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The Banker Removal Power

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THE BANKER REMOVAL POWER

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The Federal Reserve ("the Fed") can remove bankers from office if they violate the law, engage in unsafe or unsound practices, or breach their fiduciary duties. The Fed, however, has used this power so rarely that few even realize it exists. Although major U.S. banks have admitted to repeated and flagrant lawbreaking in recent years, the Fed has never removed a senior executive from one of these institutions.

This Article offers the first comprehensive account of the banker removal power. It makes four contributions. First, drawing on a range of primary sources, it recovers the power's statutory foundations, showing that Congress created the authority to better align the interests of senior bankers and the public. Second, using a novel dataset obtained through Freedom of Information Act requests, it maps the actual practice of banker removal—who is removed, how often removal occurs, and for what reasons. It reveals that the Fed now uses the

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removal power mostly to prevent already-terminated, low-level employees from working at other banks, even though Congress never intended for the power to be used primarily in this way. Third, harnessing corporate law theory, the Article defends the legislative design. It argues that removal of senior bank executives for unsound management practices is a critical component of effective bank supervision, filling gaps left by regulatory rules and traditional corporate governance measures. Finally, the Article concludes by assessing obstacles to the use of the removal power against bank leadership and suggesting policy responses.

INTRODUCTION

Many observers have wondered why the Department of Justice ("DOJ") did not prosecute more high-level executives following the 2008 financial crisis.[1] Some argue that the paucity of indictments was the product of soft corruption or the government's fear of challenging deep-pocketed defendants.[2] Others attribute it to the absence of executive-level criminal offenses: to them 2008 "was a bubble, not a fraud."[3] Missing has been any discussion of why the Board of Governors of the Federal Reserve System ("the Fed")—the country's leading bank supervisor—failed to remove even a single top bank executive in connection with the crisis. This civil remedy—the "banker removal power"—allows the Fed to fire bank officers, directors, and employees for "unsafe or unsound practices" and to prohibit them from working in banking.[4] It was a core part of Franklin D. Roosevelt's financial reform agenda.[5] And it was designed precisely to allow the Fed to prevent an economic collapse of the sort experienced in 2008.

The mystery deepens when one considers the remarkable breadth of wrongdoing that has surfaced since the 2008 crisis. In the past twenty years, America's largest banks have settled hundreds of major lawsuits

[1] See, e.g., Jesse Eisinger, The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives xvi–xvii, at xxi (2017); Jed S. Rakoff, The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?, N.Y. Rev. Books, Jan. 2014, at 4–8; William D. Cohan, How the Bankers Stayed Out of Jail, Atlantic, Sept. 2015, at 20; Dorothy S. Lund & Natasha Sarin, The Cost of Doing Business: Corporate Crime and Punishment Post-Crisis (unpublished manuscript) (on file with authors); see also John C. Coffee, Jr., Corporate Crime and Punishment: The Crisis of Underenforcement, at ix–x, 2–6, 13–14 (2020); Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations 5, 18 (2014).

[2] See Rakoff, supra note 1, at 4, 6 (critiquing the Justice Department's rationales for not prosecuting bank executives); Eisinger, supra note 1, at xx, 228, 233 (citing revolving door practices at the Justice Department and the risk aversion of prosecutors). For other commentary on prosecutors' failure to charge executives in connection with the 2008 crisis, see Coffee, supra note 1, at 13 (arguing that the lack of prosecution "results chiefly from the logistical mismatch between the government's limited enforcement resources and the nearly limitless capacity of the large corporation to resist and delay"); Garrett, supra note 1, at 6, 45–80 (showing how public corporations were able to escape criminal prosecution through the use of deferred prosecution agreements).

[3] Coffee, supra note 1, at 4 (collecting sources).

[4] 12 U.S.C. § 1818(e). A brief definitional point: current law authorizes the Fed to remove sitting bankers as well as to temporarily suspend them or permanently prohibit them from working in banking (even if they have already been terminated). This Article uses the terms "removal power" and "removal action" broadly to encompass all three sanctions.

[5] See infra Section I.A.

and paid an unprecedented $195 billion in fines and penalties.[6] They have admitted to fraud, bribery, money laundering, price fixing, bid rigging, illegal kickbacks, discriminatory lending, and a host of other consumer protection violations.[7] In 2019, the DOJ labeled one trading desk at JPMorgan Chase a "criminal enterprise."[8] Yet during this period, the Fed did not remove a single senior executive of Chase or any other major U.S. bank.

Instead, the Fed used its removal power mostly to exclude rogue low-level employees from the banking business for isolated instances of misconduct. For example, in the early 2000s, SunTrust Bank fired Roslyn Terry for stealing $21,200 while working as a teller.[9] Following her termination, the Fed banned Terry from working at a bank ever again.[10] The Fed's ban had no impact on SunTrust, its management, or its practices, nor was it intended to. Primarily, it signaled Terry's lack of fitness to other banks and potential employers.

Terry's case—and the lack of executive removals in recent years—was not always the norm. In the early 1990s, the Fed used its removal power primarily against bank leadership. Between 1989 and 1993—the first five years for which enforcement data is publicly available—over 75% of domestic removal orders issued by the Fed targeted presidents, chief executive officers, board chairmen, and board directors. But as the banking industry consolidated in the subsequent decade, the Fed's enforcement focus shifted toward rank-and-file workers, especially those who had already been fired by their employers and no longer worked at a bank. Over the five years ending in 2019, 72% of domestic removal actions by the Fed barred low- and mid-level employees who had already been terminated.[11]

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[6] See, e.g., Laura Noonan, US Banks Rack Up $200bn in Fines and Penalties over 20 Years, Fin. Times (Dec. 24, 2020), https://www.ft.com/content/989035f3-767a-43c2-b12e-2f6c0be0aa6b [https://perma.cc/R29R-AQT6].

[7] See Better Markets, Wall Street's Crime Spree 1998–2020: 395 Major Legal Actions and $195+ Billion in Fines and Settlements over the Last 20 Years, at 2 (Jan. 13, 2021).

[8] Tom Schoenberg & David Voreacos, JPMorgan's Metals Desk Was a Criminal Enterprise, U.S. Says, Bloomberg (Sept. 16, 2019), https://www.bloomberg.com/news/articles/2019-09-16/jpmorgan-s-metals-desk-was-a-criminal-enterprise-u-s-says [https://perma.cc/FW3C-QC99].

[9] Prohibition Ord., Roslyn Y. Terry, Bd. of Governors of the Fed. Rsrv. Sys. No. 08-016-E-I (Aug. 29, 2008).

[10] Id.

[11] See Compiled Data on Removal Orders Completed by the Bd. of Governors of the Fed. Rsrv. Sys. (on file with authors) [hereinafter Removal Orders].

Scholars and policymakers have failed to notice this change or appreciate its significance.[12] There has been little effort to date to explain why the Fed has a removal power or to consider how the Fed should use it.[13] The absence of the power in the literature is particularly surprising given the salience and frequency of lawbreaking by banks and the ensuing public outrage toward bank executives.[14]

This Article seeks to give the banker removal power a seat back at the table. It makes four contributions. The first is historical. Through original research, Part I reconstructs the statutory development of the banker removal power. It highlights the power's animating conception of bank executives as public fiduciaries and reveals that banker removal is not just another remedial tool in the Fed's toolkit. Removal is the legal foundation for modern bank supervision, a distinctive form of government oversight that proceeds through continuous, confidential engagement between bankers and government officials. Policymakers first proposed the power in the late nineteenth century as a way to enhance the government's supervisory control of banks. And Congress granted the Fed the power in 1933 in an effort to preserve an institutional arrangement for expanding the money supply that relies on deposit money issued by privately run

[12] There is little scholarship on the removal power, and the scholarship that does exist is dated. See Joseph M. Korff, Banking, 8 B.C. Indus. & Com. L. Rev. 599, 600 (1967) (describing the effect of the Financial Institutions Supervisory Act of 1966 on the removal power); Robert J. Basil, Suspension and Removal of Bank Officials Under the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA"), 18 J. Legis. 1, 2 (1991) (discussing the effect of recent amendments on removal actions from the perspective of the private bar). One exception is work by Professor Heidi Schooner who considers removal in the context of disparate enforcement policies for large and small banks. See Heidi Mandanis Schooner, Big Bank Boards: The Case for Heightened Administrative Enforcement, 68 Ala. L. Rev. 1011, 1013, 1024–27 (2017).

[13] The power is similarly neglected by corporate governance scholars and unknown to the voluminous administrative law literature focused on the President's power to remove independent agency heads. See, e.g., Cass R. Sunstein & Adrian Vermeule, Presidential Review: The President's Statutory Authority over Independent Agencies, 109 Geo. L.J. 637 (2021); Ganesh Sitaraman, The Political Economy of the Removal Power, 134 Harv. L. Rev. 352, 354 (2020); Gillian E. Metzger, The Constitutional Duty to Supervise, 124 Yale L.J. 1836, 1880–81 (2015); Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 Cornell L. Rev. 769, 772 (2013); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 110 (1994).

[14] See, e.g., Letter from Elizabeth Warren, Ranking Member, Senate Subcomm. on Fin. Inst. & Consumer Prot., to Janet Yellen, Chair, Fed. Rsrv. Bd. of Governors (June 19, 2017) [hereinafter Letter from Elizabeth Warren].

banks.[15] Congress hoped that if the Fed had the power to remove untrustworthy bank leaders, banks would heed informal supervisory directives and better serve public as well as private interests.[16]

In 1966, Congress gave the banking agencies a further tool to strengthen supervision—the cease-and-desist order—and rolled back removal, limiting it to situations involving "dishonesty."[17] In 1978, concerned by evidence of increasing executive malfeasance, Congress reversed course, allowing for removal even in cases not involving dishonesty.[18] Removals accelerated, and in the wake of hundreds of costly bank failures in the late 1980s, Congress further expanded the removal power in 1989. Today, the power exists at its broadest scope. Any institution-affiliated party is subject to sanction; a removal may result in a lifetime prohibition from banking; and willful or continuing "unsafe or unsound" conduct, even in the absence of fraud, suffices to justify enforcement.

[15] See Lev Menand, Why Supervise Banks? The Foundations of the American Monetary Settlement, 74 Vand. L. Rev. 951, 958, 1004 (2021).

[16] Bank supervision has been the subject of a surge of recent scholarly attention. See, e.g., id.; Daniel K. Tarullo, Bank Supervision and Administrative Law, Colum. Bus. L. Rev. (forthcoming) (unpublished manuscript) (on file with authors), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3743404 [https://perma.cc/ZY2P-3EXR]; see also Julie Andersen Hill, Bank Supervision: A Legal Scholarship Review (forthcoming) (U. Ala. Legal Stud., Research Paper No. 2627472), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777580 [https://perma.cc/5752-7XHC]; Event Overview Bank Supervision: Past, Present, and Future, Fed. Rsrv. Bd. of Governors, Wharton Sch. & Harv. L. Sch. (Dec. 11, 2020), https://events.stlouisfed.org/event/67aec69c-628d-459d-8366-466979e3f8af/summary; Lev Menand, Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking, 103 Cornell L. Rev. 1527 (2018); Julie Andersen Hill, When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations, 92 Wash. U. L. Rev. 1101, 1105 (2015). This growth is due in part to an active debate inside and outside the government over supervision's legitimacy as a mode of administrative governance. See Jeremy Kress, Notice & Comment, The War on Bank Supervision, Yale J. Regul. (Dec. 18, 2020); Peter Conti-Brown & Nicholas R. Parrillo, Supervision, Stress Tests, and the Administrative Procedure Act (unpublished manuscript) (on file with authors); Randal Quarles, Vice Chair, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the "Law and Macroeconomics" Conference at Georgetown University Law Center: Law and Macroeconomics: The Global Evolution of Macroprudential Regulation 12 (Sept. 27, 2019). Part I of this Article introduces removal law to the supervision literature and adds to the debate by recovering a portion of supervision's legal foundations. It reveals, among other things, that removal law treats banks as public franchises, complicating contemporary efforts by critics of bank supervision to characterize banks as purely private enterprises.

[17] See infra Section II.B.

[18] See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, § 904 (codified as amended at 12 U.S.C. § 1818).

This Article's second contribution is analytic, picking up the story after 1989 and bringing it to the present. Part II introduces a novel dataset on the Fed's removal actions between 1989 and 2019 using public information as well as orders obtained through Freedom of Information Act ("FOIA") requests.[19] Details about the individuals sanctioned and their wrongdoing were hand collected from case files and contemporaneous news accounts and matched with bank characteristics.

The data reveal that the Fed uses its removal power sparingly, averaging 7.2 actions per year over the past 31 years. Even less common are Fed removals of *sitting* bank employees; 91% of Fed removal orders ban people who are no longer working at banks, blocking them from returning in the future. More notably, since the late 1990s, the Fed has deployed its power, now codified at 12 U.S.C. § 1818(e), primarily against rank-and-file workers for activities already subject to criminal penalties. For example, the most common reason for removal during this period was embezzlement or misuse of funds. In only three instances has the Fed used its removal power to address poor oversight and reckless management, and two of these instances involved employees of the same bank who jointly supervised a rogue trader. The Fed's other 187 removal actions all targeted individuals who directly participated in unlawful activities.[20]

The Article's third contribution is theoretical. Part III argues that a credible threat of removal against senior bank executives for unsound management practices is an indispensable component of contemporary bank supervision. Traditional corporate governance measures, which focus on enhancing the accountability of senior bankers to shareholders, will not eliminate incentives for banks to engage in socially harmful risk taking. Shareholders have strong incentives to exploit banks' government backstopping and extract wealth from the public by encouraging investment in risky assets. No matter how carefully constructed, regulatory rules and statutory provisions that directly restrict the menu of

[19] The Fed is not the only bank regulator with the power to remove bank employees and affiliates. Little is currently known about how the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC") use their parallel power—whom they remove and for what conduct. Given the breadth of their supervisory jurisdictions, their practices are worthy of future study.

[20] These results align with qualitative accounts of the Fed's supervisory rollback in the late 1990s and early 2000s. See, e.g., Menand, supra note 16, at 1541, 1574. They also provide empirical evidence for concerns about the government's enforcement posture toward senior corporate executives. See, e.g., Coffee, supra note 1, at 2.

choices available to banks are backward looking, crude, and inevitably incomplete.[21]

This Article therefore joins a growing body of scholarship in recognizing that corporate governance reforms and prudential regulatory rules have limited capacity to curb unsafe bank behavior.[22] But contrary to the emerging view, we do not conclude from this diagnosis that entirely new regulatory methods are needed.[23] Instead, we argue that regulators

[21] We use Dan Tarullo's term "regulatory rules" to describe strictures promulgated through notice-and-comment in order to differentiate them from "regulation," which we use to refer to all manner of government oversight. See Tarullo, supra note 16.

[22] See infra Sections III.A–B; see also Jonathan R. Macey & Maureen O'Hara, The Corporate Governance of Banks, 9 Fed. Rsrv. Bank N.Y. Econ. Pol'y Rev. 91, 97–99 (2003) (observing that banks have "special corporate governance problems" that "weaken the case for making shareholders the exclusive beneficiaries of fiduciary duties"); Lucian A. Bebchuk & Holger Spamann, Regulating Bankers' Pay, 98 Geo. L.J. 247, 255–61 (2010) (observing the same problem and detailing how features of modern banking organizations heightened the basic moral hazard problems); Steven L. Schwarcz, Misalignment: Corporate Risk-Taking and Public Duty, 92 Notre Dame L. Rev. 1, 4 (2016) (describing the "misalignment" between shareholders' interests and the public's interest in systemically important firms); John C. Coffee, Jr., Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight, 111 Colum. L. Rev. 795, 807 (2011) (noting that "the more 'shareholder friendly' the firm's corporate governance system, the less attention is likely to be paid to externalities, and the greater the exposure to volatility and systemic risk"). See generally Dan Awrey & Kathryn Judge, Why Financial Regulation Keeps Falling Short, 61 B.C. L. Rev. 2295, 2299–300 (2020) (summarizing the literature on "why financial regulation so often falls short" and contributing additional explanations).

[23] For examples of this emerging view, see Schwarcz, supra note 22, at 23–44 (arguing that "managers should have a public governance duty not to engage their firms in excessive risk-taking that leads to [systemic] externalities"); Macey & O'Hara, supra note 22, at 92 (contending that "directors and officers of banks should be charged with a heightened duty to ensure the safety and soundness of these enterprises[, which] . . . should not run exclusively to shareholders"); Coffee, supra note 22, at 834–35 (proposing a contingent capital mechanism that would, in part, serve the function of giving creditors' voting powers once the bank is in the "vicinity of insolvency"); John Armour & Jeffrey N. Gordon, Systemic Harms and Shareholder Value, 6 J. Legal Analysis 35, 67–70 (2014) (arguing that *Caremark* liability for oversight failure should be "applied in wider circumstances and to a higher standard" in banks and other systemically important financial firms); Saule T. Omarova, Bank Governance and Systemic Stability: The "Golden Share" Approach, 68 Ala. L. Rev. 1029, 1032, 1043–51 (2017) (arguing for a "golden share" regime that would "giv[e] the federal government a seat on the board of each systemically important banking organization"); Saule T. Omarova, Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation, 37 J. Corp. L. 621, 658–69 (2012) [hereinafter Omarova, Bankers, Bureaucrats, and Guardians] (proposing the creation of a Public Interest Council that would function to "represent the public interest in preserving financial stability and minimizing systemic risk"); Ross Levine, The Governance of Financial Regulation: Reform Lessons from the Recent Crisis, 12 Int'l Rev. Fin. 39, 41–42 (2012) (proposing a new regulatory entity "to act as the public's sentry over financial policies and to help compel financial regulators to act in the

already have a tool that would allow them to reorient bank managers' incentives toward the public interest. Section 1818(e) can serve this role. A credible threat of removal permits the Fed to keep senior executives and directors in line by prioritizing its judgment over that of private shareholders in order to improve the safety of the banking system as a whole. It also bolsters ongoing government supervision of banks by ensuring that Fed officials do not need to continue to rely on bank managers whom they no longer trust.

The Article's final contribution is prescriptive. The removal power has failed to achieve its full potential to improve bank governance because the Fed rarely removes senior bankers. Part IV examines how the current statutory design enables this trend and recommends changes. In particular, it shows that the removal power was last updated before the emergence of large financial conglomerates and thus is out of sync with the reality of modern banking. Bank executives now serve in oversight, rather than operational, roles. Because the removal power relies on a single culpability standard that applies in blanket fashion to all bankers along the corporate hierarchy, regardless of their varied roles and responsibilities, it substantially raises the difficulty of removing bank leadership relative to lower-level subordinates. Accordingly, Part IV argues that Congress should expressly recognize oversight failure as a removal ground. In addition, the Fed should revise its practice of imposing uniform removal terms for all cases, instead varying the scope and duration of removal according to the type of wrongdoing at issue.

Banker removal can be a powerful tool for strengthening bank governance. It can even work silently, with few if any formal actions. But the law only works if bankers believe they will be removed for breaking the law or jeopardizing the public's interest in a safe and sound banking system. The evidence suggests that, at the most senior levels of the banking industry, removal has ceased to fulfill this function. By providing a comprehensive account of the removal power in theory and practice, this Article takes a first step toward its renewal.

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public interest, regardless of their private interests"); see also Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the Association of American Law Schools Midyear Meeting: Corporate Governance and Prudential Regulation 11–17 (June 9, 2014), https://www.federalreserve.gov/newsevents/speech/tarullo20140609a.htm [https://perma.cc/9QMX-A32B] (proposing mechanisms to align corporate governance at banks with public objectives, including: changing the incentives of decision makers; restricting dividends under certain circumstances; reforming the institutions and processes of corporate decision making; and amending the fiduciary duties of bank boards).

I. STATUTORY FOUNDATIONS

This Part reconstructs the statutory foundations of the banker removal power. First, it shows how Congress created the power in 1933 to strengthen bank supervision and preserve the American Monetary Settlement, an arrangement in which privately owned banks perform the public function of expanding the money supply.[24] Second, it examines how Congress revisited removal law after major banking crises in 1966, 1978, and 1989, changing whom the Fed may remove, the consequences of removal, and the extent of the Fed's discretion. Throughout this period, the removal power's intended function remained constant: to buttress informal bank oversight, check dangerous bank executives, and ensure that banks do not maximize private profits at the public's expense.

A. The Origins of Removal and the Banking Act of 1933

To subject banks to a greater degree of public control, Congress in 1933 authorized the Fed to remove bank officers and directors. Like deposit insurance, another policy adopted during the Great Depression, the idea of empowering government agencies to fire bad bankers had been circulating in policy circles for decades. But it took two crises and the triumph of the progressive movement to add the power to the U.S. Code.

1. The Select Committee on Failed National Banks

Many of the core provisions of contemporary U.S. banking law date to the Civil War era when Congress created the national banking system. The system is composed of hundreds of "national banks," each separately capitalized and chartered by a quasi-independent bureau in the Treasury Department known as the Office of the Comptroller of the Currency ("OCC").[25]

Collectively, national banks create the bulk of the nation's money supply, issuing liabilities known as deposits.[26] Yet despite the critical role national banks play in monetary policy, they are run by officers and directors selected by private shareholders. To prevent inflation and

[24] See Menand, supra note 15, at 951 (defining the American Monetary Settlement and examining its features).

[25] See Lev Menand & Morgan Ricks, Federal Corporate Law and the Business of Banking, 88 U. Chi. L. Rev. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3702511 [https://perma.cc/GYK9-BKPS].

[26] Id. (manuscript at 22–23).

politicized credit provisioning, Congress expressly withheld the power to appoint national bank executives from government officials such as the President. In this way the National Bank of Act of 1864 follows statutes from 1791 and 1816 incorporating the First and Second Banks of the United States.[27]

The use of private shareholders to pursue a public imperative—monetary expansion—was controversial from the start. But it became especially salient when national banks collapsed, jeopardizing the savings of ordinary households and shrinking the money supply. It is perhaps unsurprising, then, that it was in the wake of the worst year to date for the national banking system that the idea of empowering government officials to fire bad bankers first surfaced at the federal level.

In 1891, twenty-five national banks failed. Amidst the outcry, the Senate appointed a select committee to investigate the failures and determine "whether the existing provisions of the laws relative to national banks . . . furnish[ed] sufficient protection to the depositors and other creditors and to the stockholders [in such institutions]."[28] The investigators concluded that the failures were a product of excessive lending and reckless management. Although the involvement of private shareholders in running national banks had helped avoid inflation and government corruption, it had also created its own pathologies.

"[E]xcessive overloans to officers and stockholders"[29] was a particular problem.[30] For example, the Committee found that the president of Maverick National Bank lent himself $1.3 million against a capital of just $400,000, routing smaller loans through clerks, pages, and minors.[31] The Committee further determined that the Comptroller had been aware of Maverick's tendency to exceed loan limits for years and that his office had repeatedly directed the bank to reduce its overloans.[32] The bank's executives, however, had ignored the Comptroller's demands. Worse, Maverick's intransigence was not an isolated incident. As the Comptroller put it, "bank officers usually courteously reply that they will comply [with

[27] Id. (manuscript at 20). When Congress rechartered the bank in 1816, it permitted the President to appoint five of the bank's twenty-five directors. See Lessig & Sunstein, supra note 13, at 30 (describing the Second Bank of the United States as "the first truly independent agency in the republic's history"). The bank's charter expired in 1836.
[28] S. Rep. No. 1286, at I (1893).
[29] Id. at XXIV.
[30] Id. at XXIV, 13.
[31] Id. at XIII, XV–XVIII.
[32] Id. at XXI–XXII.

requests to reduce overloans], and pay no attention to the subject thereafter."[33] The problem was that the "penalty for [improper lending]—the commencement of an action . . . to forfeit the bank's charter—[wa]s so severe as to render it nugatory."[34] Moreover, the Committee noted that many bank failures can be "traced to . . . evasions of the law which technically do not amount to unlawful loans," even though they violate the spirit of the law, further complicating the ability of the Comptroller to protect the public interest.[35]

The Committee proposed a solution: "many [bank] failures," it argued, "could [be] avoided if the system"[36] were better designed. Rather than limit the Comptroller's remedial authority to charter forfeiture, the Committee recommended that Congress directly empower the Comptroller "to remove bank officials persistently guilty of [violating the banking laws]."[37] In a parallel report, the sitting Comptroller, A. Barton Hepburn, echoed the Committee's conclusion. According to Hepburn, the national banking system would be more efficient if the government had more leverage over bank officers and directors:

> I think this whole difficulty, as well as others that arise, might be substantially reached if the Comptroller, with the approval of the Secretary of the Treasury, were given power, after a hearing, to remove bank officers and directors for violations of law, leaving the vacancy to be filled in the regular way. It is a power that would be seldom exercised. The existence of the power would deter many who now keep the letter, only to violate the spirit of the law.[38]

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[33] Id. at XXII.

