The Foreign Affairs of the Federal Reserve

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Traditionalists believe that foreign policy is forged by conflict between the legislature and the executive, with the judiciary acting as referee. We reject that paradigm, and make the case that the country's independent agencies, exemplified by its central bank, have become significant and independent foreign policymakers. The U.S. Federal Reserve System sometimes has imposed a globalist, cosmopolitan approach to international economic relations at loggerheads with the political preferences of the executive and legislative branches; at other times it pursues a form of rank nationalism at the expense of our allies. Our account complicates the paradigmatic story of foreign relations law and identifies a problem—the independent agency foreign policy role is both necessary and unconstrained. To solve the problems posed by the Fed's foreign policy, we identify a mechanism that might preserve central bank independence and yet support some of the advantages that accrue from tolerating the Fed as an independent foreign policy-maker. We argue that this solution may also be applicable more generally to the problem of regulatory diplomacy wherever it occurs in the administrative state.

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I. INTRODUCTION

The contours of foreign relations law have been contested since the founding, when American alliances with European powers created rifts between a new presidency and an increasingly factionalized legislature.[1] These contests have not stopped since. Whether in military conflicts like the wars in Afghanistan and Iraq, diplomatic initiatives like the Joint Comprehensive Plan of Action for Iran's nuclear capabilities,[2] or executive agreements like the Paris Agreement on climate change,[3] the paradigm has been, as Edward Corwin famously put it in 1955, a constitutional "invitation to struggle" between the executive and legislative branch, with the judiciary playing the role of cautious referee.[4] Congress can protest or forestall or sometimes control foreign policy programs implemented by the executive branch, in the manner of a political dispute.

Corwin's staging of the constitutional play is incomplete. While Congress and the president continue to fight in political and judicial fora over foreign policy, they are not the only players in the game. In this Article we profile other actors—focusing on one in particular—who contributes to American foreign policy independent of the executive, legislature, and courts.

The actor on which we focus is the U.S. Federal Reserve System (Fed), the American central bank. The Fed has practiced its own brand of foreign relations since its 1913

1. *See* GEORGE HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 56–92 (2008) (describing the early fissures in setting foreign policy between Congress and the president).

2. S.C. Res. 2231 (July 20, 2015); JOINT COMPREHENSIVE PLAN OF ACTION, U.S. DEP'T STATE (July, 14, 2014) https://www.state.gov/documents/organization/245317.pdf.

3. Paris Agreement to the United Nations Framework Convention on Climate Change, Apr. 22, 2016, https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

4. EDWARD CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 470 (1955).

legislative founding. Throughout its existence, it has kept up relations with its foreign counterparts, in many ways uncoordinated with either Congress or the presidential administrations, forging relationships, traditions, legal commitments, and even building formal organizational institutions with counterparts abroad. In other cases, it has snubbed foreign officials who have objected that its policies are inconsistent with their place as allies of the country.

The Fed's international connections are not unique; rather it is the most extreme and important version of a phenomenon that can be observed at almost every federal agency outside the executive branch—almost every agency now has an international relations office and belongs to an organization of regulators that cross national boundaries.[5] We call this phenomenon "regulatory diplomacy."

Regulatory diplomacy is ubiquitous. As we document in the appendix, 13 of the 18 agencies designated as independent by Congress have international affairs offices, including the Nuclear Regulatory Commission, the Office of the Comptroller of the Currency, and the Postal Regulatory Commission.[6] The former chair of the Securities and Exchange Commission, reported that international work "comprise[d] over half of [his] time and responsibilities."[7]

The D.C. Circuit has nervously observed that "an independent agency[] is a responsible governmental agency and will surely take into account . . . any foreign policy concerns communicated to it by the Department of State."[8] But that is not always clearly the case. ICANN, the Internet Corporation for Assigned Names and Numbers, assigns domain names on the Internet, which in turn makes it an authority with worldwide power.[9] Created by the Department of Commerce, ICANN is now much less responsive to it, a fact that some observers have celebrated, and others have treated as cause for concern.[10] The Federal Communications Commission has gone its own way regarding

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5. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 1–21 (2005) (describing this phenomenon). To take one example, as Justice Antonin Scalia observed in his dissent in *Massachusetts v. EPA*, the case seeking to require the Environmental Protection Agency to address global warming, the agency "(*ought* to take into account) . . . the impact [EPA regulations] would have . . . on foreign policy." Massachusetts v. EPA, 549 U.S. 497, 552 (2007) (Scalia, J., dissenting).

6. Congress made the designation in the Paperwork Reduction Act, 44 U.S.C. § 3502(5) (2010). Of the five agencies that do not have international affairs offices, two are specialized administrative appellate courts, Mine Enforcement Safety and Health Review Commission and Occupational Safety and Health Review Commission, one oversees two domestic housing finance firms, the Federal Housing Finance Agency, and two are surprising, the relatively new Consumer Financial Protection Bureau and the National Labor Relations Board.

7. Christopher Cox, Chairman, SEC, Address to the American Institute of Certified Public Accountants' International Issues Conference, International Business—An SEC Perspective (Jan. 10, 2008), http://www.iasplus.com/usa/sec/0801coxaicpa.pdf. For a discussion, see David Zaring, *International Institutional Performance in Crisis*, 10 CHI. J. INT'L L. 475, 502 (2010).

8. Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 33 n.3 (D.C. Cir. 1987), *abrogated by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

9. The quintessential commitment to this sort of focus comes from LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE (1999). For more, s*ee* Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 781–83 (2014) (discussing the delegation of authority from the Department of Commerce to ICANN).

10. *See, e.g.*, Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 406 (2005) (expressing concern about American dominance in the area). One commentator has suggested that the independent foreign policy posed by ICANN has constitutional implications. Michael Froomkin has argued that "if ICANN is, in fact, independent, then the federal government's decision to have ICANN manage a resource of such importance and to allow—indeed,

foreign access to American infrastructure, which it can condition on reciprocal access—rendering some of its decisions out of step with the views of the departments within the executive branch.[11]

These institutions, and the agreements that they conclude, are at the forefront of some of the country's most prominent foreign initiatives. They come at a cost to the power of Congress, as regulators conclude their own international arrangements, and in so doing dispense with the advice and consent required by treaty ratification—something the Senate has been increasingly reluctant to give.[12]

By the same token, the president's usual channels for the realization of foreign policy—the State Department, the United States Trade Representative, and the national security agencies—have been undermined by the emergence of widespread regulatory diplomacy. Some might call it, at its most controversial, an example of the "deep state" at work.[13] The current president has complained about this deep state; he is, according to CNN, "now officially pushing a more sinister conspiracy theory—the so-called deep state—the idea that an entrenched bureaucracy is working to delegitimize him."[14]

Regulatory efforts like the Paris climate change agreement,[15] standards for internet domain names,[16] and the global effort to tackle money laundering,[17] to name a few, are being pursued by American regulators, and not its diplomats. Sometimes this work is coordinated with the state's diplomatic apparatus, but sometimes it is entirely independent of that apparatus.

The Fed is the foremost practitioner of regulatory diplomacy in the contemporary

require—it to enforce regulatory conditions on users of that resource violates the nondelegation doctrine of the U.S. Constitution." A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 20 (2000).

11. Elizabeth A. Snodgrass, *Foreign Affairs in the Twilight Zone: The Foreign Affairs Powers of the Federal Communications Commission*, 83 VA. L. REV. 207, 213–14 (1997) ("[T]he foreign policy implications of some FCC decisions in this context have been so marked as to draw the attention of the legislative branch, especially when the Commission's decision was at odds with the recommendation of the executive branch.").

12. *See* Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 248 (2012) (noting that "the Senate has earned its reputation as the 'graveyard of treaties'").

13. Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234, 2246 (2014) (defining the "deep state" as a fundamentally anti-democratic institutionalized bureaucracy).

14. Z. Byron Wolf, *Trump Embraces Deep State Conspiracy Theory*, CNN (Nov. 29, 2017, 11:15 AM), http://www.cnn.com/2017/11/29/politics/donald-trump-deep-state/index.html; *see also* Steven A. Cook, *The Deep State Comes to America*, FOREIGN POL'Y, (Feb. 24, 2017, 9:34 AM), http://foreignpolicy.com/2017/02/24/the-deep-state-comes-to-america/ (describing the role of the bureaucracy in frustrating presidential preferences in foreign affairs).

15. David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 HARV. ENVTL. L. REV. 515, 517 (2015) (arguing that "domestic federal regulations that are already in place or contemplated could provide sufficient domestic legal authority for the conclusion of all or part of such a binding international instrument as an executive agreement, as well as for its domestic implementation, overcoming the legal necessity for interaction with Congress either before or after its conclusion").

16. For a discussion, *see* Galbraith and Zaring, *supra*, note 9 at 781. ("The government has, in an effort to smooth the concerns of other countries about American domination of cyberspace, delegated much of its power over cyberspace's architecture to a private corporation supervised by a council of regulators from over fifty countries.").

17. *See, e.g.*, Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 687 (2008) ("[T]he trend raises concerns related both to individual rights and to the structural separation of powers between the branches.").

administrative state; in this Article we use it to exemplify the phenomenon. As we will see, the Fed has the power to disrupt foreign economies, respond to financial contagion that crosses borders, and favor or disfavor allies with extraordinary interventions in the financial systems of other countries. Moreover, while the Fed's primary roles as regulator and domestic guarantor of the currency have been studied,[18] its global reach has, for the most part, been overlooked.[19] Two features define the Fed's unique foreign relations policy. First, there is a tension between two themes of central bank relations—nationalism and cosmopolitanism. Second, there is a tension between its willingness to coordinate with other parts of government and its independence from the political branches.

The two tensions are not unrelated. At various points in history—including the present—the Fed shows significantly greater tolerance for a globalized view of its functions than other parts of government. This cosmopolitanism is particularly evident in matters of regulatory cooperation, where the Fed increasingly supervises the financial industry in lockstep with the Bank of England, the European Central Bank, and other foreign institutions.[20] Perhaps for these reasons, the vice-chair of the House Financial Services Committee on January 31, 2017, protested the Fed's continued participation in "international forums on financial regulation," and pleaded with the agency to "cease all attempts to negotiate binding standards burdening American business."[21] President Trump's historic decision not to reappoint Fed Chair Janet Yellen may also have been influenced by the Fed's regulatory diplomacy, as House Republicans stood in steadfast opposition to her candidacy in part on this basis.[22]

The more nationalistic vein of the Fed's foreign policy also runs deep, back to its founding, where it was created not only to mimic the Bank of England, but also to beat it, and create a global currency of last resort.[23] The idea of becoming an international playmaker for U.S. interests has thus been baked into the Fed's institutional DNA. Its monetary policy decisions have been made mostly with attention to the effects on the domestic economy, much to the frustration of central bankers in the developing world, who would like the Fed to take a more global perspective.

It should not be surprising that the Fed occasionally flexes nationalist muscles when pursuing its legislative goals, given Congress's instructions that, when it comes to monetary policy, it focus on domestic employment and inflation.[24] What is more striking

18. *See generally* Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. REG. 257 (2015); David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 L. & CONTEMP. PROBS. 157 (2015).

19. *See* Edwin M. Truman, *The Federal Reserve Engages the World (1970–2000): An Insider's Narrative of the Transition to Managed Floating and Financial Turbulence* (Peterson Inst. for Int. Econ., Working Paper No. 14-5, 2014); Robert Kahn & Ellen Meade, *International Aspects of Central Banking: Diplomacy and Coordination* (2018), *in* RESEARCH HANDBOOK ON CENTRAL BANKING (Peter Conti-Brown & Rosa M. Lastra, eds., 2018); Katherine C. Harris, *Hidden in Plain Sight: The Federal Reserve's Role in U.S. Foreign Policy*, 40 YALE J. INT'L L. 393, 395 (2015).

20. *See infra* Part III.D.

21. Letter from Rep. Patrick T. McHenry to Janet Yellen, Chair of the Fed. Reserve (Jan. 31, 2017), https://ftalphaville-cdn.ft.com/wp-content/uploads/2017/02/02104940/McHenry-letter-to-Yellen.pdf [hereinafter McHenry].

22. See Jeff Cox, *3 Republican House Members Tell Trump Not to Pick Yellen as Fed Chair*, CNBC (Oct. 26, 2017, 9:31 AM), https://www.cnbc.com/2017/10/26/house-republicans-tell-trump-not-to-pick-yellen-as-fed-chair.html.

23. *See infra* Part III.E.

24. Congress's instructions to the Fed do not mention an international mission, though setting of American

is how easily the Fed switches between two institutional perspectives—here cosmopolitan, there nationalist—when it comes to the art of foreign relations. As a substantive matter, these twin institutional impulses, as ubiquitous as they are in the Fed's history, make the Fed's foreign policy difficult to characterize as consistent when the same central bankers, in the same month, and with the same foreign counterparties, insist on both cooperation and national isolation.

This Article offers historical and contemporary evidence to support this claim. The Fed has, since World War II, destabilized financing of the Korean War, complicated the president's relationships with Latin American allies during the 1980s and 1990s, and managed the currency after the 2008 crisis in ways that invited China, Brazil, and India to accuse the United States of engaging in strategic currency manipulation.[25] In other cases, as in the government's response to the financial crisis, the Fed has pursued its foreign relations—most notably through the extension of so-called central bank swap lines—that has operated all but beyond its legal authority, and has only garnered some, but not lots, of criticism from Congress.[26]

On the other hand, the Fed has worked hand in glove with the Treasury Department in both the Fed's response to the global financial crisis and its treatment of the East Asian and Latin American financial crises of the 1990s. But these incursions into the global order often occur with minimal coordination with the executive branch. Often the Fed is walking its own path, "tussl[ing]" with the Secretary of the Treasury even at the height of the President's authority to direct responses to crises.[27] It is telling, for example, that it was Ben Bernanke who was Time's Person of the Year for 2009, not Barack Obama; that Alan Greenspan was the Chairman of '[t]he Committee to Save the World," not Bill Clinton.[28]

The story of the Fed's foreign policy independence is consistent with recent scholarship underscoring the diversity of voices in the executive branch. Following Kenneth Shepsle's famous recharacterization of Congress, scholars like Cass Sunstein and Jennifer Nou have argued that the executive is a they, not an it.[29] They view the White House as a coordinator of interests that affect domestic policy as much as it is an agenda setter. Historical accounts of this kind of effect—from the internal rivalries that defined George Washington's administration,[30] through Lincoln's team of rivals,[31] to more recent accounts of the divisions between State and Defense in the George W. Bush,[32] and the

monetary policy has global implications. *See* 12 U.S.C. § 225a (2000) (instructing the Fed to set rates "to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates").

25. *See infra* Parts III.A.1, III.E, and III.G.

26. *See infra* Part III.D.

27. Jon Hilsenrath et al., *Paulson, Bernanke Strained for Consensus in Bailout*, WALL STREET J. (Nov. 10, 2008, 11:59 PM), https://www.wsj.com/articles/SB122628169939012475.

28. *Cover Search*, TIME MAG., http://content.time.com/time/coversearch/ (last visited Mar. 3, 2019) (search Feb. 15, 1999 cover).

29. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013); Cass R. Sunstein, *Deliberative Democracy in the Trenches*, DAEDALUS J. AM. ACAD. ARTS & SCI. (2017), https://www.mitpressjournals.org/doi/pdf/10.1162/DAED_a_00452; Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

30. For an excellent account from Hamilton's perspective, see RON CHERNOW, ALEXANDER HAMILTON (2004).

31. *See generally* DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN (2005).

32. For two of the best accounts of these rivalries, see PETER BAKER, DAYS OF FIRE: BUSH AND CHENEY

internal conflicts of the Obama Administration's economic team[33]—are well-known. Indeed, the observation that the executive branch can pull a president in multiple directions is not a novel observation.

What is novel is to highlight the extent of regulatory diplomacy as it is practiced far beyond presidential purview. The Fed illustrates perhaps an extreme instance of this practice, but it invites skepticism about the descriptive accounts of foreign affairs that focus exclusively on the president, Congress, or the judiciary.

The Article proceeds as follows. In Part I, we review the conventional foreign relations literature on who sets the country's foreign policy—usually conceived as a battle between two of the three traditional branches of government—and complicate the story by suggesting that other actors matter, in particular the Fed, for a variety of institutional reasons. We also consider the emerging literature on the "deep state"—a claim that it has become increasingly difficult for elected officials to impose their will on the established bureaucracy—and even that the bureaucracy can undermine those officials that do not conform to its preferences.[34] In our view, the Fed embodies the advantages of bureaucratic constraints on policymaking, though its powers should be exercised more transparently. Part II offers a history of the Fed's independence in foreign relations; from the beginning, we argue, it has acted as an "America Firster" at times, and at other times as a cosmopolitan internationalist, but at all times it has pursued its own agenda, even when that agenda differed from that of the rest of the government—which, of course, is not all the time. Part III shows how the Fed's occasional nationalism, occasional cosmopolitanism, and fundamental independence in foreign relations has affected the touchstones of international diplomacy today.

Part IV turns from the structural to the normative by raising the important question: should we worry about the fact that the Fed sets its own foreign policy? Many Fed watchers care almost exclusively about how some Fed practice contributes to its independence, and there are lessons there. Certainly, members of Congress worry about the Fed's diplomacy, but Congress has worried about the structure and functions of the Fed since its beginning. We value the insulation of the Fed from day-to-day partisan pressures, and agree that in many ways, it is an exemplar of an effective government agency. Modifying the Fed's vaunted independence, moreover, risks creating more problems than it solves. As macroeconomic policy becomes inherently connected to international relations, it may be impossible to demand central bank subservience in diplomacy while preserving central bank independence for monetary policy.

