[437] QE also required Fed–Treasury coordination, as it involved the Fed buying U.S. Treasury securities, agency debt, and agency mortgage-backed securities, purchases which were financed, in part, by the cash deposited by the U.S Treasury at the Fed (to facilitate QE, the Treasury kept larger balances than average in its account at the Fed).[438] As both institutions communicated in a joint press release:

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432. *See* Joshua Cooper Ramo, *The Three Marketeers*, TIME (Feb. 15, 1999), http://content.time.com/time/world/article/0,8599,2054093,00.html [https://perma.cc/5PYF-T4GE].

433. *Id.*

434. *See id.*

435. *See* Donald L. Kohn, Vice Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Conference on Monetary–Fiscal Policy Interactions, Expectations, and Dynamics in the Current Economic Crisis: Interactions Between Monetary and Fiscal Policy in the Current Situation (May 23, 2009), https://www.federalreserve.gov/newsevents/speech/kohn20090523a.htm [https://perma.cc/M8BP-6BK6].

436. Joint Press Release, Bd. of Governors of the Fed. Reserve Sys. & U.S. Dep't of the Treasury, The Role of the Federal Reserve in Preserving Financial and Monetary Stability: Joint Statement by the Department of the Treasury and the Federal Reserve (Mar. 23, 2009), https://www.federalreserve.gov/newsevents/pressreleases/monetary20090323b.htm [https://perma.cc/N8RY-YT5V] [hereinafter March 2009 Joint Press Release].

437. *See* LABONTE, *supra* note 278, at 15.

438. *See id.* at 15–16.

> As long as unusual and exigent circumstances persist, the Federal Reserve will continue to use all its tools working closely and cooperatively with the Treasury and other agencies as needed to improve the functioning of credit markets, help prevent the failure of institutions that could cause systemic damage, and to foster the stabilization and repair of the financial system.[439]

No doubt, much of this collaboration was facilitated by the personalities in power. Ben Bernanke, then-Fed Chair, and then-Treasury Secretary Hank Paulson were friends and respected one another. In his autobiography, Paulson refers to weekly breakfasts with Bernanke that long predated the crisis.[440] As Paulson explained, "Before I'd come to Washington, I'd hardly known Ben, but I liked him immediately, and soon after I settled in at Treasury, he and I began to meet for breakfast every week."[441] He continues, referring to the precrisis days, "In the year I'd been in government, Ben and I had developed a special bond. . . . I kept Ben abreast of what I saw happening, passing along to him any market color I picked up from my conversations with senior bankers in the U.S. and around the world . . . ."[442] Paulson knew there was a legal boundary between their two institutions, but nevertheless the crisis demanded some flexibility: "By law, the Federal Reserve operates independently of the Treasury Department. Though we took care to observe this separation, Ben, Tim Geithner, and I developed a spirit of teamwork that allowed us to talk continually throughout the oncoming crisis without compromising the Fed's independence."[443]

We cannot be sure that future Fed chairs and Treasury secretaries will be as amiable and conciliatory as Bernanke and Paulson were; but coordination failures during such times can be fatal to the successful handling of the acute phase of a crisis. A formal power of direction there could, again, help Fed independence. History has taught us that regardless of a formal power, the Fed's independence from the Treasury is at its lowest points during a crisis. Of course, it is reasonable to expect the Fed to participate in "circling the wagons" in times of crisis. And Fed employees likely do see themselves as public servants. As such, it is understandable that they feel pressure to be team players during those crises. But regardless of what forces are at work to propel the Fed to loosen its grip on formal

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439. March 2009 Joint Press Release, *supra* note 436.

440. *See* HENRY M. PAULSON, JR., ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM 62–63 (2010).

441. *Id.* at 62.

442. *Id.*

443. *Id.* Commentators have, however, suggested that this collaboration *did* compromise the Fed's independence in a different way: by putting the Fed in the fiscal position of taking on risk-sharing arrangements with the fiscal authority through some of its loan facilities. *See* William Nelson, *Lessons from Lender of Last Resort Actions During the Crisis: The Federal Reserve Experience*, *in* 97 BANK FOR INT'L SETTLEMENTS, RE-THINKING THE LENDER OF LAST RESORT 76, 77 (2014). Others have noted that the Fed also conscripted the Treasury into monetary policy—the inverse of our study here. The example presented is the supplemental financial facility and the Fed's request that, to counteract the potential inflationary impact of its credit expansion, the Treasury sell special issues of Treasury bills under that program. *See* Hubbard et al., *supra* note 398.

independence, it may be worthwhile to channel this situation into an established legal framework with accompanying checks and limitations.

CONCLUSION

Central bank independence is as much a matter of practice and custom as it is a matter of law. The relationship between any nation's executive branch and its central bank is one that will have developed organically over time, reflecting the constitutional traditions of that system of government and the prevailing political and economic circumstances. Against this background, this Article has provided an in-depth comparison of the executive override powers available to HM Treasury over the Bank of England on the one hand, and the U.S. Treasury over the Federal Reserve on the other. This deep dive examination of treasury–central bank override powers—ranging from formal to informal—offers scholars and policymakers alike a new lens through which they can view the question of central bank independence.