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INTRODUCTION

With the fiftieth anniversary of the Freedom of Information Act (FOIA) in 2016, advocates for greater transparency in the American government will contemplate whether and how that statute and others like it have shed light on the deepest decision-making processes of lawmakers and those who advise them. This Article will apply the tradition of American government transparency (or lack thereof) to the Federal Reserve System (the Fed), which as the nation's central bank has a crucial but little-understood influence on the state of the nation's and the world's economies. This became a matter of even greater public interest after the financial collapse of 2007–2008, which sent the world economy into a stubborn and long-lasting recession, and which may have been the indirect or even direct result of decisions made at the Fed.[1]

Through a pattern of meetings behind closed doors and structural isolation from the checks and balances process, the Fed receives very little public oversight of decision-making processes that directly affect the people's economic well-being. Who actually controls, owns, or oversees the Fed is a common question among government watchdogs. If these questions prove difficult to answer, it follows that transparency suffers when watchdogs are forced to ask further questions about an entity whose very structure and place in the American government are cloaked in secrecy.

In 1913, President Woodrow Wilson, a critic of central banks who nonetheless signed the bill that brought the Fed into existence, foreshadowed the problems that could be caused by a secretive banking industry led by unaccountable insiders:

> Since I entered politics, I have chiefly had men's views confided to me privately. Some of the biggest men in the United States, in the field of commerce and manufacture, are afraid of somebody, are afraid of something. They know that there is a power somewhere so organized, so subtle, so watchful, so

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[1] *See generally* JOHN A. ALLISON, THE FINANCIAL CRISIS AND THE FREE MARKET CURE: WHY CAPITALISM IS THE WORLD ECONOMY'S ONLY HOPE 17–35 (2013) (attributing economic instability that led to the financial crisis to the Fed); THOMAS E. WOODS, JR., MELTDOWN: A FREE-MARKET LOOK AT WHY THE STOCK MARKET COLLAPSED, THE ECONOMY TANKED, AND GOVERNMENT BAILOUTS WILL MAKE THINGS WORSE 63–86 (2009) (attributing boom-and-bust cycles to actions taken by the Fed).

> interlocked, so complete, so pervasive, that they had better not speak above their breath when they speak in condemnation of it.[2]

The myriad causes of the 2007–2008 financial crisis are beyond the scope of this Article, though financial experts (in hindsight) have pointed to a combination of factors that are relevant for a discussion of transparency in monetary policy.[3] Granted, the private banking industry committed many transgressions of a structural nature, such as predatory lending without sufficient government oversight, which encouraged banks to take on too much risk;[4] increasingly complex securitization and trading of other people's assets, made possible by deregulation that reduced government oversight;[5] and a trend of mergers and buyouts that allowed financial institutions to become larger and larger.[6] Since the advent of the crisis, these have been reported extensively in news articles and books.[7]

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[2] WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 24 (William E. Leuchtenburg & Bernard Wishy eds., 1961).

[3] *See infra* Part II.

[4] *See* FIN. CRISIS INQUIRY COMM., THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xviii–xix, xxiii, 75–126 (Jan. 2011) [hereinafter FCIC REPORT].

[5] *See id.* at 38–51. A major legislative landmark, which reduced oversight of the institutions that contributed to the financial crisis, was the 1999 repeal of the Glass-Steagall Act, which was a portion of the U.S. Banking Act of 1933, Pub. L. 73-66, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.). That statute was a direct reaction to the 1929 market crash that led to the Great Depression, and it limited the interactions between consumer banks and investment banks. FCIC REPORT, *supra* note 4, at 29, 32. Under political pressure from large financial players who claimed that modern practices had made the 1933 restrictions obsolete, Glass-Steagall was repealed by the Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 and 15 U.S.C.). That statute overturned many of the regulations of consumer and investment banks while reducing regulatory oversight. This deregulation in particular allowed the industry to become much more complex and dominated by larger and larger players that took on dangerous amounts of risk while investing the deposits of their customers. *See* James Rickards, *Repeal of Glass-Steagall Caused the Financial Crisis*, U.S. NEWS & WORLD REP.: ECON. INTELLIGENCE BLOG (Aug. 27, 2012), http://www.usnews.com/opinion/blogs/economic-intelligence/2012/08/27/repeal-of-glass-steagall-caused-the-financial-crisis [http://perma.cc/7KK8-N95L].

In the wake of the collapse, leading economists like Robert Weissman and Joseph Stiglitz saw the repeal of Glass-Steagall as a major influence. Weissman claimed that the repeal encouraged consumer banks "to emulate Wall Street's high-risk speculative betting approach." Robert Weissman, *Reflections on Glass-Steagall and Maniacal Deregulation*, COMMON DREAMS (Nov. 12, 2009), http://www.commondreams.org/views/2009/11/12/reflections-glass-steagall-and-maniacal-deregulation [http://perma.cc/5YRE-BK52]. Stiglitz claimed that the repeal changed the risk-averse culture of consumer banks and allowed them to adopt the high-risk behavior of investment banks. Joseph E. Stiglitz, *Capitalist Fools*, VANITY FAIR, Jan. 2009, at 48, 50.

[6] *See* FCIC REPORT, *supra* note 4, at 52–66.

[7] Prominent examples of books in which investigative journalists or financial experts have explored the causes of the financial collapse from the regulatory standpoint include

A much lesser-known influence on the events leading up to the financial collapse was the internal decision-making process at the Fed, particularly in regard to interest rates and money supplies.[8] As will be described herein, the Fed is a quasi-public independent agency within the Executive Branch with no direct oversight, and reduced checks and balances from the other branches of the government.[9] The Fed is the primary instigator of adjustments in the American money supply, making it the key mover in monetary policy and therefore the final approver of the amount of money that flows into the banking system.

If anyone chooses to use FOIA[10] or related transparency statutes to find information on the state of the financial industry, they are likely to be thwarted by legal interpretations, agency structures, and case precedents that have been in place since before the 2007–2008 meltdown.[11] Of particular interest is the fact that the American economy is overseen by an unwieldy variety of quasi-public agencies and secretive advisory committees, large categories of financial information are exempted from FOIA, and banks have been known to claim that their proprietary financial instruments are trade secrets.[12] Since the financial crash, what have we learned? Not very much, and this situation is unlikely to change due to the forces described in this Article.

The Article will argue that the Fed, thanks to its legislative structure, place within the American government, and court precedents regarding transparency statutes, is insulated from public oversight of almost all of its operations. The next Part introduces the Fed's history and structure. The following Part will discuss the role of transparency and secrecy in the 2007–2008 financial crisis. The third Part will consider whether two potentially powerful transparency statutes, the Freedom of Information Act and the Federal Advisory Committee Act, can be used to reveal documents from the banking sector and its regulators, along with the relevant statutory and case histories of those acts. The Article concludes with a discussion of the factors that have made the Fed System, and its internal decision-making processes, particularly impenetrable

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PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 (2009); MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010); NOMI PRINS, IT TAKES A PILLAGE: BEHIND THE BAILOUTS, BONUSES, AND BACKROOM DEALS FROM WASHINGTON TO WALL STREET (2009); and ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES (2009).

[8] *See* ALLISON, *supra* note 1, at 17–36.