Even so, the theoretical justification for independence rests on the assumption that politics will be left to politicians, and much of the Fed's diplomatic independence conflicts with this idea, among other bedrock maxims of foreign relations law. Part V therefore recommends not an overhaul of the Fed's structure or the elimination of its role in international affairs, but the more surgical mandate of greater disclosure around the Fed's international activities. The Fed should provide testimony to Congress twice per year on its foreign policy, just as it does for monetary and regulatory policy.[35] Lest this seem like

IN THE WHITE HOUSE (2013) and JAMES MANN, THE RISE OF THE VULCANS: THE HISTORY OF BUSH'S WAR CABINET (2004).

33. *See generally* RON SUSKIND, CONFIDENCE MEN: WALL STREET, WASHINGTON, AND THE EDUCATION OF A PRESIDENT (2011).

34. *See* Tushnet, *supra* note 13 and accompanying text.

35. *See* 12 U.S.C. § 225b(a)(1) (2010) (setting forth the semi-annual requirement of congressional

modest reform, the Fed has fiercely fought even this level of formalized oversight in other contexts.[36] We therefore take a moderate position against both the Feds position, which would exempt any kind of disclosure of its diplomacy, and the more searching congressional interventions that have been mooted in proposed legislation, such as requiring congressional pre-approval of the Fed's regulatory diplomacy, or prohibiting the central bank from participating in the fora where it concludes its international arrangements without going through notice and comment rulemaking before doing so.[37]

The Trump Administration has made international economic policy a priority.[38] It has dropped multilateral trade deals, has started renegotiations on the North American Free Trade Agreement, and promised an "America First Trade Policy."[39] What might surprise the President is how little ability he has to implement his goals without the participation of the Federal Reserve, and other agencies. In foreign relations as in monetary policy, the Fed and its peers are a separate, perhaps even independent power source in official Washington that fits only uncomfortably within the usual discourse of how foreign policy is created and implemented.

II. THE ARCHITECTURE OF FOREIGN RELATIONS LAW IN THE UNITED STATES

To see why the ability of federal agencies to deploy their diplomatic independence matters, this Part outlines the basic architecture of the separation of powers when it comes to statecraft. Scholars conceive of foreign relations as a two and sometimes three-branch fight that the president usually wins. But even though agencies have been working with their foreign counterparts for decades, they have not been part of the scholarly account.

A. The Traditional Three-Branch Story

Classically, foreign relations law has been viewed as a struggle for policymaking power between the President and Congress, with occasional supervision by the courts. To quote Justice Jackson's famous phrase from the *Steel Seizures* case, foreign relations represents a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."[40] The role of the administrative state in

testimony).

36. We mean "Audit the Fed" and rules-based monetary policy, though each in its way departs from a pure disclosure by testimony approach that we advocate here. For more, see PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE (2016).

37. These proposals have been included in the Financial Choice Act, which has passed the House. The statute would, among other things, "[c]reate greater transparency for financial regulators by requiring them to release for notice and comment a public disclosure of any positions they plan to take as part of international regulatory negotiations, and provide a public report to Congress on the negotiations at their conclusion." STAFF OF H. COMM. ON FINANCIAL SERVICES, 114TH CONG., REPORT, TOGETHER WITH MINORITY VIEWS [TO ACCOMPANY H.R. 5983] (Comm. Print 2016), https://www.congress.gov/congressional-report/114th-congress/house-report/883/1?s=1&r=28.

38. Edward Alden, *Trump's Manufacturing Tactics Could Backfire*, MILWAUKEE J. SENTINEL (Feb. 4, 2017, 4:38 PM), https://www.jsonline.com/story/opinion/crossroads/2017/02/04/alden-trumps-manufacturing-tactics-backfire/97493474/ ("Donald Trump came to Washington determined to shake up America's economic relations with the world. . . .").

39. Adam Davidson, *What the Death of the T.P.P. Means for America*, NEW YORKER (Jan. 23, 2017), https://www.newyorker.com/business/adam-davidson/what-the-death-of-the-t-p-p-means-for-america (reporting that that slogan had appeared on the Web site of the Office of the United States Trade Representative).

40. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) [hereinafter *Steel Seizures*]

foreign policy was not part of the *Youngstown* paradigm.

Scholars and judges have sounded a number of consistent tropes in describing the three-branch story. Executive predominance in foreign affairs is not absolute, but has a logic in constitutional law and diplomatic practice, it has been said.[41] While Congress is the seat of legislative power, the President's claims to foreign relations superiority lie in comparative advantage. The executive is poised, as a bureaucracy led by a single actor with the power to remove subordinates, to offer policy consistency, or at least not the cycling between policies supported by diverse majorities that can be a feature of legislative action.[42] The single actor role is enshrined in the Constitution—the president has been given constitutional authority to make treaties,[43] and is the designated commander in chief of the armed forces,[44] as well as the only designated constitutional actor to take care that the laws be faithfully executed.[45] The Court has said that "the structural advantages of a unitary Executive" may be "essential" to foreign policy decision-making, giving the Executive an institutional advantage far beyond the ambiguous constitutional allocation of power.[46]

Congress has a critical role to play, however. The Senate must ratify treaties before they become effective;[47] Congress alone can declare war and raise and support the military.[48] Perhaps most importantly for matters of economic importance, Congress has

(Jackson, J., concurring).

41. This strain of scholarship builds on Chief Justice John Marshall's claim that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 6 ANNALS OF CONGRESS 596, 613 (1800). *See also, e.g.*, *Exercising Congress's Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 65–79 (2007) (statement of Bradford Berenson, former Associate Counsel to the President) ("The Vesting Clause provides the President a vast reserve of implied authority to do whatever may be necessary in executing the laws and governing the nation."); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1258 (1988) (citing "three institutional factors: executive initiative, congressional acquiescence, and judicial tolerance").

42. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1936 (2015).

43. U.S. CONST. art. II, § 2.

44. *Id.*

45. U.S. CONST. art. II, § 3.

46. Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004). This judicial deference to the executive branch even extends to policing the legislature, as shown in *Zivotofsky v. Kerry*, in which the Court held that a congressional statute concerning the location of an embassy interfered with the president's sole powers to recognize foreign states. Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S.Ct. 2076, 2078 (2015). *See also* Zemel v. Rusk, 381 U.S. 1, 17 (1965) (observing that the executive is at an advantage "because of the changeable and explosive nature of contemporary international relations . . . ."). It may be true in theory that, as scholars have occasionally protested, "[i]n many important areas of foreign relations, the Executive has little independent constitutional authority." Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the* Chadha *Case*, 79 AM. J. INT'L. L. 912, 948 (1985). However, in practice, the frequent silences of the legislature on foreign policy means that the president can, conventionally, set the terms of foreign policy "without legislative parameters," to use Joseph Landau's phrase. Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1970 (2012); *see also* Sitaraman & Wuerth, *supra* note 42, at 1936 ("First, the executive simply knows more about what is happening in other countries . Second, the executive has greater institutional capacity—in terms of staff, materials, and background—to evaluate and consider international issues.") (citations omitted).

47. U.S. CONST. art. II, § 2.

48. U.S. CONST. art. I, § 8, cl. 12–13.

the power "to regulate commerce with foreign nations."[49] For these reasons, the Supreme Court has concluded, despite the power of the presidency in this space, that "[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."[50]

Hence the tangle between the political branches and Corwin's "invitation to struggle" for a role. Sometimes the courts have weighed in on the distribution of power—in the *Steel Seizures* case the Supreme Court invalidated President Truman's wartime seizure of steel mills in Ohio, rejecting Truman's argument that he was empowered to take such action based on "military necessity and on his constitutional powers in foreign relations."[51]

But this kind of intervention is relatively rare, and if the President enjoys a significant advantage in foreign relations power vis-à-vis Congress, he can thank the judiciary. Courts appear "exceedingly deferential" to executive foreign relations decisions[52] in large part because they have "long been uncomfortable in the field of foreign affairs."[53]

The jurisprudence built around the George W. Bush-era antiterrorist policies illustrates the rule by the exceptions. Although the Supreme Court repeatedly struck down the Bush Administration's efforts to structure its detention, treatment, and trial of enemy combatants as it preferred, outside the review of courts or Congress, the Court never did so comfortably, always with the hand-wringing acknowledgment of the "power the United States Constitution envisions for the Executive in its exchanges with other nations," while arguing that the founding document "most assuredly envisions a role for all three branches."[54] While some have claimed that "the executive enjoys substantial discretion in this context—and that courts typically play only a modest role," they play their part in the invitation to struggle.[55]

B. The Ignored Agencies

The classical model rests on a fiction: that the President is the "sole organ" through which the country's foreign affairs are transmitted, a "unitary" voice through which executive policy is formulated.[56]

As with other legal fictions, this vision of the presidency has its conveniences. But it is also decreasingly descriptive of modern bureaucratic administration, including when it comes to the diplomatic independence of the Fed. Relatively little has been said, other than a dismissal of the possibility that agencies might have their own role to play beyond the implementation of policy decisions from the political branches.[57] Courts never adjudicate

49. U.S. CONST. art. I, § 8, cl. 3.

50. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2090 (2015).

51. Sitaraman & Wuerth, *supra* note 42, at 1952.

52. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1122 (2009); *see also* Dalton v. Specter, 511 U.S. 462, 476–77 (1994).

53. Franck & Bob, *supra* note 46, at 952; *see also* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 794 (2011) (criticizing judicial deference).

54. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

55. *See, e.g.*, Derek Jinks & Neal K. Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1236 (2007). In Zivotofsky v. Clinton, for example, the Court held that it could address issues that are not political questions, such as the legal status of Jerusalem. *Zivotofsky*, 566 U.S. at 212 (2012).

56. United States v. Curtiss Wright Export Corp., 299 U.S. 304, 320 (1936).

57. Snodgrass, *supra* note 11, at 208. Some scholars, such as Peter Shane, have minimized the possibility that an agency could have its own foreign policy powers at all: "no one thinks Congress may set up an independent agency to negotiate treaties, direct troops in battle, or make pardon decisions." Peter M. Shane, *Independent*

foreign policy disputes by inquiring whether the agency was too insulated from the control of the political branches.[58] Scholars rarely discuss congressional efforts to rein in regulatory diplomacy.[59]

If anything, the role of agencies in foreign relations law has been understood not as a fact, but as a rubric; some observers suggest that we could treat presidential discretion in foreign relations with the sort of deference agencies enjoy when they appear in court.[60]

Some scholars have recognized that the growth of global contacts between regulated entities have changed the role of agencies, which "adds an additional layer of complexity by implicating the (even longer-standing) struggle between the President and Congress for control of foreign affairs,"[61] not simply because Congress asserts that control *through* independent agencies, but because independent agencies become a source of power unto themselves.[62] But agencies have international affairs officers and collaborate on regulator-to-regulator deals that increasingly define foreign policy. Financial regulatory reform is increasingly driven by regulatory diplomacy, as is food safety, internet regulation, and even the Paris Climate Accord; the appendix to this Article lists the heads of the offices of international affairs for thirteen independent agencies.[63]

It is precisely in this space where the Fed's diplomatic independence becomes so important, interesting, and ignored. The idea that the Fed might have an independent diplomatic policy poses a threat to "the traditionally executive role in foreign policy" by playing more of a role in the realm imagined to be squarely within presidential authority.[64]

That separated power is further empowered in those cases where agencies are self-funded, like the Fed, and so do not need to worry about congressional purse strings.[65] Moreover, although courts do not always intervene in struggles between the executive and the legislature, the Fed, almost uniquely among agencies, has also enjoyed virtual independence from judicial review.[66] These institutional barriers against oversight by the executive, Congress, and the judiciary make the Fed the epitome of a practitioner of regulatory diplomacy.

Policymaking and Presidential Power: A Constitutional Analysis, 57 GEO. WASH. L. REV. 596, 610 (1989).

58. *But see* Nat. Res. Def. Council v. Envtl. Prot. Agency, 464 F.3d 1, 9–10 (D.C. Cir. 2006) ("There is significant debate over the constitutionality of assigning lawmaking functions to international bodies" and interpreting the Clean Air Act and Montreal Protocol as "creating an ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties"). The decision is relatively unique.

59. For example, in one of the rare cases where a scholar does consider agency efforts to regulate foreign conduct, William Dodge observes that scholars and courts assume "that Congress is primarily concerned with domestic conditions," and defer to agencies when they seek to exercise their power to regulate abroad. William S. Dodge, Chevron *Deference and Extraterritorial Regulation*, 95 N.C. L. REV. 911, 925 (2017).

60. *See, e.g.*, Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1198–99 (2007) ("In many cases, the executive should be entitled to *Chevron* deference. . . .").

61. Snodgrass, *supra* note 11, at 243.

62. The canonical work is probably SLAUGHTER, *supra*, note 5 (identifying the way that agencies can collaborate across borders through networks).

63. *See infra* Appendix.

64. David Zaring, *Financial Reform's Internationalism*, 65 EMORY L.J. 1255, 1302 (2016).

65. For more discussion of the Fed's budgetary autonomy, see Peter Conti-Brown, *supra* note 18, at 273–85.

66. In *Raichle v. Fed. Reserve Bank*, the court concluded that "the correction of discount rates by judicial decree seems almost grotesque." Raichle v. Fed. Res. Bank, 34 F.2d 910, 915 (2d Cir. 1929). The Fed has enjoyed very limited judicial review for most of its activities ever since. *See generally* Zaring, *supra* note 18.

C. Conclusion

The classic structure of foreign relations law has its values, but it leaks as well, missing diplomacy and foreign policy made by other government actors. The Fed illustrates the power of one of those other actors.

III. THE ORIGINS OF ONE INDEPENDENT AGENCY'S FOREIGN POLICIES

The Fed as an international actor does not demonstrate merely that regulatory diplomacy exists. How the Fed exercises its independent diplomatic functions demonstrates the structure of those functions. In some cases, the Fed's foreign policy thwarts the executive and Congress. In others, it features close executive collaboration. One way to predict whether the Fed will collaborate with the political branches or act independently from them is to see how it assesses its own interests. However, the Fed's perspective is difficult to predict. The Fed has two conflicting ideological pulses throughout its history: cosmopolitan cooperation with foreign allies, and economic nationalism, regardless of the costs to those same allies.[67] (In Part IV of this paper, we outline a reform that will encourage the agency to be clearer about its priorities.)

In this Part, we draw from the Fed's history to explain how the Fed became the international powerhouse that it is today while balancing its relationship to the rest of the U.S. government on the one hand, and its relationship to foreign allies on the other. In our view, the paths created since the founding of the Fed explain its independent foreign policy today, but a considered examination of its evolution offers nuance—the central bank has sometimes worked with the executive branch and sometimes ignored that branch's interests, sometimes vindicated congressional objectives and occasionally frustrated them.[68]

The Fed is a complicated institution and its history is just as complex—it is an oversimplification, as we will see, to say that the Fed's internationalism concerned its efforts to collaborate with other central banks on holding firm to a gold standard for the convertibility of currency before 1973, and then switched to a collaboration focused on overseeing the increasingly cross-border operations of banks. Our account accordingly includes a broad array of Fed efforts during the 20th and 21st centuries because we think the close look both vindicates the story about an independent, sometimes nationalist, sometimes cosmopolitan institution, and introduces the nuances that only a careful historical description can provide.[69]

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67. We shall see that history suggests that the Fed will take a particularly, but not uniformly, cosmopolitan approach to bank regulation and supervision, while preferring an economic nationalist approach to monetary policy—at least as a first approximation.

68. Others have noticed the importance of this history; as Pierre Verdier has said, "[t]o understand the origins of the current, decentralized system of IFR, one must go back to the post-World War II settlement that created the modern international economic order." Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405, 1409 (2013).

69. In Part III, we look at the foreign affairs as practiced by the contemporary Fed and argue that the themes of its first century explain its foreign relations today. Those less interested than us in the Fed's past may focus on Part IV on the assumption that the themes established in this one have persisted. Both Parts are designed to prove the problem that we solve in Part V.

A. In The Beginning: The Federal Reserve and the International Order, 1913-1930

The Fed was born in a world of intense internationalism, during what scholars have called the second wave of globalization.[70] But it was not created to pursue goals of globalization as a harmonious endeavor, nor was it purely the political compromise between debtors and creditors that it is sometimes portrayed. It was created instead as an apparatus for promoting U.S. interests abroad, at the expense of allies like the United Kingdom. Despite that heavily nationalistic beginning, it also morphed into an institution that would self-consciously pursue international policy at the expense of domestic policy, often to the chagrin of the President himself.

1. The Nationalist Founding of the Fed

At the dawn of the 20th century, the international economic system in the West was dominated by Britain's ability to leverage the pound sterling as an international reserve currency, or the default currency for much of global finance. This ubiquitous demand for the British pound occurred not only because the British Empire covered a quarter of the globe (and roughly the same of the human population).[71] It was also true because those who had nothing to do with the Empire still used its currency as a contractual default, channeling business eventually to the City of London and its many bankers. This default would come to be called the "exorbitant privilege" of leading an international order.[72] At the time of the Fed's creation, the British Empire enjoyed the privilege without peer.

The bankers within London were able to route an extraordinary quantity of trade through London—even when such routes made little geographic sense—because contracts required settlement in pounds and there was little competition from any other currency.[73]

The U.S. certainly couldn't provide it. In Victorian essayist Walter Bagehot's vivid phrase, the American conception of banking and currency was irredeemable. "There is no help for us in the American system," he wrote when discussing reforms to the British system. "[I]ts very essence and principle are faulty."[74] Bagehot wasn't idiosyncratic in his view: the late 19th century United States did not have a financial system that lent itself to international participation, let alone dominance.