[34] U.S. Dep't of the Treas., No. 1565, Annual Report of the Comptroller of the Currency 42 (1892) [hereinafter Ann. Rep. of the Comptroller of the Currency].

[35] S. Rep. No. 1286, at III (1893) (quoting the Comptroller).

[36] Id. at II.

[37] Id. at XXIV–XXV. Similar provisions requiring official action against insolvent banks had been adopted by the states. California even had a judicial removal power for managers of insolvent banks. See James H. Deering, General Laws of California as Amended up to the End of the Session of 1899, An Act Creating a Board of Bank Commissioners, and Proscribing Their Duties and Powers § 11 (1899) (allowing courts to remove and replace officers "guilty of fraud, malversation, or criminal carelessness or negligence" and those that "are not the proper persons to be intrusted with the closing of the affairs and business of such corporation in the interest of the depositors, creditors, and stockholders thereof").

[38] Ann. Rep. of the Comptroller of the Currency, supra note 34, at 43. Hepburn was not the first bank supervisor to seek the power. See, e.g., Report of the Board of Bank Commissioners of the State of California to the Legislature 29 (1880).

Although the chairman of the committee, Senator William Chandler, introduced a bill that would have given the Comptroller a removal power, the bill did not become law.[39]

Chandler's idea, however, lived on. In the years that followed, many of Hepburn's successors lobbied Congress for removal authority. In 1893, for example, Comptroller James H. Eckels argued that "the powers now vested in the Comptroller do not accomplish the result that they otherwise would if the law permitted the removal of officers and directors for misconduct in office." According to Eckels, "[m]any banks would be saved from embarrassment, creditors from loss, and shareholders from assessments if the Comptroller, upon learning of the misconduct of those charged with the management of a bank, could take positive action in the premises."[40] What Eckels and Hepburn were looking for was the sort of safeguard Congress had placed just a few years earlier on the Interstate Commerce Commission ("ICC"), the first modern independent agency: the power to ensure through the exercise of limited purpose removal authority that institutions shielded from politics nonetheless stayed true to their public purpose.[41]

A generation later, with independent agencies on the rise, and limited purpose removal provisions increasingly common, John Skelton Williams, a progressive reformer appointed by President Woodrow Wilson, renewed Chandler's call to augment the Comptroller's authority. In 1915,[42] 1917,[43] and 1918,[44] Williams asked Congress to amend the National Bank Act. As Williams put it:

> For many of the offenses indicated [in the Act] the only penalty which can be enforced by the Comptroller's office is the forfeiture of the bank's charter by suit in the United States court. This [remedy] in many

[39] S. 3730, 52d Cong. § 3 (reported favorably Feb. 11, 1893); S. Rep. No. 1286, at XXV (1893).

[40] U.S. Dep't of the Treas., Annual Report of the Comptroller of the Currency 20–21 (1893). Eckels repeated the recommendation in 1894. See U.S. Dep't of the Treas., Ann. Rep. of the Comptroller of the Currency 31 (1894).

[41] See Jane Manners & Lev Menand, The Three Permissions: Presidential Removal and the Statutory Limits on Agency Independence, 121 Colum. L. Rev. 1, 7, 52–53 (2021).

[42] U.S. Dep't of the Treas., No. 2766, Annual Report of the Comptroller of the Currency 39 (1915).

[43] U.S. Dep't of the Treas., No. 2802, Annual Report of the Comptroller of the Currency 19 (1917).

[44] U.S. Dep't of the Treas., No. 2827, Annual Report of the Comptroller of the Currency 75 (1918).

> cases would prove a great hardship to innocent stockholders and depositors, and can only be resorted to with much reluctance by this office.[45]

Just as shutting down the ICC would hardly have been the best way to address malfeasant ICC commissioners, Williams thought that shutting down an entire banking franchise because of reckless leadership would unduly hamper the public welfare. Strict monitoring combined with usable sanctions would deter the sort of self-dealing that sunk many banks and would stop bank executives from exploiting their ability to expand the money supply for private gain.

2. The New Deal Compromise

But Congress never acted. Instead, it loosened restrictions on national banks and allowed a competing group of state-chartered banks to rise up and threaten the stability of the entire monetary architecture. In 1913, Congress took a major step toward addressing the growing state banking system and enhancing public control over national banks as well: it created the Federal Reserve, including twelve Federal Reserve Banks and a Board in Washington. But the Fed failed to tame the growing mass of state banks. Nor was it able to avert a "competition in laxity" between the Comptroller and state authorities.[46]

Accordingly, the second of the two crises mentioned above—the crisis of 1932–33—was far more severe. By the time President Roosevelt took office in March 1933, thousands of banks had failed, plunging the country into a Great Depression.[47] The very arrangement, established during the Civil War, of banks run by private shareholders subject to public oversight came into question. As one official put it: "Either the bankers of this country will realize that they are guardians of the moneys committed to their charge and will conduct their business accordingly, or banking will cease to be a private enterprise and will become a purely governmental function."[48]

[45] U.S. Dep't of the Treas., No. 2735, Annual Report of the Comptroller of the Currency 16–17 (1914).

[46] Fed. Rsrv. Bd., Nineteenth Annual Report 236, 248 (1932).

[47] Ben S. Bernanke, Nonmonetary Effects of the Financial Crisis in the Propagation of the Great Depression, 73 Am. Econ. Rev. 257, 259 (June 1983) (stating that "the number of banks operating at the end of 1933 was only just above half the number that existed in 1929").

[48] Albert C. Agnew, Some Thoughts on the Future of American Banking, 14 Cal. Banker 193, 194 (June 1933).

"Nationalization" of deposit issue was not a fringe view. Many of Roosevelt's advisors thought that the federal government should reclaim public control over the money supply. For example, Rex Tugwell, an influential economist in the President's "Brain Trust," argued that the government would be a more effective banker than the profit-seeking business community.[49] Eight professors at the University of Chicago proposed effectively eliminating banks' monetary powers by requiring them to back all their deposits with government-issued cash. As the economist Henry Simons put it, the "Chicago Plan" would secure the "abolition of private credit as an element in the circulating media" and concentrate "complete and direct control over the quantity of [money] in the hands of the central monetary authority."[50]

But President Roosevelt had a conservative instinct—he thought that the problem with the banking system was not with private outsourcing, per se, but with poor official sector oversight. In Roosevelt's view, the OCC and the Fed had failed to adequately check aggressive risk taking by bankers. As Roosevelt explained in his first fireside chat: "We had a bad banking situation. Some of our bankers had shown themselves either incompetent or dishonest in their handling of the people's funds. They had used the money entrusted to them in speculations and unwise loans."[51] Enhanced government supervision of banking was Roosevelt's preferred solution.[52]

The New Deal Congress followed Roosevelt's lead. In 1933, it bolstered bank supervision in two ways. First, it established the Federal Deposit Insurance Corporation ("FDIC") to explicitly backstop and oversee bank deposit money, importantly including deposit money issued by state-chartered banks. Second, it added the banker removal power to the Fed's arsenal.[53]

Its goal in adding the removal power was to avert bank failures and depositor losses by aligning the interests of bankers with the interests of the public. Congress was particularly concerned (just as Senator Chandler

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[49] Susan Estabrook Kennedy, The Banking Crisis of 1933, at 166–67 (1973).

[50] Ronnie J. Phillips, The Chicago Plan & New Deal Banking Reform 50 (1995).

[51] President Roosevelt Delivers His First "Fireside Chat," March 12, 1933, *reprinted in* 4 Documentary History of Banking and Currency in the United States 2711 (Herman E. Krooss ed., 1969).

[52] See Franklin D. Roosevelt, Looking Forward 227 (1933) ("The events of the past three years prove that the supervision of national banks for the protection of depositors has been ineffective. I propose much more rigid supervision.").

[53] Banking Act of 1933, Pub. L. No. 73–66, §§ 8, 30, 48 Stat. 162.

had been forty years earlier) that bankers had been evading the rules in pursuit of excess profits, that government examiners had learned of these evasions, and that the banking agencies had been unable to correct the problems. As one banker explained to the Senate Banking Committee,

> I cannot emphasize [the removal provision] too strongly, because it is familiar to every member of this committee that banks have gone along with mismanagement and the public has known about it, and the Comptroller of the Currency has known about it, and the superintendents of State banks have known about it and they have criticized it. But the way to get [the bank managers] out has not been plain, and I think that a way ought to be made to get them out . . . .[54]

Senator Carter Glass from Virginia emphasized this rationale:

> [The comptroller] had knowledge that [the large banks that failed and triggered a collapse of the banking system in 1932] were engaged in irregular and unsound if not actually illicit business five years before the failure came; that the files of the comptroller's office were replete with admonitory letters, with letters severely protesting against the practices in those banks over a period of years; but they did not close up the banks because of this reluctance . . . to resort to that severe proceeding.[55]

Legislators in the House held a similar view.[56]

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[54] A Bill to Provide for the Safer and More Effective Use of the Assets of Federal Reserve Banks and of National Banking Associations, to Regulate Interbank Control, to Prevent the Undue Diversion of Funds into Speculative Operations, and for Other Purposes: Hearings on S. 4115 Before the S. Comm. on Banking and Currency, 72d Cong. 320 (Mar. 1932) (statement of John K. Ottley, President of the First National Bank of Atlanta, Georgia).

[55] 75 Cong. Rec. 9890 (1932) (statement of Sen. Carter Glass).

> The comptroller has great reluctance to apply the drastic condemnation [of revoking a bank's charter]. . . . So we have embodied in the bill a provision which authorizes the comptroller . . . when a bank is found in irregular and illicit and unsound practices which it either fails or refuses to correct, to summon these bank officials to a court of inquiry and give them a thorough hearing and, if the facts sufficiently warrant it, to suspend or dismiss the officers of the bank.

Id.

[56] See, e.g., 77 Cong. Rec. 3916 (1933) (statement of Rep. Robert Luce):

> [Section 30] is, in my judgment, the best thing in the whole bill. It is pretty nearly the only provision in the whole bill that puts any teeth into existing law. The reasons why we have had so many bank failures are not easy to determine, but we know, at least, that one reason has been the inability of the Comptroller of the Currency to compel banks to conduct their business according to sound methods and on right principles.

The resulting law—Section 30 of the Banking Act of 1933—empowered the Comptroller and officials at the regional Federal Reserve banks to refer instances of continued legal "violations" or "unsafe or unsound practices" to the Fed's Board and the Board to remove bank officers and directors engaged in such conduct following notice and a hearing. No provision was made for judicial review. The Act imposed strict secrecy on any removal order and related findings of fact, presumably to preserve the franchise value of the bank. It also applied criminal penalties to any person who participated in "any manner in the management of such bank" following removal.[57]

B. 1933–1966: From Resistance to Reform

Section 30 was rarely used in the thirty years that followed. The Comptroller soured on the power, seeing it as ineffective and cumbersome, and perhaps resenting the way that it subordinated the OCC's supervisory authority to the Fed. So, in 1966, Congress made a series of changes to the removal power: expanding its scope to cover suspensions and prohibitions and restricting its applicability to cases involving personal dishonesty.

1. Goliath's Sword

It is difficult to determine how profoundly removal authority changed the dynamic between bank executives and bank supervisors. What we do know is that the Fed invoked Section 30 only a handful of times between 1933 and 1966, and that it viewed invocation of the power as a last resort only to be used on great occasions.[58]

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[57] The Banking Act of 1933 § 30. The OCC cheered the change: Removal "is a power," Deputy Comptroller F. G. Awalt told Congress the following year,

> that the Comptroller . . . has been asking for since 1895, but the Congress never gave . . . us. You left us in the situation of officiating at the birth of a bank, and at its death, but as a doctor in between with no power to make the patient take medicine. All we could do was to suggest, and, more or less, you might say, wield the 'big stick'. But if they did not want to do it you could not make them do it, and the only thing you could do was to sue them for forfeiture of charter. And if you did that it closed the bank. That was no cure but killed the patient.

A Resolution to Investigate Practices of Stock Exchanges with Respect to the Buying and Selling and the Borrowing and Lending of Listed Securities: Hearings on S. Res. 84 Before the S. Comm. on Banking and Currency, 73rd Cong. pt. 12, at 5846 (1934).

[58] The Fed appeared to view the power in the way that John Somers, the Lord High Chancellor, viewed impeachment: "The power of [i]mpeachment ought to be, like Goliath's

The first Fed removal occurred in January 1937. It involved the president of a national bank in West Virginia.[59] A second removal action followed in 1938, this time against the president of a national bank in Kentucky. In connection with these actions, the Fed explained that Section 30 served "to stop abuses and prevent the development of dangerous trends" and that "Congress did not contemplate that proceedings . . . would be utilized for the correction of trivial matters."[60] According to the Fed, the removal power "should be exercised in cases where other means of obtaining corrections of significant violations of law or of unsound banking practices . . . have failed, or where such other means apparently would be less appropriate or should be supplemented" by removal.[61]

The Fed's next removal action came in 1945. It involved a violation of the law prohibiting bankers from engaging in securities dealing. The Fed's targets were John Agnew and F. O. Fayerweather, directors of the Paterson National Bank in New Jersey. Agnew and Fayerweather had refused to discontinue their work as employees of Eastman, Dillon & Co., a securities broker-dealer based in New York. Agnew and Fayerweather appealed the Fed's removal decision to federal court. The Fed argued that removal orders were not subject to judicial review in the absence of a charge of fraud and that in the alternative it had the authority to remove Agnew and Fayerweather for their illegal behavior. In 1947, the Fed prevailed on the second point—Agnew and Fayerweather lost their appeal—but the Fed lost on the jurisdictional question: even though the statute did not expressly authorize judicial oversight of Fed removals, a majority of the Supreme Court concluded that Section 30 actions were reviewable.[62]

sword, kept in the temple, and not used but on great occasions." 5 The Parliamentary History of England from the Earliest Period to the Year 1803, at 678 (William Cobbett ed., London, T.C. Hansard 1809).

[59] Meeting Minutes, Bd. of Governors of the Fed. Rsrv. Sys., at 11–12 (Jan. 6, 1937).

[60] Memorandum from L.P. Bethea, Assistant Sec'y, to the Bd. of Governors of the Fed. Rsrv. Sys., Proceedings Under Provisions of Section 30 of the Banking Act of 1933 (Aug. 29, 1936), *in* 45 Mimeograph Letters and Statements of the Board, July – December 1936, at 114, https://fraser.stlouisfed.org/archival-collection/mimeograph-letters-statements-board-4957/july-december-1936-510039?start_page=113 [https://perma.cc/A5KF-EFQ2].

[61] Id.

[62] The Fed took the position that no review was permitted. See Brief for Petitioners, Bd. of Governors of the Fed. Rsrv. Sys. v. Agnew, 329 U.S. 441 (1947) (No. 66), 1946 WL 50159, at *28–31. A majority of the Court rejected the Fed's view, concluding that "the determination of the extent of the authority granted the Board to issue removal orders under [section] 30 of

The lawsuit may have had some chilling effect.[63] In December 1949, the Comptroller, Preston Delano, warned the directors of the Continental National Bank and Trust Company in Salt Lake City to correct unsafe and unsound lending practices in relation to the bank's depleted capital position.[64] In May 1950, Delano informed the Fed that he was prepared to certify a basis for removal proceedings under Section 30.[65] Delano believed that removal "offered the only practicable solution [to the capital shortfall] and that this was much preferable to a proceeding by the FDIC to terminate the bank's insurance, for the latter would necessarily force the bank to liquidate."[66]

But the Comptroller picked a dangerous adversary. Although Continental "was one of the worst, if not the worst, national bank in the United States from the standpoint of ratio of capital to risk assets,"[67] Continental was led by a powerful banker, Walter E. Cosgriff, who controlled a group of nine banks and led the Salt Lake City Clearing House Association.[68] Cosgriff was also politically connected; he was appointed by President Truman to the board of the Reconstruction Finance Corporation in October 1950.[69]

Cosgriff did not want to give up control of Continental. In letters to the OCC, Cosgriff denied that his bank was undercapitalized and argued that

the Act is subject to judicial review." Bd. of Governors of the Fed. Rsrv. Sys. v. Agnew, 329 U.S. 441, 444 (1947). Justices Rutledge and Frankfurter took a different position, writing that while a removal is reviewable, "it is only for abuse of discretion" by the Board. Id. at 449 (Rutledge, J., concurring in judgment). This is so "[n]ot only because Congress has committed the [banking] system's operation to [the Board's] hands, but also because the system itself is a highly specialized and technical one, requiring expert and coordinated management in all its phases." Id. at 450. According to Justice Rutledge, the Board's "judgment [on removal] should be overturned only where there is no reasonable basis to sustain it or where [the Board] exercise[s] it in a manner which clearly exceeds [the Board's] statutory authority." Id.

63 See infra note 73.

64 Letter from the Comptroller of the Currency to the Bd. of Dirs. of the Cont'l Nat'l Bank & Tr. Co. 1 (Jan. 10, 1950). In August 1949, the bank's ratio of capital to risk assets was one to twelve. Letter from the Bd. of Dirs. of the Cont'l Nat'l Bank & Tr. Co. to the Comptroller of the Currency 1 (Dec. 22, 1949) [hereinafter Letter from the Bd. of Dirs.].

65 Letter from the Bd. of Dirs., supra note 64, at 1.

66 Memorandum from the Bd. of Governors of the Fed. Rsrv. Sys. to Mr. Millard and Mr. Vest, Proposed Certification by Comptroller of the Currency with a View to Removal of National Bank Directors 1 (June 1, 1950) [hereinafter Memorandum to Millard and Vest].

67 Id.

68 Cosgriff to Head Bank Group, Deseret News, Jan. 20, 1950, at 16.

69 Walter Cosgriff's Testimony Before the Fulbright Committee, *in* Investigations of Senators Joseph R. McCarthy and William Benton Pursuant to S. Res. 187 and S. Res. 304, at 46 (1953).

"[b]anks with 'cold storage' policies [i.e., high capital ratios] do not serve the public."[70] Cosgriff also escalated the conflict in the media. He argued that the "adequacy of an existing bank's capital is a matter for its directors and stockholders to decide—not the bank supervisory agencies."[71] And he called on Congress to hold hearings on the overweening powers of the banking agencies. According to Cosgriff, the OCC "ha[d] no authority to tell him what the bank's capitalization or other policies shall be."[72]

The Fed balked at removing Cosgriff,[73] and the Comptroller never moved forward with certification. Instead, the Fed, OCC, and FDIC agreed to conduct a simultaneous examination and to invite Cosgriff and the other directors to come to Washington "to work out some satisfactory solution."[74]

Despite the Cosgriff setback, the Fed did not abandon removal authority completely. In 1952, the Fed issued notices and scheduled hearings to remove all but one of the officers and directors of the City National Bank of Fort Smith, Arkansas. This time the Fed achieved its desired outcome: Fort Smith's president stepped down and sold his stock, and the bank's shareholders replaced most of the directors and elected new officers.[75] In 1953, the Board also successfully threatened to remove the president and board chairman of a state member bank, leading the bank's own board to act.[76] And in several further cases, Fed officials in

[70] Letter from the Bd. of Dirs., supra note 64, at 3.

[71] Robert W. Bernick, Cosgriff Suggests Probe of Comptroller Office, Salt Lake Trib., Dec. 2, 1951, at 1C.

[72] Nicholas P. Gregory, Authority over Banks May Be Subject to Probe, Phila. Inquirer, Dec. 10, 1951, at 38.

[73] According to the Board, "a case of this kind would be reviewable by the courts" and "the overexpansion of loans in relation to capital is a relative matter." In the absence of abnormal losses that the government's lawyers could point to before a judge, the Board feared it might not prevail. Moreover, "even if the proceeding were successful," the Board explained, "there would seem to be nothing to prevent the stockholders from electing other directors to carry out the policies desired [by Mr. Cosgriff]." Memorandum to Millard and Vest, supra note 66, at 1.

[74] Memorandum from Mr. Vest to the Files, Possible Certification by Comptroller with Respect to Directors of National Bank (June 2, 1950).

[75] Memorandum to the Bd. of Governors of the Fed. Rsrv. Sys. from Mr. Chase, Assistant Solicitor, Section 30 Proceeding—City National Bank of Fort Smith, Arkansas 1 (Jan. 22, 1953).

[76] See Letter from W. R. Diercks, Vice President, Fed. Rsrv. Bank of Chi., to George Sloan, Dir., Div. of Examinations, Bd. of Governors of the Fed. Rsrv. Sys. (Apr. 1, 1953) (detailing charges against the President and Chairman of the Board of Devon-North State Bank in Chicago, a member of the Federal Reserve System); Letter from Nat M. Khan to Logan Ford

the 1950s considered invoking Section 30, but ultimately declined to do so.[77]

2. Restriction and Reform

Although the New Deal banking regime constrained bank risk taking successfully for almost three decades, in the 1960s earnings volatility began to grow. In 1966, in response to requests from the Johnson Administration, Congress substantially strengthened supervision. It passed the Financial Institution Supervisory Act ("FISA"), expanding the remedial powers of the banking agencies.[78] FISA authorized the agencies to issue cease and desist orders, which allowed government officials to force bankers to stop engaging in practices that they deemed unsafe or unsound. Whereas previously the Fed's remedy when a banker repeatedly ignored informal supervisory directives was to remove that person, the cease-and-desist power allowed the Fed a middle path.[79]

FISA also altered removal law, increasing its scope to permit immediate but temporary removals from office (suspensions)[80] and permanent prohibitions from banking;[81] dropping a requirement that the Fed find a legal violation or unsafe or unsound practice had continued after a warning; and adding a new removal ground, breach of fiduciary duty. At the same time, FISA restricted removal by requiring the Fed to find that a legal violation, unsafe practice, or breach of fiduciary duty involved "personal dishonesty" and that it created the possibility of either

(June 29, 1953) (noting that the President "was removed for cause at a special meeting of the Board of Directors").

[77] Sometimes this was because the relevant individual resigned. See, e.g., Letter from John A. O'Kane, Gen. Counsel, Fed. Rsrv. Bank of S.F., to George Vest, Gen. Counsel, Bd. of Governors of the Fed. Rsrv. Sys. (Nov. 29, 1954).

[78] Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1046. The new remedial powers, added by title II of the Act to § 8 of the Federal Deposit Insurance Act ("FDIA"), were originally effective only until June 30, 1972, but were made permanent by § 908 of title IV of Pub. L. No. 91-609, 84 Stat. 1811 (1970).

[79] Id. § 202, 80 Stat. at 1046 (amending § 8(b) of the FDIA).

[80] Id. § 202, 80 Stat. at 1049 (adding § 8(e)(5) to the FDIA to allow the Fed "suspend . . . from office . . . [an officer, director, or other person] effective upon service of . . . notice and, unless stayed by a court . . . pending the completion of the administrative proceedings").

[81] Id. § 202, 80 Stat. at 1048–49 (adding § 8(e)(3) and § 8(e)(5) permitting the Fed to "prohibit . . . further participation in any manner in the conduct of the affairs of the bank"). FISA also granted the FDIC removal authority for the first time and gave the OCC the power to appoint national bank directors in cases where the Fed had suspended all of the bank's existing directors. Id. § 202, 80 Stat. at 1050 (adding § 8(g)(2) to the FDIA).