[9] *See infra* notes 70–89 and accompanying text.

[10] Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012).

[11] *See* Samuel L. Zimmerman, Note, *Understanding Confidentiality: Program Effectiveness and the Freedom of Information Act Exemption 4*, 53 WM. & MARY L. REV. 1087, 1092–96 (2012); *see also* Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 342–49 (1979) (describing the Fed's policy against disclosing certain monetary policy directives); Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 143, 147–50 (2d Cir. 2010) (describing the Fed Board's legal arguments against disclosing loan information), *cert. denied*, 562 U.S. 1303 (2011).

[12] *See infra* Parts III.A–B.

to citizens, journalists, and politicians who seek information on crucial matters of monetary policy.

I. A BRIEF HISTORY OF THE FEDERAL RESERVE SYSTEM AND MODERN BANKING REGULATION

Financial regulation in the United States comes in many different categories, with the combined goal of maintaining the integrity and stability of the economy.[13] Many different segments of the economy are regulated, from small banks to the trading of stock issued by publicly owned corporations.[14] Of particular interest in any analysis of the 2007–2008 financial crisis is the regulation of large banks and firms that provide financial services and investment management.[15] In addition to traditionally structured regulatory agencies like the Securities and Exchange Commission, there are several unconventionally structured agencies in the United States government with some sort of oversight of the economy and financial markets.[16] The most important for this Article's arguments is the Fed,[17] along with similarly unconventional entities like the Federal National Mortgage Association (FNMA or "Fannie Mae")[18] and the Federal Home Loan Mortgage Corporation (FHLMC or "Freddie Mac").[19] Each of these entities comes with specific transparency challenges, due to the complexity of their operations, their quasi-public status, and their positions within the executive branch of the American government.

This Article assumes that the techniques of modern American financial regulation date back to the early twentieth century and the formation of the Fed. Since the country's founding, periodic panics and other crises had beset the American economy, culminating in the particularly severe Panic of 1907, in which many state and local

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[13] BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 15–16 (9th ed. 2005).

[14] *See generally* EDWARD V. MURPHY, CONG. RESEARCH SERV., R43087, WHO REGULATES WHOM AND HOW? AN OVERVIEW OF U.S. FINANCIAL AND REGULATORY POLICY FOR BANKING AND SECURITIES MARKETS (2015) (providing a description of various regulatory authorities across financial institutions).

[15] While the exact causes of the financial crisis are many and varied, risky lending practices by financial services firms, particularly in real estate and mortgage loans, were predominantly cited in a speech by then-Chairman of the Federal Reserve Ben S. Bernanke. Ben S. Bernanke, Chairman, Fed. Reserve Sys., Four Questions about the Financial Crisis, Speech at Morehouse College (Apr. 14, 2009), http://www.federalreserve.gov/newsevents/speech/bernanke20090414a.htm [http://perma.cc/4TAU-QNWT].

[16] *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 607–23 (2010) (providing an overview of financial regulatory agencies).

[17] The Fed will be the focus of much of this Article. Official information can be found at BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/default.htm [https://perma.cc/7QWJ-P98E].

[18] *See generally* FANNIE MAE, http://www.fanniemae.com/ [http://perma.cc/Y3NQ-3EKV].

[19] *See generally* FREDDIE MAC, http://www.freddiemac.com/ [http://perma.cc/7BDQ-5EBB].

banks went bankrupt after runs on their cash reserves.[20] It was necessary for wealthy financier J.P. Morgan to convince his peers to contribute large sums of their own money to shore up the banking industry.[21] At the time, the United States had no central bank to manage the liquidity of local banks or to inject funds into the marketplace.[22] Senator Nelson Aldrich chaired a congressional committee to investigate preventative solutions, leading to the establishment of the Fed as a central bank in 1913.[23]

It is important to note that the Federal Reserve Act, which authorized the new central bank, was not written in Congress.[24] Morgan invited a selection of powerful financiers and agreeable politicians, including Senator Aldrich, to his private estate at Jekyll Island, Georgia starting in late 1910 to construct the central bank and its statutory mandate.[25] Paul Warburg, then a director at Wells Fargo & Company, had written widely on the need for banking reform after the Panic of 1907, and attracted the notice of Senator Aldrich, who utilized him as a consultant.[26] Warburg's ideas and leadership were particularly influential at Jekyll Island, and he was later tapped by Woodrow Wilson as one of the first members of the Federal Reserve Board.[27] The attendees at Jekyll Island concocted what later became known as the Federal Reserve Act of 1913.[28]

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[20] For coverage of the Panic of 1907 and its influence of later monetary policy, see generally Bradley A. Hansen, *A Failure of Regulation? Reinterpreting the Panic of 1907*, 88 BUS. HIST. REV. 545 (2014); Jon Moen & Ellis W. Tallman, *The Bank Panic of 1907: The Role of Trust Companies*, 52 J. ECON. HIST. 611 (1992); George E. Roberts, *Lesson of the Panic*, 25 BANKING L.J. 781 (1908).

[21] *See Banks and the Panic*, 16 AM. LAW. 118 (1908); Ben S. Bernanke, Chairman, Fed. Reserve Sys., The Crisis as a Classic Financial Panic, Remarks at 14th Jacques Polak Annual Research Conference (Nov. 8, 2013), http://www.federalreserve.gov/newsevents/speech/bernanke20131108a.htm [http://perma.cc/UPT7-4BVU].

There have been some suggestions that Morgan and his peers caused the Panic of 1907 by spreading false rumors about the insolvency of small banks, which caused depositors to withdraw their funds in a panic; the wealthy financiers then purportedly used the resulting crisis to justify the creation of a central bank that would protect their business interests. *See generally* G. EDWARD GRIFFIN, THE CREATURE FROM JEKYLL ISLAND: A SECOND LOOK AT THE FEDERAL RESERVE 20–25 (5th ed. 2010).

[22] Bernanke, *supra* note 21 ("In 1907 the United States had no central bank, so the availability of liquidity depended on the discretion of firms and private individuals, like Morgan.").

[23] William G. Dewald, *The National Monetary Commission: A Look Back*, 4 J. MONEY, CREDIT, & BANKING 930, 931–35 (1972).

[24] *See* GRIFFIN, *supra* note 21, at 451–69.

[25] Michael A. Whitehouse, *Paul Warburg's Crusade to Establish a Central Bank in the United States*, REGION (May 1, 1989), https://www.minneapolisfed.org/publications/the-region/paul-warburgs-crusade-to-establish-a-central-bank-in-the-united-states [http://perma.cc/4P29-KVP7].

[26] *Id.*

[27] *Id.*

[28] Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. §§ 221–522); Whitehouse, *supra* note 25.