If the U.S. lacked a credible alternative to the British juggernaut, it was not for lack of economic might. At the time of the Fed's legislative founding, the United States stood, economically, at the cusp of global economic integration, and was reaching increasingly toward its center. Table 1 summarizes the statistical picture in the late 19th and early 20th centuries.

Table 1: National export share by area, 1872, 1899, 1913 (percent)

70. *See generally* HAROLD JAMES, THE END OF GLOBALIZATION: LESSONS FROM THE GREAT DEPRESSION (2002).

71. Ronen Palan, *International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics*, 11 THEORETICAL INQUIRIES L. 149, 155 (2010).

72. For an overview of both history and policy regarding reserve currencies, see BARRY EICHENGREEN, EXORBITANT PRIVILEGE: THE RISE AND FALL OF THE DOLLAR AND THE FUTURE OF THE INTERNATIONAL MONETARY SYSTEM (2011).

73. *See* JOHN DARWIN, UNFINISHED EMPIRE: THE GLOBAL EXPANSION OF BRITAIN (2012);.For the benefits of the currency to participants in the British Empire, see Niall Ferguson & Moritz Schularick, *The Empire Effect: The Determinants of Country Risk in the First Age of Globalization, 1880–1913*, 66 J. ECON. HIST. 283 (2006).

74. WALTER BAGEHOT, LOMBARD STREET: A DESCRIPTION OF THE MONEY MARKET 334 (1897).

Share of Global Exports by Country	***1872***	***1899***	***1913***
United Kingdom	*35.8*	*27.6*	*22.8*
Germany	*15.6*	*17.2*	*21.4*
Other Western Europe	*13.5*	*15.6*	*14.9*
U.S.	*14.1*	*21*	*22.1*
Canada	--	*2.8*	*3.8*
Japan	--	*3*	*3.5*

Source: J. LAWRENCE BROZ, THE INTERNATIONAL ORIGINS OF THE FEDERAL RESERVE SYSTEM 102 (1997).

The British may have had the upper hand on currency, but they were dwindling in their share of global trade, to the benefit of the U.S. (and, to a slightly lesser extent, the newly unified imperial Germany).[75]

This split power—economic might on the one hand, an international financial backwater on the other—was the context of the Fed's beginning and part of the challenge that the Fed's early sponsors sought to overcome.[76] Historians have largely viewed the creation of the Federal Reserve System as a kind of domestic apotheosis of the Progressive Era conceit of government by technocracy, whether to enrich the few or to guide the many.[77] But there is reason to discount this focus.[78] As political scientist Lawrence Broz argues, while domestic concerns were important, what was *new* about the Federal Reserve Act were the kinds of features that would be of most interest on the international stage, not the domestic one.[79] And the international goal was to make the U.S. banking system safe for international ambitions. It was nonetheless a nationalistic effort toward a nationalist end.

75. J. LAWRENCE BROZ, THE INTERNATIONAL ORIGINS OF THE FEDERAL RESERVE SYSTEM 102 (1997).

76. For an engaging narrative of this legislative moment, see ROGER LOWENSTEIN, AMERICA'S BANK: THE EPIC STRUGGLE TO CREATE THE FEDERAL RESERVE (2015).

77. For arguments that the Federal Reserve Act represents basically a business-oriented conservatism, see ROBERT H. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT (1962) and GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916 (1963). For a similar argument from a Marxian lens of class consciousness among bankers and capitalists, see JAMES LIVINGSTON, ORIGINS OF THE FEDERAL RESERVE SYSTEM: MONEY, CLASS, AND CORPORATE CAPITALISM, 1890-1913 (1986). There's a counter-argument, though, that farmers and populists—not bankers and businessmen—had more to say about the advent of the Federal Reserve than these previous scholars presumed. *See* ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877-1917 (1999). The most recent account of these origins emphasizes the international dynamics, but also essentially embraces the idea that the Fed's legislative founding reflected the strong trends in domestic politics. *See* LOWENSTEIN, *supra* note 76.

78. *See* ELMUS WICKER, BANKING PANICS OF THE GILDED AGE (2000). For a good treatment of the Panic of 1907, see ROBERT F. BRUNER & SEAN D. CARR, THE PANIC OF 1907: LESSONS LEARNED FROM THE MARKET'S PERFECT STORM (2009).

79. BROZ, *supra* note 75. Many of these ideas came from Paul Warburg, who wanted the American central bank to encompass three features of modern central banking. He sought to impose a "uniform national currency" backed not by government bonds, as was the case with the greenbacks under the National Banking System, but by those backed "by gold and commercial paper." CHERNOW, *supra* note 30, at 130.

This overview of the Fed's origins underscores an important reality: the foreign policy of Congress came into expression not merely through tussling with the presidential administration, but through the creation of a new kind of entity that blended public and private functions whose purpose was to pursue American policies abroad in ways that it alone would determine. The idea that the Fed would serve an international purpose—including with an independent international orientation—was not accidental to its congressional creation. It was a congressional focus.

2. The Fed's First International Turn

After the war, with its status secured, Fed officials worked not against foreign interests, but closely with them including at the expense of national interests. The iconic example of Fed diplomatic independence from the presidency came during the 1920s. Benjamin Strong, the original Governor of the Federal Reserve Bank of New York, saw international monetary stability through the gold standard as the goal of his administration. Working with Montagu Norman, the Governor of the Bank of England, and other central bankers, Strong sought to accommodate the monetary and credit demands of other countries—even if that meant a disadvantage to domestic U.S. political concerns.[80] There were multiple aspects of this cooperation, but a large part of it came through the informal system of cooperation based on personal relationships between central bankers led to the restoration of a variation on the pre-war gold standard.[81] Elements of this kind of association by personality—where national interests sometimes took the backseat to international commitments made between friends—would come to dominate the period of 1919–1930.[82]

In steadfast opposition: Herbert Hoover, first as President Coolidge's Secretary of Commerce and eventually as President himself (and then in opposition to Strong's successor, George Harrison). Hoover was not always consistent on the substance of his critique of the Federal Reserve, but he was consistent in his opposition. As he recalls his posture toward the Fed in his memoir,

> The Federal Reserve Board, during 1925, had undertaken credit expansion by open market operations and by lowering discount rates. It had been led into this action by Governor Benjamin Strong of the New York Federal Reserve Bank upon the urging of Montagu Norman, head of the Bank of England, Hjalmar Schacht of the Reichsbank, and Charles Rist of the Bank of France, who came to New York and Washington to press this expansion. It was direct inflation.[83]

Hoover, both at the time and in his later memoirs, saw the Fed as one of most important antagonists, precisely because of the way it managed its international policies independent of the Presidency.

We see a Federal Reserve designed to take congressional authority and pursue an international banking policy all its own, through public-private partnerships quite separate

80. *See* BARRY EICHENGREEN, GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919-1939 (1992); LIAQUAT AHAMED, LORDS OF FINANCE: THE BANKERS WHO BROKE THE WORLD (2009).

81. AHAMED, *supra* note 80.

82. *See* LESTER V. CHANDLER, BENJAMIN STRONG: CENTRAL BANKER (1958).

83. 3 HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE GREAT DEPRESSION 1929-1941 3, 7 (1952).

from the rest of the administrative state.

It is worth noting, by illustration, that Benjamin Strong was not a public appointment at the Fed, but the private banker meant to represent private banking interests. The Federal Reserve Bank, then and (to a lesser extent) now, is not an agency of the government, but something else besides.[84] The very design of the Federal Reserve, to include that opaque collaboration between public and private interests, illustrates more of the insulation from the political process that Congress gave it. The way that Benjamin Strong took that authority to move against the Administration illustrates how independent that policy became.

B. The Fed, the Bank for International Settlements, and the Bretton Woods System

The cooperation launched informally between the quasi-private figures at the Bank of England and Federal Reserve Bank of New York reached an institutional climax in the aftermath of the Great Depression and World War II. Central banks organized what they called the Bank for International Settlements (BIS), located in neutral Basel, Switzerland—a bank for central banks, and one owned by them, and not by their governments.[85] The creation of institutionalized mechanisms for cooperation among central banks underscores the cosmopolitan outlook of the Fed and its foreign counterparts.[86]

Although the Federal Reserve Bank of New York was a charter member of the BIS, the U.S. Congress was not: it wasn't statute that bound the U.S. to the BIS, but the Fed's own independent foreign affairs policies.[87]

Initially, the Bank's charge was to facilitate reparations payments from Germany to the former Allies, but this purpose didn't last long. Within a few years, the Allies instituted a payment moratorium, designed to ease the burden on Germany.

What the BIS left behind is an institutionalized forum for central bank participation that has continued to the present. The BIS has proven itself to be a remarkable adapter to changing international systems.[88] Given that its stated purpose became moot almost at inception, the BIS adapted to facilitate cooperation among central banks—including those states at war. The most infamous example of this included the laundering of gold

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84. *See* HOWARD HACKLEY, THE STATUS OF THE FEDERAL RESERVE SYSTEM IN THE FEDERAL GOVERNMENT 31 (1972) (unpublished manuscript) (on file with authors).

85. For a discussion of the history of the organization, see Carl Felsenfeld & Genci Bilali, *The Role of the Bank for International Settlements in Shaping the World Financial System*, 25 U. PA. J. INT'L ECON. L. 945, 956 (2004) ("In all, some eighty-six percent of BIS issued share capital is registered in the names of central banks; the remaining fourteen percent is held by private shareholders.").

86. BANK INT'L SETTLEMENTS, CONSTITUENT CHARTER OF THE BANK FOR INTERNATIONAL SETTLEMENTS 3–4 (1930), https://www.bis.org/about/charter-en.pdf (incorporating the Bank, and noting that prominent American banks "have undertaken to found the said Bank and have guaranteed or arranged for the guarantee of the subscription of its authorised capital amounting to five hundred million Swiss francs equal to 145,161,290.32 grammes fine gold, divided into 200,000 shares"); BANK INT'L SETTLEMENTS, STATUTES OF THE BANK FOR INTERNATIONAL SETTLEMENTS 8–13 (1930 amended 2016), https://www.bis.org/about/statutes-en.pdf (Articles 4-18A set out the Bank's capital structure); *see also* BANK INT'L SETTLEMENTS, CONVENTION RESPECTING THE BANK FOR INTERNATIONAL SETTLEMENTS (1930), https://www.bis.org/about/convention-en.pdf.

87. See generally, GIANNI TONIOLO, CENTRAL BANK COOPERATION AT THE BANK FOR INTERNATIONAL SETTLEMENTS, 1930–1973 (2005).

88. Carl Felsenfeld & Genci Bilali, *supra* note 85, at 966 (2004) ("BIS emerged over time as a major international organization charged with the task of increasing the efficiency of regulatory and supervisory activities for improvement of the international banking system.").

confiscated from Czech Jews by invading German Nazis, an era of BIS history that the institution has shown remarkable transparency in documenting.[89] But the very fact that the BIS could be seen as an institutionalized world apart from nations bent on each other's complete annihilation tells us something about the scope and strength of central banking foreign policies. When FDR's America and Churchill's Britain were trying to destroy Hitler's Germany, how remarkable that the Federal Reserve, the Bank of England, and the Reichsbank worked closely together to govern the BIS.

After World War II, the Norwegians and other European delegations to the conference wanted to liquidate the BIS—it had arguably never served a useful purpose, and what it did accomplish since its inception 15 years before had effectively been to launder money for the Nazis. Indeed, the status of the BIS in the post-war order was almost enough to derail the entire conference.[90] Keynes seemed to want the Bank liquidated, but the rest of the British delegation didn't agree with him; some of the U.S. wanted instead an insistence that membership in the BIS would preclude participation in the new International Monetary Fund. Ultimately, the limp compromise only called for the BIS to be "liquidated at the earliest possible moment."[91] That moment, 70 years later, has still not come.

Under the new system, the new purpose of the BIS—a bank owned by central banks, and never ratified by a treaty signed by the political branches—was to facilitate international financial cooperation. The IMF and World Bank also facilitated this cooperation, but it was the BIS that would keep central bankers interacting with one another and that would eventually house a more institutionalized mechanism of cooperation over the supervision of banks survived.

C. The Fed-Treasury Accord

Perhaps the most important period of the Fed asserting control of a significant piece of the foreign policy apparatus came in the immediate aftermath of World War II. It is a principle example of the way that the Fed's regulatory diplomacy could conflict with the policies of the rest of the executive branch. Soon after the Bretton Woods conference, "there was almost complete dissensus" between the Fed and the U.S. Treasury on core matters of Fed policymaking, including the setting of interest rates.[92] As former Fed Chair Ben Bernanke described the intersection of Fed policy and foreign affairs, after World War II "the Fed sought to resume an independent monetary policy, fearing the inflationary consequences of continued political control, but the Treasury was still intent on containing the cost of servicing the debt," in light of the country's geopolitical obligations created by pending participation in anti-communist conflicts such as the Korean War.[93]

The Fed's insistence on its monetary policy independence challenged Truman's ability to wage war on Chinese communists on the Korean peninsula. As contemporaneous press accounts reported, there was "'open speculation' as to whether the Federal Reserve

89. *See* generally TONIOLO, *supra* note 87.

90. BENN STEIL, THE BATTLE OF BRETTON WOODS: JOHN MAYNARD KEYNES, HARRY DEXTER WHITE, AND THE MAKING OF A NEW WORLD ORDER 226–28 (2013).

91. *Id.*

92. PETER A. JOHNSON, THE GOVERNMENT OF MONEY: MONETARISM IN GERMANY AND THE UNITED STATES 136–37 (1998).

93. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks at the Institute for Monetary and Economic Studies International Conference (May 26, 2010), https://www.federalreserve.gov/newsevents/speech/bernanke20100924a.pdf.

would continue to support the long-term government bonds" as it had steadfastly done in World War II.[94]

The point is that power to wage war and conduct military policy was at the core of the President's and Congress's constitutional authority. Truman tried to persuade the Fed that "the Federal Reserve Board should make it perfectly plain . . . to the New York Bankers that the peg is stabilized," as the Fed put it at its next meeting.[95] The alternative, the president warned, would be for the board to "allow the bottom to drop from under our securities." Truman concluded with an ominous warning: "If that happens that is exactly what Mr. Stalin wants."[96]

A war of public speeches followed. Finally, Truman had had enough and summoned—for the first and last time in Fed history—the Federal Open Market Committee to the Oval Office for a presidential lecture. Immediately thereafter, he issued a press release that presented the (false) view that "[t]he Federal Reserve Board has pledged its support to President Truman," and "the market for government securities will be stabilized at present levels and . . . these levels will be maintained during the present emergency," meaning the Korean conflict.[97]

At the time, it was clear that Fed members viewed the resistance to the President in this foreign policy maneuver as key to the Fed's public legitimacy. "We should not think that we are going to work this out with the Treasury," Governor Mariner Eccles said during the February 1951 FOMC meeting.[98] "[W]e have been trying to do so more than a year and have not worked anything out. . . . The public today . . . think[s] this is nothing but a feud for power between the Treasury and the Federal Reserve. It is no such thing. We have not only the power[,] but the responsibility to do a certain job."[99]

The result was what has come to be called the Fed-Treasury Accord of 1951. Commonly seen as a pronouncement of Fed independence, this is a modern construction—at the time, no one could say for certain what the Accord meant. Instead, it was, in its own words, an announcement that *some* "accord" had been reached between Treasury and the Fed regarding "their common purpose to assure the successful financing of the Government's requirements and, at the same time, [the need] to minimize monetization of the public debt."[100]

When the Fed insisted on monetary policy independence after the accord, Truman

94. JONATHAN KIRSHNER, APPEASING BANKERS: FINANCIAL CAUTION ON THE ROAD TO WAR 144 (2007). This Part is drawn from CONTI-BROWN, *supra* note 36, pages 34–37. For more on the chronology of the Fed-Treasury Accord, see MARRINER S. ECCLES, BECKONING FRONTIER (1951); A. JEROME CLIFFORD, THE INDEPENDENCE OF THE FEDERAL RESERVE SYSTEM (1965); DONALD F. KETTL, LEADERSHIP AT THE FED (1988); and 1 ALLAN MELTZER, A HISTORY OF THE FEDERAL RESERVE SYSTEM (2003). For a more detailed account, see Robert L. Hetzel & Ralph F. Leach, *The Treasury-Fed Accord: A New Narrative Account*, 87 FED. RES. BANK RICHMOND ECON. Q. 33 (2001).

95. FED. RES. BD, MEETING OF THE FEDERAL OPEN MARKET COMMITTEE MEETING MINUTES 9–12 (Jan. 31, 1951), https://www.richmondfed.org/-/media/richmondfedorg/publications/research/special_reports/treasury_fed_accord/historical_documents/pdf/fomc_minutes_01_31_1951_10am.pdf (quoting note from the President on Dec. 4).

96. *Id.*

97. *Id.*

98. FED. RESERVE BD, MEETING OF THE FEDERAL OPEN MARKET COMMITTEE MEETING MINUTES 18 (Feb. 6–8, 1951), https://fraser.stlouisfed.org/files/docs/historical/FOMC/meetingdocuments/19510208Minutesv.pdf.

99. *Id.*

100. *Treasury and Federal Reserve Statements*, 37 FED. RES. BULL. 267, 267 (1951), https://fraser.stlouisfed.org/title/62/item/21195.

called its chair, William McChesney Martin, a "traitor" to the cause of military strategy in Korea.[101]

The Fed's decision to move apart from the President's desire to wage war and control the public fisc represents an example of the Fed's assertion of independence to pursue policies in direct and immediate conflict with the President's ability to pursue foreign affairs at a time when those affairs were of primary concern.