"substantial financial loss or other damage" to the institution or "serious[] prejudice[]" to the interest of the bank's depositors.[82]

While the Fed had resisted previous efforts by members of Congress to weaken removal authority,[83] it supported FISA because it was eager to obtain the more nimble and expansive cease-and-desist authority. The addition of suspension and prohibition authority also closed worrisome gaps that had permitted malfeasant bankers to inflict damage during and after Section 30 removal proceedings.[84] The Comptroller's office meanwhile actively supported rolling back removal power. According to the Comptroller, removal was not particularly effective because "the removal from office of a dominant figure does not necessarily end his influence."[85] Besides, the Comptroller argued, there were "nonstatutory mean[s]" to affect the removal of bank officers and directors and the statutory process merely created delay.[86] In other words, the Comptroller's powers of persuasion were sufficient.

Congress agreed with the Comptroller that removal (and forfeiture) had proven inadequate—"[o]n the one hand, [these sanctions] may be too severe for many situations . . . [o]n the other they may be so time consuming and cumbersome that substantial injury occurs to the institution before remedial action is effected."[87] Removal, the Senate Banking Committee explained, could "do great harm to the individual affected and to his institution and to the financial system as a whole."[88]

[82] Id. § 202, 80 Stat. at 1047–48 (adding §§ 8(e)(1)-(2)).

[83] There had been a previous effort to clip the Fed's wings in 1957, which Fed Chair William McChesney Martin opposed. That change would have changed the standard of review from "substantial evidence" to "weight of the evidence." Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7026 Before the H. Comm. on Banking and Currency, 85th Cong. 23 (1957).

[84] Meeting Minutes, Bd. of Governors of the Fed. Rsrv. Sys. 5 (Jul. 20, 1966).

[85] Att'y Gen. Comm. on Admin. Proc., Administrative Procedures in Government Agencies, S. Doc. No. 76-186, at 17 (3d Sess. 1940). "Often, the officer or director will own substantial interests in the institution; thus removal would not end his ability to exercise his influence in a damaging manner." Joseph M. Korff, Current Legislation, Banking: The Financial Institutions Supervisory Act of 1966, 8 B.C. Indus. & Com. L. Rev. 599, 611 (1967).

[86] Meeting Minutes, supra note 84, at 5.

[87] S. Rep. No. 89-1482, at 3536–38 (1966) (quoting a letter from the Secretary of the Treasury, Chairman of the Fed, Chairman of the Federal Home Loan Bank Board, and Chairman of the FDIC).

[88] Id. at 3539. Concern that removal, like its earlier cousin charter forfeiture, would prove too severe and that something like a cease-and-desist power was needed dates back to the Depression. See, e.g., Hearings on S. Res. 84 Before the S. Comm. on Banking & Currency, 73d Cong. 5787 (1935) (statement of Sen. Couzens) ("I do not think the removal of the officers of a bank will always rehabilitate the bank . . . I am of [the] opinion there should be some

Congress was also concerned that "unsafe" and "unsound" have no "definite or fixed meaning" and that, therefore, "a broad construction of these terms might result in the issuance of suspension or removal orders on the basis of nothing more than a difference of opinion about the most debatable of management problems."[89] According to the Senate Banking Committee, it was not "desirable to leave any opening for such a result," and therefore, removal power "must be strictly limited and carefully guarded."[90] Hence "the further requirement that the violation or practice must be 'one involving personal dishonesty on the part of such director or officer.'"[91]

FISA's changes meant the Fed could no longer remove recklessly risk-seeking bankers of the sort Comptroller Delano had criticized at Continental.[92] However, legislators appeared to read "personal dishonesty" broadly enough to encompass self-dealing and other noncriminal conduct. For example, one senator said that the revised removal authority was designed to stop "the flow of losses through the hands of self-seeking or criminal elements" and that a banker could be removed for failing to exhibit "the integrity demanded by a position of public trust."[93] In other words, the function of removal remained unchanged: removal ensured that those who "handl[e] other people's money under special licenses granted by the Government in the public interest" act to advance "the interests of depositors, borrowers, and the public."[94]

C. 1978: Removing the Honest Banker

Soon after FISA became law, concerns arose that Congress had "deprived the [banking] agencies of any efficient remedy to meet [the] serious problem [of] grossly incompetent management."[95] Bank closures

additional statutory provision that the Comptroller of the Currency may either close the bank or have something else done [besides removal] that would not create such a condition [i.e., an undercapitalized bank] as I have just described.").

[89] S. Rep. No. 89-1482, at 3539 (1966).

[90] Id.

[91] Id.

[92] 112 Cong. Rec. 19,223 (Aug. 19, 1966) ("[L]ike all human institutions, our banks and savings and loan associations . . . from time to time [have] been the victims of careless or irresponsible individuals or, on extremely rare occasions, outright criminals.").

[93] 112 Cong. Rec. 20,232–33 (Aug. 22, 1966).

[94] S. Rep. No. 89-1482, at 3540 (1966).

[95] Korff, supra note 85, at 614–15.

continued, reprising their 1965 peak of nine in 1969, and then spiking to thirteen and sixteen in 1975 and 1976, respectively.[96] The 1974 failure of Franklin National Bank was especially salient: its collapse was the largest in nominal terms in U.S history,[97] reverberated internationally,[98] and led the Fed and nine other central banks to announce they would do whatever "necessary" to stabilize the system.[99]

In 1976, Congress ordered the Government Accountability Office ("GAO") to review bank oversight and propose new legislation. The GAO's report, released in January 1977, did not identify any instances in which the banking agencies used either removal or cease-and-desist powers between 1966 and 1971.[100] And although the agencies had initiated 108 actions and forty-nine removals over the subsequent six years,[101] the GAO concluded that more actions had been merited.[102]

The GAO also argued that FISA had excessively constrained the Fed's removal powers. "[M]ost bank failures in the last 5 years," it explained, "were caused by individual bank managers who followed self-serving loan practices or were incompetent as stated in examination reports and correspondence." Further, "57 percent [of the banks on the government's problem list] were cited by examiners for ineffective management."[103]

[96] Elmer B. Staats, Report to the Congress by the Comptroller General of the United States: Highlights of a Study of Federal Supervision of State and National Banks 7 (1977) [hereinafter GAO Report].

[97] John H. Allan, Franklin Found Insolvent by U.S. and Taken Over, N.Y. Times, Oct. 9, 1974, at 1; see also Andrew F. Brimmer, The Federal Reserve and the Failure of Franklin National Bank: A Case Study of Regulation, *in* Business and the American Economy, 1776–2001, at 108 (Jules Backman ed., 1976).

[98] See Brimmer, supra note 97, at 110, 118; Benjamin Braun, Arie Krampf & Steffen Murau, Financial Globalization as Positive Integration: Monetary Technocrats and the Eurodollar Market in the 1970s, 28 Rev. Int'l Pol. Econ. 794, 810–11 (2021) (describing the impact of the collapse of Franklin National Bank throughout Europe).

[99] Clyde H. Farnsworth, 10 Nations Plan Bank Aid to Shore Up Confidence, N.Y. Times, Sept. 11, 1974, at 93; Statement of Central Bankers, N.Y. Times, Sept. 11, 1974, at 64.

[100] The report explicitly noted that the FDIC had failed to use its cease-and-desist authority prior to 1971. See GAO Report, supra note 96, at app. III, at III-48. It did not discuss explicitly the activity of the other agencies but did document their cease-and-desist and removal actions from 1971 to 1976. See id. at 25–27. See also John C. Deal, Bank Regulatory Enforcement—Some New Dimensions, 40 Bus. Law. 1319, 1320 (1985).

[101] Comm. on Gov't Operations, Federal Response to Criminal Misconduct and Insider Abuse in the Nation's Financial Institutions, H.R. Rep. No. 98-1137, at 143 (1984). Four of these were Fed removals; the rest were split between the FDIC and OCC. Id.

[102] GAO Report, supra note 96, at 48.

[103] Id.

Removal could not reach these "incompetent" managers. Moreover, even when a banker is dishonest, it "is sometimes difficult to [prove]."[104]

Accordingly, the GAO recommended Congress empower the agencies to remove bank officers for gross negligence and to levy fines against bank officers for legal violations,[105] and the agencies agreed.[106] The resulting legislation, the Financial Institutions Regulatory and Interest Rate Control Act ("FIRIRCA"), loosened the 1966 restrictions on removal by allowing the Fed to remove any individual who "demonstrates a willful or continuing disregard for . . . [the] safety and soundness" of a bank.[107] FIRIRCA also loosened the requirement that agencies show either an institution was likely to suffer substantial financial loss or other damage or that the depositors were likely to be seriously prejudiced by adding "receipt of financial gain by the individual."[108]

According to the House Committee on Banking, Finance, and Urban Affairs, the new provisions "g[a]ve the regulatory agencies a less burdensome test under which they may institute removal proceedings."[109] Importantly, the agencies could now "move against individuals who may not be acting in a fraudulent manner but who are nonetheless acting in a manner which threatens the soundness of their institution."[110] The Senate Committee on Banking, Housing, and Urban Affairs saw things similarly: the Committee supported the amendment because "[t]he requirement that fraudulent behavior be shown as a precondition for removal has hampered the regulators from taking timely action against individuals where actions have had adverse effects on financial institutions."[111]

[104] Id.

[105] Id. at 49.

[106] Id. at 48; Statement by the Board of Governors of the Federal Reserve System on the GAO Report (Jan. 16, 1977), *in* Federal Supervision of State and National Banks: A Study by the Comptroller General of the United States app. II-1, at II-24 (1977); see also Financial Institutions Regulatory Act of 1978, H.R. Rep. No. 95-1383, at 18 (1978).

[107] Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630 § 107(d)(1), 92 Stat. 3641, 3656–57 (amending § 8(e) of the FDIA).

[108] S. Comm. on Banking, Hous. & Urb. Affs., Financial Institutions Supervisory Act Amendments of 1977, S. Rep. No. 95-323, at 7 (1977). FIRIRCA also responded to Feinberg v. FDIC, 420 F. Supp. 109 (D.D.C. 1976), by providing an opportunity for agency hearing prior to suspensions. Financial Institutions Regulatory Act of 1978, H.R. Rep. No. 95-1383, at 18–19 (1978).

[109] H.R. Rep. No. 95-1383, at 18.

[110] Id.

[111] S. Rep. No. 95-323, at 7.

D. 1989: Further Expansion

The banking agencies did not initially embrace the expanded authority Congress granted them in FIRIRCA. The Fed removed no one in 1980[112] and just one executive in 1981.[113] When Penn Square Bank failed in 1982, Congress held two full days of hearings, calling the Comptroller and the FDIC Chair to testify.[114] Although the Comptroller, Penn Square, and its directors "enter[ed] into a formal written agreement to cease and desist from unsound and illegal practices" in September of 1980, the agreement, according to Ferdinand St. Germain, the Chair of the House Banking Committee, "had all the sting of a flogging with a wet noodle."[115] Instead, the serious weaknesses at the bank were covered up and hidden from the public and the bank's counterparties, and Congress feared it would find that "once again nothing effective was done to curb [mismanagement] practices."[116] These fears were realized as the hearings soon revealed that bank executives had engaged in "substantial insider transactions."[117]

When the question turned to removal, the OCC took the mystifying position that the personal dishonesty requirement still pertained.[118] Following the hearing the OCC conceded that it had the authority to proceed in cases not involving dishonesty, provided the relevant individuals continually disregard the safety and soundness of the bank. Yet, according to the Comptroller, the management of Penn Square had

[112] Bd. of Governors of the Fed. Rsrv. Sys., Annual Report on Formal Enforcement Actions (1980) (on file with authors). The OCC issued a notice of charges to remove the president of a small bank with assets of between $25 and $50 million. Comptroller of the Currency, 1980 Annual Report 108.

[113] Bd. of Governors of the Fed. Rsrv. Sys., Annual Report on Formal Enforcement Actions 81-25 (1981) (on file with authors) (suspending bank chairman and president following indictment for personal and corporate federal income tax violations and violations of the U.S. currency reporting laws).

[114] Penn Square Bank Failure: Hearing Before the H. Comm. on Banking, Fin. & Urb. Affs., 97th Cong., at iii (1982).

[115] Id. at 2.

[116] Id.

[117] Id. at 100.

[118] "Our intent" in 1978, the Chair explained, "was to give you the power that you needed without a finding of fraud or illegality." To this, the Senior Deputy Comptroller for Supervision replied, "there must be a personal act of dishonesty present before we start a removal." "In other words," the Chair replied, "you ignore the statute." "No," the Deputy insisted, "that is the advice that our general counsel gives us, that we must have that factor present before we are able to go forward. That may be a fallacious interpretation, but it is the agency's legal opinion." Id. at 99.

merely needed strengthening, and "removal . . . [was] neither appropriate under the statute nor necessary to effect management changes."[119]

The Fed's record in the 1980s was better. Although it issued no removal orders in 1982 or 1983, it averaged eleven suspensions, removals, or prohibitions each year between 1984 and 1988. All but two of these fifty-four orders targeted bank officers or directors, and the exceptions involved a scheme that also led to the removal of the bank's president.[120] Moreover, many involved situations where personal dishonesty was not involved or likely would have been challenging to prove in court.

But underlying structural problems and limits on the Fed's jurisdiction meant its efforts were inadequate to check wholesale weakening across the financial system. By the second half of the 1980s, a race to the bottom between state and federal regulators (and between banks and thrifts) culminated in a massive wave of bank failures known as the Savings and Loan Crisis. In 1987, 262 FDIC-insured banks failed. That September, the stock market fell 23% in one day. In 1988, another 470 insured depository institutions failed, followed by 534 in 1989.[121]

In response to this unraveling, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). FIRREA expanded the Fed's removal power in several ways. First, it changed the law to permit removals of any institution-related party, not just officers and directors.[122] Second, it specified that

[119] Letter from Paul M. Homan, Senior Deputy Comptroller for Bank Supervision, to Honorable Fernand J. St. Germain, Chairman, Comm. on Banking, Fin. & Urb. Affs. (Jul. 29, 1982) (on file with authors).

[120] Data on 1984–1988 removal actions were hand collected from the corresponding Federal Reserve System Annual Reports. For details about the two exceptions who were former employees of a bank in the bank municipal securities department, see Board of Governors of the Federal Reserve System, 1984 Annual Report 23.

[121] See Menand, supra note 16, at 1556.

[122] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 903, 103 Stat. 183, 453 (1989) (codified at 12 U.S.C. § 1818) (amending § 8(e)(1) of the FDIA). Around this time, pursuant to the 1990 Securities Enforcement Remedies and Penny Stock Reform Act, Congress empowered the Securities and Exchange Commission ("SEC") to obtain federal court orders barring individuals who violate the antifraud provisions of the federal securities laws from future service as officers or directors of public companies. See Jayne W. Barnard, SEC Debarment of Officers and Directors After Sarbanes-Oxley, 59 Bus. Law. 391, 395 (2004). In 2002, in Sarbanes-Oxley, Congress empowered the SEC to impose bars in administrative cease-and-desist proceedings as well. Id. at 407. But unlike the Fed's removal power, which originates from agency cost concerns about senior bank executives, the SEC's authority has injunctive roots. See id. at 393–94. This translates to a crucial difference:

"indirect[]" violations of law, unsafe or unsound practices, and breaches of fiduciary duties could give rise to a removal order, as could violations of final cease-and-desist orders, conditions imposed in writing in connection with a bank's applications or requests, and any written agreements entered into between banks and the agencies.[123] Third, FIRREA deleted the adjectives "seriously" and "substantial," which had modified the 1966 requirement that regulators find either the likelihood of financial loss or other harm and prejudice to depositors before removing an individual. Fourth, it reversed a D.C. Circuit case, decided earlier that year, which had concluded that the Fed lacked the authority to invoke Section 1818(e) after a banker had already left office (either by resigning or because they were terminated).[124] FIRREA expressly authorized the Fed to pursue prohibition up to six years later.

The result is a statutory scheme that gives the Fed wide-ranging discretion to pursue suspensions, removals, and prohibitions against executives, investors, employees, and third parties in a variety of circumstances in order to check excessive risk taking and prevent bank failures. While it continues to outsource to private shareholders the power to appoint bank executives, it tempers this delegation with for-cause removal authority, which it grants to public officials as a way of checking abuses.

II. BANKER REMOVAL IN PRACTICE

As explained above, FIRREA required the Fed to make its enforcement activity public. This Part takes advantage of that change in the law to analyze a unique dataset of all removal orders (including suspensions and prohibitions) issued by the Fed since 1989.

The data reveal a disconnect between the conception of the banker removal power that Congress has long embraced—as a tool to align senior bankers with the public interest—and how the Fed has used the power in practice. This Part documents this gap by detailing whom the Fed has removed, how often removal occurs, and for what reasons. Our analysis

regardless of whether the SEC seeks a bar through judicial decree or administrative proceedings, the SEC must prove a concrete violation of securities laws and at least some risk of re-offense. See 5 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 16:9, at 778 (7th ed. 2016); SEC v. E-Smart Techs., Inc., 139 F. Supp. 3d 170, 181 (D.D.C. 2015).

[123] § 903, 103 Stat. at 453.

[124] Stoddard v. Bd. of Governors of the Fed. Rsrv. Sys., 868 F.2d 1308, 1310 (D.C. Cir. 1989).

raises normative questions about whether the removal authority must be modernized to reflect the institutional decentralization and many layers separating bank officers from business execution that characterize the modern banking environment.

A. The Data

The Fed disclosed almost no information about its enforcement activity prior to 1989. In 1989, the House of Representatives criticized this secrecy as "do[ing] little to deter misconduct, but [serving] to ultimately worsen the problems of financial institutions."[125] Congress responded by requiring federal banking agencies to publish "any final order" issued in connection with a civil enforcement action, barring exceptional circumstances.[126]

Today, the Fed maintains a database of formal enforcement actions on its public website.[127] For the years after 1996, this database includes the name of each sanctioned individual, the name of the affiliated bank, the date, and links to corresponding press releases and final orders. The documents in turn provide a range of information, including position, employment status, and findings of fact. But for entries between 1989 and 1996 many of these data are missing because links to the corresponding final orders are unavailable. We were able to obtain all but two of these orders through a FOIA request.[128]

We also requested every formal Section 1818(e) order issued between 1933 and 1989. The Board responded with annual summaries of removal

[125] Comm. on Banking, Fin. & Urb. Affs., Financial Institutions Reform, Recovery and Enforcement Act of 1989, H.R. Rep. No. 101-54, at 470 (1989).

[126] § 913, 103 Stat. at 483–84.

[127] Enforcement Actions, Bd. of Governors of the Fed. Rsrv. Sys., https://www.federalreserve.gov/supervisionreg/enforcementactions.htm [https://perma.cc/29NG-GVH4] (last visited June 15, 2020). Within this database, we limited our search to enforcement actions in the "prohibition from banking" category of the "type of action" field. Prior to October 13, 2006, removal proceedings that were initiated by the OCC involving affiliates of a national banking association or a District depository institution were certified to the Fed for final decision. See 12 U.S.C. § 1818(e)(4) (2000); Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 303, 120 Stat. 1966, 1970 (2006) (repealing this provision). Because the Fed ultimately determined whether a removal order would be issued in these cases, they are included in our dataset.

[128] See Letter from Michele Taylor Fennell, Assistant Sec'y, Bd. of Governors of the Fed. Rsrv. Sys., to Da Lin, Assistant Professor of L., Univ. of Rich. Sch. of L. (Feb. 26, 2020) (on file with authors).

actions from 1980 to 1988,[129] but redacted the names of individuals and institutions.[130] We further located three boxes at the National Archives and Records Administration that contain correspondence relating to removal actions pursued by the Fed between 1933 and 1954.[131] Because the pre-1989 records contain less detail than the post-1989 ones, the analysis below is limited to the more recent orders, supplemented by information from pre-1989 cases as appropriate.

The dataset captures removal actions against affiliates of both domestic institutions and foreign banks with U.S. operations. The bulk of analysis, however, excludes actions associated with (1) foreign bank branches, agencies, representative offices, and non-bank subsidiaries; and (2) individuals who live and work abroad for two reasons—one pragmatic and one conceptual. The pragmatic reason is that foreign bank branches and agencies report assets and other financial data at a local level instead of at a consolidated level like domestic institutions, so their inclusion would muddle the probative value of the data.[132] The conceptual reason is that supervision and enforcement against foreign banks (and their employees) present unique obstacles that are not present in domestic bank cases. Regulation of foreign banks' U.S. operations has traditionally been designed to accommodate some degree of "consolidated supervision" by the banks' home-country regulators,[133] and resolution of problems at foreign branches depends on "[c]ooperation and frank and timely

[129] See Letter from Margaret McCloskey Shanks, Deputy Sec'y, Bd. of Governors of the Fed. Rsrv. Sys., to Da Lin, Assistant Professor of L., Univ. of Rich. Sch. of L. (July 17, 2019) (on file with authors).

[130] See id.

[131] The Archives records are located in Boxes 195–97, "Central Subject Files, 1913-1954," Record Group 82, "Records of the Federal Reserve System, 1913-2003," National Archives and Records Administration.

[132] Each branch or agency of a given foreign bank files its own separate financial disclosures with the Federal Financial Institutions Examination Council ("FFIEC"). See Fed. Fin. Insts. Examination Council, Instructions for the Preparation of Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, at GEN-2 (2020). By contrast, U.S. depository institutions report their finances at the consolidated bank or bank holding company level. See Fed. Fin. Insts. Examination Council, Instructions for Preparation of Consolidated Reports of Condition and Income 10a–11 (2020). Finally, representative offices and non-bank subsidiaries of foreign banks do not file financial disclosures with the FFIEC because they may not take deposits or make loans.

[133] Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Rsrv. Sys., Regulation of Foreign Banking Organizations, Remarks at the Yale School of Management Leaders Forum (Nov. 28, 2012), https://www.federalreserve.gov/newsevents/speech/tarullo20121128a.htm [https://perma.cc/Q9JM-Q6PZ].

communication" between U.S. and foreign bank supervisors.[134] Dropping these fifty observations removes approximately 21% of the data.

Most of the remaining orders are easy to categorize; they have a clear issuance date and contain relatively detailed descriptions of the individual's conduct and relationship to the bank. But there are some edge cases. First, in a large minority of cases, enforcement orders only vaguely describe the underlying conduct and the individual's relationship to the organization. For example, an order against Charles Rowland merely describes him as "a former institution-affiliated party" and does not mention why he was sanctioned.[135] Whenever possible, we filled these gaps with hand-collected information from contemporaneous news accounts and related lawsuits.

Second, although we assigned each order to a single primary misconduct category, perhaps inevitably, the categories sometimes overlap in ways that introduce a degree of subjectivity. For example, employees who embezzled or engaged in other forms of self-dealing often attempted to cover up their activities by falsifying records or lying to regulators.[136] We coded the orders based on our assessment of the dominant reason that led to removal.

[134] Press Release, Off. of the Comptroller of the Currency, Testimony of Eugene A. Ludwig Before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Banking and Financial Services, on the Supervision of Foreign Banks in the U.S. (Dec. 5, 1995), https://www.occ.treas.gov/news-issuances/news-releases/1995/nr-occ-1995-133.html [https://perma.cc/C2U7-JNWG]. For an example of socio-political influences on enforcement decisions against foreign banks, see, e.g., Ben McLannahan, Osborne Intervened in US HSBC Money-Laundering Probe, Report Says, Fin. Times (July 12, 2016), https://www.ft.com/content/2be49f84-47c9-11e6-b387-64ab0a67014c [https://perma.cc/GH2A-Y536] (reporting that Britain's former Chancellor of the Exchequer and the U.K. Financial Services Authority intervened to persuade the U.S. government not to pursue criminal charges against HSBC for money laundering). For an insightful account of how foreign banks present unique supervisory challenges to U.S. regulators, see generally Jeremy C. Kress, Domesticating Foreign Finance, 73 Fla. L. Rev. 951 (2021). But cf. David Zaring, Enforcement Against the Biggest Banks (2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678439 [https://perma.cc/45NY-4WVJ] (finding that, between 2010 and 2016, U.S. banking regulators pursued the same number of enforcement actions against large domestic and foreign banks).