The attendees at the 1910 powwow had made connections with Woodrow Wilson, who was just beginning to campaign for the Presidential election of 1912.[29] Wilson was perturbed by the plans of the big bankers and made his opposition to their banking reform efforts a cornerstone of his campaign.[30] After Wilson became President, Senator Aldrich introduced the Jekyll Island group's legislation, proposing the National Reserve Association to Congress.[31] The Aldrich Plan faced strong opposition from both parties and was not voted on.[32] A compromise bill proposed by Carter Glass and Robert Latham Owen, which retained some of Aldrich's original proposal, passed both houses by comfortable margins.[33] Wilson, perhaps fearing a veto override, reluctantly signed the bill into law in December 1913.[34]

Woodrow Wilson's ominous comments on this episode would inspire criticism of the Fed up to the present day. In his memoirs, Wilson alluded to the cabal of powerful bankers behind the Federal Reserve Act and surrounding events by stating: "A great industrial nation is controlled by its system of credit. Our system of credit is privately concentrated. The growth of the nation, therefore, and all our activities are in the hands of a few men . . . ."[35]

> [W]e have come to be one of the worst ruled, one of the most completely controlled and dominated, governments in the civilized world—no longer a government by free opinion, no longer a government by conviction and the vote of the majority, but a government by the opinion and the duress of small groups of dominant men.[36]

It would be unwise to speculate on the true motivations of those small groups of dominant men, but they certainly constructed a banking system that was more stable than before, thanks to direct backing from the government. The Federal Reserve Act of 1913 established the central bank of the United States,[37] set up a Board

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[29] GRIFFIN, *supra* note 21, at 451–57.

[30] Gregory D.L. Morris, *The Secret Meeting That Launched the Federal Reserve: Echoes*, BLOOMBERG VIEW (Feb. 15, 2012, 11:49 AM), http://www.bloombergview.com/articles/2012-02-15/the-secret-meeting-that-launched-the-federal-reserve-echoes [http://perma.cc/P2MM-R2SQ].

[31] *Id.*

[32] *Id.*

[33] *Id.*; *see* Roger Lowenstein, *The Central Bank Skeptic Who Helped Give Birth to the Fed*, N.Y. TIMES (Oct. 24, 2015), http://www.nytimes.com/2015/10/25/business/dealbook/the-central-bank-skeptic-who-helped-give-birth-to-the-fed.html.

[34] Lowenstein, *supra* note 33.

[35] WILSON, *supra* note 2, at 111–12.

[36] *Id.* at 122.

[37] 12 U.S.C. §§ 221–52 (2012). Note that there had previously been some attempts at an American central banking system, dating as far back as the establishment of the First National Bank of the United States by Alexander Hamilton in 1791, but these were unsuccessful and

of Governors to oversee the system,[38] and initially mandated that body to manage three monetary policy objectives: maximum employment, stable prices (via the management of inflation and deflation), and stable long-term interest rates.[39] The Fed refers to itself as "an independent central bank because its [monetary policy] decisions do not have to be ratified by the President or anyone else in the executive branch of government."[40] "[I]t does not receive funding appropriated by the Congress, and the terms of the members of the Board of Governors span multiple presidential and congressional terms."[41] The central banking system consists of the main Fed offices in Washington, D.C. and twelve regional Federal Reserve banks.[42]

A large number of local banks (slightly more than one third of the country's banks overall) are members of the Fed and report to the twelve regional offices, which in turn give them federal backing for their operations.[43]

In passing the Federal Reserve Act, Congress agreed that a stable central bank could alleviate cyclical crises by managing the money supply and regulating the possibly risky behavior of local banks.[44] Accordingly, the Fed serves as the government's bank (via the Department of the Treasury) and as a bank for other banks.[45] The Fed also sells and redeems government-backed securities like savings bonds and treasury bills.[46]

The Fed often describes itself as "independent within the government,"[47] explaining that it does not receive funding from Congress but maintains an internal budget funded mainly through the trading of government-backed securities.[48] However, the

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politically unpopular. *See generally* David J. Cohen, *The First Bank of the United States and the Securities Market Crash of 1792*, 60 J. ECON. HIST. 1041 (2000); Bray Hammond, *The Second Bank of the United States*, 43 TRANSACTIONS AM. PHIL. SOC. 80, 83–85 (1953).

38 12 U.S.C. § 241 (2012).

39 These mandates are included in the Fed's own mission statement. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 13, at 1.

40 *Id.* at 2–3.

41 *Federal Reserve System: Who Owns the Federal Reserve?*, FED. RES. BANK RICHMOND, https://www.richmondfed.org/faqs/frs [https://perma.cc/3KZ4-8YFF]. Members of the Board of Governors are appointed to staggered 14-year terms, purportedly to insulate individual Governors and the Board itself from the political intrigues of shorter-lived Presidential administrations. *Id.* at 4; *Introduction to the Board of Governors*, FED. RES. BANK ST. LOUIS, https://www.stlouisfed.org/in-plain-english/federal-reserve-board-of-governors [http://perma.cc/H83A-6BRL].

42 BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 13, at 3; *see also* 12 U.S.C. § 222 (2012).

43 This includes approximately 900 state banks and 5,000 bank holding companies. BD. OF GOVERNORS OF THE FED. RESERVE. SYS., *supra* note 13, at 4–5, 12. Banks that are not members of the Fed are supervised by the Federal Deposit Insurance Corporation (FDIC), which primarily backs insurance plans to shield customer deposits from bank failures. *Id.* at 60–61.

44 *Id.* at 70, 83.

45 *Id.* at 97.

46 *Id.* at 99, 116.

47 *Id.* at 3.

48 *Id.* at 11.

Fed admits that it is ultimately accountable to Congress and the people.[49] Of particular interest for discussions of transparency at the Fed is a tacit congressional mandate for the institution to achieve a balance between the private profit motives of the banking system and the public interest responsibilities of the American government, which can be achieved with pro-consumer regulations targeted at fair lending and the like.[50] This attempt at a balance is represented in the structure of the Fed: the directors of the twelve regional Federal Reserve Banks are elected by the leaders of the private banks in the respective regions (a private sector process),[51] while the members of the Board of Governors are nominated by the President and confirmed by the Senate (a public sector process).[52] Furthermore, the Fed distributes government-backed public funds to its member banks, which are private for-profit institutions.[53]

The position of the Fed in the American economic and monetary structure is unique in the world, in that the Fed is a central bank that does not create the currency that it is tasked with managing and stabilizing.[54] Unlike in other countries, the U.S. Dollar is created outside of the central bank, at the Department of the Treasury, thus further separating the Fed's operations from the executive branch of the government.[55] The Department of the Treasury actually manufactures the bills and coins that make up U.S. currency, then sells them to the Fed at cost; the Fed then distributes the currency into the banking and financial network.[56] Importantly, the amount of money to be actually produced is determined by the Fed,[57] with the Chairman of

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[49] *What Does It Mean That the Federal Reserve Is 'Independent Within the Government'?*, BOARD GOVERNORS FED. RES. SYS. (Feb. 6, 2015), http://www.federalreserve.gov/faqs/about_12799.htm [http://perma.cc/3D4X-HSN7].

[50] *See* Charles I. Plosser, President, Fed. Reserve Bank of Phila., An Appreciation of the Fed's 12 Banks, Speech Before the Union League of Philadelphia (Feb. 17, 2015), https://www.philadelphiafed.org/publications/speeches/plosser/2015/02-17-15-union-league [http://perma.cc/S55N-Q3N7].

[51] *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 13, at 10.

[52] *Id.* at 4.

[53] About thirty-eight percent of commercial banks are members of the Fed. *Id.* at 12.