D. The Internationalization of Bank Supervision

The Fed-Treasury Accord is rightly viewed as one of the critical "foundings" of the Fed and a guarantee of central bank independence in setting monetary policy.[102] Presidents like Truman could reassure themselves, however, that the center of monetary policy had been established by the heads of state and finance ministers who participated in the Bretton Woods Conference, at which most countries agreed to peg their currencies to the dollar, and the United States agreed to peg the dollar to gold.[103] The paradigm did not afford the Fed much discretion in raising and lowering interest rates, given the peg. The creaky system dissolved in 1971 when' the United States left the system, letting its central bank set its own interest rates; by 1973, all member countries had elected to let their currencies float.[104]

But if the end of the Bretton Woods system meant the resurgence of central banks as the primary arm of national and international monetary policy, even against the president's view of military and national security necessity, another development at the same time lifted their role in regulatory policy. During the 1970s and 1980s, the Fed agreed with its foreign counterparts to coordinate much of the fundamentals of bank supervision, building on a series of informal meetings that had been held at the BIS in Basel, beginning in 1963.[105] If the Fed-Treasury dispute in 1951 represented the Fed asserting that only central banks should be in charge of monetary policy—whatever the consequences for national security—the creation of the Basel Committee on Bank Supervision represented a claim that these institutions could best perform the regulatory parts of their jobs in concert.

Bank supervision is not now and has almost never been the exclusive purview of central banks, whether in the United States or abroad.[106] But through the Basel Committee,

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101. As quoted in ROBERT P. BREMNER, CHAIRMAN OF THE FED: WILLIAM MCCHESNEY MARTIN, JR. AND THE CREATION OF THE MODERN AMERICAN FINANCIAL SYSTEM 91 (2004).

102. Peter Conti-Brown, *Ulysses and the Punch Bowl: The Governance, Accountability, and Independence of the Federal Reserve*, 24 GEO. MASON L. REV. 617, 627 (2017) (discussing the "'three foundings' of the Federal Reserve: the statutory beginning in 1913, the Fed's reformulation in 1935, and the Fed-Treasury Accord of 1951").

103. *See* Michael D. Bordo, *The Operation and Demise of the Bretton Woods System; 1958 to 1971* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 23189, 2017), http://www.nber.org/papers/w23189 (describing how the dollar and gold peg worked).

104. For a brief discussion of this history, see Arthur E. Wilmarth, Jr., *The Road to Repeal of the Glass-Steagall Act*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 441, 548 (2017).

105. Alan Greenspan, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks at Opening of HM Treasury Building, London (Sept. 25, 2002), http://www.bis.org/review/r020925a.pdf.

106. *See generally* ELIZABETH F. BROWN, VOLCKER ALLIANCE, CONSOLIDATED FINANCIAL REGULATION: SIX NATIONAL CASE STUDIES AND THE EXPERIENCE OF THE EUROPEAN UNION, https://www.volckeralliance.org/sites/default/files/attachments/Background%20Paper%202_Consolidated%20Financial%20Regulation%20%20Six%20National%20Case%20Studies%20and%20the%20Experience%20of%20the%20European%20Union.pdf.

central banks negotiated an international framework of enormous, decisive importance to the way that national governments think about this basic feature of government-market interaction.[107]

Participation in these international efforts to coordinate bank supervision also exemplify the Fed at its most cosmopolitan, as it has agreed to conduct the rules it uses to supervise the most important American banks, including their capital rules, in the manner set by an international process that it influences, but does not control. It began participating in Basel of its own accord, without direction from the executive or supportive legislation in Congress. From there, the Fed pushed for internationally developed capital rules, and, later, for an international form of procedure to be followed in promulgating those rules that resembles the way American administrative law works. The former shows the cosmopolitan side of the Fed when it comes to banking supervision; the latter shows how even in such a context, the Fed is capable of insisting on doing things the American way.

Prompted by two medium-sized, but broadly consequential, international bank failures in 1974, the Fed, the other central bank governors of the G-10, Luxembourg, and Switzerland established the Basel Committee.[108] The founding mandate of the committee was identified in a press communiqué from the central bank governors issued through the BIS on February 12, 1975, a reflection of the exceedingly informal, and delegated, nature of the institution. To this day, the BIS acts as the committee's secretariat; the committee itself does not have a staff, and barely has a budget.[109] It is, at best, a kind of institutionalized meeting that makes ample use of the resources of the home central banks and the coordination function of the Bank for International Settlements.

As with the BIS, the Fed created Basel without congressional authorization to do so, though that authorization eventually came.[110] There is little evidence that in its secretive early years that the executive branch had much information at all about the policy formulation process in Basel; the Treasury Secretary has not had an opportunity to join the committee or to participate in its meetings. It was strictly a central banker affair.[111]

Basel began with a simple division of labor between the home and host countries of multinational banks, and for a decade attempted little more than that. But allocation of supervisory responsibilities was not enough for the Fed, which has supported the committee's continued expansion quite devotedly. The Fed, as the *Financial Times* has

107. Why Basel became so important has been the subject of much debate. For an overview, see Verdier, *supra* note 68, at 1422 (providing this overview, and arguing that it "is better explained by a combination of historical path dependence and political economy, . . . [and] the respective role and motivations of three dominant actors . . . specialized regulators, financial firms, and great power governments").

108. In this they have been characterized as "reluctant diplomats," acting internationally after the failure of purely domestic regulation to solve problems. DAVID ANDREW SINGER, REGULATING CAPITAL: SETTING STANDARDS FOR THE INTERNATIONAL FINANCIAL SYSTEM ix (2007).

109. David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 557 (2005) ("The Committee does not even have its own staff . . . .").

110. International Lending Supervision Act of 1983, 12 U.S.C. § 3901(b) (1983) ("The Federal banking agencies shall consult with the banking supervisory authorities of other countries to reach understandings aimed at achieving the adoption of effective and consistent supervisory policies and practices with respect to international lending.").

111. The Fed was the first American member of the committee; it has since been joined by the Federal Reserve Bank of New York, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. *Basel Committee Membership*, BANK INT'L SETTLEMENTS, https://www.bis.org/bcbs/membership.htm (last updated Dec. 30, 2016).

described it, has been Basel's "most vocal proponent."[112]

As the committee historian and former Bank of England economist Sir Charles Goodhart has explained, getting Basel to promulgate global capital adequacy rules applicable to every bank depended upon the Fed's encouragement. The chair of the Fed during the early 1980s, Paul Volcker, personally lobbied the chair of the Bank of England to support the creation of capital rules for all of the world's major banks.[113] Ever since, the Fed has spent time and resources revising the capital rules to keep up with the fast evolving banks subject to them; Greenspan described this as a necessary process for "those of us associated with the Basel exercise."[114]

The Basel Committee describes its goals as designed to "enhance financial stability by improving the quality of banking supervision worldwide, and to serve as a forum for regular cooperation between its member countries on banking supervisory matters."[115] The Committee described its capital framework as "intended to evolve over time."[116]

As the Basel Committee's importance in setting capital standards has grown, so has its transparency. The committee now practices a form of notice and comment, maintains a website, allows interested parties to attend some of its annual meetings and otherwise. This relative growth in transparency has also been encouraged by the Fed.[117]

But even as the Fed has supported the creation of Basel, and have made it more procedurally regular, it has had to accept that Basel will develop rules that might not be entirely to America's taste. But the way the accord developed in the 1990s occasioned vociferous opposition from America's smaller bankers, who viewed the internal risk models that Basel began to apply as overly expensive and complicated.[118] The criticism was such that the Fed never entirely implemented that requirement against small banks.[119]

Basel's requirements have been blamed in some quarters as a contributor to the financial crisis, particularly because of its overly generous treatment of the stability of housing assets, but the Fed has doubled down on international financial regulation in the

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112. Claire Jones, *The Basel Committee on Banking Supervision*, FIN. TIMES (Oct. 23, 2011), https://www.ft.com/content/3e5af5f6-fb51-11e0-8df6-00144feab49a.

113. *Id.* As Goodhart has explained, "Basel I had also floundered until a dinner between Paul Volcker, then Federal Reserve chairman, and Robin Leigh-Pemberton, then governor of the Bank of England."

114. Alan Greenspan, Chairman,Bd. of Governors of the Fed. Reserve Sys., The Evolution of Bank Supervision, Remarks at the American Bankers Association (Oct. 11, 1999), https://www.federalreserve.gov/boarddocs/speeches/1999/19991011.htm (discussing the Fed's position on the second iteration of the Basel capital accord) .

115. *History of the Basel Committee*, BIS, https://www.bis.org/bcbs/history.htm (last updated Apr. 14, 2018).

116. *Id.*

117. David Zaring, *Legal Obligation in International Law and International Finance*, 48 CORNELL INT'L L.J. 175, 207—08 (2015).

118. *Basel II: Capital Changes in the U.S. Banking System and the Results of the Impact Study Before the Subcomm. on Fin. Insts. and Consumer Credit and the Subcomm. on Domestic and Int'l Monetary Pol'y, Trade and Tech. of the H. Fin. Serv. Comm.*, 109th Cong. (2005) (testimony of William J. Small on behalf of America's Community Bankers), https://www.scribd.com/document/333877433/HOUSE-HEARING-109TH-CONGRESS-BASEL-II-CAPITAL-CHANGES-IN-THE-U-S-BANKING-SYSTEM-AND-THE-RESULTS-OF-THE-IMPACT-STUDY.

119. Press Release, Fed. Res. Bd. Governors, Bd. Approves Final Rules to Implement Basel II Risk-Based Capital Framework (Nov. 2, 2007) ("Basel II would be mandatory for large, internationally active banking organizations . . . and optional for others"), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20071102a.htm.

wake of the downturn. Its cosmopolitanism has, once again, created rules that have not been to the liking of every constituency in American banking. Jamie Dimon, chief executive of JPMorgan Chase, considers the current version of the Basel capital rules "blatantly anti-American," in part because he believes that Basel's uniform rules will place banks like his at a competitive disadvantage to their European counterparts.[120]

The turn to cosmopolitan banking supervisory standards is in many ways a rational response to the problems posed by the globalization of finance, and an effort by American banks to encourage their regulators to ensure that their foreign competitors did not enjoy regulatory advantages over them.[121] Former Fed Chair Alan Greenspan seems to embrace this view: "The Federal Reserve's close relationship with the Bank of England and other major central banks," he argued, "has been enhanced through [these] periodic meetings. . . ."[122]

In an era of economic nationalism, the Fed's cosmopolitan embrace of the Basel Committee—despite the legislative check on the adoption of the principles forged in that forum—is seen by some legislators as a step too far.[123] The complaints from bankers and congressmen illustrate the independence of the Fed's foreign policy. Its regulatory cosmopolitanism has, in some cases, taken the political branches by surprise.

E. The Fed's Response to Foreign Financial Crises

So far, the history recounted above focuses on the Fed's autonomy in pursuing its foreign policy goals. But it has not always worked separately from the Administration. The Mexican and East Asian financial crises of the 1980s and 1990s illustrate a fundamentally different kind of international cooperation than the institutionalized Basel Committee or Bank for International Settlements, including collaboration *with* the executive, not against it.

To be sure, the Fed sometimes complicates the foreign relations work of the rest of the executive branch, even when it comes to a foreign financial crisis. The Treasury solved the sensitive foreign relations problems created by the Fed's focus on domestic inflation in the early 1980s by creating a novel type of sovereign bond, guaranteed by the International Monetary Fund and collateralized with Treasury debt.[124] It took some scrambling. The genesis of what would come to be known as the "Brady Bond," named after Treasury Secretary Nicholas Brady, came because of the tightening of monetary policy in the United States by Fed Chair Paul Volcker, embittering Latin American allies who had depended on the low interest rates the Fed was set on raising to roll over their sovereign debt.[125] The

120. Jones, *supra* note 112.

121. We omit the Plaza Accords, another example of regulatory diplomacy, about which see Kahn & Meade, *supra* note 19.

122. Greenspan, *supra* note 105.

123. Letter from McHenry, *supra* note 21.

124. As Steven Schwarcz has explained, the bond scheme was designed to "encourage banks to exchange their debt claims for lower amount (usually below-market interest), 30-year U.S. dollar-denominated bonds ("Brady Bonds") issued by the debtor-State." Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 1004 n.280 (2000); *see also* Rory Macmillan, *The Next Sovereign Debt Crisis*, 31 STAN. J. INT'L L. 305, 311–15 (1995) (providing a nice overview of the way that Brady bonds worked).

125. *See* William Poole, *President's Message: Volcker's Handling of the Great Inflation Taught Us Much*, FED. RES. BANK ST. LOUIS (Jan. 2005), https://www.stlouisfed.org/~/media/files/pdfs/publications/

Fed was not a helpful partner in that case. It prioritized American interests first, and cared little for the effects on allies. In responding to other foreign financial crises, however, it has been more willing to coordinate.

During the Mexican peso crisis in the mid-1990s, called by some the "first crisis of the 21st century," many feared that Mexico's default on its government debt would not only wreak havoc on its own economy, but also affect its major trading partners—including the United States.[126]

The standard narrative of foreign affairs predicted what followed. The President (here, the Clinton Administration, led by Treasury Secretary Robert Rubin and Deputy Treasury Secretary Larry Summers) saw a bubbling point of drama in international affairs and formulated a plan. The plan required legal authority that they lacked, so they turned to Congress. In this case, the Administration wanted to help Mexico avoid default, and needed $40 billion to rescue (or, as its critics would have had it, "bail out") the peso. It submitted proposed legislation to the Congress to accomplish this task. Up until this point in the narrative, the President and the Congress were engaged in the "invitation to struggle" over the levers of foreign policy.[127]

And struggle they did. Congress balked and refused to budge.[128] Clinton's team at the Treasury—including Summers and Deputy Assistant Secretary for International Monetary and Financial Policy, Timothy Geithner—sought to figure out a way to use authority already granted to them to stave off the crisis.[129] The best they could do was use what is called the Exchange Stabilization Fund, a pot of money given to the Treasury to influence exchange rates without tapping directly into the central bank's money supply.[130]

Using ambiguous legal authority in response to an obdurate Congress isn't remarkable—the judiciary can always serve as the referee through such assertions of authority. But even the Exchange Stabilization Fund wasn't enough to provide what the Mexicans needed, and Treasury's first appeal to Congress for more funds failed. Here is where the Fed came in: Edwin Truman, the economist in charge of the Fed's Division of International Finance, engineered a way for Mexico to exchange pesos for dollars through an "international swap facility" between the Fed and the Bank of Mexico, an enduring policy move that, as we see below, had implications for the way the Fed would handle the financial crisis of 2008.[131] Through the swap facility, Mexico could get access to dollars

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pub_assets/pdf/re/2005/a/pres_mes.pdf ("Volcker, in office only two months, took the radical step of switching Fed policy from targeting interest rates to targeting the money supply. The days of 'easy credit' turned into the days of 'very expensive credit.' The prime lending rate exceeded 21 percent.").

126. This section is adapted from CONTI-BROWN, *supra* note 36, at 88. For more on the history of the Fed's engagement with the world on this front, *see* Truman, *supra* note 19, at 14–19.

127. TIMOTHY F. GEITHNER, STRESS TEST: REFLECTIONS ON FINANCIAL CRISES 46–48 (2014).

128. C. Randall Henning, *Chapter 6: The Mexican Peso Crisis of 1995 and Its Aftermath*, *in* THE EXCHANGE STABILIZATION FUND: SLUSH MONEY OR WAR CHEST? 62–64 (1999), https://piie.com/publications/chapters_preview/43/6iie2717.pdf.

129. *See generally* Nelson D. Schwartz, *Watching the Fed, and Remembering the Tequila Crisis*, N.Y. TIMES (Sept. 18, 2015), https://www.nytimes.com/2015/09/19/business/economy/if-rates-rise-global-markets-fear-effects-of-any-aftershocks.html.

130. HENNING, *supra* note 128, at 64–66; *Exchange Stabilization Fund*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/international/exchange-stabilization-fund (last visited Feb. 10, 2019).

131. HENNING, *supra* note 128, at 64 n.4. For a review of the implications of the crisis by Truman himself, see Edwin Truman, *The Mexican Peso Crisis: Implications for International Finance*, FED. RES. BULL. (1996), https://www.federalreserve.gov/pubs/bulletin/1996/396lead.pdf.

exclusively from the Federal Reserve that it could not secure in the private markets, or at least not at such favorable rates. The Fed's policy innovation had allowed the Clinton Treasury and the central bank to overcome the lack of congressional authorization without putting the administration's fingerprints too heavily on the proposal.[132] The Fed, needless to say, worked very closely with the administration at every turn of the Mexican peso crisis, if not Congress. But the crisis illustrates how the Fed's participation in foreign affairs is not just about external matters, but the relations between the co-equal branches struggling over who should have the last word in foreign affairs.

The financial crises following soon thereafter in Southeast Asia saw the Fed's similar participation in a policy and diplomatic role. As the currencies, financial systems, and economies of the developing Asian countries such as Indonesia and Thailand began to teeter, they threatened to bring down the rest of the region. The Clinton Treasury and the Federal Reserve sprang into action, handling much of the work of selling their plans to the governments, including heads of state of the affected countries.[133] It was high-stakes economic diplomacy and not an exaggeration to say that Truman, a senior economist at the central bank—ostensibly independent from such political considerations—acted on the country's behalf as one of its chief diplomats.[134]

These efforts paid off. First Mexico, then the Asian economies, were spared. *Time* feted the Secretary of the Treasury, Robert Rubin; his deputy, Larry Summers; and, with placements of prominence, Fed Chair Alan Greenspan as the "Committee to Save the World."[135] U.S. foreign policy in these tumultuous days came largely from the Fed.