[135] Consent Ord., Charles N. Rowland, Bd. of Governors of the Fed. Rsrv. Sys. No. 93-035-E-I1 (Dec. 6, 1994) (on file with author).

[136] For instance, the § 1818(e) actions against Thomas and Mark Huston alleged that they "authorized a series of loans to one another which cumulatively exceeded federal and state lending limits to bank officers, and then concealed or attempted to conceal some of those violations from state and federal banking examiners." Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Board Permanently Bars Thomas H. Huston and T. Mark Huston from Participating in the Banking Industry (July 28, 2016).

Third, sometimes the Fed issued multiple orders against the same individual for the same conduct at the same bank. Generally, these duplicate entries arise either because the Fed suspended the individual from office (first entry)[137] and then subsequently prohibited the individual from further participation in the banking industry (second entry), or because the Fed publicly issued a notice of intent to pursue a Section 1818(e) action (first entry) and then later issued a formal removal order (second entry). Relatedly, for a few orders, the order itself or a contemporaneous lawsuit references an earlier, related Section 1818(e) action that does not appear on the Fed's website or in the FOIA records that we received. For example, the 1995 order against Ernest Vickers, III, refers to the Fed's "issuance, on September 28, 1990, of a Notice of Intention to Remove from Office and of Prohibition and Order of Suspension against Vickers."[138] In all of these cases, we used the earliest formal action and dropped notices as well as subsequent entries.[139]

We matched the removal actions to financial data from the Reports of Condition and Reports of Income banks and bank holding companies ("BHCs") file quarterly.[140] Our dataset offers a reasonably comprehensive

[137] Both 12 U.S.C. § 1818(e)(3) and § 1818(g)(1) allow federal banking regulators to suspend a bank affiliate from office or temporarily prohibit her from further participation in the banking industry. Section 1818(e)(3) allows for a suspension order if the supervisory agency "determines that such action is necessary for the protection of the depository institution or the interests of the depository institution's depositors." 12 U.S.C. § 1818(e)(3). Section 1818(g)(1) is narrower and allows for the suspension of a bank affiliate who has been charged with either a felony involving dishonesty or certain other criminal violations. See id. § 1818(g)(1)(A). If the individual is convicted and the conviction is no longer subject to judicial review, the supervisory agency may make the order permanent. See id. § 1818(g)(1)(C)(i). In practice, the Fed has also invoked § 1818(e) when issuing a permanent removal order after a § 1818(g) suspension. See, e.g., Consent Ord., The NorCrown Tr., Bd. of Governors of the Fed. Rsrv. Sys. No. 05-010-B-HC (Feb. 10, 2005), https://www.federalreserve.gov/boarddocs/press/enforcement/2005/20050210/attachment.pdf [https://perma.cc/VNB7-EJJT].

[138] Consent Ord., Vickers, Bd. of Governors of the Fed. Rsrv. Sys. No. 90-047-E-I (July 14, 1995) (on file with author).

[139] In 2017, the Fed issued a notice of intent to pursue a § 1818(e) prohibition against Fang Fang, a former employee of J.P. Morgan Securities (Asia Pacific) Limited, but it has not taken any other action against Fang since then. See Consent Ord., Fang, Bd. of Governors of the Fed. Rsrv. Sys. No. 17-006-E-I (March 9, 2017), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20170310a1.pdf [https://perma.cc/C268-3F67]. Because the Fed has not taken any actual enforcement action against Fang to date, he was excluded from our dataset.

[140] We matched removal actions to Call Reports using each bank and bank holding company's unique identifier, known as its RSSD ID. See Definitions of Banking Terms, Nat'l Info. Ctr. (last visited June 16, 2020),

picture of the Fed's removal activity between 1989 and 2019. The data does not, however, capture the full range of federal removal actions, which would require the inclusion of orders issued by the OCC, the FDIC, and the now-defunct Office of Thrift Supervision.[141] Each banking agency occasionally publishes counts of completed civil enforcement actions, and these statistics reveal the pace of enforcement does vary from agency to agency, with the Fed's enforcement numbers at the lower end of the spectrum.[142] With that said, among the federal bank supervisors,

https://www.ffiec.gov/nicpubweb/Content/HELP/DefinitionsOfBankingTerms.htm [https://perma.cc/Q8QU-G7AL]. If the institution named in the removal order matched with more than one RSSD ID, we confirmed the institution's identity using its location and institution type. Once again, some coding complexities deserve mention. First, a large number of orders list both a bank holding company and its subsidiary bank (or banks) in the caption. In constructing financial variables, we matched the enforcement orders to the data reported by the largest U.S. institution named in the caption—typically, the bank holding company. If the largest U.S. institution did not report call data, we used the largest call data reporter. Second, we generally matched orders to financial data using the issuance date, but some banks had closed or were acquired by the time enforcement occurred. In these cases, we took the maximum value from the last four quarterly reports prior to the quarter the bank ceased operations. We used this methodology even if the institution continued filing financial disclosures under its own RSSD ID after the acquisition or closing date because the reported figures may be tainted by the merger or bank resolution process. Third, two actions in the dataset involved individuals who committed fraud or embezzlement at one bank but were working at a different bank at the time they were removed. Because the orders removed these employees from their more recent jobs, they were coded as being associated with those employers. Two other actions involved employees who committed fraud or embezzlement at two unrelated banks and were no longer working at either bank at the time of the Fed's enforcement order. We matched these actions with data from the first institution listed on the order caption.

[141] See 12 U.S.C. § 1813(q) (defining "appropriate Federal banking agency" as referring to either the OCC, FDIC, or the Fed, depending on the type of banking institution). The Office of Thrift Supervision ("OTS") was eliminated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. See Pub. L. No. 111-203, § 313, 124 Stat. 1376, 1523 (2010). For a broad survey of federal financial regulatory bodies, see generally Cong. Rsch. Serv., R44918, Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework (2020), https://sgp.fas.org/crs/misc/R44918.pdf [https://perma.cc/6D3C-D38J].

[142] A recent study by the Offices of Inspector General for several federal banking regulators, for example, found that, between Jan. 1, 2008 and September 30, 2013, the FDIC issued removal orders against eighty-six individuals who were associated with failed banks; the OCC and OTS each issued nineteen such removal orders; and the Fed issued four. Offs. of Inspector Gen., Fed. Deposit Ins. Corp., Bd. of Governors of the Fed. Rsrv. Sys. & Consumer Fin. Prot. Bureau, Dep't of the Treasury, Enforcement Actions and Professional Liability Claims Against Institution-Affiliated Parties and Individuals Associated with Failed Institutions 15 (2014), https://oig.federalreserve.gov/reports/board-actions-claims-failed-institutions-jul2014.pdf [https://perma.cc/3HX8-P7S8] [hereinafter OIG Report]. A 1977 Comptroller General report similarly found significant variance. See Report to the Congress by the Comptroller General of the United States: Highlights of a Study of Federal Supervision of

the Fed has the broadest purview and the "broadest sight lines across the economy," so a deep understanding of its enforcement activity alone can yield valuable insights.[143] Unfortunately, a fully comprehensive study is not practicable at this time because some bank supervisors limit access to past Section 1818(e) orders and have not produced them in response to our FOIA requests.[144]

B. Thirty Years of Removals: A Brief Overview

When compared to the total number of employees working in commercial banks, the number of removals pursued by the Fed is tiny. Between 1980 and 2019, the Fed completed an average of 7.2 actions each year for a total of 289 orders. By contrast, the number of employees working in BHCs and banks supervised by the Fed averaged approximately 2.77 million during the past five years.[145] The Fed's removal activity appears low even when compared with the overall rate of federal criminal convictions for bank fraud, which ranged from 421 to 599 each year between 2015 and 2019.[146]

It is possible that the Fed is ceding some of its removal jurisdiction to other bank regulators.[147] For example, our data show that the Fed pursues significantly fewer removals against affiliates of BHCs (which also have a different bank-level supervisor such as the OCC) than against affiliates of state-member banks (for which the Fed is the sole supervisor), particularly in recent years. But if this is so, it remains unclear why the Fed defers. Oversight at the bank level presents a risk of underenforcement because banks can shop their charter based on "laxity

State and National Banks 26–27 (1977) (finding that, between 1971 and 1976, the OCC took twenty-six removal actions, the FDIC took nineteen actions, and the Fed took four actions).

143 Lael Brainard, Governor, Bd. of Governors of the Fed. Rsrv. Sys., The Federal Reserve's Financial Stability Agenda (Dec. 3, 2014), https://www.federalreserve.gov/newsevents/speech/brainard20141203a.htm [https://perma.cc/42TU-T75C].

144 We submitted a similar FOIA request to the OCC in May of 2019 and are in the process of appealing their response.

145 This figure is calculated from Call Reports data, which are described in Section II.A.

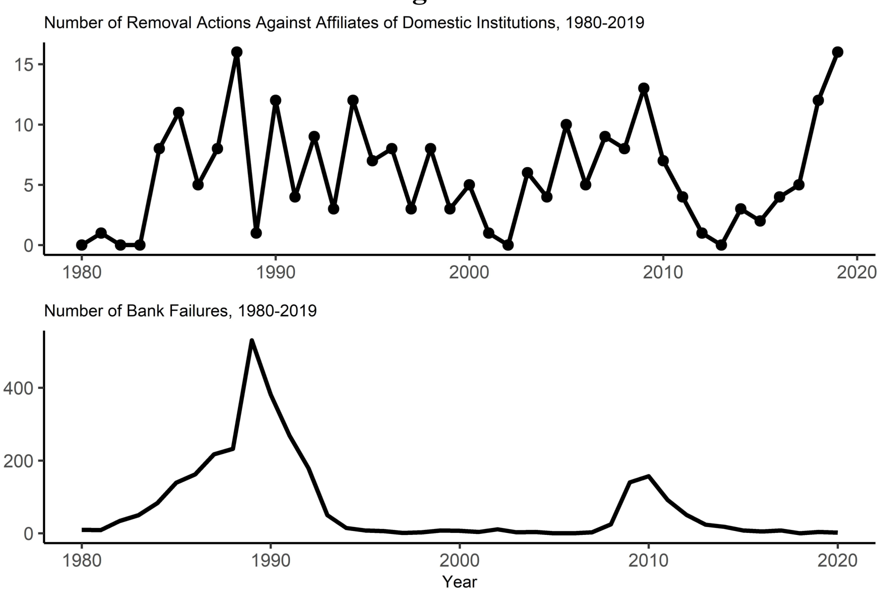
146 Federal Criminal Enforcement, TRACFed (last visited May. 25, 2020), https://tracfed.syr.edu/index/index.php?layer=cri [https://perma.cc/C5BZ-5PBS] (tallying "# convicted" for 18 U.S.C. § 1344).

147 While the Fed cannot pursue § 1818(e) actions against individuals who are solely affiliates of a BHC's depository institution subsidiaries, its jurisdiction covers employees, officers, directors, and other affiliates of the BHCs themselves as well as their non-bank subsidiaries. See 12 U.S.C. § 1813(q) (defining "appropriate Federal banking agency").

in regulation."[148] Oversight at the holding company-level avoids this problem. The Fed has also actively issued *institution*-level enforcement actions against BHCs based on misconduct that occurred at the bank level. It is puzzling why enforcements against *individuals* would be treated differently.

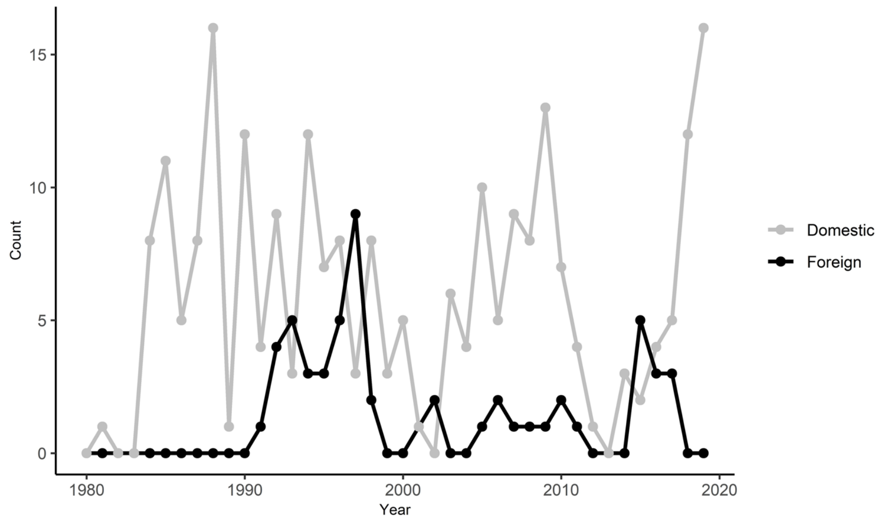
As Figure 1 illustrates, removals against affiliates of domestic banks and BHCs roughly track general U.S. banking conditions. The number of completed actions peaked in 1988, around the height of the Savings and Loan Crisis, then steadily declined during the 1990s. It rose again in the leadup to the 2008 financial crisis but dropped off sharply after 2009. In the last few years, we have seen yet another resurgence, though this recent increase curiously coincides with a period of growth and stability in the banking system.

Figure 1



[148] See Adam J. Levitin, The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay, 127 Harv. L. Rev. 1991, 2043 (2014) (observing that "[a]ttracting charters was critical for OCC and OTS because their budgets came primarily from the assessments levied against the banks . . . [rather than] congressional appropriations"). The Fed, by contrast, is not funded by industry assessments. Federal Reserve System, The Fed Explained: What the Central Bank Does 4 (2021).

Figure 2: Number of Removal Actions Against Affiliates of Domestic and Foreign[1] Institutions, 1980–2019



[1] "Foreign" institutions include foreign banks and holding companies, as well as their U.S. branches, agencies, subsidiary banks, and Edge Act corporations.

Figure 2 compares the Fed's removal activity against affiliates of domestic and foreign institutions. While the number of removal actions against foreign affiliates for most years is much lower than the number against domestic affiliates, there have been two distinct periods during which foreign bank actions spiked. The first period, beginning in 1991 and peaking in 1997, followed a series of scandals involving foreign banks in the late 1980s and early 1990s.[149] Eleven of the thirty removal orders relate to the most well-known of these frauds: the multi-billion-dollar collapse of the Bank of Credit and Commerce International ("BCCI").[150] The scandals also led to a significant expansion of the Fed's

[149] See Thomas C. Baxter, Jr. & Anita Ramasastry, The Importance of Being Honest—Lessons from an Era of Large-Scale Financial Fraud, 41 St. Louis U. L.J. 93, 95–98 (1996) (describing the fraud and losses that occurred at Daiwa Bank, Barings Bank, and the Bank of Credit and Commerce International).

[150] See id. at 95–96; The BCCI Affair: Hearing Before the Subcomm. on Terrorism, Narcotics, and Int'l Operations of the S. Comm. on Foreign Relations, Part 5, 102d Cong. 144 (1992) [hereinafter The BCCI Affair] (statement of James Virgil Mattingly, Jr., Gen. Couns., Bd. of Governors of the Fed. Rsrv. Sys.) (describing the Fed's enforcement actions stemming from the BCCI fraud); cf. Tarullo, supra note 133 (explaining that the BCCI scandal

supervisory capabilities and duties with respect to the U.S. operations of foreign banks. In 1991, Congress passed the Foreign Bank Supervision Enhancement Act, which, among other things, required the Fed to conduct annual examinations of foreign branches and agencies.[151]

The second wave of enforcement began between 2015 and 2017, in the wake of the Justice Department's investigations into several foreign banks for their roles in facilitating tax evasion and manipulating the foreign currency market. In 2015, the Fed issued temporary suspension orders against five former Credit Suisse employees who had been indicted—in 2011, four years earlier—for allegedly helping wealthy Americans evade taxes by hiding money in undeclared Swiss bank accounts.[152] Then in 2016 and 2017, the Fed barred from banking six traders who allegedly coordinated transactions to rig foreign exchange rates while employed at Barclays and HSBC.[153]

Imposition of these sanctions can be highly uneven, as the prohibitions relating to foreign currency manipulation reveal. In one of those cases, Barclays's Christopher Ashton allegedly colluded with Citigroup trader Rohan Ramchandani, JPMorgan Chase trader Richard Usher, and UBS trader Matt Gardiner using private chatrooms to discuss their trading strategies.[154] Ashton, Ramchandani, and Usher were tried (and acquitted) together; Gardiner chose to cooperate with prosecutors in exchange for a non-prosecution agreement.[155] But only Ashton and Gardiner, who worked for foreign banks, have been prohibited from the industry to date. Although the OCC—which shares jurisdiction over the relevant institutions—has fined and issued notices of charges against

"highlighted the need for more effective supervision of banks operating in multiple countries").

[151] Pub. L. No. 102-242, §§ 201–15, 105 Stat. 2236, 2286–305 (1991); see also The BCCI Affair, supra note 150, at 149 (describing the FBSEA and changes the Fed made in response to strengthen its supervisory capacity).

[152] See Notice, Walder, Bd. of Governors of the Fed. Rsrv. Sys. (May 4, 2015) (No. 15-012-G-I), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20150511a1.pdf [https://perma.cc/JBS8-VE3U].

[153] See Enforcement Actions, Bd. of Governors of the Fed. Rsrv. Sys., https://www.federalreserve.gov/supervisionreg/enforcementactions.htm [https://perma.cc/UJ4V-CUR8] [hereinafter Enforcement Actions] (search "Prohibition from Banking" actions in 2016 and 2017).

[154] See Katie Martin & Caroline Binham, Cleared British Traders Put US Justice on Trial, Fin. Times (Nov. 25, 2018).

[155] See id.

Ramchandani and Usher,[156] no further action has been taken against them to date.

C. Rank-and-File, Already-Terminated Employees

Prohibition orders against former employees or bank affiliates are by far the most common type of enforcement action in our dataset: 92.5% of the orders (173 of 187) temporarily or permanently prohibited people who were no longer working in banking from re-joining a bank in the future.[157] Section 1818(e) actions were rarely directed against sitting employees or current bank affiliates. Only seven of the 187 orders (3.7%) in our dataset permanently removed—and simultaneously prohibited from banking—an individual who was still involved with a bank at the time of the enforcement order. The most recent of these removals was issued in 2001. In seven other cases, the Fed suspended a sitting employee from office or a shareholder from exercising control. Six of these seven suspensions took

[156] Press Release, Off. of the Comptroller of the Currency, OCC Issues Notice of Charges to Prohibit and Assess $5 Million Penalty Against Two Foreign Exchange Traders (Jan. 11, 2017), https://www.occ.gov/news-issuances/news-releases/2017/nr-occ-2017-6.html [https://perma.cc/2RSU-RNVS]. Foreign regulators have in fact complained that their U.S. counterparts disproportionately sanction foreign banks. See, e.g., David Zaring, How the Fed Is Flexing Its Muscles as a Banking Regulator, N.Y. Times (Aug. 28, 2017), https://www.nytimes.com/2017/08/28/business/dealbook/fed-banking-regulator.html [https://perma.cc/ZCE7-VE4W].

[157] In one instance, the Fed ordered the dismissal of the Chairman and CEO of a bank using its authority under 12 U.S.C. § 1831o. See Prompt Corrective Action Directive, Orion Bank, Bd. of Governors of the Fed. Rsrv. Sys. (Nov. 9, 2009) (No. 09-185-PCA-SM), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20091113a1.pdf [https://perma.cc/88UT-YQRT] (directing Orion Bank to "dismiss Jerry Williams [], its current chief executive officer, president, and chairman of its board of directors, from office and as a member of the board of directors"). Section 1831o empowers the Fed to order prompt corrective actions; in the case of banks that meet the definition of "significantly undercapitalized," the Fed can make changes to management, including "[d]ismissing directors or senior executive officers." 12 U.S.C. § 1831o(f)(2)(F)(ii) (2018). Following the prompt corrective action directive, the Fed issued a § 1818(e) order that barred the individual from future participation in banking. See Consent Ord., Williams, Bd. of Governors of the Fed. Rsrv. Sys. No. 12-035-E-I (June 12, 2012), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20120613a1.pdf [https://perma.cc/Z5XY-HPJQ]. Because the individual was no longer working at the bank at the time of the § 1818(e) action, we coded him as a former employee. If this case was instead coded as a removal of a current employee based on the § 1831o order, the total number of actions against current employees or affiliates would increase slightly from 7.5% to 8%. We also examined all 58 prompt corrective action directives issued by the Fed since 1999, the first year for which the directives are publicly accessible, and did not find any other instance in which the Fed ordered the departure of an employee or affiliate.

place before 2006, and a majority were initiated following a criminal indictment.[158]

There are several possible reasons why the Fed almost never removes or suspends bank employees from office. First, allegations of misconduct must be investigated and substantiated before an enforcement action can be initiated, and such investigations take time.[159] This delay is compounded by the fact that supervisors typically pursue fixes and enforcement options at the institution-level first.[160] Accordingly, banks may proactively sever their affiliation upon learning that an individual is under investigation. As a former Fed governor explains, "the actual or planned initiation of removal and suspension proceedings usually results in resignations of the individuals cited, thereby obviating the need to complete the removal action."[161]

[158] See Removal Orders, supra note 11.

[159] See OIG Report, supra note 142, at 12–13 (describing the process by which federal bank supervisors investigate and pursue enforcement actions against individuals); Korff, supra note 85, at 604 (describing the removal power as "unwieldy" because "[l]engthy hearings were required before removal . . . orders could be issued").

[160] See Niel Willardson & Jackie Brunmeier, Supervisory Enforcement Actions Since FIRREA and FDICIA, Fed. Rsrv. Bank of Minneapolis (Sept. 1, 2006), https://www.minneapolisfed.org/article/2006/supervisory-enforcement-actions-since-firrea-and-fdicia [https://perma.cc/49W2-4P54] (explaining that "[s]upervisors often focus first on stemming losses and curtailing dangerous practices and only later on determining which individuals were sufficiently culpable to warrant individual enforcement actions, a process that is often time consuming").

[161] Statement by J. Charles Partee, Member, Bd. of Governors of the Fed. Rsrv. Sys., Before the Com., Consumer & Monetary Affs. Subcomm. of the H. Comm. on Gov't Operations, May 3, 1984, *in* Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Bulletin 423, 425 (May 1984).

Table 1: Removal Actions by Type and Affiliation, 1989–2019[1]

Former employees or affiliates	**173 (92.5%)**
Permanent prohibition	170 (90.9%)
Temporary suspension	3 (1.6%)
Current employees or affiliates	**14 (7.5%)**
Permanent removal from office and prohibition	7 (3.7%)
Temporary suspension from office/banking	7 (3.7%)

[1] Calculations in this table exclude three prohibition actions that were brought against appraisers because the nature of appraisers' relationships with banks defies classification as "former" or "current."

Second, the Fed might fear that removals, particularly of senior management, would jeopardize the franchise value of the bank. As critics have pointed out, banks have historically been unusually insulated from public scrutiny because regulators fear negative disclosure could, at worst, trigger a run.[162] In the 1980s, Fed officials argued against proposals to publicize removal orders by claiming that "disclosures could have a disruptive effect on a bank's funding or overall financial condition, thereby potentially aggravating a delicate situation that the supervisory action was intended to correct."[163] To avoid shaking public confidence, the Fed may thus choose not to force a change in management, preferring to wait until after the individual and the bank have severed ties to initiate sanctions.

Finally, the Fed may rely on informal mechanisms or threats to cause removals of sitting employees.[164] For instance, according to the *Wall*

[162] See, e.g., Robert P. Bartlett, III, Making Banks Transparent, 65 Vand. L. Rev. 293, 307 (2012) (asserting that "it is hardly an exaggeration to say that federal banking policy during most of the twentieth century was affirmatively hostile to the notion of bank transparency").