[54] U.S. FED. RESERVE SYS., THE FEDERAL RESERVE TODAY 28–30 (16th ed. 2012), https://www.richmondfed.org/~/media/richmondfedorg/publications/education/federal_reserve_today/frtoday.pdf [https://perma.cc/CV9M-TQMA].

[55] *Id.*

[56] *Id.*; *How Currency Gets into Circulation*, FED. RES. BANK N.Y. (July 2013), https://www.newyorkfed.org/aboutthefed/fedpoint/fed01.html [http://perma.cc/NRM6-MCFZ].

[57] *How Currency Gets into Circulation*, *supra* note 56. As of 2013, the most common coins in circulation (pennies, nickels, dimes, and quarters) cost between about one cent and nine cents each to produce, subject to fluctuations in mineral prices. Christopher Ingraham, *It Cost 1.7 Cents to Make a Penny This Year, and 8 Cents to Make a Nickel*, WASH. POST: WONKBLOG (Dec. 15, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/15/it-cost-1-7-cents-to-make-a-penny-this-year-and-8-cents-to-make-a-nickel/ [http://perma.cc/JN83-2EJ3]. Bills, made out of inexpensive paper but with intricate designs to deter counterfeiting, cost about four cents each. *How Currency Gets into Circulation*, *supra* note 56.

the Fed meeting regularly with the Secretary of the Treasury to discuss matters of the monetary supply.[58] This is notable because decisions on the supply of money are influenced by the goals and desires of the for-profit banks that inform the Fed leadership on policy matters, and less so on budgetary or fiscal matters that are within the bailiwick of the Department of the Treasury.[59] The Fed also utilizes measurements of the money supply—the rarely reported and little understood "M" measurements—as part of overly complex determinations of monetary policy toward cash supplies, bank reserves, control of inflation, and the like.[60] This is one example of the very complicated internal decision-making processes at the Fed, the sheer complexity of which might deter citizens and journalists from knowing which questions to ask and which might serve as a de facto style of secrecy.

The Fed's original charter was largely premised on the need to prevent financial panics, which were typically caused when citizens lost faith in the ability of banks to protect their savings; people would withdraw their funds en masse (a "run" on the banks), which would then eliminate the reserves that those same banks could use to provide loans or otherwise invest in the economy.[61] The Fed's most prominent regulatory tool for avoiding panics is to act as the "lender of last resort," providing federally backed funds to financial institutions that cannot obtain credit elsewhere due to a lack of confidence.[62] The Fed also mandates a reserve requirement, or the percentage of customer deposits that must be available as hard cash.[63] Another powerful regulatory tool involves controlling the federal funds rate, which is the rate of interest charged to banks that borrow funds from the Fed.[64] This affects the supply of money in the economy significantly.[65] Furthermore, at the Fed's discretion, poorly

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[58] BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 13, at 5.

[59] *See id.* at 15–25 (providing a detailed summary of the policy considerations the Fed takes into account when regulating the money supply).

[60] *See id.* at 21–22. These measurements include "M0" to represent extant physical currency, "MB" for M0 plus Federal Reserve deposits, "M1" for M0 that is outside the private banking system, "M2" for M1 plus savings accounts and money market funds, and several others of increasing complexity. For an overview, see George T. McCandless Jr. & Warren E. Weber, *Some Monetary Facts*, 19 FED. RES. BANK MINNEAPOLIS Q. REV. 2 (1995).

[61] *See generally* John Bryant, *A Model of Reserves, Bank Runs, and Deposit Insurance*, 4 J. BANKING & FIN. 335 (1980); Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. POL. ECON. 401 (1983) (arguing that bank runs can cause, and be a predictor of, economic downturns).

[62] *See generally* Michael D. Bordo, *The Lender of Last Resort: Alternative Views and Historical Experience*, 76 FED. RES. BANK RICHMOND ECON. REV. 18 (1990) (discussing the role of and differing views of the lender of last resort).

[63] 12 U.S.C. § 461 (2012); *see also* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 13, at 41–44.

[64] BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 13, at 16–19.

[65] The federal funds rate is not mentioned under that name in the Federal Reserve Act, though the act does instruct the Fed to achieve "moderate long-term interest rates." 12 U.S.C.

performing member banks can be expelled from the Fed unless they improve their operations; expulsion can significantly impact such a bank's ability to obtain funds due to the loss of federal backing.[66]

The Fed's responsibilities have expanded since its original charter in 1913, thanks to amendments to the Federal Reserve Act and other legislative developments. Most of these later developments increased the Fed's authority to supervise and regulate the American banking industry.[67] Presently the Fed's regulatory reach extends into the daily operations of banks and bank holding companies that are members of the Fed.[68] Some of the Fed's regulations can be applied to all banks in the country, regardless of their membership in the Fed; these typically involve enforcement of consumer protection laws targeted at lending practices and equal opportunities for credit.[69]

The Fed is a combined public/private (or "quasi-public") agency within the American government.[70] It was indeed formed by law and the members of its Board of Governors are appointed by the President and confirmed by the Senate.[71] The legislative branch can, and often does, call upon the Board of Governors to testify on their higher-level monetary policy strategies and issues of banking and financial regulation.[72] The Fed also does not make a profit after paying for expenditures; it

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§ 225a (2012); *see also* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 13, at 16–19. Members of the Federal Open Market Committee, a body within the Fed made up of a rotating cast of regional Federal Reserve Bank presidents plus the Chair of the Board of Governors, meets approximately eight times each year to discuss adjusting the federal funds rate. *Id.* at 11–12.

66 12 U.S.C. § 301 (2012).

67 Some of the more noteworthy legislation includes the Glass-Steagall Act of 1933, also known as the Banking Act of 1933 (though it is actually a specific section of that act), Pub. L. No. 73-66, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.); the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841–1852 (2012); the Federal Reserve Reform Act of 1977, Pub. L. No. 95-188, 91 Stat. 1387 (1977) (codified in scattered sections of 12 U.S.C.); the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. §§ 6801–6809 (2012) (repealing portions of the Glass-Steagall Act); the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008) (codified in scattered sections of 12 U.S.C.); and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 15 U.S.C.). The latter two of these were reactions to the 2007–2008 financial crisis.

68 *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 13, at 4–5.

69 *Id.* at 59–76.

70 *Id.* at 10.

71 FED. RESERVE BANK OF S.F.: DR. ECON, *Is the Federal Reserve a Privately Owned Corporation?* (Sept. 2003), http://www.frbsf.org/education/publications/doctor-econ/2003/september/private-public-corporation/ [http://perma.cc/LQ69-GQYE]; Juliet Lapidos, *Is the Fed Private or Public?*, SLATE (Sept. 19, 2008, 6:21 PM), http://www.slate.com/articles/news_and_politics/explainer/2008/09/is_the_fed_private_or_public.html [http://perma.cc/8KQV-283T]; *see also* BD. OF GOVERNORS OF THE FED RESERVE SYS., *supra* note 13, at 10.