The international crises of the 1980s and 1990s reveal two aspects of the Fed's foreign policy. First, that the Fed has ample expertise, connections, resources, and history interacting with counterparts in the rest of the world to accomplish its goals, whether bailing out the Mexican peso or stabilizing the East Asian financial system. Second, we see the Fed working not only with the rest of the Administration to accomplish common goals, but also running interference in the battle for supremacy between an Administration eager to act and a Congress eager to prevent action.

IV. CONTEMPORARY AGENCY DIPLOMACY

As we have seen, the Fed's first century established its independence as a foreign relations actor. It was founded in part to compete with its foreign counterparts, but it quickly established a cosmopolitan approach to central banking cooperation that led to coordination over the way that banks across the globe are supervised. It also established a

132. PAUL BLUSTEIN, THE CHASTENING: INSIDE THE CRISIS THAT ROCKED THE GLOBAL FINANCIAL SYSTEM AND HUMBLED THE IMF 187–93 (2003); Truman, *supra* note 131, at 16–19.

133. Truman traveled to South Korea to determine the extent of their exposure. When Truman realized "the hopelessness of Korea's position, he wondered why the country's new finance ministers had agreed to take on the portfolio." SEBASTIAN MALLABY, THE MAN WHO KNEW: THE LIFE AND TIMES OF ALAN GREENSPAN 517–18 (2016). The answer, from one central banker to another: because the South Korean government simply didn't know.

134. His job titles during these talks stayed the same: staff economist for the FOMC and director of the Board of Governors' Division of International Finance. Appropriately, in December 1998—after the events described here—Bill Clinton appointed Truman to the political position of Assistant Secretary of the U.S. Treasury for International Affairs. *See* GEITHNER, *supra* note 127, at 274.

135. *Cover Search*, *supra* note 28; Joshua Cooper Ramo, *The Three Marketeers*, TIME (Feb. 15, 1999), http://content.time.com/time/world/article/0,8599,2054093,00.html.

distinctive relationship with the executive branch that occasionally led to rifts over foreign policy priorities, such as when the Fed ignored the international consequences of its actions, and occasionally to coordination, where Fed officials would pursue, through international diplomacy, ends supported by Treasury and the President.

These themes mark the Fed's foreign policy today. During the financial crisis, the Fed stretched its legal authority to provide favored foreign central banks with the dollar liquidity they needed to survive, and in the wake of it, it has doubled down on the value of internationally created standards to reign in bank excesses. It has also pursued a nationalist monetary policy that has complicated the country's relationships with some of its most important allies. In what follows we look closely at the Fed's signature foreign policy initiatives today; in the next two sections, we evaluate what this independent actor means for the country's international and financial relationships.

A. International Swaps and the Financial Crisis

If the financial crises of the 1980s and 1990s showed a Fed working with the Administration to provide liquidity to the global financial system, we see in the 2008 financial crises a Fed moving even further toward its own ends and its own means. In 2008-2010, central bankers smoothly extended loans and supplied plenty of particularly stable currencies to one another; the Fed's role in this proved to be quite a controversial practice but is one that underscores its belief that crisis response required internationalism.

These transactions are known as currency swaps, and agreements in place to commit to a number of currency swaps in advance are called swap lines; they are quite similar to the facility created during the peso crisis.[136] During the crisis, "swap lines became mechanisms to outsource the Federal Reserve's bedrock power—its lender of last resort role—to foreign central banks," as Colleen Baker has observed.[137]

The swap lines marked another turn by the Fed toward a globalist cosmopolitanism and demonstrate again how much foreign policy the Fed conducts on its own. Swaps are essentially fully collateralized loans, and the foreign policy decision about who receives these loans involved trusting some central banks (and their banking systems) with dollar reserves but not others, in a way that threatened to deeply affect the economies of those countries, some of whom are putatively American allies. Swap lines both exemplify the Fed's power, given the size and importance of these swaps, and the Fed's autonomy in deploying that power. Congress has never exactly blessed them, and the legal theory that would defend them is, to put it charitably, aggressive. And although the Treasury was given access to the deliberations over how to use swap lines during the financial crisis, the Fed was the decision-maker, not the expert adviser. Today it has institutionalized its swap line practice, concluding standing swap agreements with six foreign central banks, an institutionalization that means those banks can do a currency swap with the Fed at any time—a decision made at the agency, rather than executive, level.[138]

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136. *See supra* Part III.E.

137. Colleen Baker, *The Federal Reserve's Use of International Swap Lines*, 55 ARIZ. L. REV. 603, 607 (2013).

138. *Central Bank Liquidity Swaps Arrangements Archive*, FED. RES. BANK OF N.Y., https://www.newyorkfed.org/markets/liquidity_swap_archive.html (last visited Feb. 10, 2019).

1. Swap Lines in Practice

In a crisis, the conventional response is to flood the economy with liquidity, encouraging lending and stabilizing currencies.[139] But in some countries, a central bank's vow to provide extensive liquidity might raise fears of inflation—a central government, through its central bank, that seeks to run the printing presses to stave off financial panic may find itself printing more and more money to stave off disasters—and may find itself being pushed to interpret an array of things as disasters. When that occurs, foreign and domestic creditors rightly worry that the loans they offered in rosier times will be repaid by a substantially depreciated currency.[140]

Swap lines are meant to respond to those fears. They work by guaranteeing that a foreign central bank can pay back a loan of dollars at the same rate it borrowed them for.[141] These swaps are not permanent. Part of the agreement is the foreign central bank's commitment to repurchase its currency at a set future date for a set price, which means that it receives back the exact nominal amount of dollars that it originally swapped. The foreign central bank also pays an additional fee based on a preset interest rate.[142] Domestically, the Fed gets general stabilization of the dollar market, and in particular ensures that counterparties to dollar-denominated trades with American financial institutions hold up their ends of the bargain.

The financial crisis represented a new frontier in swap line deployment. In December 2007, the Fed created swap lines with the European Central Bank (ECB) and the Swiss National Bank.[143] After the collapse of Lehman Brothers in September 2008, the Fed extended swap lines to the Banks of Canada, England, and Japan, the Reserve Bank of Australia, the Swedish National Bank (Sveriges Riksbank), the central bank of Norway (Norges Bank), and the central bank of Denmark (Danmarks Nationalbank).[144] In October 2008, the Fed created swap agreements with the Reserve Bank of New Zealand, the central

139. As Kathryn Judge has put it, "[T]he standard prescription that a LOLR should flood the market with liquidity, subject only to moral hazard and credit risk considerations, is apt." Kathryn Judge, *The First Year: The Role of a Modern Lender of Last Resort*, 116 COLUM. L. REV. 843, 846 (2016).

140. That in turn can make firms that hold foreign currency in bulk unstable—in particular, the so-called Eurodollar market was, during the crisis, faced with a high demand for dollars, and a small supply of them, putting all financial institutions participating in eurodollar trades—and there were many of them—at risk. For an overview, see Stephen A. Fowler, Note, *The Monetary Fifth Column: The Eurodollar Threat to Financial Stability and Economic Sovereignty*, 47 VAND. J. TRANSNAT'L L. 825, 827 (2014) (observing that "at the height of the financial crisis, the biggest beneficiaries of the Federal Reserve's emergency loans were not American banks but European ones").

141. As the Fed describes the swaps, after the Fed and its swap counterparty exchange currencies at a set rate, "[t]he Federal Reserve then deposits dollars in the foreign central bank's account at the Federal Reserve Bank of New York. . . . Similarly, the foreign central bank deposits its currency in the Federal Reserve's account at the foreign central bank. . . . From its account at the Federal Reserve Bank of New York, the foreign central bank then distributes these dollars to borrowers through a selection process of its choosing . . . ." Baker, *supra* note 137, at 623.

142. *Id.* at 623–24.

143. *Id.* at 625 n.139; *Frequently Asked Questions: U.S. Dollar and Foreign Currency Liquidity Swaps,* BD. GOVERNORS FED. RES. SYS., https://www.federalreserve.gov/monetarypolicy/bst_swapfaqs.htm (last visited Mar. 10, 2019).

144. Michael J. Fleming & Nicholas Klagge, *The Federal Reserve's Foreign Exchange Swap Lines*, 16 CURRENT ISSUES ECON. & FIN. 1, 3 (2010); *see also* John W. Head, *The Global Financial Crisis of 2008-2009 in Context—Reflections on International Legal and Institutional Failings, "Fixes," and Fundamentals*, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 43, 49–50 (2010).

banks of Brazil and Mexico (Banco Central do Brasil; Banco de México), the Bank of Korea, and the Monetary Authority of Singapore.[145]

It is worth underscoring how selective the Fed was, even among America's putative allies. The Fed entered into swaps with Brazil, but not Argentina; Japan, but not China; with Singapore, but not Malaysia. This kind of selective policy was no doubt motivated by the Fed's assessment in part of counterparty risk, and in part where dollar liquidity would do the most good. But the appearance (and likely substance) of the decision also reflects the irreducibly political and diplomatic nature of the Fed's foreign relations. Normally, the President, subject to congressional legislation, is in charge of determining which allies get which benefits, whether in trade, military support, direct aid, or other kinds of benefits. Here, the support of allies' financial systems—hardly a niche interest—was left to the Fed to determine.

Initially, the swap agreements were meant to expire in 2010, but they were extended several times until, in October 2013, six bilateral agreements were "converted to standing arrangements . . . that will remain in place until further notice."[146] All told, the size and scope of these agreements were staggering. As Baker has observed, at one point the Fed had sent $583 billion, or one-fourth of the assets on its books, to its foreign partners.[147] By way of contrast, the entire U.S. AID budget in 2017 was $22 billion.[148]

While sometimes the Fed keeps its own foreign relations counsel, during the financial crisis the Fed consulted with the Treasury and State Departments about swap line candidates, though it applied its own judgment to who ought to receive the funds.[149] As Fed principals indicated during a crisis meeting, the Fed's criteria for offering swap lines to central banks included whether the associated economies had "significant economic and financial mass," that risked "unwelcome spillovers for both the U.S. economy and the international economy more generally," and that could be stabilized with "access to dollar liquidity."[150]

The Fed's swaps policies were not done to be friendly; the Fed never lost sight of the inherently domestic crisis-prevention justification for this kind of assistance in the foreign economic life of our allies. But the style of the rescue represented the Fed at its most

145. Fleming & Klagge, *supra* note 144, at 3.

146. Press Release, Bd. of Governors of Fed. Reserver Sys., Federal Reserve and Other Central Banks Convert Temporary Bilateral Liquidity Swap Arrangements to Standing Arrangements (Oct. 31, 2013), https://www.federalreserve.gov/newsevents/pressreleases/monetary20131031a.htm.

147. Baker, *supra* note 137, at 626. Fleming & Klagge further note:

> Over the second phase, the Fed boosted the available amount by nearly a factor of ten, to $620 billion from $67 billion. This expansion allowed a significant increase in the quantity of dollars actually lent by central banks under the swap agreements. . . . By the end of the second phase, on October 12, more than $330 billion in dollar loans was outstanding under the program . . . At the program's peak, in the week ending December 10, 2008, swaps outstanding totaled more than $580 billion, accounting for over 25 percent of the Fed's total assets.

Fleming & Klagge, *supra* note 144, at 4–5.

148. McKenna, Long & Aldridge, LLP, *History and Mission of USAID*, INTERNATIONAL GOVERNMENT CONTRACT LAW § 4:2 (Aug. 2017) ("In 2016, USAID administered $22.7 billion in aid.").

149. *The Spread of Central Bank Currency Swaps Since the Financial Crisis*, COUNCIL FOREIGN REL., http://www.cfr.org/international-finance/central-bank-currency-swaps-since-financial-crisis/p36419#!/?cid=from_interactives_listing (last visited July 17, 2016).

150. Meeting Transcript of the Federal Open Market Committee on Oct. 28–29, http://www.federalreserve.gov/monetarypolicy/files/FOMC20081029meeting.pdf.

cosmopolitan.

2. The Legality of Swap Lines

If Congress wrote a statute authorizing the exercise of swap line discretion, it would be a stretch to argue that the Fed has been acting as anything other than its Congressional masters have suggested. But these important crisis response tools are particularly interesting given that they have been created only on the basis of a catch-all provision of the Federal Reserve Act, promulgated long before the creation of the first swap line.[151] The general counsel of the Fed admitted in 1962 that there is "no provision of present law that specifically refers to foreign currency or foreign exchange operations by the Federal Reserve System: and, accordingly, it cannot be said that there is explicit and clear authority for such operations."[152] He worried that "there can be no assurance, in the absence of legislation, that it would not be criticized from some sources on legal grounds."[153]

These concerns are well founded. Section 14(e) authorizes the Fed " to open and maintain accounts in foreign countries, appoint correspondents, and establish agencies in such countries wheresoever it may be deemed best for the purpose of purchasing, selling, and collecting bills of exchange."[154] The Fed has suggested that this language might be interpreted to give the Fed the discretion to maintain accounts not only for transactions, but also for other reasons, like financial stability.[155] And it has observed that Congress has not, until recently, objected to its interpretation.[156] But swap lines are unrelated to the "bills of exchange" identified in the statute, except generically, and swaps—which are currency derivatives that did not exist when the Federal Reserve Act was passed—are not analogous to an "accounts in foreign countries."[157]

These legal problems underscore the independence of the Fed in this area of foreign policy. With swap lines, the Fed has been willing to interpret its legal authority aggressively to be able to help some of the allies of the United States government respond to their own financial crises. Swaps are a firehose of U.S. dollars that the Fed can provide to foreign central banks in an effort to provide dollar liquidity around the world to respond to pressures that *might* have spillover effects in the United States but *will* have disastrous consequences in the foreign economies they aim to serve. The fact that the legal authority for swaps is so tenuous only highlights how much discretion the Fed has appropriated for itself when it comes to regulatory diplomacy.

If the Obama administration did not interfere with the Fed's foreign policies in these

151. The Fed has cited section 14 of the Act for the basis of its power to enter into currency swaps. *Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, BD. GOVERNORS FED. RES. SYS. (July 2009), https://www.federalreserve.gov/monetarypolicy/SOMA_holdings_liquidity_swaps200907.htm ("The FRBNY operates swap lines under the authority in section 14 of the Federal Reserve Act and in compliance with authorizations, policies, and procedures established by the FOMC.").

152. *Bretton Woods Agreement Act Amendments: Hearings before the H. Comm. On Banking and Currency*, 87th Cong. 155–56 (1961) (Memorandum from Howard Hackley, General Counsel, Foreign Open Market Committee), https://fraser.stlouisfed.org/docs/historical/house/ush_ hearing_hr10162_19620227.pdf [hereinafter HACKLEY MEMO].

153. *Id.* at 144.

154. 12 U.S.C. § 358 (1938); *see also* HACKLEY MEMO, *supra* note 152, at 145.

155. HACKLEY MEMO, *supra* note 152, at 145.

156. *Id.* at 147. Baker has identified two other ways that the statute could be interpreted to permit swap lines; the Fed has not yet adopted either interpretation. Baker, *supra* note 137, at 627–28.

157. 12 U.S.C. § 358 (1935).

currency swaps, member of Congress were not so circumspect. The reaction to the Fed's swaps policies has been described as "volcanic" by the *Financial Times*.[158] Other critics have characterized swap lines as a "covert bailout" of foreign countries.[159] It certainly underscores the Fed's foreign policy independence.

3. The Post Crisis Coordination on Regulation

The sort of work done by the Fed in the wake of the crisis exemplifies the new commitment to the possibilities of international regulatory efforts. In particular, it has redoubled its efforts to work on improved capital and other regulatory standards through the Basel Committee, and supported the effort to empower a new, and more politically responsive overseer for the committee, the Financial Stability Board (FSB).

Here, as with the international swap lines, the Fed has continued to practice cosmopolitanism when it comes to financial regulation, and it has done so in ways that have worried members of Congress, some of whom argue that American financial regulation has been outsourced to its international counterparts. Both members of the House and Senate have introduced legislation that would forbid American financial regulators from setting regulatory standards through an international process.[160] Despite this, the Fed has continued to rely on Basel and the FSB to set the standards for safety and soundness that it applies to American banks. Post-crisis financial regulation has continued to be outsourced to an international process. But its application has, on occasion, troubled domestic institutions more than foreign ones.

In our view, the way that financial regulation has evolved after the crisis underscores how irrevocably international it has become. In an era when a presidential election rises or falls on concepts of economic nationalism, the Fed had supported efforts to encourage international standards for financial companies that it oversees partly because it is difficult to see how it could enact a coherent regulatory program without doing so.

As Fed board member Lael Brainard has observed, cooperation is now "under way internationally across the major financial jurisdictions and the international standard-setting bodies under the umbrella of the Financial Stability Board (FSB)"[161] Little is omitted from the purview of these international efforts, and the Fed has participated in all of them. Even Fed critics like Peter Wallison have admitted that there are reasons for "close collaboration between the Federal Reserve and the FSB."[162]

158. Yves Smith, *Battle Royale Coming Over Fed Currency Swap Lines?*, NAKED CAPITALISM (June 25, 2012), http://www.nakedcapitalism.com/2012/06/battle-royale-coming-over-fed-currency-swap-lines.html.

159. Gerald P. O'Driscoll Jr., *The Federal Reserve's Covert Bailout of Europe*, CATO INST. (Dec. 28, 2011), http://www.cato.org/publications/commentary/federal-reserves-covert-bailout-europe.

160. Victoria McGrane & Ryan Tracy, *Sen. Shelby to Unveil Legislation Heightening Fed Security*, WALL STREET J. (May 11, 2015, 9:23 PM), http://www.wsj.com/articles/sen-shelby-to-unveil-legislation-heightening-fed-scrutiny-1431393248.