[163] Statement by J. Charles Partee, supra note 161, at 426; accord Korff, supra note 85, at 604 (explaining that a removal action could aggravate a weak bank's condition because "[p]ublicity of mismanagement would shake public confidence in the institution and raise doubts about the soundness of the entire industry, eventually resulting in a [bank run]").

[164] For a helpful overview of the Fed's informal enforcement tools, see generally Office of the Inspector General, Board of Governors of the Federal Reserve System, Bureau of Consumer Finance Protection, The Board Can Enhance Its Internal Enforcement Action Issuance and Termination Processes by Clarifying the Processes, Addressing Inefficiencies,

Street Journal, the OCC "effectively forced out" two top Wells Fargo executives in 2018 by privately sending them individual rebukes.[165] The Fed's 2018 cease-and-desist order against Wells Fargo was accompanied by an announcement that, "[c]oncurrently with the [Fed's] action," Wells Fargo would replace four directors by the end of the year.[166] And back in 2008, Fed officials, along with the Secretary of the Treasury, reportedly "threatened to remove the board and management of Bank of America" if they caused Bank of America to back out of a deal to purchase the embattled Merrill Lynch.[167] Anecdotally, industry attorneys report that the Fed and other bank regulators can exert and do exert pressure on banks to change the composition of senior leadership including board members. Informal tools have practical advantages over formal enforcement actions, at least from the Fed's point of view. They are less open and thus less likely to negatively impact firm reputation or disrupt financial markets. There are also no limits on the types of misconduct that can be addressed, no requirements for hearings, and no opportunity for appeals.[168]

The scope of the removals in our dataset was strikingly monotonous. Every order to permanently remove a sitting employee was issued simultaneously with an order of prohibition. Every prohibition order contained sweeping language, barring the individual from "participating *in any manner* in the conduct of the affairs of *any* [federally insured banking] institution or agency" without prior approval from the

and Improving Transparency 11 (2019) (discussing mechanisms for informal enforcement such as MOUs, Board resolutions, and commitment letters).

[165] Emily Glazer, Wells Fargo Regulators Weigh Executive Shakeup as CEO Heads to Washington, Wall St. J. (Mar. 11, 2019, 11:02 AM), https://www.wsj.com/articles/washington-wants-to-know-why-timothy-sloan-hasnt-fixed-wells-fargo-11552316533 [https://perma.cc/KRU9-5ZVG].

[166] Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Responding to Widespread Consumer Abuses and Compliance Breakdowns by Wells Fargo, Federal Reserve Restricts Wells' Growth Until Firm Improves Governance and Controls. Concurrent with Fed Action, Wells to Replace Three Directors by April, One by Year End (Feb. 2, 2018), https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm [https://perma.cc/S92H-CE4J].

[167] Robert Kuttner, Betting the Fed, Am. Prospect, June 2009, at 33, 34.

[168] For a thoughtful explanation of the mechanics of bank supervision, including the ongoing communication of informal supervisory directions by bank supervisors, and discussion of the opacity inherent to that process, see generally Tarullo, supra note 16. As Professor Tarullo notes, the nature of the supervisory process limits the ability of outside researchers to assess the effectiveness of supervisory tools. Id. at 17, 62–63.

appropriate banking supervisor.[169] We were surprised to find, however, that this has not always been the case. Descriptions of prohibition from the early 1980s were relatively bespoke. An order from 1981, for instance, removed and then prohibited a bank's president from any further participation in that same bank.[170] Several orders from 1985 banned individuals from working at any banking institution for just periods of between two and three years.[171] The shift from flexibility to monotony can be partially explained by FIRREA, in which, as noted earlier, Congress banned removed individuals from further participation in the industry.[172] But the Fed retains authority to waive or modify this ban, though it has rarely exercised this power.[173] We explore the question of why not—particularly given that Fed officials often decry removal's "draconian" consequences—in Part III below.

Our data also confirm familiar post-2008 narratives that corporate-suite executives almost never face punishment for wrongdoing.[174] Of the removal orders issued by the Fed, 56.3% (107 of 190) sanctioned a lower-level bank employee like bank tellers, loan officers, vice presidents, branch managers, credit managers, and investment advisers. Senior bankers, by contrast, make up a much smaller fraction of overall removals: individuals at or above the executive vice president level were targets of 24.2% of enforcement orders (46 of 190), and non-executive board members were targets of only 9.5% (18 of 190). Nine (4.7%) of the remaining orders sanctioned other types of bank affiliates, such as appraisers, shareholders, and independent consultants.[175] Another ten

[169] Prohibition Ord., Roslyn Y. Terry, Bd. of Governors of the Fed. Rsrv. Sys. No. 08-016-E-I (Aug. 29, 2008) (emphasis added). This language appears in every permanent removal order in our dataset. See Removal Orders, supra note 11.

[170] See Bd. of Governors of the Fed. Rsrv. Sys., supra note 113, at 47.

[171] See Bd. of Governors of the Fed. Rsrv. Sys., Annual Report on Formal Enforcement Actions 38, 40–41 (1985) (on file with author).

[172] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 904, 103 Stat. 183, 457 (codified at 12 U.S.C. § 1818) (amending § 8(e)(1) of the FDIA).

[173] Id.

[174] See supra note 1 and accompanying text.

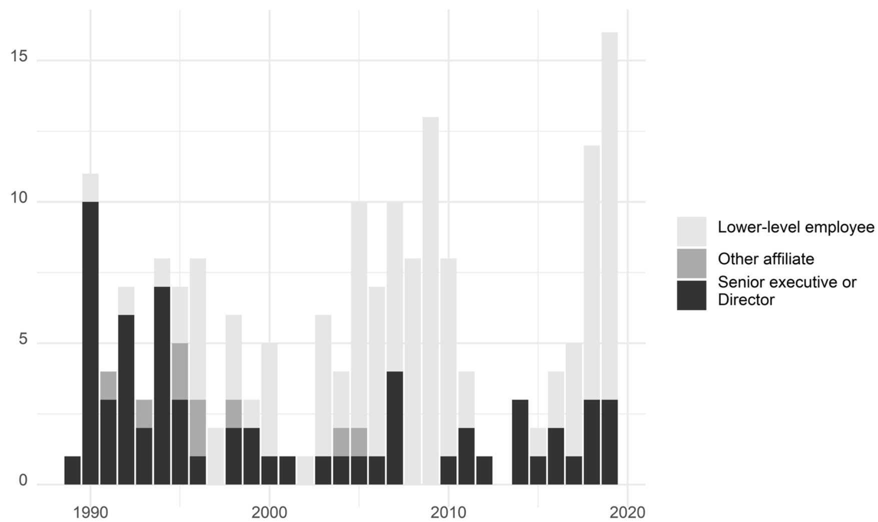
[175] In one instance, the Fed issued a temporary suspension order against a controlling shareholder and former director of a bank whose involvement with the bank was connected to the mob. See Consent Notice of Prohibition, Kenneth M. Matzdorff, Bd. of Governors of the Fed. Rsrv. Sys. No. 04-020-G-I (Aug. 23, 2004), https://www.federalreserve.gov/boarddocs/press/enforcement/2004/200408242/attachment.pdf [https://perma.cc/83TX-X6TS]; Feds Ban Matzdorff from Bank Dealings, Kan. City Bus. J. (Aug. 26, 2004, 3:55 PM), https://www.bizjournals.com/kansascity/stories/2004/08/23/daily30.html [https://perma.cc/VP83-YPSL] (reporting allegations that Matzdoff "acted as a front man" for

(5.3%) orders provided only vague descriptions of the sanctioned individual.

Peeling the onion reveals a stark shift in how the Fed has used its removal power over the past thirty years—from primarily punishing senior executives and directors to rank-and-file employees. The basic story is reflected in Figure 3 below.

As Figure 3 illustrates, the removal power was used against only a handful of lower-level bank employees in the first ten years of our dataset. From 1989 to 1998, around one-fifth (22.4%, or 15 of 67) of the Fed's removal orders sanctioned a lower-level employee. During the same period, more than half (52.2%, or 35 of 67) of removal actions sanctioned individuals at or above the executive vice president level, including non-executive board members. In short, in the early years of our dataset, the removal power was overwhelmingly used to hold bank leadership accountable.

Figure 3: Number of Removal Actions by Affiliation, 1989–2019[1]



[1] Excludes ten § 1818(e) orders for which the affiliation of the sanctioned individual to the bank is vague or omitted.

organized crime and that the bank was a key part of a criminal scheme). Because it is unclear whether the individual had a role at the bank beyond the use of his name, we coded this case as involving an "Other" type of bank affiliate.

Over time, however, lower-level employees have come to dominate Fed enforcement. The percentage of removal orders against senior bankers declined steeply from 52.2% between 1989 and 1998 to 21.8% between 1999 and 2008 (12 of 55) and then rose to 25% between 2009 and 2019 (17 of 68). Conversely, the percentage of orders against lower-level bank employees rose from 22.4% between 1989 and 1998 to around 75% during both 1999–2008 and 2009–2019 (41 of 55 and 51 of 68, respectively). All twenty-one orders issued by the Fed between 2008 to 2009—during and immediately after the last financial crisis—affected lower-level employees. Most recently, lower-level employees constituted 81.3% of the removal orders (13 of 16) issued in 2019.

It is possible that our data are skewed because the Fed disproportionately relies on informal mechanisms or threats to sanction bank directors and senior employees and uses formal removal actions only for rank-and-file workers. This divergence may occur if, for instance, the Fed perceives that community-based reputational sanctions erect potent barriers to reemployment for bank leaders and thus render a formal removal action unnecessary or excessively punitive. Even so, serious questions remain, including whether informal (confidential) and formal (public) removal mechanisms actually lead to similar outcomes for the affected individuals and whether a dual-track approach to sanctioning bank employees could undermine the Fed's own legitimacy.[176] It would take analysis of currently nonpublic information to answer these questions, but it is clear from the public data that the overwhelming majority of Fed removal orders sanction lower-level bank employees.

[176] Existing empirical studies exploring whether senior executives suffer reputational consequences for misconduct yield mixed results. Compare, e.g., Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, The Consequences to Managers for Financial Misrepresentation, 88 J. Fin. Econ. 193, 202 (2008) (finding that 92% of executives who are identified in public filings as culpable for financial misrepresentation are fired, compared with 95.9% of culpable non-executives), with Leah Baer, Yonca Ertimur & Jingjing Zhang, Tainted Executives as Outside Directors 9 (AAA 2018 Mgmt. Acct. Section Meeting, Working Paper, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991803 [https://perma.cc/7VFC-V777] (reporting that 11% of CEOs who are named as defendants in settled securities class action lawsuits continue to gain board seats in the three years following the lawsuit). Most of these studies, moreover, examine reputational consequences following a public announcement of the misconduct—for example, agency enforcement actions—which may not be applicable when details about the misconduct are kept confidential. Cf. Roy Shapira, A Reputational Theory of Corporate Law, 26 Stan. L. & Pol'y Rev. 1, 12–14 (2015) (arguing that market players systematically react inaccurately to corporate misconduct, so they rely on information generated publicly through the legal system to calibrate reputational penalties).

D. Organizational Complexity Problems

Table 2: Institution-Level Descriptive Statistics, 1989–2019

	All Actions	1989–1998	1999–2008	2009–2019
N	190	67	55	68
Institution Type				
Bank holding company	73	21	15	37
State member bank	92	34	28	30
National bank	20	12	8	0
Foreign subsidiaries	5	0	4	1
Assets and capital adequacy				
Total assets (average,[1] $ mil)	$164,417 (894)	$17,858 (66)	$51,703 (1,011)	$399,986 (67,092)
Risk-weighted assets ratio[2] (average[1])	75 (78.1)	-	74.1 (73.1)	76.8 (80.1)
Tier 1 capital ratio[3] (average[1])	12.2 (10.9)	-	12.2 (10.1)	11.3 (11.7)
Total equity capital (average,[1] $ mil)	$15,488 (83)	$1,081 (6)	$4,867 (97)	$38,275 (8,734)
Total assets (count, by group)				
<$100M	50	35	11	4
$100M-$10B	71	22	22	27
$10B-$250B	47	9	21	17
>$250B	22	1	1	20

[1] The numbers in parentheses represent medians.
[2] Risk-weighted assets ratio is calculated as risk-weighted assets as percentage of total assets. Data for risk-weighted assets was not reported prior to 1996.
[3] Tier 1 capital is calculated as tier 1 capital as a percentage of risk-weighted assets. Data for risk-weighted assets was not reported prior to 1996.

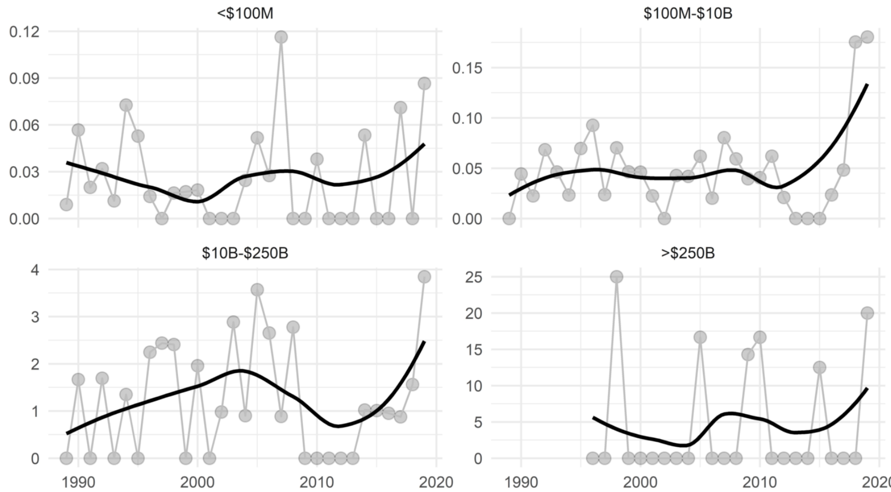
Table 2 presents summary statistics describing the full sample of banking institutions associated with the orders in our database. The most striking observation is that affiliates of community banks, defined as banks having less than $10 billion in total assets,[177] are removed far more

[177] We recognize that fixing a single definition for community banks inevitably involves some arbitrary line drawing. Throughout the period of study, the asset cutoff used by bank

frequently than affiliates of larger banks. Across the full data sample, the gap in the raw numbers is considerable (63.7% versus 36.3%). Between 1989 and 2008, the Fed pursued nearly three times as many removal actions against affiliates of community banks than those of larger banks. This difference vanishes after 2008, largely because the number of removal actions involving banks with more than $250 billion in assets rose sharply. While some might conclude this represents a reversal of the earlier trend, we do not put great weight on the shift as an indicator of heightened Fed focus on the largest banks because 16 of the 20 observations relate to employees of a single bank—Wells Fargo—and all are for lending violations during the 2008 financial crisis.

regulators to define community banks has increased from $1 billion to $10 billion. Compare Off. of the Comptroller of the Currency, Community Bank Supervision: Comptroller's Handbook 1 (2019) ("Generally, banks with assets of $10 billion or less are characterized as community banks."), with Letter from Sarah A. Miller, Dir., Ctr. for Sec. Tr. & Inv., to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (May 23, 2002), https://www.sec.gov/rules/proposed/s70802/samiller1.htm#P78_10707 [https://perma.cc/VA8R-XYBN] ("Community banks are generally defined as banks with less than $1 billion in total assets."); cf. Jeremy C. Kress & Matthew C. Turk, Too Many to Fail: Against Community Bank Deregulation, 115 Nw. U. L. Rev. 647, 649 n.6 (2020) (surveying other definitions for "community bank").

Figure 4: Percentage of FDIC-Insured Banks Whose Affiliates Were Removed by Total Assets, 1989–2019[1]



[1] The black lines reflect locally weighted regressions, (known as LOWESS or LOESS) calculated with a modest smoothing factor of 0.67. To calculate the relevant percentages, we collapsed and treated as a single bank observation all § 1818(e) actions relating to affiliates of a common bank for each year.

Drawing conclusions about where the Fed directs its attention grows more complicated, however, when the frequency of removal actions is judged in relation to the composition of the U.S. banking landscape. For instance, the shrinking numbers of enforcement orders involving banks with assets less than $100 million can largely be explained by the fact that the prevalence of such banks declined by 68% between 1994 and 2015.[178] Conversely, the near absence of removal orders against banks with assets greater than $250 billion in the first ten years of the data may owe to the fact that no such banks existed before 1996.[179] Figure 4 plots banks whose affiliates were removed as a percentage of the total number of FDIC-insured banks in each asset category, along with a smoothed curved that shows trends over time. As Figure 4 illustrates, the share of community

[178] See Council of Econ. Advisers, Issue Brief, The Performance of Community Banks over Time 4 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160810_cea_community_banks.pdf [https://perma.cc/F5UY-7HA7].

[179] Data on the assets of FDIC-insured banks are derived from Call Reports, which are described in Section II.A.

bank affiliates is remarkably low both in absolute terms (less than 0.2%) and as compared to the percentage for larger banks. Although some scholars have suggested a change in how the Fed approaches enforcement against large banks since the financial crisis, we did not observe this shift.[180] The trends across all four asset categories appear fairly flat—and more importantly, move in parallel—indicating that the Fed's Section 1818(e) enforcement has kept up with changes in the banking population but its focus has not meaningfully changed.

Finally, Figure 5 segments the sanctioned affiliates of community and larger banks. Professor Heidi Schooner has argued that directors of smaller banks are easier targets for removal actions because they "are more likely directly involved in management."[181] Scholars studying individual prosecutions for corporate misconduct have long thought that organizational complexity insulates high-level executives by diffusing responsibility and obscuring fault.[182] This is not to say that regulators and prosecutors deploy different standards in smaller and larger banks, but rather that individual accountability for senior management is harder to obtain in larger institutions.[183]

Our findings support these hypotheses. As Figure 5 shows, the number of removal actions against individuals at or above the executive vice president level, including directors, decreases sharply as bank size increases. To date, the Fed has never used Section 1818(e) to remove the leadership of the largest U.S. banks.[184] By contrast, 57.1% (60 of 105) of removal orders associated with community banks involve misconduct by CEOs, directors, and other senior managers.

[180] See, e.g., Zaring, supra note 156 (arguing that the Fed has interpreted its jurisdiction and enforcement authority more broadly since the 2008 financial crisis).

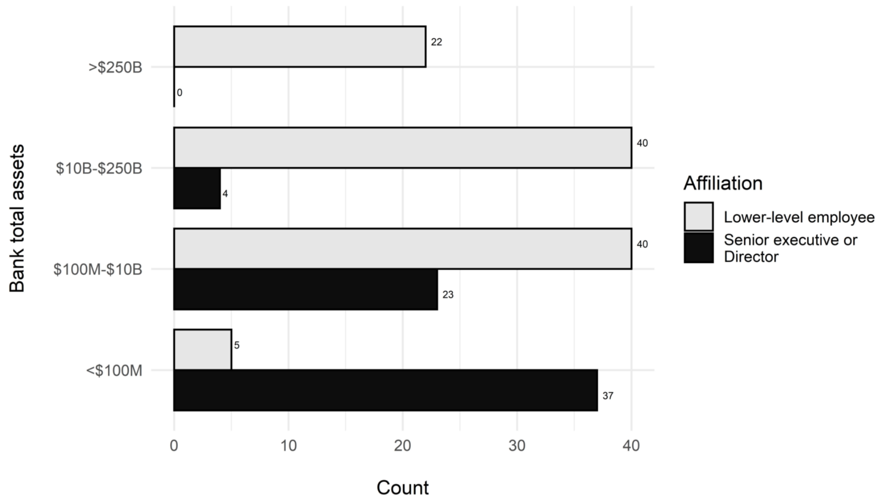
[181] Heidi Mandanis Schooner, Big Bank Boards: The Case for Heightened Administrative Enforcement, 68 Ala. L. Rev. 1011, 1026 (2017).

[182] See, e.g., Brandon L. Garrett, The Corporate Criminal as Scapegoat, 101 Va. L. Rev. 1789, 1824–26 (2015) (explaining that "organizational complexity can obscure fault [because i]t may be quite clear that some employees and officers approved a misleading financial statement, but sorting out who knew what and when, where dozens each signed the relevant reports and statements, could be a frustrating if not impossible task").

[183] See id. at 1824–26; cf. Schooner, supra note 181, at 1025–26 (observing that "[o]fficers and directors of small community banks are [currently] held to the same statutory standards for administrative liability as the officers and directors of the largest international banks" but arguing that "[t]his [parity] seems worthy of reconsideration").

[184] But see infra notes 296–300 and accompanying text (discussing the OCC's removal of former Wells Fargo CEO John Stumpf).

Figure 5: Number of Removal Actions by Affiliation and Bank Total Assets, 1989–2019



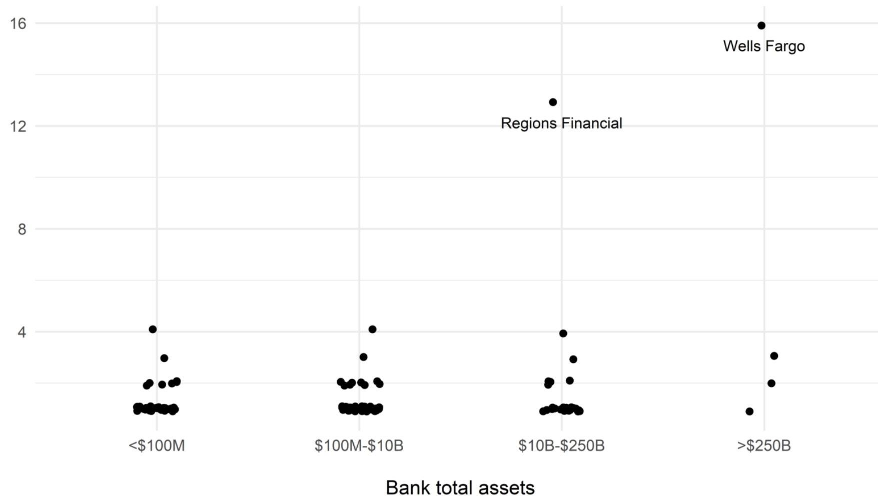
Strikingly, the Fed did not remove upper-level managers even when it removed multiple lower-level workers at the same bank within a short span of years. As noted above, the Fed removed sixteen Wells Fargo employees between 2009 and 2010—the highest number of Section 1818(e) orders for a single bank in the dataset.[185] All sixteen had fabricated income documents in order to inflate the creditworthiness of subprime borrowers, and some had taken actions to falsely suppress the creditworthiness of other borrowers. Among the employees, the most senior were six branch managers. But as we now know, these were not isolated instances of fraud; they were instead symptoms of deeper problems at the bank. Since at least 2003, senior executives at Wells Fargo have cultivated an aggressive sales culture that pushed its employees to engage in deceptive lending and sales practices.[186] Last

[185] See Enforcement Actions, supra note 153.

[186] See Indep. Dirs. of Bd. of Wells Fargo & Co., Sales Practices Investigation Report 19–27 (Apr. 10, 2017), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf [https://perma.cc/9EUT-AXT5] (detailing Wells Fargo's sales and management practices from 2003 to 2017); Emily Glazer, How Wells Fargo's High-Pressure Sales Culture Spiraled out of Control, Wall St. J. (Sept. 16, 2016, 3:10 PM), https://www.wsj.com/articles/how-wells-fargos-high-pressure-sales-culture-spiraled-out-of-control-1474053044 [https://perma.cc/9A9F-EZGE] (reporting that "[q]uestionable sales tactics" were "an open secret in Wells Fargo branches across the country" and bank executives had noticed this behavior as early as 2009 or 2010).

year, in response to revelations that more than 5,000 Wells Fargo workers created more than two million unauthorized customer accounts, the OCC finally prohibited John Stumpf, Wells Fargo's CEO from 2007 to 2016, from future participation in the banking industry.[187] But the question remains: Given evidence of widespread misconduct by Wells Fargo employees in 2009 and 2010, should federal banking regulators have forced a change at the top sooner?