72 *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 13, at 5.

hands the proceeds from its operations over to the Department of the Treasury.[73] In 2014 this transfer of funds amounted to $97 billion.[74] These are all indications of a public institution. But on the other hand, the legislative and executive branches have no direct oversight of the Fed's daily decisions and it pays for its own operations with a completely internal budget.[75]

The legal and governmental status of the twelve regional Federal Reserve Banks raises many of the transparency concerns that are at the heart of this Article. While the Fed's Board of Governors is considered to be a government agency,[76] the regional Fed banks have been granted an intermediate legal status somewhere between public and private, with some characteristics of federal agencies and others of private corporations.[77] Where the Federal Reserve Banks cross the line from public to private is a confusing matter that has confounded the courts. The distinction arises when courts try to decide which federal laws those banks should observe.

For example, in a case involving a tort claim against a regional Federal Reserve Bank, the Ninth Circuit ruled that "the Reserve Banks are not federal instrumentalities . . . but are independent, privately owned and locally controlled corporations," while then noting rather contradictorily, "the Reserve Banks have properly been held to be federal instrumentalities for some purposes."[78] The Ninth Circuit has defined the concept thusly: "Many financial institutions are federally chartered and regulated and are considered federal instrumentalities, without attaining the status of government agencies within the meaning of federal procedural rules."[79] Furthermore, the same court ruled that "an organization does not become a government agency simply because it is federally chartered and regulated."[80] From this ruling, one is bound to infer that the Federal Reserve Banks are used by the government as "instruments" to

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73 *Id.* at 11.

74 Ben Leubsdorf, *Fed Sent Nearly $97 Billion to the U.S. Treasury in 2014*, WALL ST. J.: REAL TIME ECON. (Mar. 20, 2015, 12:00 PM), http://blogs.wsj.com/economics/2015/03/20/fed-sent-nearly-97-billion-to-the-u-s-treasury-in-2014/ [https://perma.cc/HJD3-FK8M].

75 *See* Lapidos, *supra* note 71.

76 *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 13, at 4.

77 *Id.* at 10. *Compare* Lewis v. United States, 680 F.2d 1239 (9th Cir. 1982) (holding that Federal Reserve Banks are not federal instrumentalities for purpose of the Federal Torts Claims Act), *and* Ball v. Bd. of Governors of the Fed. Reserve Sys., 87 F. Supp. 3d 33, 55–56 (D.D.C. 2015) (holding that the Federal Reserve Bank is a financial institution under FOIA disclosure exemptions), *with* Fed. Reserve Bank of Bos. v. Comm'r of Corp. & Taxation, 499 F.2d 60, 62 (1st Cir. 1974) (classifying a Federal Reserve Bank as federal instrumentality for purposes of state tax exemption), *and* Lee Constr. v. Fed. Reserve Bank, 558 F. Supp. 165, 179 (D. Md. 1982) (holding that a Federal Reserve Bank was an agency under the Administrative Procedures Act).

78 *Lewis*, 680 F.2d at 1241–42. This case was brought by a man who was hit by a car owned by the Federal Reserve Bank of San Francisco. *Id.* at 1239. In the belief that the bank was a federal agency, he sued for damages under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2012). *See id.*

79 *In re* Hoag Ranches, 846 F.2d 1225, 1227 (9th Cir. 1988).

80 *Id.* (citing Fed. Land Bank v. Cotton, 410 F. Supp. 169, 171 (N.D. Ga. 1975)).

achieve a goal, but are not parts of the government themselves.[81] Of the most interest for this Article's arguments is the court's legal definition of the banks: "Each Federal Reserve Bank is a separate corporation owned by commercial banks in its region."[82] As will be discussed below, this conception of the structure of the Fed places it beyond the reach of transparency statutes that are directed toward government agencies.[83]

In a case involving a civil rights claim against a regional Federal Reserve Bank, the Eighth Circuit was compelled to draw a legal distinction between the regional Federal Reserve Banks, which are private corporations created by the government in pursuit of economic and monetary goals, and the Board of Governors, which is a Federal agency.[84] In this case, the government argued that Federal Reserve Banks are distinct from the Board of Governors and are therefore not government agencies, because the banks are not overseen by the government but by the private directors of the regional Federal Reserve Banks.[85] The government also argued that Federal Reserve Bank employees should not be considered government employees.[86] The court agreed that "although the government may have a substantial interest in the operation of the Federal Reserve Banks, it does not have a proprietary interest in them. We also conclude that the Bank is not a department, commission, administration, authority, or bureau of the federal government."[87] Also, due to the limited interactions between the Reserve Banks and the government, the fact that the banks "[do] not receive government appropriations to operate," and "are not listed as either wholly-owned or mixed-ownership corporations under federal law," then they are not federal agencies.[88] This is a crucial distinction when it comes to the Fed; the Board of Governors has been determined to be a federal agency, and that board does indeed release some information to requesters, but the "corporate" segments of the Fed have thus been insulated from the transparency rules that apply throughout the rest of the executive branch.[89]

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81 The term "instrumentality" appears in several court rulings and statutes but a precise judicial or statutory definition is typically absent, perhaps turning the term into a self-fulfilling prophecy. For example, the section of the United States Code that established the Farm Credit Administration decrees that this organization "shall become as of such date a federally chartered body corporate and an instrumentality of the United States" but with no definition of *instrumentality* or citation to any other regulation that may have one. 12 U.S.C. § 2091(b)(4) (1988). *Black's Law Dictionary* does not have a precise definition for the term "instrumentality," but defines "means" as "the instrument or agency through which an end or purpose is accomplished." *What is MEANS?*, Law Dictionary, http://thelawdictionary.org/means/ [https://perma.cc/MSZ3-SYAY] (featuring Black's Law Dictionary Free Online Legal Dictionary 2d ed.).

82 *Lewis*, 680 F.2d at 1241.

83 *See infra* Part II.

84 *See generally* Scott v. Fed. Reserve Bank of Kan. City, 406 F.3d 532 (8th Cir. 2005).

85 *Id.* at 534.

86 *Id.*

87 *Id.* at 536.

88 *Id.* at 536–37.

89 *See id.*

Some American financial regulation is under the purview of other agencies that further exhibit the challenges of quasi-public status. Congress has established several Government-Sponsored Enterprises (GSEs) to purportedly stabilize the commercial banking industry from periodic shocks, the two most prominent of which are Fannie Mae and Freddie Mac.[90] A GSE is a private corporation that was chartered by the government to enhance the flow of credit to certain segments of the economy, such as the mortgage market, while providing a government-enforced guarantee against excessive losses or failure.[91] This places even more federal decision-making processes involving the economy out of reach of executive branch transparency rules. This is particularly troubling for Fannie Mae and Freddie Mac, which are significantly involved in the mortgage marketplace, the unscrupulous risk-taking of which was a primary cause of the 2007–2008 financial crisis.

This conception of the Fed as a governmental operation that is not quite part of the government has many critics. G. Edward Griffin, author of a book about the writing of the Federal Reserve Act of 1913, argues that the Fed is a private banking cartel and not a government organization.[92] The Fed's top leadership, the Board of Governors, has typically been populated by former academics with advanced degrees in economics who exhibit the qualities of long-time public servants.[93] The presidents of the twelve regional Federal Reserve Banks, with a few exceptions, are also former academics with long careers in public service.[94] But these regional officials are appointed by boards of directors that are made up almost entirely of officials from the member banks in the respective districts; many of these are actual bankers or are selected by the bank officers.[95] These boards then supervise the operations of the respective regional Federal Reserve Banks, approving budgets and expenditures.[96]

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[90] *Fannie Mae and Freddie Mac*, FED. HOUSING FIN. AGENCY, http://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac/Pages/About-Fannie-Mae---Freddie-Mac.aspx [http://perma.cc/P6A4-UH4M].