161. *The Role of the Financial Stability Board in the U.S. Regulatory Framework*: *Hearing Before the S. Comm. On Banking, Hous. & Urban Affairs*, 114th Cong. 38 (2015) (statement of Peter J. Wallison, Am. Enter. Inst.) https://www.govinfo.gov/content/pkg/CHRG-114shrg97398/ pdf/CHRG-114shrg97398.pdf; Governor Lael Brainard, Speech at the Hutchins Center on Fiscal and Monetary Policy and the Brookings Institution on the Federal Reserve's Financial Stability Agenda (Dec. 3, 2014), https://www.federalreserve.gov/newsevents/speech/brainard20141203a.htm#f9.

162. *The Role of the Financial Stability Board in the U.S. Regulatory Framework*, *supra* note 161, at 38.

The way that the FSB and Basel Committee have taken the lead on the regulation of banks and other financial firms in the wake of the financial crisis illustrates how international the Fed's perspective has become.

The FSB is comprised of all of the principal financial regulatory networks, principally the Basel Committee, along with the securities market and insurance company regulators.[163] The G-20 also added two important treaty-based international organizations to the FSB's membership—the World Bank and IMF.[164]

Once its members pass rules that the FSB, or the networks under it, have adopted, presumably for their prospect of promoting financial stability, the Board conducts regular reviews of both the membership, on a country-by-country basis, and on particular issues for all the FSB members at once.[165] The goal is to institutionalize cosmopolitan cooperation.

Basel itself has published an increasing number of principles, all of which it has opened for comment; it is this embrace of administrative proceduralism that has characterized the committee as much as has its redoubled efforts in the wake of the financial crisis. It has adopted notice and comment for all of its most important efforts.[166] The committee has also published speeches, agendas, white papers, and other documents on its website.[167]

If the FSB is about governmental coordination for crisis response and the regulation of systemic risk, the Basel Committee has maintained its grip on formulating the architecture of bank supervision. An extensive revision of the Capital Adequacy Accord, now known as the Basel III Accord, has been the product.[168] Basel III introduced a complicated array of quantitative measures of bank balance sheets, and required banks to meet the standards of each of them to be considered well-capitalized. It raised capital requirements, introduced a leverage ratio to serve as an alternative to the risk-based capital measure, and added a short-term liquidity coverage ratio and a longer term structural net stable funding ratio requirement.[169]

163. *See* Chris Brummer, *Post-American Securities Regulation*, 98 CAL. L. REV. 327, 359 (2010) (discussing the FSB's membership).

164. *See id.* at 358 (noting that "the Managing Director of the IMF and the President of the World Bank, plus the chairs of the International Monetary and Financial Committee and the Development Committee of the IMF and World Bank, also participate in G-20 meetings on an ex officio basis").

165. It also has conducted peer reviews on particular members, including for example, in February 2011 Spain and Italy. *See, e.g.*, FIN. STABILITY BD., PEER REVIEW OF SPAIN: REVIEW REPORT (2011), http://www.fsb.org/wp-content/uploads/r_110207a.pdf.

166. For example, it took comments for its June 2011 BASEL COMM. ON BANKING SUPERVISION, BANK INT'L SETTLEMENTS, PRINCIPLES OF OPERATIONAL RISK MANAGEMENT (2011), http://www.bis.org/publ/bcbs195.pdf. Similarly, its July 2011 *Disclosure Standards For Remuneration* built on a consultative document and comments which were also announced in December 2010. Press Release, Bank Int'l Settlements, Pillar 3 Disclosure Requirements on Remuneration Issued by the Basel Committee (July 1, 2011), http://www.bis.org/press/p110701.htm. While it would be inaccurate to characterize these principles as particularly specific, it is the case that they represent finer grained incursions into the practice of banking supervision.

167. *The Basel Committee—Overview*, BANK INT'L SETTLEMENTS, http://www.bis.org/bcbs/ (last visited Feb. 10, 2019).

168. Kenneth W. Dam, *The Subprime Crisis and Financial Regulation: International and Comparative Perspectives*, 10 CHI. J. INT'L L. 581, 627–28 (2010) ("Since the subject is capital adequacy regulation, an amendment to the Basel agreements will be required.").

169. For a summary of the requirements of the lengthy Basel III document, see Peter King & Heath Tarbert,

It is at this point in our story that some modest qualifications must be introduced. Although the through line of the Fed's global regulatory policy has been to engage in collaboration, it has not always consistently embraced the practice. It was slow to implement the second iteration of the Basel Accord for its smaller banks—to the consternation of the other members of the Basel Committee.[170] Moreover, foreign banks doing business in the United States have failed the Fed's bank-specific tests of their crisis resiliency, known as stress tests, but American banks have not, worrying some that a double standard has been applied.[171]

In 2014, the Fed finalized a rule to "require foreign banking organizations with a significant U.S. presence to create an intermediate holding company over their U.S. subsidiaries," that would be subject to US capital requirements.[172] Foreign regulators protested,[173] and foreign bankers argued that the requirements would change the supposedly level playing field that harmonized banking regulation is supposed to create by, as the *New York Times* put it, creating an environment where "American banks are not required to lock up capital at their American operations, like the Europeans will have to" or suffer the restructuring expenses "that the Europeans will most likely have to bear."[174]

But despite this bit of America first in bank capital requirements, the theme of banking supervision has generally leaned towards cosmopolitanism. What the post-crisis regulatory framework shows us is that, despite the displacement of some of this central banking coordination, the enterprise of bank supervision through international means is alive and

Basel III: An Overview, 30 BANKING & FIN. SERVS. POL'Y REP. 1, 3–7 (2011).

170. As Pierre-Hugues Verdier has explained, "U.S. regulators announced in 2003 that, contrary to previous expectations, they would only apply Basel II to a small number of internationally active banks. . . . In 2007, U.S. regulators . . . announced that the advanced Basel II approaches would apply to large, international 'core' banks." Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 142 (2009).

171. In June 2016, the Fed announced "that . . . Germany's Deutsche Bank and Spain's Santander had failed an annual stress test, citing weaknesses in their capital planning and risk management." AFP, *Deutsche Bank, Santander Fail US Fed Stress Test*, BBC (June 30, 2016), https://www.bbc.com/news/business-36669886. This was Santander's third consecutive year failing the Fed's stress test, and Deutsche Bank's second. *Id.* To be sure, however, foreign banks are not currently subject to tests as intensive as performed on U.S. banks, at least not yet. Nathaniel Popper & Michael Corkery, *Nearly All U.S. Banks Pass Fed's Stress Test*, N.Y. TIMES: DEALBOOK (June 29, 2016), https://www.nytimes.com/2016/06/30/business/dealbook/nearly-all-us-banks-pass-feds-stress-test.html.

172. Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Board Approves Final Rule Strengthening Supervision and Regulation of Large U.S. Bank Holding Companies and Foreign Banking Organizations (Feb. 18, 2014), https://www.federalreserve.gov/newsevents/press/bcreg/20140218a.htm.

173. For example, then-European internal markets commissioner Michel Barnier wrote a lengthy letter to Fed Chairman Ben Bernanke, requesting "a globally-coordinated response to regulation, criticising [sic] US unilateral regulation, and demanding that the US come forward with final rules to implement the Basel III reforms." *In Full: Barnier's Letter to Bernanke*, OTC MAR. NEWS (Apr. 26, 2013), https://otcmarket.news/in-full-barniers-letter-to-bernanke.aspx; *see also* Daniel Schäfer, *UK and Germany Join Warnings of US's Bank Proposals*, FIN. TIMES (Apr. 29, 2013), https://www.ft.com/content/2c92e3d6-b0f1-11e2-9f24-00144feabdc0?siteedition=intl (warning the Fed that the proposed rule "would cause significant disruption to many foreign banks and fuel a further fragmentation of global banking and its regulation").

174. Peter Eavis, *Exporting U.S. Rules for Foreign Banks*, N.Y. TIMES: DEALBOOK (Jan. 22, 2014, 9:04 PM), http://dealbook.nytimes.com/2014/01/22/exporting-u-s-rules-for-foreign-banks/?_r=0. Michael Kemmer of the Association of German Banks stated: "'This is a considerable competitive handicap for European banks, as their U.S. competitors aren't subject to any equivalent requirements in the EU.'" Geoffrey Smith, *Europe's Banks Chafe as Fed Goes it Alone*, WALL STREET J. (Feb. 19, 2014), https://www.wsj.com/ articles/europe-banks-chafe-as-fed-goes-it-alone-1392839142.

well.

B. The Nationalism of Unconventional Central Banking

On or about November 2008, monetary policy in the United States changed. The Fed began a long-term set of experiments to combat high unemployment and the potential devastation of deflation.

The international consequences of the Fed's unconventional monetary policies have been extraordinary, leading allies and quasi-allies—especially China—to accuse the United States of currency manipulation, an accusation that has as much to do with diplomacy and foreign policy as it does with economics and monetary policy. How the Fed responded to those accusations, and how it structured those policies, tells us more about the Fed's go-it-alone foreign policy, not only independent of the rest of government but also nationalistic in its posture toward allies. If the Fed is a cosmopolitan when it comes to regulating banks, it leans toward economic nationalism, when it comes to monetary policy.

1. Quantitative Easing and Unconventional Monetary Policies[175]

To understand this dynamic, we must first understand more about how the Fed's approach to monetary policy changed profoundly in the post-crisis. Readers familiar with the way the post-crisis unconventional monetary policies worked will find the use of them as a tool (or not) of economic diplomacy in the following subsection.

The 2008 financial crisis stretched the role of the central bank in a variety of ways, especially through the advent of "unconventional policies," including what came to be called "quantitative easing."[176] To understand quantitative easing, we have to understand the problem a central bank faces in "liquidity trap."[177] A liquidity trap occurs when the central bank, facing a recession, has already dropped interest rates to zero (or close to it) and the economy is still sinking. The problem in a liquidity trap is how to convince individuals, households, firms, and banks to revive their confidence and their borrowing and spending so that the economy can stand up again.

Keynes first discussed these traps in his General Theory of Employment, Interest, and Money. "There is the possibility," Keynes wrote, "that, after the rate of interest has fallen to a certain level" such "that almost everyone prefers cash to holding a debt which yields so low a rate of interest. In this event the monetary authority would have lost effective control over the rate of interest."[178] While Keynes didn't use the term "trap," the implication was clear: if there's no real advantage of holding interest-bearing assets, then

175. This section draws on CONTI-BROWN, *supra* note 36, at chapter 6.

176. For a discussion of quantitative easing, see Brett W. Fawley & Christopher J. Neely, *Four Stories of Quantitative Easing*, 95 FED. RES. BANK ST. LOUIS REV. 51 (2013), https://files.stlouisfed.org/files/htdocs/publications/review/13/01/Fawley.pdf; John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 1011 (2015).

177. Andrew J. Johnson, *Fed Talk Puts Pressure on Dollar*, WALL STREET J. (Oct. 2, 2010, 4:46 PM) https://www.wsj.com/articles/SB10001424052748703859204575525452752320786 (quoting senior Federal Reserve Board (FRB) officials as stating that "[t]he current situation is wholly unsatisfactory" and may indicate that the United States is in a "liquidity trap"). For a discussion of liquidity traps by legal scholars, see Therese G. Franzén & Alvin C. Harrell, *Introduction to the 2011 Annual Survey of Consumer Financial Services Law*, 66 BUS. LAW. 409, 412 (2011).

178. John Maynard Keynes, *The End of Laissez-Faire (1926)*, *in* ESSAYS IN PERSUASION 312, 313 (1963).

individuals, firms, and banks will simply hoard cash.[179]

Most economists paid little attention to the idea of liquidity traps until the 1990s. The reconsideration came because of the Japanese experience. There, interest rates hovered just above zero—meaning that money was essentially free for the borrowing—and yet banks and borrowers weren't taking the invitation to spend. As a result, the economy fell in and out of recession throughout the decade (sometimes referred to as the "Lost Decade" because of the problems). In response to the Japanese experience, and out of fear that it might be repeated in the U.S. in the early 2000s, economists and central bankers began developing the intellectual apparatus for dealing with liquidity traps. As a result, the 2008 financial crisis came when there was already a great deal of theoretical and empirical discussion of what central banks could do in a liquidity trap. As Paul Krugman put it in an influential paper, "[t]he "point is important and bears repeating: under liquidity trap conditions, the normal expectation is that an increase in [cash in the economy] will have little effect" on generating economic growth. [180]

The goal for the central banker in this context is to "flatten the yield curve." This idea refers to the fact that interest rates on any kind of bond—government debt, mortgage debt, or really anything else—usually go up the longer the bond's maturity. The logic is simple: if you borrow money from your bank and promise to pay it back the next day, you'll get a lower interest rate than if you keep the same money tied up for thirty years. It's a less risky proposition to lend money on shorter time horizons than for longer ones. The "yield curve" refers to a graph of these interest rates.

Since the 1950s, the Fed had been largely in the business of investing in short-term government debt for more than half a century when the financial crisis of 2008 hit. As a result, conventional monetary policy had already provided the answer it could give: the Fed had already dropped the near end of the yield curve as low as it can go. The new question was what to do with the rest. If the far end of the yield curve stays high, then individuals and firms are less likely to borrow money and expand their investments in themselves, their homes, their businesses: in a word, their economy.

The Fed then turned toward targeting the far end of the yield curve, to "flatten" it. Here is where unconventional monetary policy comes into play. Early in the 2008 financial crisis, the Fed targeted interest rates toward the right on the yield curve not just of government debt, but of all kinds of debt, including bank debt and mortgage-backed securities.[181] In the recent history of the Federal Reserve—since roughly the 1920s—this represents a dramatic change in the practice of monetary policy. In March 2009, it held almost $2 trillion worth of such debt (this period of unconventional asset purchases became known, retrospectively, as "QE1," meaning the first round of quantitative easing).[182]

179. For Keynes's discussion, see JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY Ch. 15 (1936).

180. Paul Krugman, *It's Baaack: Japan's Slump and the Return of the Liquidity Trap*, 1998 BROOKINGS PAPERS ON ECON. ACTIVITY 137, 158 (1998); *see also* Ben S. Bernanke et al., *Monetary Policy Alternatives at the Zero Bound: An Empirical Assessment*, 2004 BROOKINGS PAPERS ON ECON. ACTIVITY 1, 10 (2004) (noting that "[a]n important recent example of a conditional commitment is the zero-interest-rate policy of the Bank of Japan"). For more on the Japanese problem in the context of the 2008 financial crisis, see PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 56–77 (2009).

181. *See* Daniel L. Thornton, *The Federal Reserve's Response to the Financial Crisis: What It Did and What it Should Have Done* 1 (Fed. Reserve Bank of St. Louis, Working Paper No. 2012-050A, 2012), https://research.stlouisfed.org/wp/2012/2012-050.pdf.

182. *Id.*

When, in the Fed's view, this wasn't enough to revive the economy, it started buying up that long-term governmental debt to bring down those interest rates. Again, the Fed had significant experience with this kind of government debt purchasing back in the 1950s, but it had long lay dormant. The crisis brought back those kinds of purchases—in what would come to be known as the second round of quantitative easing, or QE2, but that proved insufficient.[183] While these actions succeeded in flattening the yield curve for governmental debt, the yields on longer-term securities outside the governmental debt context remained stubbornly high. This meant, from the Fed's perspective, that not enough borrowing and lending was taking place to push the economy to employment and inflation levels that the Fed wanted to see. The idea is to get cash into the economy as fast as the central bank can. In one speech in 2002, Bernanke, then a member of the Fed's Board of Governors but not the Chair, alluded to a helicopter drop of cash on the general public as a way of getting growth and inflation back to desirable levels. (In light of subsequent events, and with that precedent in mind, his critics have sometimes called him "Helicopter Ben.")[184]

Ultimately, the Fed decided to focus not just on buying government debt, but on buying specific kinds of mortgage-backed securities, starting at $40 billion per month[185] but eventually going up to $85 billion per month.[186] This program ended in October 2014. By the end, the Fed had extended its balance sheet from roughly $800 billion in 2008 to almost $5 trillion at the end of QE3.[187] Quantitative easing, in that peculiar jargon of central bankers, actually meant that the 800-pound gorilla that is the central bank had in fact sextupled the size of its balance sheet.

2. International Consequences

The domestic political consequences of the Fed's unconventional policies have been stark. Most Republicans now viewed Ben Bernanke not as one of their own, but as an inflationary "dove" who had gone to the dark side. As had the bailouts before them, the Fed's unconventional monetary policies inflamed public opinion against them.

This reaction is ironic, in a sense: the same critics who have abhorred the Fed's internationalism through swaps as overly solicitous of the international order have also been hostile to quantitative easing, which is designed to protect the domestic economy. The Fed's domestic critics didn't differentiate that hostility between these two programs, one anchored to domestic goals, the other to international responsibilities.

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183. *See* Norbert Michel, *Quantitative Easing, the Fed's Balance Sheet, and Central Bank Insolvency*, HERITAGE FOUND. (Aug. 14, 2014), http://www.heritage.org/monetary-policy/report/quantitative-easing-the-feds-balance-sheet-and-central-bank-insolvency.

184. *See* Ben S. Bernanke, Fed. Reserve Governor, Remarks before the National Economists Club in Washington, D.C., Deflation: Making Sure "It" Doesn't Happen Here (Nov. 21, 2002), https://www.federalreserve.gov/boarddocs/Speeches/2002/20021121/default.htm; *see also* WSJ Staff, *Deflation, Ben Bernanke and the Famous Helicopter*, WALL STREET J. (Oct. 18, 2008, 10:38 AM), https://blogs.wsj.com/economics/2008/10/18/deflation-ben-bernanke-and-the-famous-helicopter/.

185. Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Issues FOMC Statement (Sept. 13, 2012), https://www.federalreserve.gov/newsevents/press/monetary/20120913a.htm.

186. Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Issues FOMC Statement (Jan. 30, 2013), https://www.federalreserve.gov/newsevents/press/monetary/20130130a.htm.

187. Neil Irwin, *Quantitative Easing is Ending. Here's What It Did, in Charts.*, N.Y. TIMES: THE UPSHOT (Oct. 29, 2014), https://www.nytimes.com/2014/10/30/upshot/quantitative-easing-is-about-to-end-heres-what-it-did-in-seven-charts.html.

The Fed's international critics, on the other hand, were much more consistent. Foreign central bankers—usually part of the close network we have described earlier in this article—came out in criticism of the Fed's quantitative easing in direct, nationalistic terms. These criticisms came in two flavors: first, that the Fed was engaged in "currency wars" through quantitative easing, since these unconventional policies had the consequence of depreciating the U.S. dollar at the expense of export-oriented economies.[188] Second, that there were significant spillovers in the use of quantitative easing that could and would have dramatically bad consequences for the economic wellbeing of other countries.

First, the "currency wars." The idea suggests a beggar-thy-neighbor kind of unilateral policy whereby a government artificially manipulates the value of its currency to support its export-oriented industries. When the currency is weaker—that is, when the market perception of the currency suggests that it doesn't hold value as well—then the currencies of trading partners are in turn stronger. That means that foreign currencies can buy more goods from the exporting country: good news if your economy is primarily an exporter, bad news for the importer.

In 2010, Brazilian finance minister Guido Mantega responded to the latest round of quantitative easing with hostility: "We're in the midst of an international currency war," he said, with reference not only to the Fed but also other major foreign central banks that had engaged in similar policies.[189] Given how squarely accusations against other countries—China, for example, is a perennial target—the accusation that the Fed is engaging in a currency war is a strong suggestion of a muscular, nationalistic foreign policy.

Interestingly, former Fed Chair Ben Bernanke effectively demurred on the question. In a lecture before the International Monetary Fund, Bernanke did not deny that "monetary easing usually leads to a weaker currency and thus greater trade competitiveness," including in the U.S. But he pointed to the empirical evidence that suggests that such devaluation is offset by the increase in domestic income, "which in turn raises home demand for foreign goods and services."[190] Bernanke's point is that he wasn't convinced that there had been an asymmetric devaluation of the currency, but even if there had been he was comfortable with the fact that "along with economic conditions in our respective countries, our perceived interests began to diverge."[191] Bernanke felt no obligation to consider the international consequences of domestic policies: his was a statutory mandate to focus on U.S. domestic macroeconomic indicators.

The second critique was even more substantive, and Bernanke's response even more quasi-nationalistic. Reserve Bank of India Governor Raghuram Rajan had regularly insisted that quantitative easing and other unconventional monetary policies were damaging emerging markets, and that the Fed should consider those consequences in making monetary policies. "At what point does the domestic mandate get trumped by international responsibility? . . . If it never gets trumped, then let's stop talking about

188. JAMES RICKARDS, CURRENCY WARS: THE MAKING OF THE NEXT GLOBAL CRISIS 3–16 (2011).

189. *Factbox-Official Comments on Global Currency Tensions*, REUTERS (Oct. 21, 2010, 9:46 PM), https://www.reuters.com/article/g20-currencies/factbox-official-comments-on-global-currency-tensions-idUSSGE69J0AX20101022.

190. Ben S. Bernanke, Brookings Institution, Mundell-Fleming Lecture at the IMF: Federal Reserve Policy in an International Context 9 (Dec. 2015), https://www.imf.org/external/np/res/seminars/2015/arc/pdf/Bernanke.pdf.

191. *Id.* at 1.

international responsibility," Rajan complained.[192]

To this, Bernanke strongly took issue:

> monetary and exchange-rate policies should focus on macroeconomic objectives, with the problem of spillovers being tackled by regulatory and macroprudential measures, possibly including targeted capital controls, and through careful sequencing of market reforms. Financial regulation and supervision are areas in which the Fed and other central banks should cooperate (and to an important extent already do) to reduce financial risks.[193]

Bernanke's point is that, while coordination and cooperation should take place in regulatory matters, monetary policy is a different beast. Nationalism is the key ideology there, with no room for the usual cosmopolitan cooperation seen when the central banking policy is about combatting crises or regulating the financial system.

Is Bernanke right? Should central banks stick to their own nationalistic knitting? Or should they engage in greater coordination with their counterparts to ensure better global harmony of monetary policy? These questions aren't easily and permanently answerable. Indeed, they are deeply intertwined with the country's foreign relations with its allies, changeable through electoral processes that sometimes prefer one ideology over the other.

In this context, though, the decision to coordinate policy or not is not made in the White House. It is not made in Congress. It is made at the Federal Reserve.

To consider how remarkable the Fed's unilateral foreign policy is in this discussion, consider how deeply political—and diplomatic—is the question of currency manipulation when the target of the accusation isn't the United States by, say, China. The Chinese have faced the accusation for decades, from both sides of the U.S. political scene.[194] The Bush Administration faced steep criticism from Democrats, principally New York Democratic Senator Chuck Schumer, urging the Administration to rebuke China for manipulating the currency.[195] And accusations against China's currency animated Donald Trump's presidential campaign and may yet guide policy in the Trump Administration.[196]

Importantly, though, even as these issues find uneasy resolution in our relationship with China, that process is squarely within the purview of Congress and the Administration. It fits the classic mode of thinking about foreign affairs. The Fed is different. When the U.S. is the target of these accusations, politicians can conveniently dodge the issue by displacing these policies to the Federal Reserve. Doing so is not merely a question of autonomous monetary authority. It becomes one of the Fed's semi-autonomous foreign relations.

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192. Greg Robb, *India's Central Bank Chief Accuses G-7 Of Currency Manipulation*, MKT. WATCH (Apr. 16, 2015, 12:19 PM), http://www.marketwatch.com/story/rajan-accuses-rich-countries-of-flouting-currency-manipulation-rules-2015-04-16.

193. Bernanke, *supra* note 190, at 4.

194. Bryan Mercurio & Celine Sze Ning Leung, *Is China A "Currency Manipulator"?: The Legitimacy Of China's Exchange Regime Under The Current International Legal Framework*, 43 INT'L LAW. 1257, 1257 (2009) ("U.S. lawmakers perpetually raise the issue and periodically initiate legislation, which would deem China a 'currency manipulator' and thus trigger retaliatory measures. Lawyers are less certain whether there can be a multilateral solution to the perceived problem."). See also

195. *See id.*

196. *Id.*

C. Conclusion

The history of the Federal Reserve's foreign affairs above is far from comprehensive—we could choose other examples of how the Fed maneuvers through the international world, as others have done.[197] At the same time, like any complicated entity's actions over the course of a century, the Fed has acted in different ways when it enters the realm of foreign affairs, with different consequences.

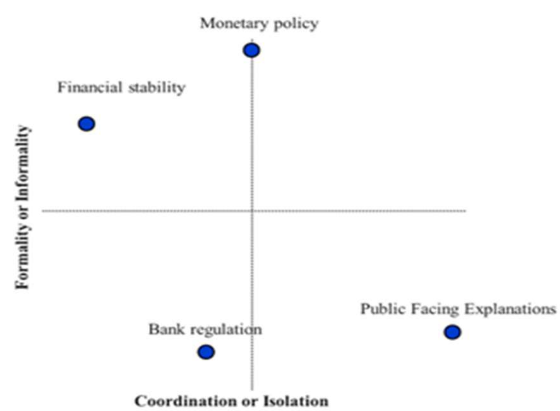
The key elements, though, are four. First, the Fed's foreign affairs operate independent of the presidential administration, in the sense that the President neither originates the policy nor oversees it.

Second, the Fed's regulatory diplomacy is not merely the purview of technocrats hammering out common themes at international conferences—nor, we would argue, are the international initiatives in which other agencies are engaged. The Fed has plenty of these kinds of interactions with its counterparts. But the Fed's foreign affairs speak to a different set of phenomena, those more appropriately viewed as diplomatic and political. Choosing winners and losers through international swap lines, for example, or pursuing unconventional monetary policies for the good of the U.S. economy even in the face of evidence of real harm that can occur to our allies, are central foreign policy concerns. By the same token, there are few regulatory questions of more interest to banks than how much capital they must hold in reserve, and the Fed's decision to delegate the content of the answer to that question to an international process is striking.

Third, the Fed's foreign affairs operate at varying levels of formality, between the highly formal structures like the Bank for International Settlements or Basel Committee, or informal personal connections as in the post-crisis coordination.

A dimension of the Fed's foreign relations is the extent of its formality. By formality, we mean the ways in which "hard law" form the basis of this authority. Within this schema we can place most or all of the Fed's international activities. Figure 1 illustrates the schema.

Figure 1: The Foreign Affairs of the Federal Reserve



197. *See* Truman, *supra* note 19; Kahn & Meade, *supra* note 19.

Fourth, the Fed vacillates between nationalism—meaning, placing U.S. interests above all others, whatever the consequences—and internationalism. Sometimes, in fact, both trends exist simultaneously, as they do today, where the Fed pursues a monetary policy that ignores the effects of the dollar on foreign economies, even as it has redoubled its efforts to create a firm commitment to and from other countries to regulatory and supervisory matters the same, initially agreed upon way.

The Fed, then, is intensely autonomous, not only as a monetary policy-maker but as author of a significant section of the nation's foreign policy.

V. PROBLEMS AND SOLUTIONS

Many observers of the Fed, especially those most interested in its monetary policy, view the legal issues presented by any Fed activity through one lens—does it, or does it not affect central bank independence? This question is not always the right one to ask—we can imagine regulators who lack independence engaging in aggressive regulatory diplomacy. Indeed, they might do so to try to obtain independence they otherwise lack. But the Fed's free hand to act internationally is relevant to the quality of its free hand in general, and so we begin assessing the consequences of the agency's regulatory diplomacy by considering what it means for regulatory independence—a subject of some controversy in an era of concern about the ability of the so-called "deep state" to frustrate the will of the elected president.

Moreover, concerns about central bank independence render some fixes to the unconstrained authority the Fed has in foreign affairs to be unappealing. We turn to those fixes in the second part of this section, recommend a disclosure requirement for the Fed's foreign policy positions, and articulate some reasons why disclosure is a more attractive solution than its alternatives.

A. Foreign Affairs and Central Bank Independence

For some scholars and commentators, the idea that the Fed would forge its own path in foreign affairs is a phenomenon to dread, the ultimate capture of organs of the state by an unaccountable bureaucracy insensitive to political accountability. One way to think about this accountability is to assess it in the context of its worst case.

Increasingly, scholars have warned that the "deep state," a term ordinarily associated with the entrenched and secretive national security bureaucracies of Middle Eastern autocracies, increasingly describes the relationship that the current president has with his agencies.[198] Mark Tushnet has given the deep state an antidemocratic valence, defining it as "an organization or network of people whose decisions actually determine the course of public policy notwithstanding purported supervision by democratically accountable executives and legislatures."[199] David Pozen has argued that "on utilitarian, democratic, and constitutional grounds, deep state secrecy ought to be seen as especially troubling."[200]

For others, it is the very heart of the institutional benefits of central banking: central

198. *See, e.g.*, Jonathan Easley, *Trump White House Feels Under Siege*, THE HILL (May 18, 2017, 7:21 PM), https://thehill.com/homenews/administration/334132-trump-white-house-feels-under-siege ("Some in Trump's orbit view . . . the administration as at war with the 'deep state.'").

199. Tushnet, *supra* note 13, at 2246.

200. David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 275 (2010).

banks are supposed to be "independent," the argument goes, and we should seek to protect the exercise of the independent technocratic judgment on display in the examples above, rather than interfere with it.

In this Part, we argue that both sides of this debate are wrong, but for different reasons. The Fed is neither a case of the deep state at work, nor the epitome of enlightened technocracy. The difference lies in a fundamental misunderstanding of the nature of central bank independence in general, a phenomenon whose intellectual coherence grew up in an era no longer with us. We discuss where this outdated conception of Fed independence comes from and why features of the Fed's ability to pursue an autonomous foreign policy are consistent with its institutional design, but why features of it are not.

If agency independence has been a recent obsession of scholars in administrative law,[201] central bank independence has been an even longer one for economists and political scientists. In 2004, Alan Blinder, an academic and former central banker, called the study of central bank independence a "growth industry,"[202] and the growth has only accelerated in the years since. This independence is not very democratic, but when it comes to central banks, it is widely thought to be a best practice of institutional design.[203] Independent central banks have been associated with stable currencies, which in turn have been associated with the sorts of monetary conditions conducive to economic growth.[204] Central banks that are subject to the political process often adjust monetary policy to suit the needs of the party in power—usually to the detriment of long term stability to the money supply, which makes investors cautious.[205] This tendency is why the World Bank has recommended to all of its client countries that they insulate their central banks from political intermeddling.[206]

The widely invoked metaphors of central banking come tumbling forth from here. In the Homeric epic the Odyssey, when Odysseus—referred to in central banking circles by his Latin name Ulysses, for reasons that are unclear—ventured close to the seductive and vexing sirens, he devised a scheme to allow his men to guide their ship past the sirenic

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201. *See Jacob Gersen*, *Designing Agencies: Public Choice and Public Law*, *in* RESEARCH HANDBOOK IN PUBLIC CHOICE AND PUBLIC LAW (Anne Joseph O'Connell & Daniel A. Farber eds., 2010) (summarizing some of this extensive literature).

202. ALAN S. BLINDER, THE QUIET REVOLUTION: CENTRAL BANKING GOES MODERN 1–4 (2004).

203. *See* Alberto Alesina & Lawrence H. Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. MONEY, CREDIT & BANKING 151, 154 (1993) (insulated central banks are less likely to set inflationary monetary policy); Geoffrey P. Miller, *An Interest-Group Theory of Central Bank Independence*, 27 J. LEGAL STUD. 433 (1998) (discussing the interest group effects on a non-independent central bank); Laurence H. Meyer, Governor, Bd. of Governors of the Fed. Reserve Sys., Remarks at the University of Wisconsin-LaCrosse, The Politics of Monetary Policy: Balancing Independence and Accountability (Oct. 24, 2000), http://www.federalreserve.gov/boarddocs/speeches/2000/20001024.htm (speech by member of the FOMC on the value of independent central banks); *cf.* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294 (2006) (discussing the best practices of agency rulemaking).

204. It is fair to say that Fed officials believe that central bank independence keeps inflation in check, and may contribute to economic growth. For the views of the current vice chair of the Fed, along with a literature review, see Stanley Fischer, *Central-Bank Independence Revisited*, 85 AM. ECON. REV. 201 (1995).

205. Timothy A. Canova, *Black Swans and Black Elephants in Plain Sight: An Empirical Review of Central Bank Independence*, 14 CHAP. L. REV. 237, 237 ("It was widely accepted that politicians could not be trusted with monetary policy because of their short-term time horizons and fixations on their next elections.").

206. The World Bank strongly advocates for national political, fiscal, and administrative decentralization. *Social Sector & Decentralization,* WORLD BANK GROUP, http://www1.worldbank.org/publicsector/decentralization/SocialSector/index.htm (last updated 2001).

seduction in safety, while he experienced the short-term joys of hearing their songs.[207]

Central bank independence is precisely this kind of Ulysses contract. Societies write central banking laws that lash citizens (and their politicians) to the mast and stuff beeswax in the ears of central bankers.

The other commonly invoked metaphor is even more colorful. In the oft-repeated words of William McChesney Martin, the longest serving Fed chair in history, the Federal Reserve is "in the position of the chaperone who has ordered the punch bowl removed just when the party was really warming up."[208] The subjects of the metaphors differ by millennia, but the idea is the same: the partygoers and Ulysses alike want something in the near term that their best selves know is bad for them in the long term. Central bank independence is the solution.

The Ulysses/punch-bowl model of Fed independence has taught us a lot about central banks and their institutional design. It has also motivated an extraordinary rise of a specific kind of central bank throughout the world. As one scholar put it, "in monetary policy, macro political economy made the unthinkable thinkable, and more: it turned it into conventional wisdom."[209] There is much insight to be gained by studying central banks and their legal relationships to politicians for purposes of combating inflation along the lines of this model.

The problem is that the standard account of Fed independence— the story of Ulysses and the sirens, of the dance hall and the spiked punch bowl—doesn't work to explain the Fed's many functions against the context of the demands of democratic accountability, doesn't account for the way that the Fed's internal complexity will shape its policies, and doesn't do enough to explain the national—and, importantly, international—pressures that determine how the Fed exercises its extraordinary power over the financial system and broader economy.

The Ulysses/punch-bowl account also tells us almost nothing about the virtues *vel non* of the Fed's foreign policies. Delegating that diplomatic authority, where such delegations have occurred, aren't because the public faces a time consistency problem in the handling of U.S. foreign affairs. Indeed, the collective decision of the U.S. Constitution has been that diplomacy is a quintessentially political role. There's a reason that the ambassador to, say, Djibouti must be appointed by the President and confirmed by the Senate.