Figure 6: Removal Actions Per Bank by Total Assets, 1989–2019



Wells Fargo is not the only repeat offender. Figure 6 shows the number of affiliates sanctioned per bank throughout our sample time period. Regions Financial Corporation is another clear outlier. The Fed pursued removal actions against twelve Regions employees between 2014 and 2019 as well as one employee in 2006.[188] In Regions's case, the employees were engaged in several different types of misconduct, ranging from falsely inflating customers' incomes on credit applications and other lending violations to directing a Regions subsidiary's business to a third party in exchange for kickbacks. Of the thirteen enforcement orders, one

[187] See infra notes 296–300 and accompanying text.

[188] See Enforcement Actions, supra note 153. The Fed removed another former Regions employee earlier this year. Consent Ord., Matthew Curtis, Bd. of Governors of the Fed. Rsrv. Sys. No. 20-010-E-1 (May 26, 2020), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20200528a1.pdf [https://perma.cc/C7T9-ZG2E].

prohibited Regions's chief credit officer from future participation in banking, and two prohibited executive vice presidents.[189] All three senior managers personally committed fraud. Specifically, they intentionally misclassified loans that defaulted during the 2008 financial crisis, which in turn caused Regions to overstate its financial results.[190]

E. Embezzlement and Lending Violations, but Not Failed Supervision

Figure 7 probes the reasons for removal in two ways. First, it displays the primary misconduct type for all 190 removal orders. The alternative approach "trims" the sample by collapsing and treating as a single removal event any observations involving a common bank and identical or obviously related fact patterns. Trimming mitigates the concern that some wrongs are more likely to be committed by solo operators (e.g., embezzlement), while others are more likely to be committed by a group of conspirators or be symptomatic of flawed corporate cultures (e.g., unsafe and unsound extensions of credit). At the same time, one downside of trimming is that it treats enforcement actions directed at a widespread scheme to defraud borrowers the same as one directed at a single rogue loan officer. As Figure 7 shows, the results from the two approaches follow roughly the same pattern, though with some variation in the exact numbers.

The most common reason for removal was embezzlement or misuse of funds (e.g., use of funds from the 2008 Troubled Asset Relief Program to buy personal real estate). The Fed also frequently pursued removals for customer-related account or lending violations (e.g., unauthorized or unsound extensions of credit, or customer account record alterations), and for self-dealing transactions (e.g., improperly participating in loans, kickbacks, or other payments that resulted in self-benefit or benefit to a

[189] See Consent Ord., Jeffrey C. Kuehr, Bd. of Governors of the Fed. Rsrv. Sys. No. 20-010-E-1 (June 25, 2014), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20140625a1.pdf [https://perma.cc/5LHW-N5WT] [hereinafter Kuehr Consent Ord.]; Consent Ord., Michael J. Willoughby, Bd. of Governors of the Fed. Rsrv. Sys. No. 14-018-E-I (June 25, 2014), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20140625a4.pdf [https://perma.cc/U572-P4X8] [hereinafter Willoughby Consent Ord.]; Consent Ord., Thomas A. Neely, Jr., Bd. of Governors of the Fed. Rsrv. Sys. Nos. 14-020-E-I; 14-020-CMP-I (Oct. 16, 2015), https://banking.alabama.gov/pdf/orders_removal/FRB/FRBNeelyThomasAJr101615.pdf [https://perma.cc/PJV6-VNX5] [hereinafter Neely Consent Ord.].

[190] See Kuehr Consent Ord., supra note 189; Willoughby Consent Ord., supra note 189; Neely Consent Ord., supra note 189.

family member). Removals for deceiving regulators or management (e.g., taking actions that falsely enhanced the bank's financial condition or failing to comply with reporting obligations) are fairly uncommon. Removals for failure to properly supervise and manage the bank are vanishingly rare.

The most high-profile individuals to be sanctioned for poor oversight in the dataset are David Cronin and Robert Ray.[191] Cronin and Ray were the treasurer and senior vice president, respectively, of Allfirst Financial Inc., a subsidiary of an Irish bank.[192] In 2002, Allfirst revealed that a rogue currency trader had incurred and then concealed $691 million of losses.[193] The ensuing investigation concluded that Cronin and Ray neither knew about nor participated in the deception, but they oversaw the trader's activities and were "asleep at the switch."[194] The third removal order in this category sanctioned Adam Koontz, a former CFO, director, and officer of Fayette County Bank for, among other things, failure to "properly supervise the lending practices of subordinate employees" and to establish effective controls.[195]

[191] In 2020, after the time period covered by the data, the Fed issued a prohibition order against Andrea Vella, Goldman Sach's former co-head of the Investment Banking Division for the Asia Ex-Japan region, for "engag[ing] in unsafe and unsound practices" by failing to ensure that a transaction with heightened underwriting risks was fully escalated within the firm. See Consent Ord., Andrea Vella, Bd. of Governors of the Fed. Rsrv. Sys. No. 20-001-E-I (Jan. 31, 2020), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20200204a1.pdf [https://perma.cc/77LB-MBZW]. Even though Vella directly participated in structuring the deal, the Fed did not allege that he knew about the fraud that occurred in connection with the transaction. See Matthew Goldstein, Goldman Sachs Banker in Malaysian Fund Scandal Is Barred from the Industry, N.Y. Times (Feb. 4, 2020), https://www.nytimes.com/2020/02/04/business/goldman-sachs-1MDB.html [https://perma.cc/VKW2-JUT2].

[192] 2 Ex-Allfirst Officials Barred from Banking, Balt. Sun (Apr. 25, 2006), https://www.baltimoresun.com/news/bs-xpm-2006-04-25-0604250322-story.html [https://perma.cc/M7YQ-88B2].

[193] Id.

[194] Erik Portanger, Craig Karmin & Alessandra Galloni, AIB Report Finds Internal Failings; Officials Are Fired; CEO Is Spared, Wall St. J. (Mar. 15, 2002, 12:01 AM), https://www.wsj.com/articles/SB1016096578238909000 [https://perma.cc/D4R3-J2LS]; accord Robert Little, Allfirst Treasurer Is Called the 'Key Weak Link,' Balt. Sun (Mar. 15, 2002), https://www.baltimoresun.com/news/bs-xpm-2002-03-15-0203150271-story.html [https://perma.cc/9T9F-V3RK] (describing Cronin's alleged inaction despite receiving warnings about trading irregularities).

[195] Consent Ord., Adam D. Koontz, Bd. of Governors of the Fed. Rsrv. Sys. No. 19-014-E-I (May 13, 2019), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20190516a1.pdf [https://perma.cc/XYN8-NL6R].

The Fed appears to prefer sanctioning the institution rather than high-level management when it comes to supervisory failure. Two cases in particular stand out. The first involves Michelle Kennedy, the former CFO of Hinsdale Bank & Trust. During 2014 and 2015, Kennedy "engaged in improper accounting practices to conceal an unreconciled balance of approximately $2.7 million," and the Fed subsequently prohibited her from banking.[196] The Fed's investigation found numerous internal control deficiencies at Hinsdale, including the fact that an internal audit committee knew about the unreconciled balance since at least 2008 but failed to address or investigate it until March 2015.[197] But although the Fed ultimately imposed a $1 million fine on Hinsdale and its parent holding company, no sanctions were pursued against the individuals who knowingly failed to supervise Kennedy.[198] One of the Regions cases is similar. Three executives were prohibited from banking for intentionally misclassifying loans that defaulted, and the Fed, following a joint investigation with the Alabama Department of Banking and the Securities and Exchange Commission, found that senior Regions managers had failed to timely review accounting controls, even though examiners had warned them about lapses.[199] But none of these executives were sanctioned. Instead, the Fed imposed a $46 million fine on Regions itself.[200]

The scope of harms addressed by the removal actions also varied. At the low end of the spectrum, for instance, is Kenneth Coleman, who stole $2,570 and $810 from PNC Bank and Mellon Bank, respectively.[201]

[196] Consent Ord., Michelle A. Kennedy, Bd. of Governors of the Fed. Rsrv. Sys. No. 18-026-E-I (July 10, 2018), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180712a2.pdf [https://perma.cc/KG9B-XK86].

[197] See Assessment Ord., Wintrust Fin. Corp., Bd. of Governors of the Fed. Rsrv. Sys. No. 19-006-CMP-HC (Feb. 25, 2019), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20190228a2.pdf [https://perma.cc/MW5J-9JEJ].

[198] Cf. id.

[199] Consent & Assessment Ord., Regions Bank, Bd. of Governors of the Fed. Rsrv. Sys. No. 14-017-B-SMB (June 25, 2014), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20140625a3.pdf [https://perma.cc/6EG2-CAEB].

[200] Id.

[201] Order of Prohibition, Kenneth L. Coleman, Bd. of Governors of the Fed. Rsrv. Sys. No. OCC-AA-EC-04-43 (Mar. 1, 2005), https://www.federalreserve.gov/boarddocs/press/enforcement/2005/200503012/attachment.pdf [https://perma.cc/5Z9H-MWV7]; Final Decision, Kenneth L. Coleman, Bd. of Governors of the Fed. Rsrv. Sys. No. OCC-AA-EC-04-43 (Mar. 1, 2005), https://www.federalreserve.gov/boarddocs/press/enforcement/ https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180712a2.pdf 2005/200503012/attachment.pdf [https://perma.cc/5Z9H-MWV7].

Another example is Rohit Bansal, a former Goldman Sachs employee, who tried to impress his bosses by obtaining confidential reports from a former coworker at the Federal Reserve Bank of New York.[202] The actions associated with some of the highest reported losses were from Allfirst ($691 million in concealed trading losses), BankBoston International ($66 million due to embezzlement and fraud by a loan officer), and Chemical Banking Corp. ($66 million due to concealed trading losses).[203] These figures of course do not include harms that are difficult to quantify, such as the costs flowing from steering customers into subprime products.

* * *

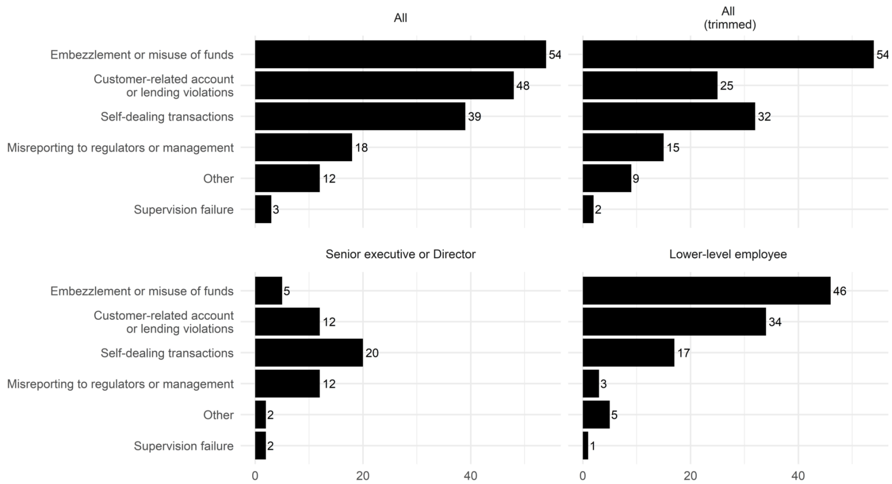
Ultimately, the removal power today has become unmoored from bank management, the conduct for which Congress created the power in 1933 and expanded it in FIRIRCA and FIRREA. Removed individuals have mostly been former tellers, traders, and branch managers, not senior bankers. The reasons for removal are typically theft, self-dealing, or concealment, not mismanagement. It is possible that other enforcement tools in the Fed's arsenal, particularly its cease-and-desist authority against institutions, are picking up some of the slack.[204] Even so, we believe that such tools are imperfect substitutes for removal for reasons that we discuss in the next two Parts.

[202] See Ben Protess & Peter Eavis, Ex-Goldman Banker and Fed Employee Will Plead Guilty in Document Leak, N.Y. Times (Oct. 26, 2015), https://www.nytimes.com/2015/10/27/business/dealbook/criminal-charges-and-50-million-fine-expected-in-goldman-new-york-fed-case.html [https://perma.cc/GCU2-MYYP]; Consent Ord., Rohit Bansal, Bd. of Governors of the Fed. Rsrv. Sys. No. 15-033-G-I (Nov. 5, 2015), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20151105a1.pdf [https://perma.cc/P9KE-BPU3].

[203] Removal Orders, supra note 11.

[204] For instance, the Fed's 2017 cease-and-desist order against BNP Paribas prohibited the bank from re-employing individuals who were identified by BNP's investigations as involved in the underlying misconduct. See Cease & Desist Ord., BNP Paribas S.A., BNB Paribas USA, Inc. & BNP Paribas Sec. Corp., Bd. of Governors of the Fed. Rsrv. Sys. Nos. 17-020-B-FB; 17-020-CMP-FB; 17-020-B-FBR; 17-020-CMP-FBR (July 17, 2017), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20170717a1.pdf [https://perma.cc/5FKW-72EC].

Figure 7: Number of Removal Actions by Reason for Removal, 1989–2019[1]



[1] Excludes sixteen § 1818(e) orders for which a description of the underlying misconduct is vague or omitted.

The full dataset is "trimmed" by collapsing and treating as a single enforcement event any observations involving a common bank and identical or obviously related fact patterns.

The following misconduct was included in the "Other" category: unsafe and unsound practices in the preparation of appraisals (3 cases); Foreign Corrupt Practices Act violation (2 cases); BHCA violation (1 case); antibribery law violation (1 case); misdemeanor theft of confidential information from the FRB (1 case); criminal charges for retaliating against a witness and obstruction of justice (1 case); violation of an FRB cease and desist order (1 case); criminal charges for conspiracy to commit mail, wire, and credit card fraud (1 case); and unsafe and unsound practice arising from a loan officer's payments to a loan processor who had the power to approve loans the officer originated (1 case).

III. A THEORY OF BANKER REMOVAL

This Part develops a theory of the banker removal power as a tool for disciplining senior management. First, it examines the limits of alternative mechanisms for aligning the interests of bank managers with the public interest: traditional corporate governance measures, which tighten the interests of bank leadership and bank shareholders, and prudential or structural regulations, which restrict the menu of permissible bank activities. Post-2008 crisis reforms have leaned heavily on both mechanisms.

Second, it explains how the power to remove senior bankers serves a distinct complementary function. Regulatory rules are inherently incomplete because of the dynamism and complexity that characterize modern finance.[205] Corporate governance reforms, although they focus on the incentives governing how bank leadership exercises their discretion, motivate executives to advance only the interests of shareholders.[206] Neither can effectively reorient the incentives of bank officers and directors toward the public interest, which is the function removal performs.

A. Corporate Governance and the Misalignment Problem

Corporate governance is shareholder-centric. By the standard corporate governance account, excessive risk taking and other corporate misconduct are the result of managerial self-dealing.[207] Mechanisms that align investor and managerial interests reduce these agency costs and deter harmful corporate activities. Developments that increase shareholder sophistication and concentrate their voting power also help.[208] For example, since 2017, the three largest asset managers, BlackRock Funds, Vanguard Group, and State Street Global Advisors, have jointly owned more than 20% of shares in the S&P 500.[209] Unlike passive retail investors, these institutional actors are not afraid to put corporate managers under close supervision and speak up when they are dissatisfied with management's performance.[210] In fact, according to

[205] Bebchuk & Spamann, supra note 22, at 253.

[206] See infra Section III.A.

[207] See, e.g., Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 312–13 (1976); Reinier Kraakman et al., The Anatomy of Corporate Law 36 (2d ed. 2009) (observing that a core objective of corporate law is to control "the conflict [of interest] between the firm's owners and its hired managers"). For a detailed account of how misaligned managerial incentives contributed to the 2008 financial crisis, see, e.g., Bebchuk & Spamann, supra note 22, at 255–66.

[208] See, e.g., Lucian Bebchuk & Scott Hirst, The Specter of the Giant Three, 99 B.U. L. Rev. 721, 726 (2019) ("[I]nstitutional investors now control a large majority of the shares of public companies and have a dominant impact on vote outcomes at those companies."). See generally John C. Coates, The Future of Corporate Governance Part I: The Problem of Twelve 2 (Harv. Pub. L. Working Paper No. 19-07, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 [https://perma.cc/5U2U-PZE9] (describing the "Problem of Twelve," which is that "control of most public companies . . . will soon be concentrated in the hands of a dozen or fewer people"); Dorothy S. Lund, The Case Against Passive Shareholder Voting, 43 J. Corp. L. 493, 500–06 (2018) (arguing that the increasing concentration of the shareholder base through the rise of institutional investors has "play[ed] a vital role in reducing agency costs").

[209] Bebchuk & Hirst, supra note 208, at 732–33.

[210] See, e.g., Zohar Goshen & Sharon Hannes, The Death of Corporate Law, 94 N.Y.U. L. Rev. 263, 306–08 (2019); Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, The New

Professors Zohar Goshen and Sharon Hannes, investors have become so capable of fending for themselves that there is no longer any need for public regulation of managerial behavior.[211]

Following the 2008 financial crisis, many reforms sought to increase the stability of the financial system by improving the corporate governance of banks. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") requires banks above a certain size to establish risk committees with "independent" directors.[212] Other provisions of Dodd-Frank require all public corporations, including banks, to submit their top executives' compensation arrangements for an advisory shareholder vote—an advisory "say on pay"[213]—and seek to empower shareholders by authorizing "proxy access," a mechanism that reduces the cost to shareholders of electing their preferred directors.[214]

But as Professor Steven Schwarcz and others have shown, reforms that rely on corporate governance improvements implicitly but *incorrectly* assume "that the investors themselves would oppose excessively risky business ventures."[215] The assumption is flawed because shareholders are in fact rationally motivated to pressure management to increase leverage and take more than the socially optimal amount of risk.[216] While bank investors stand to capture all of the profits from risks that pay off, they are able to externalize much of the losses to third parties.[217] These third

Titans of Wall Street: A Theoretical Framework for Passive Investors, 168 U. Pa. L. Rev. 17, 43–51 (2019). Some scholars, however, have argued that large institutional investors, particularly index funds, have the ability but lack the incentive to oversee management. See, e.g., Lucian Bebchuk & Scott Hirst, Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy, 119 Colum. L. Rev. 2029, 2035 (2019) (arguing that "index fund managers have strong incentives to (i) underinvest in stewardship and (ii) defer excessively to the preferences and positions of corporate managers"); Lund, supra note 208, at 500.

211 Goshen & Hannes, supra note 210, at 271.

212 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 165(h), 124 Stat. 1376, 1429–30 (2010) (codified at 12 U.S.C. § 5365).

213 Id. § 951(a)(1), 124 Stat. at 1899 (codified as amended at 15 U.S.C. § 78n-1).

214 Id. § 971, 124 Stat. at 1915 (codified as amended at 15 U.S.C. § 78n).

215 See supra note 22 and accompanying text; Schwarcz, supra note 22, at 4.

216 See Schwarcz, supra note 22, at 4–5. Moreover, as Professor Robert Hockett argues, financial market failure is often the product of "recursive collective action problems," in which private shareholders and their fiduciaries all act rationally to advance their self-interest but these actions aggregate into a collectively calamitous outcome. As a result of this dynamic, Hockett argues, strengthening relations between private sector principals and their fiduciaries will do little to reduce systemic risk. See generally Robert Hockett, Are Bank Fiduciaries Special?, 68 Ala. L. Rev. 1071, 1074–75 (2017).

217 See Schwarcz, supra note 22, at 4–5.

parties include bank depositors and the government, most notably the FDIC insurance fund that pays off depositors of failed banks.[218] For systemically significant banks, affected third parties may also include other market participants, whose risks are increasingly interconnected, and the ordinary workers impacted by a crisis in the real economy.[219] The crucial idea here is that bank investors can "privatize gains and socialize losses," so the privately optimal level of risk for investors is higher than what is beneficial from the public's perspective.[220] Corporate governance reforms that better align management and shareholders may thus even exacerbate the incentives for excessive risk taking at banks.

In fact, a substantial body of empirical evidence suggests that investors were actually the culprits that pressured banks to take on high risk before 2008, not the victims. For example, a 2012 study by Professors Andrea Beltratti and Rene Stulz found that banks with more "shareholder-friendly" boards performed worse during the financial crisis.[221] They suggested that "shareholder-friendly boards positioned banks in ways that they believed maximized shareholder wealth" before the crisis, such as by encouraging investment in subprime securities, and these decisions left banks "more exposed to risks that manifested themselves during the crisis."[222] Deniz Anginer and his co-authors similarly found evidence suggesting a causal link between "shareholder-friendly corporate governance" at banks and risk taking, particularly for larger banks that may benefit from a too-big-to-fail guarantee.[223] Their results show that large U.S. banks that had to add independent directors to their boards after

[218] See Macey & O'Hara, supra note 22, at 97 ("FDIC insurance . . . gives the shareholders and managers of insured banks incentives to engage in excessive risk-taking . . . [because] bank shareholders are able to foist some of their losses onto innocent third parties. These third parties are the healthy banks whose contributions to the FDIC pay off depositors of failed banks, and ultimately the federal taxpayers whose funds replenish the federal insurance funds when they are depleted."). The existence of FDIC insurance also reduces the incentives of bank creditors—who are mostly bank depositors—to control excessive risk taking by ensuring that their funds are protected if the risks turn out poorly. See id. at 98; Bebchuk & Spamann, supra note 22, at 257.

[219] See Schwarcz, supra note 22, at 4–5 ("[R]isk-taking that causes the failure of a systemically important firm could trigger a domino-like collapse of other firms or markets, causing systemic externalities that damage the economy and harm the public.").

[220] Levitin, supra note 148, at 2030.

[221] Andrea Beltratti & René M. Stulz, The Credit Crisis Around the Globe: Why Did Some Banks Perform Better?, 105 J. Fin. Econ. 1, 1 (2012).

[222] Id. at 2.

[223] Deniz Anginer, Asli Demirguc-Kunt, Harry Huizinga & Kebin Ma, Corporate Governance of Banks and Financial Stability, 130 J. Fin. Econ. 327, 328 (2018).

a 2004 stock exchange rule change disproportionately increased their risk taking as a result.[224] They concluded that because banks are supported by a state-funded safety net, "the case for more shareholder-friendly corporate governance at banks is much weaker than in the case of nonfinancial firms."[225]

Studies that examine other causes of the 2008 crisis have also observed that, at bottom, investors were part of the problem. Lucian Bebchuk and his co-authors have argued that the pre-crisis pay arrangements for bank executives gave them excessive incentive to accept risk.[226] They show that, before the financial crisis, senior management of the largest U.S. banks received a substantial portion of their compensation in the form of common stock and stock options, which aligned the executives' interest with the banks' shareholders.[227] Because of the externality problem described above, this alignment meant that the executives had excessive incentives to take risk.[228] Pursuing the cause of the crisis from a different angle, Brian Cheffins has observed that shareholders chose not to vigilantly monitor bank management during the early to mid-2000s because banks delivered better shareholder returns than their nonfinancial counterparts during that period.[229] As we now know, the profits that inspired shareholder complacency were generated from the aggressive lending, securitization, and trading strategies that eventually contributed to the 2008 crisis. These studies suggest that, even if investors did not directly pressure management to accept higher risk, they were complicit in setting managers' incentives to achieve this result.