[91] *See generally* Harold Seidman, Thomas H. Stanton & G. Thomas Woodward, *Government Sponsored Enterprises*, 9 PUB. BUDGETING & FIN. 76 (1989).

[92] *See generally* GRIFFIN, *supra* note 21, quoted in ETHOS (independent film, 2011).

[93] The careers of the last two Chairs of the Fed are indicative of this pattern. Janet Yellen (Chair from 2014 to present) started as an economics professor at Harvard University and the London School of Economics before joining the Fed as an economist; Ben Bernanke (Chair from 2006 to 2014) followed a similar path via Stanford, New York, and Princeton Universities; Current Vice-Chair Stanley Fischer (2014 to present) taught economics at the University of Chicago and at the Massachusetts Institute of Technology. *Members of the Board*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/aboutthefed/default.htm [https://perma.cc/DA9L-7E8N].

[94] BD. OF GOVERNORS OF THE FED. RESERVE SYS., *Federal Reserve Bank Presidents*, http://www.federalreserve.gov/aboutthefed/bios/banks/default.htm [http://perma.cc/3JBC-79GY] (last updated Feb. 2, 2016).

[95] *See The Structure of the Federal Reserve System: Board of Directors*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/pubs/frseries/frseri4.htm [https://perma.cc/XD82-95KY].

[96] *Id.*

By law, in return for the benefits of membership in the Fed, the member banks are required to buy stock in the regional Federal Reserve Banks, thus giving them certain types of shareholder authority over Fed operations and an interest in the system's short-term profitability.[97] Critics have often focused on "ownership," as in private bankers owning the Fed through the stock that they are required by law to purchase.[98] The Fed appears to take this critique seriously, stating on its website that it "is not 'owned' by anyone and is not a private, profit-making institution."[99] Be that as it may, private banks, which have an obvious profit motive, have a large amount of influence over the operations of the national central bank that was purportedly created to keep them solvent.[100] In a further indication of private industry influence, a group called the Federal Advisory Council, consisting of twelve representatives from the banking industry selected by the respective regional Federal Reserve Banks, regularly advises the Fed's Board of Governors.[101] As will be discussed below, the minutes of such meetings are proactively disclosed by the Fed, but only since 2011 after political pressure for more openness.[102]

The quasi-public structure and profit motive of the members of the Fed has reduced the efficacy of traditional American transparency rules, making necessary the piecemeal and largely ineffective legislative efforts described in the next section.[103]

II. TRANSPARENCY AND THE FINANCIAL CRISIS

Of interest in the discussion of the openness of the financial sector are specific privacy and transparency statutes. Prior to 1978, the U.S. government was not required to tell bank customers that it could inspect their banking records, and the customers had no procedure for preventing record collection.[104] In *United States v. Miller*,[105] the Supreme Court ruled that banking records belong to the institution (who can then hand them over to the government), rather than to the customer.[106] This inspired the passage of the Right to Financial Privacy Act of 1978, which reacted

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[97] Brooks Jackson, *Federal Reserve Bank Ownership*, FACTCHECK.ORG (Mar. 31, 2008), http://www.factcheck.org/2008/03/federal-reserve-bank-ownership/ [http://perma.cc/Z6Q7-X5TP].

[98] *Id.*

[99] *Who Owns the Federal Reserve?*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/faqs/about_14986.htm [http://perma.cc/2PP6-RKLE] (last updated Aug. 25, 2016).

[100] *See Federal Advisory Council*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/aboutthefed/fac.htm [http://perma.cc/63XW-3GRM] (last updated May 19, 2016).

[101] *Id.*

[102] The documents can be downloaded from *Federal Advisory Council*, *supra* note 100.

[103] *See infra* Part II.

[104] *Right to Financial Privacy Act*, ACCESS REP., http://www.accessreports.com/statutes/RFPA.htm [http://perma.cc/86CJ-5V6M].

[105] 425 U.S. 435 (1976).

[106] *Miller*, 425 U.S. at 442–43.

to the Supreme Court ruling by giving customers of financial institutions an intermediate level of privacy against government searches, with advance notice required.[107] The Bank Secrecy Act of 1970, while not preventing secrecy in the eyes of customers, requires reports from financial institutions to the government for investigations into financial crimes like money laundering and tax evasion.[108] It is important to note that these federally mandated reports are exempt from disclosure to citizens under the FOIA.[109] These statutes are directed at any government agency that oversees banking records, including the Fed for its member banks,[110] but there have not yet been enough cases for judicial review in determining the extent to which the statutes can shed light on the Fed's operations.

Since 1978, the Fed in particular has been subjected to specific accountability rules, with the Federal Banking Agency Audit Act enabling the Government Accountability Office (GAO) to audit the Fed's handling of some limited operations like check processing and currency supply management, plus some of the Fed's regulatory activities toward consumer banks.[111] However, the Act forbade the GAO from auditing some important Fed activities, including transactions with foreign governments and their central banks, and internal deliberations and decisions on monetary policy.[112] This is a crucial loophole in the transparency of the Fed for which there is no justification given in the statutory language. It is perhaps inspired by the perennial belief that unfavorable information about the banking system can cause a panic when it gets into the public's hands,[113] but in any case the public has been deprived of this information and has not been told why.

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[107] Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (1978) (codified as amended at 12 U.S.C. §§ 3401–3422).

The USA PATRIOT Act amended the RFPA to exempt information deemed relevant to national security investigations. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 358 (2001) (codified as amended in scattered sections of the U.S. Code).

[108] Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114-2 (1970) (codified as amended in scattered sections of 12 and 15 U.S.C.).

[109] This is because the Bank Secrecy Act states that many types of documents and disclosures can remain confidential. Therefore, these materials cannot be obtained via the FOIA, Exemption 3, which states that "[i]nformation that is prohibited from disclosure by another Federal law" can be withheld. 5 U.S.C. § 552(b)(3) (2012); 24 C.F.R. § 15.107 (2015).

[110] In particular, the Fed has published a lengthy document on its responsibilities under the Right to Financial Privacy Act. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMER COMPLIANCE HANDBOOK: RIGHT TO FINANCIAL PRIVACY ACT (2006).

[111] 31 U.S.C. § 714 (2012).

[112] *Id.*; *see* U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-96-159, FEDERAL RESERVE SYSTEM: CURRENT AND FUTURE CHALLENGES REQUIRE SYSTEMWIDE ATTENTION 1 n.2 (1996). Note that the current Government Accountability Office was formerly known as the General Accounting Office. *See also* Sudeep Reddy, *What Would a Federal Reserve Audit Show?*, WALL ST. J. (Aug. 31, 2009, 9:45 AM), http://blogs.wsj.com/economics/2009/08/31/what-would-a-federal-reserve-audit-show/tab/article/ [https://perma.cc/BG68-6LP6].

[113] This is the primary rationale for Exemption 8 of the FOIA, as will be discussed extensively *infra* Part III.B.