Recently, public attention on the Fed's many functions beyond the preservation of the vitality of the currency has led to a wholesale reexamination of how central bank independence operates within the broader context of public accountability. Some have called it into question entirely, arguing that "a careful review of the supporting evidence [in favor of central bank independence] suggest it would be better discarded."[210] Others

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207. William McChesney Martin, Jr., Chairman, Bd. of Governors of the Fed. Reserve Sys., Address before the New York Group of the Investment Bankers Ass'=ociation of America (Oct. 19, 1955), https://fraser.stlouisfed.org/title/448/item/7800. Interestingly, Martin himself purports to cite someone else (although he, too, does not source his quote). The full quote is this: "The Federal Reserve, as one writer put it, after the recent increase in the discount rate, is in the position of the chaperone who has ordered the punch bowl removed just when the party was really warming up." *Id.* at 12.

208. *Id.*

209. Susanne H. Lohmann, *The Non-Politics of Monetary Policy*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY 523–44 (Barry R. Weingast & Donald Wittman eds., 2008).

210. Thomas F. Cargill, *The Myth of Central Bank Independence* 6 (Mercatus Ctr. at George Mason Univ., Working Paper, 2018), https://www.mercatus.org/system/files/mercatus-cargill-central-bank-v1.pdf.

have offered a stout defense of the concept even in changing times. Legal scholars Neil Buchanan and Michael Dorf view the Fed's independence as justifiable on a basis roughly equivalent to the judiciary: "Just as we cannot fully trust majoritarian politics to safeguard the constitutional rights of minorities," they write, "so we cannot trust venal politicians who have incentives timed to the political cycle to set monetary policy timed to the business cycle, all the while keeping in mind longer-term goals of growth and stability."[211]

Others have taken a more moderate, if still strident approach. Ed Balls, one of the chief architects of the Bank of England's rediscovered independence in the late 1990s, came to revise his view of central bank independence. In his view, the "model of a central bank is being challenged," with politicians and academics "questioning the value of central bank independence," while "popular discontent towards central banks is growing."[212] Balls and his two co-authors argued that central banks had to take on more politically active roles in managing the economy, and therefore needed to become somewhat more politically responsive.[213]

We agree with Balls and his co-authors. The Fed's ability to navigate its policy-making space outside the day-to-day of political interference is an important institutional development of the last two generations. But recognizing that vast—and changing—authority to deal globally requires greater attention to how its many functions interface, or not, with the rest of the government. It is infeasible and undesirable to attempt a wholesale excision of the Fed's ability to perform its diplomatic functions.

To thread the needle between autonomy and accountability requires a delicate adjustment. But it is fair to say that the independence absolutists have no monopoly on the right way to think about where the central bank belongs in our polity. And while we would not compare the Fed to the deep state in Egypt or Turkey, we are mindful of the dramatic nature of its diplomatic freedom. We apply these insights to the discretion the Fed enjoys when it comes to regulatory diplomacy.

B. Reforming the Diplomatic Federal Reserve: Four Paths Ahead

We have identified a feature of Fed foreign policy and it is one that might seem to ask for some degree of correction. Unaccountable bureaucrats making foreign policy might look like an anathema to ordinary democratic governance. But solving the problem of an independent foreign policy conducted by a central bank is difficult, which means that, in our view, a modest corrective that assents to the foreign relations independence that the Fed has achieved is the most realistic solution to the problems created by the Fed's foreign policy.

Opening the Federal Reserve Act for a complete overhaul is unappealing. There is no guarantee that the resulting central bank would be an improvement to the existing one and there is a great risk that it would be inferior. If the benefits of operating monetary policy at a level or two of insulation from the day-to-day of electoral politics are real, then subjecting

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211. Neil H. Buchanan & Michael C. Dorf, *Don't End or Audit the Fed: Central Bank Independence in an Age of Austerity*, 102 CORNELL L. REV. 1, 9 (2016).

212. Ed Balls et al., *Central Bank Independence Revisited: After the Financial Crisis, What Should a Model Central Bank Look Like*? 4 (Harvard Kennedy Sch. Mossavar-Rahmani Ctr. for Bus. & Govt., Associate Working Paper Series No. 87, 2018), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/x87_final.pdf.

213. *Id.*

the Fed to dramatic change could undo much of the institutional framework that has evolved over the last century.

If its independence is one of the Fed's most valuable, if frequently misunderstood, political assets, it is difficult to find ways to obligate it to coordinate its policies with the legislature or executive without damaging that asset. That is the central challenge: how to protect what is worthwhile about the Fed while also increasing the extent of democratic accountability for its conduct of foreign policy.

Four kinds of proposals come to mind. First, governance, by way of making the Fed's chief diplomat a Presidential appointee, confirmed by the Senate.[214] This sort of solution of a legitimation of international relations has been tried before. The lead negotiator of trade deals, the U.S. Trade Representative, is subject to Senate confirmation.[215] In 1974, Congress and the President agreed that as trade policy became an increasingly important facet of the country's foreign relations policy, it would be inappropriate to leave it in the hands of career diplomats unchecked by legislative oversight.[216]

In some ways, Senate confirmation has had its desired effect on transparency, at least for the U.S. Trade Representative. In their confirmation hearings, nominees have made their views about trade policy public—in 2009, Ron Kirk admitted that "the over-arching benefits of trade are difficult to appreciate when a plant closes in a small community because of increased foreign competition," suggesting a degree of skepticism about trade deals that may have been exemplified by the reticence of the executive to send new deals to Congress for ratification and foreshadowing the current administration's decision to pull out of various trade arrangements.[217]

It would be appealing to get this sort of candor from the Fed's international negotiators. But unlike the USTR, making the Fed's chief diplomat presidentially appointed and senate confirmed would complicate oversight over one of the most organizationally complex entities in government. It is also risky; a Senate-confirmed Fed diplomat could set foreign policy in concord with the President and the Secretary of the State while simultaneously increasing the access the President would have in setting monetary policy, even if by way of personality only, by giving the diplomat an important role in macroprudential measures like central bank swap lines, which as we have seen, are closely related to monetary policy. Senior diplomats work as at-will employees of the President. And the Fed's foreign policy is entirely intertwined with the way it supervises banks and does monetary policy. Making international agreements on financial matters with a presidential appointee, removable at the president's will, would not just weaken the independence of the agency, it would end it.[218]

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214. Conti-Brown floated, but did not endorse, this idea in CONTI-BROWN, *supra* note 36, at 190.

215. *Biographies of Key Officials*, OFF. U.S. TRADE REP., https://ustr.gov/about-us/biographies-key-officials (last visited Feb. 10, 2019).

216. *See History of the U.S. Trade Representative*, OFF. U.S. TRADE REP., https://ustr.gov/about-us/history (last visited Feb. 10, 2019).

217. *Confirmation of Ambassador Ronald Kirk to be U.S. Trade Representative: Hearing Before the S. Comm. on Fin.*, 111th Cong. 81 (2009) (statement of Ambassador Kirk), https://www.finance.senate.gov/imo/media/doc/625681.pdf. The executive branch did conclude an agreement with a number of Pacific countries on trade, but it is not entirely clear that it made ratification of that agreement a priority.

218. It would also be quite a change. "The Fed also has been delegated broad, almost unlimited, power over monetary policy." Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 526 (2000).

A second kind of proposal would involve dramatically increasing the formal, institutionalized congressional oversight over the Fed, usually through the Government Accountability Office (GAO). The Fed's most vociferous critics, usually associated with the "Audit the Fed" proposals, sometimes gleefully seek the Fed's institutional elimination, even if they fall short of its formal legislative repeal.[219] Other legislative proposals would require American financial regulators to get pre-approval from Congress before entering into international negotiations.[220]

But there is little reason to believe that inserting the GAO or some other congressionally provided mechanism into the way the Fed conducts foreign policy will result in better policy ends.[221] And while it is easy to come up with what might be characterized as a strong legislative solution, such as extensive statutory authorization and careful statutory construction forbidding certain Fed functions to be subjected to international cooperation or a series of hearings triggered by international efforts or agreements concluded by the Fed (indeed these hearings could be required before the Fed goes abroad and deals with its foreign counterparts), it is not so easy to say that this sort of stepped up legislative oversight would lead to better policy.[222]

A third approach is to do nothing. The Fed may be a separate power center for foreign affairs in government, but perhaps its democratic deficit is exaggerated and the policy outcomes it produces are superior to those achieved through the political processes. And anyway, the President and Senate already jointly participate in selecting the Fed's senior leadership: perhaps that is all that is needed.

But doing nothing and letting the current state of affairs continue seems, in our view, unappealing as well. Not only is the general lack of accountability troubling, but also the consistency of the Fed's approach to foreign relations is, as we have shown, by no means clear. And while a consistent foreign policy is not a be-all and end-all, the Fed might serve its own interests as well as the public interest if it provided more information about its international plans than it does today. Also, in a time of concern about the deep state, doing nothing about the Fed's increasingly controversial regulatory diplomacy risks furthering a political backlash against any degree of agency discretion. These decisions are inescapably political. Regulatory diplomacy, with all the virtues described above, needs some kind of

219. One Congressman wrote a briskly selling book seeking to eliminate the Fed. RON PAUL, END THE FED (2009). He has ever since sought to audit the institution. *See also* Hal S. Scott, *The Reduction of Systemic Risk in the United States Financial System*, 33 HARV. J. L. & PUB. POL'Y 671, 734 (2010) (discussing the politics of these requests); Anne Flaherty, *House Pushes for Sweeping Audit of the Fed*, SAN DIEGO UNION-TRIB. (Sept. 25, 2009, 9:17 AM), https://www.sandiegouniontribune.com/sdut-us-congress-federal-reserve-092509-2009sep25-story.html.

220. *See Legislation Addressing International Insurance Standards Introduced in U.S. Congress*, MAYER BROWN (Aug. 7, 2015), http://perma.cc/LHU2-5HU3.

221. At least Congress has not thought so. As Steven Ramirez has observed, "Congress has twice affirmatively acted to assure that the Fed does not lose control of monetary policy." Ramirez, *supra* note 218, at 588 n.521.

222. The House has introduced legislation that would require the Fed and Treasury Department to engage in notice and comment rulemaking setting forth its position on capital rules for insurance companies *before* entering into negotiations about the content of those rules with its foreign counterparts. *Hearing on the Impact of International Regulatory Standards on the Competitiveness of U.S. Insurers: Part II Before the Subcomm. on Housing & Ins. of the H. Comm. on Fin. Servs.*, 114th Cong. 6–10 (2016) (testimony of Professor David Zaring), https://www.govinfo.gov/content/pkg/CHRG-114hhrg23719/pdf/CHRG-114hhrg23719.pdf. Presumably, the promulgation of capital standards would make international negotiations over the content of those capital standards brief. *Id.*

external political check to guide its internal political logic.

For this reason, we endorse a fourth solution to the problem of the Fed's independent foreign relations policy: a modest legislative fix whereby the Fed goes to Congress twice annually, separate from its twice annual monetary policy testimony, to discuss specifically its vision of international affairs and the Fed's role within it.[223]

For the most part, these hearings would be uneventful, even boring. Not every six-month period includes the deployment of a trillion dollars in swap lines, or the wholesale renegotiation of our supervisory framework of banks. But these hearings can serve a useful purpose for democratic accountability by educating members of Congress—and the public—about exactly how international an institution the Federal Reserve actually is. And if, as in today's climate, the Fed's internationalism is out-of-step with the political zeitgeist, a bit of democratic humility might counsel toward an adjustment in orientation. Elections have consequences, as the saying goes, and a Fed with significant foreign policy commitments out of step with the rest of government is a Fed sowing the wind and reaping a whirlwind.

In this way, the Fed's foreign relations would be subject to enhanced disclosure, but not audits, or other more intrusive forms of legislative action. We think that the project of stating what its foreign approach is would be as a way of clarifying where the Fed sees its international relationships. It also gives both the Executive and the Legislative Branch a chance to adjust their own thinking about international economic affairs.

Finally, such testimony also lets light into the informal collaboration which already exists between the Fed and the Treasury Department with a more formal and more public opportunity for the Fed to state what exactly it is it is doing when it is venturing forward overseas.[224] More testimony and hearings amount to low-key reform, but in this case the more exciting solutions seem to come with uniquely detrimental drawbacks.

Our disclosure-oriented approach may be a solution, more generally, that could inform the way the political branches treat the other independent agencies. The globalization of all that they regulate has driven agencies to expand their foreign engagements, probably necessarily.[225] Their international diplomats—and, as we have seen, they all have them—could also be called before Congress to explain what their agencies are doing with regard to their foreign counterparts. For independent agencies, this may benefit the executive branch in ways that OIRA review of rulemaking, from which independent agencies are

223. Under Dodd-Frank, the Fed Vice Chair for Supervision must testify twice per year to Congress, though as of yet no one has been nominated for that role. Gabe Rubin, *Stalemate Over Fed Vice Chair Post Unlikely to Be Resolved*, MORNING CONSULT (Feb. 1, 2016), https://morningconsult.com/2016/02/01/stalemate-over-fed-vice-chair-post-unlikely-to-be-resolved/.

224. In the midst of the last financial crisis, the Fed and Treasury Department put out a statement observing 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." Joint Press Release, Bd. of Governors of the Fed. Reserve Sys. & Dep't of the Treasury, The Role of the Federal Reserve in Preserving Financial and Monetary Stability by the Department of the Treasury and the Federal Reserve (Mar. 23, 2009), https://www.federalreserve.gov/newsevents/pressreleases/monetary20090323b.htm. Even this sort of cooperation is controversial. Matthew Boesler, *Powell: Fed-Treasury Cooperation Fraught with Risk*, BLOOMBERG (Sept. 30, 2014, 12:22 PM), http://www.bloomberg.com/news/articles/2014-09-30/powell-fed-treasury-cooperation-fraught-with-risk (recounting a speech by a Fed Governor criticizing efforts to coordinate Fed and Treasury policymaking).

225. For a discussion of the way this process has occurred in financial regulation, *see* Zaring, *supra* note 117, at 179–82.

exempt, has served to coordinate policy. At the very least, these regulators can be expected to be public about what they are doing. In fact, there may be occasion for a Congressional Hearings on Regulatory Diplomacy Act (the "CHORD Act") that would institutionalize regular testimony for all agencies engaged in regulatory diplomacy; as we have seen, the CHORD Act would affect many agencies, but we view that as a positive development, and not a cost. The CHORD Act would preserve independence while increasing knowledge, making it, for us, the most sensible of the realistic solutions.

VI. CONCLUSION

The Fed makes its own foreign policy, and has done so for the entirety of its existence, making it an extreme example of a phenomenon that characterizes most departments and agencies in the government today. These agencies pursue foreign policies neither as an extension of the President, nor, for the most part, on plain delegation from Congress. Their autonomy looks worrisome, but we have argued that there are good reasons, at least in the case of the Fed, to preserve that independence.

To be sure, regulatory diplomacy is a challenge to bedrock understandings of the way that foreign policy works in our system of checks and balances. Understanding how it works in the Fed—and, by extension, other agencies—complicates the "invitation to struggle" at the heart of foreign affairs scholarship, has lessons for agency independence, and offers insight into the way that regulators navigate the impulses towards cosmopolitanism and economic nationalism. We have seen that regulatory diplomacy is complicated and occasionally controversial. But in a global world, it is hard to undo, and accordingly something that, with the right correctives, can be a sort of statecraft with which we can live.

International Offices of Independent Agencies[1]

Agency	"International" or "Global" Office	Year Office was Formed	Who Runs the Office[2]
Board of Governors of the Federal Reserve System	International Finance	1971	Steven B. Kamin, Director
Commodity Futures Trading Commission	Office of International Affairs	1975	Eric J. Pan, Director Warren Gorlick, Deputy Director Kevin Piccoli, Deputy Director Natalie Markman Radhakrishnan, Head of Supervisory Cooperation
Consumer Product Safety Commission	International	1972	Richard W. O'Brien, Director
Federal Communications Commission	International Bureau	1934	Tom Sullivan, Bureau Chief Troy Tanner, Deputy Chief Tim Schlichting, Deputy Chief
Federal Deposit Insurance Corporation	Office of International Affairs	1996	Ed Christovich, International Deposit Insurance Policy and Support Section, Chief (Acting) Anthony Sinopole, International Affairs Branch, Associate Director (Acting) Susan Randall, International Affairs Branch, Administrative Officer
Federal Energy Regulatory Commission	The State, International and Public Affairs Division of the Office of External Affairs	1977	Sandra Waldstein, Director
Federal Maritime Commission	International Ocean Transportation	1961	Michael A. Khouri, Acting Chairman Rebecca F. Dye, Commissioner William P. Doyle, Commissioner Daniel B. Maffei, Commissioner
Federal Trade Commission	Office of International Affairs	2007	Randolph W. Tritell, Director

[1] The Paperwork Reduction Act, 44 U.S.C. § 3502(6), is the only place where Congress has set forth a list of independent agencies, including the agencies in this table and the Interstate Commerce Commission, which has since been renamed and merged into the Department of Transportation. For more, see Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1175 (2013) (discussing the "list of independent agencies embodied in the definitional sections of the Paperwork Reduction Act").
[2] As of July 21, 2017.

Nuclear Regulatory Commission	Office of International Programs	1997	Nader L. Mamish, Director
Postal Regulatory Commission	Office of Accountability and Compliance	1983	Margaret M. Cigno, Director
Securities and Exchange Commission	Office of International Affairs	1989	Paul Leder, Director
Office of Financial Research	Office of Financial Research	2010	Robert Peterson, Senior Advisor for International Affairs
Office of the Comptroller of the Currency	International Banking Supervision	1962	Marci A. Heppner, Director Teresa A. Rutledge, Director Vance S. Price, Deputy Comptroller
Federal Housing Finance Agency	None		
Mine Enforcement Safety and Health Review Commission	None		
National Labor Relations Board	None		
Occupational Safety and Health Review Commission	None		
Consumer Financial Protection Bureau	None		