Today, the investor base of the largest financial institutions is increasingly consolidated in the hands of institutional—rather than human—investors, but this development only compounds the misalignment problem. Indeed, before the 2008 crisis, large mutual funds were prominent buyers of the mortgage- and asset-backed securities sold by banks, driving demand for the financial products that later turned out to be toxic.[230] Institutional investors may have agency problems of their

[224] See id.
[225] Id. at 343.
[226] Bebchuk & Spamann, supra note 22, at 262–66.
[227] See id.
[228] See id.
[229] Brian R. Cheffins, The Corporate Governance Movement, Banks, and the Financial Crisis, 16 Theoretical Inquiries L. 1, 33–36 (2015).
[230] See Diya Gullapalli & Shefali Anand, Mutual Funds Willing to Risk Subprime Heat, Wall St. J. (July 13, 2007, 12:01 AM), https://www.wsj.com/articles/

own that, for a variety of reasons, tend to ossify or exacerbate the moral hazard problem associated with bank investors. In the first place, while the ordinary individuals who are the ultimate beneficiaries of mutual funds, pension funds, and other institutional investors may have an acute interest in the long-term health of the economy and thus want banks to accept only the socially optimal level of risk, the money managers who make decisions for the funds may not.[231] Most money managers are evaluated and compensated based on annual performance and, consequently, may have personal incentives to pressure banks in their portfolios toward riskier strategies that produce high short-term yields.[232] Evidence shows, for example, that banks with higher institutional ownership took on more risk before the 2008 crisis.[233]

A second, more under-appreciated factor is that institutional investors may be indifferent to systemic risk—the risk of disruption to the stability of the financial system as a whole and not just localized economic distress. Because institutional investors, especially passive mutual funds, compete against each other on the basis of relative performance, they have no incentive to pursue benefits or avoid harms that will be equally shared by their rivals.[234] Any catastrophe from excessive systemic risk taking

SB118429132937465533 [https://perma.cc/ENB4-QFUA]; Alberto Manconi, Massimo Massa & Ayako Yasuda, The Role of Institutional Investors in Propagating the Crisis of 2007–2008, 104 J. Fin. Econ. 491, 492 (2012) (observing that "one private estimate puts these institutional investors' collective exposure [to securitized bonds] higher than that of banks").

[231] For a detailed account of agency problems within institutional investors, see generally Ronald J. Gilson & Jeffrey N. Gordon, The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights, 113 Colum. L. Rev. 863 (2013); Lucian A. Bebchuk, Alma Cohen & Scott Hirst, The Agency Problems of Institutional Investors, 31 J. Econ. Persps. 89, 98–100 (2017); Bebchuk & Hirst, supra note 210, at 2050–56 (conducting an empirical analysis of stewardship activities undertaken by index funds and concluding that stewardship decisions confirm an agency-costs theory of index fund manager incentives to underinvest in stewardship).

[232] In a study of over 4,500 U.S. mutual funds' compensation contracts, the authors found that most contracts tied manager pay to the performance of the fund advisor and that "[t]he performance evaluation window ranges from one quarter to 10 years, with the average evaluation window equal to 3 years." Linlin Ma, Yuehua Tang & Juan-Pedro Gómez, Portfolio Manager Compensation in the U.S. Mutual Fund Industry, 74 J. Fin. 587, 588 (2019).

[233] See David H. Erkens, Mingyi Hung & Pedro Matos, Corporate Governance in the 2007–2008 Financial Crisis: Evidence from Financial Institutions Worldwide, 18 J. Corp. Fin. 389, 390 (2012) (finding that "firms with more independent boards and greater institutional ownership experienced worse stock returns during the crisis period").

[234] See Bebchuk & Hirst, supra note 210, at 2057 ("Index fund managers thus have an incentive to make their funds as attractive as possible, and to perform as well as possible, *relative to other index funds*." (emphasis added)); Bebchuk, Cohen & Hirst, supra note 231,

would, by definition, affect competitor funds and be therefore harmless to a fund's relative performance. On the other hand, any investment in reducing systemic risk would benefit rivals while simultaneously driving up the fund's own costs.[235] Institutional investors thus face an inherent collective action problem when it comes to monitoring systemic risk.[236] Moreover, to the extent that a government-assisted rescue is more likely in the event of multiple bank failures, institutional investors may even favor taking on systemic risk rather than risks that are particular to a standalone bank.[237]

at 97 (observing that, for fund managers, what matters "is not the absolute performance of the investment manager, but its performance relative to alternative investment opportunities").

[235] See Bebchuk & Hirst, supra note 210, at 2057 (explaining that "[i]f the index fund manager invests in stewardship that increases the value of a particular portfolio company, the increase will be shared with all other investors in the company, including rival index funds that replicate the same index"); Bebchuk, Cohen & Hirst, supra note 231, at 98 (concluding that "for managers of index funds, a desire to improve relative performance would not provide *any* incentives that could counter tendencies that the investment manager might otherwise have to underspend on stewardship").

[236] See Armour & Gordon, supra note 23, at 60 (noting that "[s]ystemic risks will harm [institutional investors'] competitors' portfolios as well as their own, and so [their] incentives to intervene will be muted"). John Coffee, however, has argued based on the Capital Asset Pricing Model that "as the market becomes increasingly populated by diversified [institutional] investors, these investors will focus primarily on systematic risk." John C. Coffee, The Future of Disclosure: ESG, Common Ownership, and Systematic Risk 11–12 (Eur. Corp. Governance Inst. Working Paper No. 541/2020, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678197 [https://perma.cc/79GZ-JWC5]; see also Yesha Yadav, Too-Big-to-Fail Shareholders, 103 Minn. L. Rev. 587, 653–55 (arguing that institutional shareholders have the capacity and financial incentive to monitor system-wide risks). While we agree with Coffee that institutional investors are interested in disclosures about systemic risk, we note that receiving information, unlike overseeing the portfolio company or other forms of stewardship, is costless from the fund managers' perspective, and thus does not implicate the collective action problem described above.

[237] See Viral V. Acharya & Tanju Yorulmazer, Too Many to Fail—An Analysis of Time-Inconsistency in Bank Closure Policies, 16 J. Fin. Intermediation 1, 1 (2007) (finding that "when the number of bank failures is large, the regulator finds it ex-post optimal to bail out some or all failed banks, whereas when the number of bank failures is small, failed banks can be acquired by the surviving banks").

B. Substantive Regulation and "Chasing the Greased Pig"[238]

In theory, substantive prudential regulation could correct the misalignment between the interests of shareholders and the public.[239] Unlike corporate governance mechanisms, which influence senior bankers' choices *indirectly* by focusing on their incentives, prudential regulation *directly* addresses banking activities by "limit[ing] the choices available to banks in order to preclude socially inefficient choices."[240] For example, the Basel III Capital Accords (and related regulations) restrict the amount of debt a bank can take on: banks must hold equity in ratio to its risk-weighted assets.[241] The "Volcker Rule," enacted pursuant to the Dodd-Frank Act, limits banks from engaging in high-risk proprietary trading.[242] Provisions of the Glass-Steagall Act, now substantially repealed, prevented commercial banks from affiliating with other firms "engaged principally" in underwriting or trading in securities.[243] Substantive restrictions can be implemented through enforcement actions

[238] "[T]he frustrations of regulation evoke an image from rural contests from earlier days where pigs would be coated with a thick layer of grease and locals would try to catch them, looking foolish in front of large crowds as the slippery beasts escaped time and time again." Donald C. Langevoort, Selling Hope, Selling Risk: Corporations, Wall Street, and the Dilemmas of Investor Protection 5–6 (2016).

[239] See Tarullo, supra note 23, at 8–9. We use "prudential regulation" in this Article to refer to microprudential regulation—that is, regulation that is focused on the safety and soundness of individual banks. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the 47th Annual Conference on Bank Structure and Competition: Implementing a Macroprudential Approach to Supervision and Regulation 2 (May 5, 2011), https://www.federalreserve.gov/newsevents/speech/bernanke20110505a.pdf [https://perma.cc/HJ7L-ZXVY]. Since the 2008 crisis, there has been a recognition that microprudential regulation needs to be supplemented by a macroprudential approach that addresses threats to the stability of the system as a whole. Id. at 3–4. The removal power, however, is firm-specific by nature and thus of limited relevance to the design of macroprudential regulation.

[240] Bebchuk & Spamann, supra note 22, at 280.

[241] See Anat Admati & Martin Hellwig, The Bankers' New Clothes: What's Wrong with Banking and What to Do About It 94–96 (2013).

[242] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 619, 124 Stat. 1376, 1620 (2010) (codified at 12 U.S.C. § 1851 (2012)). Section 619 is called the "Volcker Rule" because it was first proposed by former chairman of the Federal Reserve, Paul Volcker. Paul Volcker, Opinion, How to Reform Our Financial System, N.Y. Times (Jan. 30, 2010), https://www.nytimes.com/2010/01/31/opinion/31volcker.html [https://perma.cc/TR9F-J5UB].

[243] See Banking Act of 1933 (Glass-Steagall Act), Pub. L. No. 73-66, § 20, 48 Stat. 162, 188 (codified as amended in scattered sections of 12 U.S.C.) (repealed in part by Financial Services Modernization Act of 1999 (Gramm-Leach-Bliley Act), Pub. L. No. 106-102, 113 Stat. 1338 (codified in scattered sections of 12 and 15 U.S.C.)).

and supervisory guidance in addition to legislation and rulemaking. A recent example of the former is the Fed's 2018 cease-and-desist order against Wells Fargo, which capped Wells Fargo's balance sheet until the bank remediated problems with its governance, risk management, and compliance functions.[244]

In practice, however, substantive prudential regulation has fallen well short of its goals. In fact, shortly before the 2008 financial crisis, most banks reportedly "met or exceeded the highest regulatory capital requirements . . . ."[245] Regulatory capture and inattention no doubt play a role in explaining why prudential regulation has not been more successful.[246] But the problems run deeper than that. The line between socially inefficient and socially beneficial activities is impossible to draw with precision.[247] This difficulty is compounded by the "relentless dynamism" of the modern financial ecosystem—the fast pace of innovation and innate boom-and-bust cyclicality of banking.[248] Designing well-calibrated rules requires time for extensive investigation, data

[244] Cease & Desist Ord., Wells Fargo & Co., Bd. of Governors of the Fed. Rsrv. Sys. No. 18-007-B-HC (Feb. 2, 2018).

[245] Fed. Deposit Ins. Corp., 2006 Annual Report 102 (2006); see also Natasha Sarin & Lawrence H. Summers, Understanding Bank Risk Through Market Measures, 2016 Brookings Papers on Econ. Activity 57, 70–88 (evaluating a range of financial market data and concluding that banks have "become riskier in the postcrisis epoch").

[246] See, e.g., Arthur E. Wilmarth, Jr., Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street, 81 U. Cin. L. Rev. 1283, 1390–1428 (2013) (offering an extensive argument that "[b]oth before and during the financial crisis, leading banks exploited flawed incentives and governance structures in regulatory agencies to encourage regulators to cater to their interests"); Rich Spillenkothen, Notes on the Performance of Prudential Supervision in the Years Preceding the Financial Crisis by a Former Director of Banking Supervision and Regulation at the Federal Reserve Board (1991 to 2006), at 12–13 (May 31, 2010), http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2010-05-31%20FRB%20Richard%20Spillenkothen%20Paper-%20Observations%20on%20the%20Performance%20of%20Prudential%20Supervision.pdf [https://perma.cc/RF3D-N584] (observing that pre-crisis financial regulation reflected the flawed beliefs that "financial markets were largely efficient and self-correcting" and that "the rationale for government regulation of banks was principally to offset the moral hazard and subsidy stemming from the support banks received from the federal safety net").

[247] See Tarullo, supra note 23, at 9 (observing that capital requirements "will necessarily be somewhat imprecisely related" to actual risk incurred).

[248] See Awrey & Judge, supra note 22, at 2307; Roberta Romano, Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation, 43 Hofstra L. Rev. 25, 27 (2014) ("[T]he nub of the [post-crisis] regulatory problem derives from the fact that financial firms operate in a dynamic environment in which there are many unknowns and unknowables, and state-of-the-art knowledge quickly obsolesces.").

collection, and analysis.[249] During that time, the financial system invariably changes, so rules often become stale even before they take effect. Moreover, new rules inevitably lead to new risks as bankers find new ways to get around them. For example, large, complex financial institutions arbitraged leverage limits by temporarily moving mortgage-backed securities into special purpose vehicles that were held off balance sheet.[250] Faced with higher capital requirements, banks declared their intention to "manage the hell out of [their regulatory capital ratios]" by repackaging their assets to circumvent the requirements.[251] Scholars have long recognized that "[n]o set of ex ante rules, no matter how granular or sophisticated, can satisfactorily tackle the problem of regulatory arbitrage."[252]

The increasing complexity of banks and bank holding companies also contributes to the problem. Jacopo Carmassi and Richard Herring have found, for example, that the average number of subsidiaries controlled by the largest global banks roughly doubled—from 500 to over 1,000—between 2002 and 2013.[253] Non-traditional banking activities, such as securitization and use of derivatives, have become a mainstay of modern banks and have "increased both the number and types of connections that

[249] See Awrey & Judge, supra note 22, at 2303; see also Bebchuk & Spamann, supra note 22, at 281 (observing that calibrating the appropriate level of capital is challenging because it "requires not only an extremely sophisticated understanding of risk modeling, but also intimate knowledge of the bank's portfolio of contracts, securities, and other assets").

[250] Lehman Brothers, for example, used accounting techniques to remove liabilities from its balance sheet in order to conceal its true leverage ratio and "to create a materially misleading picture of the firm's financial condition in late 2007 and 2008." 3 Report of Anton R. Valukas, Examiner, at 732–64, Lehman Bros. Holdings Inc., 433 B.R. 113 (Bankr. S.D.N.Y. 2010) (No. 08-13555), 2010 WL 11417471.

[251] Tom Braithwaite, Banks Turn to Financial Alchemy in Search for Capital, Fin. Times (Oct. 24, 2011), https://www.ft.com/content/3c9e7822-202d-11e1-9878-00144feabdc0 [https://perma.cc/9JYL-AY6B]; see also Thomas M. Hoenig, Why 'Risk-Based' Capital Is Far Too Risky, Wall St. J. (Aug. 11, 2016), https://www.wsj.com/articles/why-risk-based-capital-is-far-too-risky-1470957677 [https://perma.cc/KZN7-RGA8 ("Risk-based capital schemes encouraged banks to use their financial engineering tools to increase leverage and reported returns associated with artificially low risk-weighted asset classes.").

[252] Robin Greenwood, Jeremy C. Stein, Samuel G. Hanson & Adi Sunderam, Strengthening and Streamlining Bank Capital Regulation, Brookings Papers on Econ. Activity 479, 522 (2017). See generally Steven L. Schwarcz, Regulating Complexity in Financial Markets, 87 Wash. U. L. Rev. 211, 216–36 (2009) (describing the growing complexity in financial markets and explaining how complexity can create and exacerbate regulatory challenges).

[253] Jacopo Carmassi & Richard Herring, The Corporate Complexity of Global Systemically Important Banks, 49 J. Fin. Servs. Rsch. 175, 180 (2016).

linked borrowers and lenders in the economy."[254] This growing complexity increases, in turn, the costs incurred by bank regulators in connection with locating, understanding, and correcting risks to bank safety and soundness. Most straightforwardly, as banks grow in size, cross borders, or become more interconnected, the resources needed to gather and process information about potentially relevant risks increases as well.[255] Moreover, complexity increases the likelihood that regulators must calibrate rules under conditions of uncertainty. Capital and leverage requirements, for example, rely on models that draw upon historical asset price performance and economic conditions. But these models cannot account for unmeasurable risk: future events that cannot be understood in probabilistic terms or "unknown unknowns."[256] More and more complicated interactions among banks and other financial intermediaries mean that most risks are now beyond what regulators' models can capture. As former Federal Reserve Chairman Alan Greenspan writes, the problem with prudential regulation "is that regulators, and for that matter everyone else, can never get more than a glimpse at the internal workings of the simplest of modern financial systems."[257]

To be sure, some of prudential regulation's shortcomings are the product of fixable flaws with the rulemaking process. Roberta Romano, for example, has argued for the imposition of mandatory "sunset" clauses that would compel Congress to take a second look at financial legislation.[258] Her proposal aims to mitigate the problems of arbitrage,

[254] Janet L. Yellen, Vice Chair, Bd. of Governors of the Fed. Rsrv. Sys., Interconnectedness and Systemic Risk: Lessons from the Financial Crisis and Policy Implications 2 (Jan. 4, 2013), https://www.federalreserve.gov/newsevents/speech/yellen20130104a.htm [https://perma.cc/48BT-4542].

[255] See Awrey & Judge, supra note 22, at 2310.

[256] Id. at 2311–12 (quoting Kathryn Judge, Information Gaps and Shadow Banking, 103 Va. L. Rev. 411, 418 (2017)) (recognizing that "there are categories of things that might happen—good and bad—that are simply beyond our collective imagination," and discussing the challenges such uncertainty present for regulation). For similar observations, see Steven L. Schwarcz, Regulating Financial Change: A Functional Approach, 100 Minn. L. Rev. 1441, 1466 (2016) (observing that countercyclical capital requirements may not be feasible because it is "virtually impossible to know ex ante whether a financial cycle is rational or merely a bubble"); Coffee, supra note 22, at 797 ("Economic shocks are rarely predictable[,] . . . [and] they arrive with a suddenness that often outpaces the capacity of bureaucracies to respond effectively.").

[257] Alan Greenspan, Dodd-Frank Fails to Meet Test of Our Times, Fin. Times (Mar. 29, 2011), https://www.ft.com/content/14662fd8-5a28-11e0-86d3-00144feab49a [https://perma.cc/ZK5M-JZVW].

[258] Romano, supra note 248, at 38–40.

complexity, and uncertainty by adding a process for legislation to be regularly updated.[259] Along the same lines, Kathryn Judge and Dan Awrey have recommended a decennial commission responsible for investigating the resilience of the financial system as a whole, emergent opportunities and threats, and the impact of recent regulatory reforms.[260] Judge and Awrey also argue that it is a mistake for regulators to respond to arbitrage behavior by designing more detailed and more complex rules, as is often the case.[261] Doing so "invites banks to find new, more bespoke, and more complex ways" of evasion, which perversely causes the banking system to become more complex.[262]

But none of these proposals offers a complete solution to the challenges of prudential regulation, nor is a complete solution possible. Both the standard principles of administrative law[263] and interference by well-organized interest groups[264] assure that regulatory actions cannot keep pace with the frenzied evolution of the banking industry. Most gimlet-eyed commentators—and even bank regulators themselves—recognize that "[w]hile external regulation [of substance] has a role in fostering a safe and sound banking system, this role is limited" and "increasingly important[] are the incentive structures faced by private banking agents."[265] Crucially, regulators must address senior bankers' incentives so that those incentives are aligned with public interests.

[259] See id.

[260] See Awrey & Judge, supra note 22, at 2350–53.

[261] Id. at 2333.

[262] Id.; see also Greenwood, Stein, Hanson & Sunderam, supra note 252, at 518 (arguing that regulators should not respond to arbitrage behavior by "impos[ing] another rigid ex-ante rule as a patch on the first" but should instead adjust their response after observing how banks react to the initial rule).

[263] For a description of the rulemaking and supervisory processes and how they can introduce "significant status quo bias," see Awrey & Judge, supra note 22, at 2316–21.

[264] See, e.g., John C. Coffee, Jr., The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated, 97 Cornell L. Rev. 1019, 1023 (2012) (attributing regulatory inertia to the influence of "a coalition of well-financed, tightly organized business interest groups"); cf. Romano, supra note 248, at 40–41 (responding to Coffee by noting that there are "highly organized and powerful interest groups on *both* sides of financial regulation issues, and solutions appearing in crisis-driven legislation are often policies that a range of those groups have advocated" (emphasis added)).

[265] David T. Llewellyn, Some Lessons for Bank Regulation from Recent Financial Crises, *in* Handbook of International Banking 428, 429 (Andrew W. Mullineux & Victor Murinde eds., 2003); accord Schwarcz, supra note 22, at 21–23 ("Regulating substance therefore is important, but it may be insufficient to control excessive corporate risk-taking that causes systemic externalities.").

C. Removal: Reorienting Managerial Incentives

Direct regulation of banking activities alone will not prevent excessive risk taking. As we have shown, crafting rules to generate the socially optimal amount of bank risk taking is hard enough, without factoring in capture, arbitrage, complexity, and uncertainty. At the same time, corporate governance reforms, which seek to shape bank officers' and directors' decision-making incentives, also miss the mark because they align managerial incentives with investors' interests only.

The removal power thus serves a distinct complementary function. It provides a counterweight to shareholder-centered corporate governance reforms by empowering the Fed (and other bank regulators) to reorient bank managers' incentives toward the public interest. The credible threat of removal could enhance supervisory efficacy by ensuring that regulators do not need to rely on bank executives whom they no longer trust.[266] It could also help close the "responsibility gap" in modern banking conglomerates—the recognition that in large financial institutions, "the buck still stops nowhere."[267] And no less importantly, it would restore the balance—struck during the Civil War and restored during the Great Depression—between the private shareholders, the managers who run banks, and the public sovereign that charters banks and permits them to conduct their core business of expanding the money supply.[268]

To realize this latent capacity, however, Congress must sharpen the removal power's role in bank regulation. As Part II demonstrates, the Federal Reserve currently uses the removal power primarily as a tool to ensure that all bankers, including rank-and-file employees, comply with certain standards of behavior. In other words, the removal power currently serves a professional regulation function: it is used to enforce a set of

[266] See, e.g., Baxter & Ramasastry, supra note 149, at 100 ("[S]upervisors rely on the bank's management to inform them about problems and managerial challenges. If supervisors were to independently verify each and every fact, the bank examination process would never end."); Foreign Bank Supervision and the Daiwa Bank: Hearing Before the H. Subcomm. on Fin. Inst. & Consumer Credit of the Comm. on Banking & Fin. Servs., 104th Cong. 8 (1995) (statement of Alan Greenspan, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.) ("The whole system of supervision also proceeds upon the basis of trust . . . .").

[267] Samuel W. Buell, The Responsibility Gap in Corporate Crime, 12 Crim. L. & Phil. 471, 473 (2018); Press Release, U.S. Dep't of Justice, Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law [https://perma.cc/D7N2-3VQM]; see also supra note 2 and accompanying text.

[268] See supra Section I.A.

basic standards of professional membership and to exclude persons who are deemed unqualified.[269] Professional regulation has a decidedly individualistic cast. The enforcement focus is on the individual actor and imposing individual punishment rather than improving overall organizational functioning.[270] Professional regulation thus embodies a "bad apple" theory of corporate wrongdoing. Tellingly, as shown above, the majority of Section 1818(e) actions pursued by the Fed since the mid-1990s have sanctioned rank-and-file bank employees for one-off conduct, such as embezzlement, that has little, if any, impact on systemic administration.[271] Used in this narrow way, the removal power produces a sort of government-run "shame list"—a tool that bank executives and their lobbies have repeatedly sought as a means to facilitate their hiring practices.[272]

These observations about how the Fed now uses its removal authority leaves still more questions about why it has made this choice. One explanation is that the Fed is legally constrained, resource constrained, and poorly motivated to pursue a different approach.

First, while the removal power exists today at its broadest scope in terms of who may be removed and the amount of discretion in the Fed's hands, there are nevertheless significant limits. In particular, Section 1818(e) requires proof of culpability, defined as "personal dishonesty" or a "willful or continuing disregard . . . for the safety or soundness" of the institution.[273] According to many bank regulators, this requirement broadly insulates directors and officers of large banks from liability for corporate misconduct because they can credibly deny

[269] See Richard A. Posner, Professionalisms, 40 Ariz. L. Rev. 1, 2 (1998) (observing that professional regulation is premised on the belief that the profession "cannot responsibly be entered at will but only in compliance with a specified, and usually, exacting protocol and upon proof of competence"). Moral character and fitness, in particular, "as a professional credential has an extended historical lineage." Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 493 (1985).

[270] Cf. Rhode, supra note 269, at 508 (describing a goal of the professional regulation of lawyers as "exclud[ing] individuals with 'unsavory characters' or traits 'not appropriate' for practitioners, and to deter those with 'obvious' problems from seeking a license").

[271] See supra Part II.

[272] William Dudley, former president of the Federal Reserve Bank of New York, expressed interest in creating such a government-run list. See Ian Katz, Wall Street Mulls Naughty List for Ethically Challenged Bankers, Bloomberg (Dec. 22, 2015, 5:00 AM), https://www.bloomberg.com/news/articles/2015-12-22/wall-street-mulls-naughty-list-for-ethically-challenged-bankers?sref=C8Sr7Rk8 [https://perma.cc/T3X9-PWB6].