The Fed's role in the subprime mortgage crisis and other trends that led to the 2007–2008 financial collapse, and whether it could have done anything to avoid them, are matters of great dispute that are beyond the scope of this Article and will probably be analyzed by experts for years. In any case, critics have generally noted that the Fed's powers and authority over the banking and financial sectors were increasing in the years leading up to the crisis.[114] During that period the Fed's focus on low interest rates exacerbated the risks being taken in the mortgage markets; the Fed also intervened heavily in bond markets during that period and endeavored to become a high-return, risk-taking investor of the federally backed funds and securities under its purview.[115] In early 2008, former Fed Chair Paul Volcker lambasted his successors, stating that the Fed had "take[n] actions that extend to the very edge of its lawful and implied powers, transcending certain long-embedded central banking principles and practices," while "sweeping powers have been exercised in a manner that is neither natural nor comfortable for a central bank."[116]

Even before the actual financial collapse, European economists had noted that the Fed's non-transparent decisions about interest rates and the monetary supply amounted, de facto, to false economic information for consumers and lenders, leading to uncertainty that in turn led to booms followed by busts in several financial marketplaces.[117] This was an important early critique of the Fed's lack of transparency. Meanwhile, in a congressional hearing on the worsening economy in early 2007, just months before the financial meltdown, Representative Ron Paul (R-KY) stated that "[c]ongress, in essence, has ceded total control of the value of our money to a secretive central bank."[118] Paul continued: "Congress knows nothing of the conversations, the plans, and the action taken in concert with other central banks."[119] The structural secrecy that has shielded the Fed from public oversight, as discussed throughout this Article, was thus noticed directly by a concerned Congressman.

The only significant effort to learn about the Fed's transparency practices leading up to the financial collapse was by the financial media firm, Bloomberg. Shortly after

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[114] *See* James McBride & Mohammed Aly Sergie, *The Role of the U.S. Federal Reserve*, COUNCIL ON FOREIGN REL., http://www.cfr.org/international-finance/role-us-federal-reserve/p21020 [http://perma.cc/KMX5-99SU] (last updated Dec. 17, 2015).

[115] *See id.*

[116] *See* Peter Coy, *Volcker Shuns the Blame Game*, BLOOMBERG (Apr. 10, 2008, 5:28 AM), http://www.bloomberg.com/news/articles/2008-04-10/volcker-shuns-the-blame-gamebusinessweek-business-news-stock-market-and-financial-advice [http://perma.cc/Q4YG-3XQG].

[117] *See* Matt Kibbe, *The Federal Reserve Deserves Blame for the Financial Crisis*, FORBES (June 7, 2011, 3:47 PM), http://www.forbes.com/sites/mattkibbe/2011/06/07/the-federal-reserve-deserves-blame-for-the-financial-crisis/ [https://perma.cc/G7BE-5H3X].

[118] *Monetary Policy and the State of the Economy, Part I: Hearing Before the Comm. on Fin. Servs.*, 110th Cong. 6 (2007) (statement of Rep. Ron Paul, Ranking Member, H. Comm. on Fin. Servs.).

[119] *Id.*

the collapse of several large banks and financial firms in Fall 2008, Bloomberg furnished a FOIA request for information on who exactly was receiving the hundreds of billions of dollars of stimulus funding in the government's recently commenced efforts to shore up and bail out the banks.[120] Perhaps perceiving a need to prevent a (bigger) financial panic, early in the process the Fed actually concealed the recipients of the funds.[121] While this was the largest distribution of funds by the Fed in its history, traditionally the Fed had never precisely revealed all the recipients of its funds.[122]

In reaction to the Bloomberg FOIA request, the Fed claimed that the records could remain undisclosed under FOIA Exemptions 4 and 5.[123] Bloomberg made no challenge to Exemption 5, so the trade secrets–related Exemption 4 was the focus of the District Court's analysis.[124] The Fed claimed that the requested records were "confidential" under Exemption 4 because they could damage the business operations of the banks discussed, and that Exemption 4 allows withholding of documents furnished by a "person" at the company in question.[125] The District Court rejected both of these arguments, ruling that the information was completely internal to the Fed's Board of Governors as a federal agency, and had not been obtained *from* the banks, which is necessary for Exemption 4 to apply.[126] Meanwhile, the documents had been built upon information obtained from the twelve regional Federal Reserve Banks, which did not qualify as "persons" under the statute.[127]

The Fed unsuccessfully appealed this ruling.[128] While the case was in progress, journalists had been able to uncover some particularly noteworthy bailout operations, such as that for the American Insurance Group,[129] but a full list of recipients

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[120] Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262, 267–68 (S.D.N.Y. 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

[121] *Id.* at 266–67.

[122] *See* Mark Pittman, *Bloomberg Sues Fed to Force Disclosure of Collateral*, BLOOMBERG (Nov. 7, 2008), https://web.archive.org/web/20111124220023/http://www.bloomberg.com/apps/news?pid=newsarchive&sid=akr.0Y2Ykc2g (last visited Aug. 9, 2016).

[123] *Bloomberg*, 649 F. Supp. 2d at 269. Note that FOIA Exemption 4 will be discussed in detail *infra* Part III.A. Exemption 4 concerns the withholding of trade secrets information that has been obtained from businesses, and Exemption 5 concerns the withholding of privileged communications within agencies. 5 U.S.C. §§ 552(b)(4)–(5) (2012).

[124] *Bloomberg*, 649 F. Supp. 2d at 280–81.

[125] *Id.* at 277–78.

[126] *Id.* at 278.

[127] *Id.* at 276–82.

[128] In September of 2009, the Fed appealed to the Second Circuit, and while doing so obtained a stay on the order to disclose the documents. The Second Circuit upheld the lower court's ruling. Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 143 (2d Cir. 2010), *aff'g* 649 F. Supp. 2d 262 (S.D.N.Y. 2009), *cert. denied*, 562 U.S. 1303 (2011).

[129] *See, e.g.*, Edmund L. Andrews, Michael J. de la Merced & Mary Williams Walsh, *Fed's $85 Billion Loan Rescues Insurer*, N.Y. TIMES (Sept. 16, 2008), http://www.nytimes.com/2008/09/17/business/17insure.html?_r=0&pagewanted=all; Matthew Karnitschnig, Deborah Solomon, Liam Pleven & Jon E. Hilsenrath, *U.S. to Take Over AIG in $85 Billion Bailout;*

and total amounts awarded was not revealed until Bloomberg gained a favorable ruling in its suit.[130] The Fed finally released the records in early 2011, after the Supreme Court rejected a banking group's attempt to keep the documents secret.[131] The banking group's reasons for favoring secrecy cannot be found in the public record, but this episode illustrates that the entities overseen by the Fed do not want the public to know about their internal operations or the influence that they have on the Fed leadership.