[273] 12 U.S.C. § 1818(e).

knowledge of most operational details.[274] The challenge of attributing fault increases with the distance from the relevant misconduct, particularly when it comes to issues involving financial risk, which is extraordinarily complex to measure.

There is undoubtedly some truth to this diagnosis, but the real story is likely also more complicated. There have been instances where high-ranking executives' action (or inaction) falls short of conscious complicity—for example, if they fail to prevent a problem that they have no reason to suspect existed. But there are also plenty of bank scandals in which management was surely aware of but ignored the oversized risks. Wells Fargo's sales practice problems persisted since 2002, over a decade before the accounts scandal broke in 2013.[275] JP Morgan's internal risk limits were breached 330 times during the quarter when the disastrous "London Whale" trades happened.[276] In situations like these, a unitary knowledge requirement operates not so much to tie the Fed's hands as to substantially raise the cost of removing bank leadership relative to lower-echelon subordinates.[277]

The bias in favor of targeting those at the lower levels is aggravated by time and resource constraints. The Fed has to pick its fights and weigh the manpower and funding involved in pursuing a removal case against its benefits.[278] At the bank examiner and enforcement staff level, capacity may also depend on their ability to convince agency leadership and the

[274] See OIG Report, supra note 142, at 20–21.

[275] See Consent Ord., John Stumpf, Off. of the Comptroller of the Currency No. AA-EC-2019-83 , at 3 (Jan. 22, 2020); see also Adam Davidson, How Regulation Failed with Wells Fargo, New Yorker (Sept. 12, 2016), https://www.newyorker.com/business/currency/the-record-fine-against-wells-fargo-points-to-the-failure-of-regulation [https://perma.cc/57F2-EPUQ] (noting that account fraud "was so widespread [at Wells Fargo branches] around the country that it would be a truly remarkable coincidence if each team member had come up with the strategy independently").

[276] Majority & Minority Staff of S. Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affs., 113th Cong., Rep. on JPMorgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses 7 (Comm. Print 2013), https://www.hsgac.senate.gov/imo/media/doc/REPORT%20-%20JPMorgan%20Chase%20Whale%20Trades%20(4-12-13).pdf [https://perma.cc/7STC-5EMG].

[277] In particular, the traditional method of proving the awareness of those at the top is to "fli[p]" those at the bottom and go up the ladder. See Rakoff, supra note 1; Coffee, supra note 1, at 77 (observing that this process is particularly challenging in the deeply hierarchical structure of large corporations); Eisinger, supra note 1, at xx, 3–4, 13–19 (describing the arduous effort of flipping mid-level Enron employees to secure the conviction against Kenneth Lay and Jeffrey Skilling).

[278] See OIG Report, supra 142, at 24.

public that they are doing an effective job. That is, "[o]btaining credit and public approbation is a precondition to enhanced future funding."[279] In turn, this need to claim victories exerts pressure on enforcement personnel to reach quick settlements; to prefer easy cases, such as those involving obvious self-dealing, to complex ones that require intensive investigations and could possibly be reversed on appeal; and to prioritize extracting corporate fines and reforming corporate policies, which rarely encounter resistance, over punishing individuals.[280]

Finally, beyond law and resource considerations, a third factor is Fed personnel's own lack of motivation to leverage removal unless there was extreme bad faith. A common critique from bank supervisors is that removal is a draconian remedy that "tak[es] away" the "[l]ivelihood[s]" of bankers whose careers in banking span years or even decades.[281] Because of the recent practice that has equated Section 1818(e) with imposing a lifetime ban from the entire banking industry,[282] supervisors perceive removal as an all-or-nothing proposition, a sledgehammer instead of a scalpel. As a result, even to those officials who see the problem as we do—banks are chartered to perform core public functions, but the executives who run the banks have weak allegiances to the public interest—removal seems like a blunderbuss response that may produce unintended consequences.[283]

Further compounding internal political challenges with removing management after major bank crises is the fact that the banking agencies themselves were on the scene but often never noticed anything wrong with the level of risk or types of activities they were supervising, except in hindsight.[284] The Federal Reserve Bank of San Francisco's board of

[279] Coffee, supra note 1, at 7.

[280] See, e.g., id. at 7–9 (arguing that deferred prosecution agreements grew in popularity because "they spared prosecutors from any risk of an embarrassing loss at trial, and they offered a speedy resolution that enabled prosecutors and regulators to declare an early victory (whereas a trial would potentially mean years of delay and then appeals)"); Eisinger, supra note 1, at 228–43 (describing the risks, rewards, and incentive calculus that deterred prosecutors from going after top executives at major banks).

[281] OIG Report, supra 142, at 23.

[282] See supra notes 169–71 and accompanying text.

[283] For a discussion of the unintended consequences of severe punishments against corporate entities, see generally Assaf Hamdani & Alon Klement, Corporate Crime and Deterrence, 61 Stan. L. Rev. 271, 290–94 (2008) (arguing that corporations may respond to the threat of severe sanctions by reducing their monitoring effort).

[284] For examples of critiques suggesting that regulators enabled or encouraged corporate misconduct, see, e.g., Rakoff, supra note 1 (explaining how "the government, writ large, had a part in creating the conditions that encouraged the approval of dubious mortgages," and

directors even appointed Wells Fargo's then-CEO to be its representative on the Federal Advisory Council in 2014, a year *after* the fake accounts first came to light.[285] Fed personnel are certainly aware that any decent defense lawyer to a senior bank executive would argue that if blameworthy complicity occurred, it did not just stop at bank management. To pursue a high-profile removal action is to invite critical congressional and public scrutiny of the bank supervisors themselves. Conscious or not, self-interest lurks in the background of enforcement decisions.

These constraints—proving the legal elements, marshalling the managerial resources, and overcoming agency problems within the Fed itself—are significant but not intractable. To the contrary, the next Part suggests two modest steps for the Fed and Congress, respectively, to take toward enhancing the removal power. Our work builds on a substantial body of literature that proposes binding senior bankers to the public with fiduciary duty-like obligations and expanding corporate voting rights to non-shareholder constituencies.[286] Unlike these desirable mechanisms, which may not be possible in the near future, an attractive feature of using the removal power to re-align incentives is that the authority, for the most part, already exists.

IV. REVIVING REMOVAL (AGAIN)

The previous Part argued that a credible threat of removal against bank executives for unsound management practices is an indispensable component of contemporary bank supervision. This Part makes the case for modernizing removal in order to facilitate its ability to serve this function. One set of recommendations is directed at the Fed and concerns design of removal terms. A second set is directed to Congress and

arguing that this involvement is a reason for the lack of prosecutions in connection with the 2008 crisis); Eisinger, supra note 1, at 243 (speculating that the SEC declined to bring civil charges against Lehman Brothers because it "was responsible for the investment bank[]" and "had blown its oversight").

[285] Press Release, Fed. Rsrv. Bank of S.F., John G. Stumpf Appointed to the Federal Advisory Council (Dec. 19, 2014), https://www.frbsf.org/our-district/press/news-releases/2014/john-g-stumpf-appointed-federal-advisory-council/ [https://perma.cc/M7UY-X6BG].

[286] See supra note 23. Admittedly, there are downsides to relying on the existing regulatory apparatus. Our proposals below, for example, would not resolve concerns about regulatory capture. See, e.g., Omarova, Bankers, Bureaucrats, and Guardians, supra note 23, at 630–31; Levine, supra note 23, at 40–41.

addresses the need to recognize managerial and supervisory failure as a distinct removal ground.

A. Terms of Removal

We begin with low-hanging fruit. The Fed ought to allow for more variation within the terms of removal orders. Underlying the argument that removal is too draconian is the assumption that the only possible consequence of a removal order is a *lifetime* ban from the *entire* banking industry.[287] But as our data show, bank supervisors have authority to vary—and in the 1980s did in fact vary—the scope, duration, and other terms of removal. Section 1818(e) orders issued by the Fed from the early 1980s were bespoke—in some cases, banning the individual from the banking industry for two to three years and, in other cases, banning the individual from working at a particular institution.[288] Other options for intermediate penalties include restricting the size of the institutions where an individual may work, restricting the types of positions the individual may hold, or restricting the activities in which the individual may engage. There is no question that the Fed still has the power to pursue these removal options: FIRREA explicitly provides that the banking agency issuing the Section 1818(e) order can also determine its scope.

Encouraging bank supervisors to pursue intermediate removal options may sound counterproductive at first. Why weaken the removal power? But as Professor Kenneth Culp Davis recognized half a century ago, "insufficient individualizing" undermines just punishment.[289] The reality is that the harshest penalties are often least effective in deterring misconduct because they are infrequently or inconsistently enforced.[290] If bank supervisors can circumscribe the prohibition terms according to the type of wrongdoing at issue, rather than always imposing a lifetime industry-wide ban, supervisors will be more likely to view the removal power as an appropriate, proportionate sanction and therefore more likely to use this authority. Making enforcement more likely but allowing for intermediate options may also reduce the widespread perception that bank supervisors engage in scapegoating—singling out a few lower-level

[287] See supra note 283 and accompanying text.

[288] See supra notes 170–71 and accompanying text.

[289] Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 52 (1969).

[290] See Samuel W. Buell, Criminal Procedure Within the Firm, 59 Stan. L. Rev. 1613, 1655 (2007) (noting that the "probability of sanction is at least as important as . . . severity of sanction in determining the effectiveness of legal prohibitions in deterring violations").

workers for doing what senior executives directed or encouraged them to do.[291]

We also do not mean to suggest that a lifetime ban from the banking industry should be taken off the table. There are many circumstances that could justify a severe sanction, such as cases involving recidivism, pervasive fraud, or lying to regulators. Moreover, the possibility of a draconian sanction could enable bank supervisors to obtain their preferred removal terms in the most efficient way possible, just as prosecutors derive their considerable advantage in plea bargaining from leveraging "modern sentencing statutes [that] are extraordinarily harsh."[292]

B. Failure to Supervise

Second, Congress should relieve the pressure to target rank-and-file employees by recognizing managerial and supervisory failure as a separate removal ground. The legal standards for removal currently do not distinguish between senior officers, directors, and lower-level employees, even though the roles of bankers vary dramatically along the hierarchical structure.[293] Whereas it makes sense to ask whether lower-level employees knew their actions were illegal, excessively risky, or otherwise wrongful, it makes less sense to ask whether senior bank executives and directors consciously participated in the same way given the decentralized structure of many modern banks. This is because the duties of senior bank officers and directors are not related to carrying out operational details; they are instead to oversee institutional risk taking: to establish a corporate culture that makes excessive risk taking by rank-and-file employees unlikely—or at least unrewarded—and to ensure that adequate information about the bank's risk exposure reaches those at the

[291] See Garrett, supra note 182, at 1794–95 (noting that because culpable individuals are frequently identified based on information provided by the corporation, "[t]he higher-ups, who may control negotiations with prosecutors, may themselves remain above the fray while lower-level employees are 'thrown under the bus'").

[292] David Alan Sklansky, The Nature and Function of Prosecutorial Power, 106 J. Crim. L. & Criminology 473, 488 (2016); accord Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1312 (2018) ("[B]y threatening a seriously inflated set of charges and then offering to replace it with the charges that she truly desires, the prosecutor is able to control the defendant's incentive to plead guilty, and with it the outcome of any subsequent 'negotiation.'").

[293] See supra Section III.C.

top.[294] Thus, removal of bank executives or directors should turn on an objective assessment of whether the supervisory arrangements that they put in place were adequate, rather than whether they knew that wrongdoing was afoot.[295]

As an initial matter, some might object to the premise that the need to prove that a high-level executive acted "willfully" presents a problematic mismatch between the legal framework and the realities of executive responsibility in the banking industry today. They may contend that a reasonably aggressive regulator would have no difficulty establishing the culpability of bank leadership who was truly asleep at the switch. The OCC's Section 1818(e) action against Wells Fargo's former CEO, Stumpf, in January 2020 might seem to support this argument at first glance.[296] The prohibition rested on Stumpf's alleged failure to adequately discharge his supervisory responsibilities, inform himself about the bank's condition and controls, and respond to warning signs about illegal sales practices.[297] Yet in many ways, the allegations against Stumpf prove the problem with current law, as the primary claims of failed oversight were also accompanied by secondary allegations of deliberate inaction and even direct participation in the wrongful conduct. The consent order, for instance, noted that sales practice problems existed in Wells Fargo's community bank division "[f]rom at least 2002," when Stumpf himself led the division.[298] Moreover, the misconduct at Wells Fargo was extreme: in the aftermath of the account scandal, "nearly every one of the bank's business lines [wa]s under investigation by a government agency."[299] In turn, Wells Fargo's regulators—the Fed and the OCC—faced unprecedented political pressure to use their

[294] See Proposed Guidance on Supervisory Expectations for Boards of Directors, 82 Fed. Reg. 37,219, 37,224–26 (Aug. 9, 2017); Proposed Supervisory Guidance, 83 Fed. Reg. 1351, 1356–57 (Jan. 11, 2018) (proposing guidance on the core principles of effective senior management).

[295] Cf. Tarullo, supra note 23, at 16 (discussing the regulatory benefits of "strengthening of systems of controls and risk-appetite decision processes" at banks); Rakoff, supra note 1 (discussing the challenges of proving intent and asking whether "if, despite . . . reports of suspicious activity, the executive failed to make such inquiries, might it be because he did not want to know what such inquiries would reveal?").

[296] See Consent Ord., John Stumpf, Off. of the Comptroller of the Currency No. AA-EC-2019-83, at 3 (Jan. 22, 2020).

[297] See id. at 2–4.

[298] Id. at 3.

[299] Glazer, supra note 165.

Section 1818(e) authority to punish the bank's leadership.[300] Hence, it would be a mistake to view the OCC's action against Stumpf as more than a deviation from the norm driven by a particular mix of political expediencies and an egregious set of facts.

A more substantial objection to adding supervisory failure as a separate ground for removal is that it is in tension with contemporary corporate governance trends toward recognizing that basic questions about oversight responsibilities—such as which matters should be brought to the attention of corporate leaders or how deeply or broadly we expect those leaders to monitor—eschew universalizing. "*Caremark* was wise to demand almost nothing beyond asking that *some* compliance system exists," writes Professor Donald Langevoort, referring to the corporate law doctrine governing the board of directors' oversight obligations.[301] So-called *Caremark* claims against corporate directors are notoriously hard to prove, requiring plaintiff-shareholders to show that the directors either utterly failed to implement an information and reporting system to allow the board to monitor the corporation or consciously failed to supervise the systems' operations.[302] To *Caremark*'s defenders, the doctrine's minimalism reflects a welcome appreciation for the messy realities of oversight, in which the adequacy of supervisory arrangements depends on context, rests heavily on assessments about uncertainties and contingencies, and should therefore be treated as a matter of business judgment.[303] Assessing claims that bank directors failed to supervise can

[300] See, e.g., Letter from Sen. Elizabeth Warren, supra note 14; Victoria Guida, Waters Calls on Regulators to Consider Ousting Wells Fargo CEO, Politico (Mar. 12, 2019, 3:51 PM), https://www.politico.com/story/2019/03/12/waters-remove-wells-fargo-ceo-1263665 [https://perma.cc/4GSR-Z8TH].

[301] Donald C. Langevoort, *Caremark* and Compliance: A Twenty-Year Lookback, 90 Temp. L. Rev. 727, 729–30 (2018).

[302] See Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006). *Caremark* itself remarked that oversight liability "is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

[303] See, e.g., Langevoort, supra note 301, at 729 ("As many corporate governance scholars have come to accept, corporations are complex interactive systems of processes, routines, and feedback . . . ."); Stephen M. Bainbridge, *Caremark* and Enterprise Risk Management, 34 J. Corp. L. 967, 981–85 (2009) (arguing that "courts need to be especially sensitive in applying *Caremark*" to claims alleging risk management failures (as compared with legal compliance failures) because of the complexity and uncertainty inherent to risk management); Robert T. Miller, Oversight Liability for Risk-Management Failures at Financial Firms, 84 S. Cal. L. Rev. 47, 81 (2010) (describing the "highly sophisticated exercises" involved in risk management and arguing that those exercises are "necessarily business judgments").

involve second guessing operational structure, organizational priorities, and resource allocations, which most corporate law scholars agree are best left to bank leadership to manage.[304] Simply put, excessive interference with the discretion of senior executives runs a real risk of impeding corporate wealth-producing capacities.

Yet this concern applies less well in the banking context, where wealth production is a secondary goal to providing critical money and payments infrastructure for the economy. *Caremark* is undergirded by the belief that directors are sufficiently motivated to exercise their judgement to further the interests of *shareholders,* who elected them.[305] Following *Caremark* in the banking context would undermine the goal of removal law: forcing senior bankers and directors to consider the harms of corporate actions on society at large.[306]

More critically, even if regulators set a minimal threshold for adequate supervision with limited policing of effectiveness, recognizing failed supervision as a removable offense could yield at least two important benefits. First, the addition could improve the current legal framework by expanding the inquiry. For top bank executives and directors, searching for their awareness of wrongdoing skips over a crucial question: Did the executives or directors *try* to be brought into significant risk and compliance matters? Did they establish routes by which operational-level conditions and problems can promptly reach their attention? Broadening the frame of inquiry in this way would enable supervisors to move away from the current focus on who knew what about particular misconduct. When senior leaders fail to receive or properly respond to material information, it could be a symptom of poor leadership capacity—Stumpf,

[304] See Miller, supra note 303, at 98–100 (arguing that it would be "absurd" to think that courts have the capacity to specify risk management or measurement models); Langevoort, supra note 301, at 738 (noting that, to many scholars and practitioners, "*Caremark*'s legacy of minimalism and deference is to be celebrated—private ordering will do better at getting compliance responsibilities to the right place"). See generally William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of *Van Gorkom* and Its Progeny as a Standard of Review Problem, 96 Nw. U. L. Rev. 449, 451–52 (2002) (describing the justifications for the corporate law principle of "business judgment" deference to senior management and directors). But see Frank Partnoy, Delaware and Financial Risk, *in* The Corporate Contract in Changing Times: Is the Law Keeping Up? 130, 131, 133–35 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019) (arguing that judicial competence concerns surrounding general business risk do not apply to financial risk).

[305] See Langevoort, supra note 301, at 734.

[306] Cf. id.

for example, "was not perceived within Wells Fargo as someone who wanted to hear bad news or deal with conflict"[307]—or systematic obstacles—as in the case of Michael Corbat, who had repeatedly failed to put in place "effective risk management" during his tenure as Citigroup's CEO.[308] Cabining the removal inquiry to a search for awareness of one instance or even one type of harm inevitably leads regulators to overlook these deeper problems.

Second, recognition of supervisory failure as a basis for removal could open up an important avenue for clarifying senior bankers' expected responsibilities. The Fed has said, for example, that the "core" duties of bank directors include overseeing the bank's risk levels and overseeing its management.[309] Yet the current approach to the removal power all but ensures that directors who neglect these responsibilities will not be disciplined by the Fed, which in turn has impoverished critical analysis on the scope and substance of the Fed's expectations on this front.[310] Failure to acknowledge weak supervision as a basis for removal, in other words, makes it difficult to develop a granular account of the proper bounds of bank directors' oversight and risk-management roles. This lacuna also creates confusion about the interplay between state corporate law and federal banking regulation with respect to bank governance, particularly concerning whether the Fed serves a primary or secondary role in promulgating guidance for bank boards.[311] Against this backdrop,

[307] Independent Directors of the Board of Wells Fargo & Company Sales Practice Investigation Report 53–54 (2017), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf [https://perma.cc/YV69-NLNW].

[308] Emily Flitter, Citigroup Is Fined $400 Million Over 'Longstanding' Internal Problems, N.Y. Times (Oct. 7, 2020), https://www.nytimes.com/2020/10/07/business/citigroup-fine-risk-management.html [https://perma.cc/GHS8-GGLP].

[309] See Proposed Guidance on Supervisory Expectations for Boards of Directors, 82 Fed. Reg. 37219, 37224–26 (Aug. 9, 2017).

[310] Admittedly, the Fed annually rates supervised banks' and bank holding companies' "ability to monitor and manage all risks," which takes into account the effectiveness of a bank's senior management and board as one of many other factors. See Bank Holding Company Rating System, 69 Fed. Reg. 70444, 70445–46 (Dec. 6, 2004); Proposed Guidance on Supervisory Expectations for Boards of Directors, 82 Fed. Reg. 37219, 37,220 (Aug. 9, 2017) (explaining that board effectiveness would be assessed in connection with the proposed Large Financial Institution (LFI) rating system).

[311] Cf. Letter from Tom Quaadman, Exec. Vice President, Ctr. for Cap. Mkts. Competitiveness, to Ann E. Misback, Sec'y, Fed. Rsrv. Bd. of Governors (Jan. 5, 2018), https://www.federalreserve.gov/SECRS/2018/January/20180129/OP-1570/OP-1570_010518_131935_521010752079_1.pdf [https://perma.cc/B7PG-4YEY] (asking the Fed to clarify that its "role in the corporate governance of banking organizations is secondary to that of state law and the SEC").

the rare removal actions that involve inadequate oversight are easily dismissed by banks as unprincipled or the product of political expediencies.[312] One benefit of recognizing supervisory failure is that it scaffolds more rigorous development of bank leaders' oversight responsibilities and information flow requirements.

Finally, determining what qualifies as failed supervision warranting removal will no doubt be challenging. This decision will depend heavily on the particular facts and circumstances, including, for example, the effectiveness of structures the relevant executives implemented to manage risk and information flows, the thoroughness of their responses when risks to bank safety and soundness were detected, and the extent to which they contributed to or ignored an organizational culture of excessive risk tolerance. It is beyond the scope of this Article to delineate precisely what adequate supervision requires, but we recognize that the judgment-laden nature of this determination could raise concerns about manageability. Broad discretion, however, is characteristic of bank oversight. The banking agencies are given wide latitude in carrying out virtually all aspects of their duties, including discretionary authority to assess whether "banks' risk management systems are, in fact, identifying, measuring, monitoring, and controlling risks"[313] and authority to set the minimum level of capital for a banking institution "in light of the particular circumstances of the banking institution."[314] Incorporating failed supervision as a basis for removal contributes little to changing the fundamentally discretionary nature of bank oversight, but it would greatly assist the Fed and others in fulfilling the role Congress has assigned them.

CONCLUSION

This Article offers a comprehensive study of the Fed's power to suspend, remove, and prohibit officers, directors, employees, investors, and other persons involved with bank holding companies and their bank

[312] Cf. Langevoort, supra note 238, at 150 (noting that "even if a conviction is obtained and sustained, the deterrence effect . . . is undermined as other executives see how many others are walking away free").

[313] Menand, supra note 16, at 1567 (quoting Testimony Eugene A. Ludwig, Comptrollor of the Currency, Before the H. Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Banking & Fin. Servs., 104th Cong. 3 (1995), https://www.occ.treas.gov/news-issuances/congressional-testimony/1995/pub-test-1995-133-written.pdf [https://perma.cc/AM64-TENV]).

[314] International Lending Supervision Act, Pub. L. No. 98-181, § 908(a)(1)(2), 97 Stat. 1153, 1280 (1983) (codified as amended at 12 U.S.C. § 3907(a)(2)).

and non-bank subsidiaries. It identifies the origins of the power in the wake of a series of late nineteenth century bank failures and traces its evolution in the U.S. Code from the Great Depression to the present day. It argues that Congress created the power so that the Fed could hold executives responsible to the public. And it reveals that the Fed now uses the removal power mostly to prevent already-terminated, low-level employees who committed crimes from working at other banks, even though Congress never intended for removal to be used primarily in this way.

This Article argues that this shift is problematic to the extent it creates an impression among bank executives that the government will not use removal against them. A credible threat of removal for failing to supervise bank employees is an indispensable component of modern bank supervision, filling gaps left by regulatory rules and corporate governance measures. Accordingly, this Article argues that the Fed should change its approach to removal to make actions against executives easier and that Congress should amend the statute to do the same. A workable removal power is needed to safeguard the public interest in safe and sound banking by constraining the discretion of private shareholders and their appointed executives in managing the operations of banks.