In the meantime, the Fed's information disclosure responsibilities for pre-existing documents were greatly expanded in the Dodd-Frank Act of 2010.[132] Congress was slowly progressing on this idea in other ways as well. The financial crisis inspired calls for increased transparency at the Fed and oversight by other agencies.[133] The self-explanatory Federal Reserve Transparency Act, originally introduced in 2009 as a response to the crisis, has been reintroduced several times (usually under the impetus of Senator Rand Paul (R-KY) and Representative Thomas Massie (R-KY)), but has not yet survived the Senate.[134] The leadership of the Fed has criticized the idea of greater transparency and accountability within its operations, with current Chair Janet Yellen claiming that the Fed's long-term economic and monetary strategies would be subjected to short-term political influence.[135] Perhaps in response to the political pressure, since 2012 the Fed has proactively published quarterly financial reports for the regional Federal Reserve Banks as an

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Central Banks Inject Cash as Credit Dries Up, WALL ST. J. (Sept. 16, 2008, 11:59 PM), http://www.wsj.com/articles/SB122156561931242905 [http://perma.cc/6FLW-UYSU].

[130] *See generally Bloomberg*, 601 F.3d 143.

[131] *See* Craig Torres, *Fed Releases Discount-Window Loan Records Under Court Order*, BLOOMBERG (Mar. 31, 2011, 11:25 PM), http://www.bloomberg.com/news/articles/2011-03-31/federal-reserve-releases-discount-window-loan-records-under-court-order [http://perma.cc/FX9Q-3RP6]. The Clearing House Association, acting on behalf of the American Bankers Association, took the appeal to the Supreme Court, which denied certiorari. Clearing House Ass'n L.L.C. v. Bloomberg L.P., 562 U.S. 1303 (2011).

[132] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

[133] *See, e.g.*, MARC LABONTE, CONG. RESEARCH SERV. R42079, FEDERAL RESERVE: OVERSIGHT AND DISCLOSURE ISSUES (Dec. 1, 2016); *About Audit the Fed*, CAMPAIGN FOR LIBERTY, http://www.campaignforliberty.org/audit-fed/ [http://perma.cc/6L5G-U96U].

[134] For the act's current status, see *H.R. 24—Federal Reserve Transparency Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/24 [https://perma.cc/QUD6-9S9Z].

[135] *See* Chris Matthews, *'Audit the Fed' is About Power, Not Transparency*, FORTUNE (Feb. 24, 2015, 3:18 PM), http://fortune.com/2015/02/24/federal-reserve-janet-yellen-audit/?iid=sr-link1 [https://perma.cc/XYU8-H6UG]; Jordan Weissman, *How Rand Paul's Crusade to Audit the Fed Could Make His Worst Nightmares Come True*, SLATE: MONEYBOX (Feb. 24, 2015, 7:16 PM), http://www.slate.com/blogs/moneybox/2015/02/24/the_absurdity_of_rand_paul_s_quest_to_audit_the_fed_if_he_succeeds_it_will.html [http://perma.cc/R2E5-SUG3].

expansion of its previously mandated reporting practices, in which it has traditionally released its own corporate-style annual financial statements.[136]

A recent event further illustrates the perils of secrecy in the federal banking system. Several former Obama administration officials, who were in office during the 2007–2008 crisis, have since moved on to management roles in large financial firms of the type that contributed to the crisis.[137] Leaders of the big banks have been meeting behind closed doors to achieve a long-time goal of the American financial industry—the elimination of Fannie Mae and Freddie Mac as GSEs, which would then free up more of the proceeds of the nearly six trillion dollars home loan market.[138] In effect, private banks would like to remove these government-backed institutions as competitors. In the words of the *New York Times*, "a revolving door between Washington and Wall Street" has created a pattern of influence in which banking leaders can make their regulatory wishes heard at the White House.[139] White House officials reportedly met directly with Michael D. Berman and David H. Stevens, both formerly high-ranking officials in the Department of Housing and Urban Development and now leading lobbyists for the private mortgage industry.[140]

Fannie Mae and Freddie Mac had to be bailed out in the midst of the financial crisis, because they had attempted to increase profits by reducing the cash reserves they had on hand to cover customers who had trouble repaying their mortgage loans.[141] When more and more of their customers had that exact same problem during the subprime mortgage crisis, Fannie Mae and Freddie Mac found themselves unable to carry out their mandated missions, requiring a taxpayer-funded bailout.[142] In a pattern similar to that after the Panic of 1907, bankers used Fannie Mae and Freddie Mac's apparent insolvency to push for privatization; industry lobbyists with ties in Washington have commenced meeting with the President and banking regulators behind closed doors.[143]

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136 *See* Press Release, Bd. of Governors of the Fed. Reserve Sys. (Aug. 27, 2012), http://www.federalreserve.gov/newsevents/press/other/20120827a.htm [https://perma.cc/THP2-2JHH]. The reports can be downloaded from *Federal Reserve System Financial Reports*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/monetarypolicy/bst_fedfinancials.htm [http://perma.cc/667W-D26M] (last updated Aug. 23, 2016).

137 *See* Gretchen Morgenson, *A Revolving Door Helps Big Banks' Quiet Campaign to Muscle Out Fannie and Freddie*, N.Y. TIMES (Dec. 7, 2015), http://www.nytimes.com/2015/12/07/business/a-revolving-door-helps-big-banks-quiet-campaign-to-muscle-out-fannie-and-freddie.html.

138 *Id.*

139 *Id.*

140 *Id.*

141 *See* Charles Duhigg, Stephen Labaton & Andrew Ross Sorkin, *As Crisis Grew, a Few Options Shrank to One*, N.Y. TIMES (Sept. 7, 2008), http://www.nytimes.com/2008/09/08/business/08takeover.html.

142 As Government-Sponsored Enterprises, Fannie Mae and Freddie Mac were placed under conservatorship by the Department of the Treasury. *See id.*

143 *See* Morgenson, *supra* note 137.

One can wonder if the nation's potentially powerful document disclosure and public participation statutes, the FOIA and the Federal Advisory Committee Act (FACA), can be utilized by citizen watchdogs or journalists to penetrate the quasi-public agencies that dictate monetary policy. As will be discussed in the next Part, court precedents on other matters have weakened the possibilities of using these statutes to obtain information from a quasi-public entity like the Fed.

III. MONETARY POLICY AND TRANSPARENCY LAW

The Fed's leadership is unelected and independent, which in itself is not necessarily unusual within the American government. "Independent" regulatory agencies like the Federal Communications Commission do not need direct supervision from the executive branch, but they must still report to the President regularly while being checked by the legislative branch (often via budget cuts) or the judicial branch during the judicial review process.[144] As another example, the Supreme Court is a powerful and influential body that is made up of unelected leaders who do not have to report regularly to the other branches of the government, but it is still constrained by the rule of precedent, not to mention by the basic checks and balances process as mandated in the Constitution.[145] On the other hand, the Fed is almost entirely detached from the checks and balances process, operating independently of the executive branch, and its quasi-public status has insulated it from many transparency requirements. This makes the Fed's operations inherently anti-democratic, and largely impenetrable via the country's existing transparency statutes.

This Part of the Article discusses two federal transparency statutes that could be utilized for greater oversight of the Fed, the well-known and heavily adjudicated FOIA,[146] and the more obscure and easily evaded FACA.[147] It is crucial to note that the Fed has a FOIA compliance office and some types of documents can be obtained on the Board of Governors' website,[148] though as discussed above, many categories

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144 *See* David H. Davis, *The Structure of Government Agencies*, UNIV. TOLEDO, http://www.utoledo.edu/llss/pspa/faculty/DAVIS/structure.htm [http://perma.cc/CV8X-D2DD] (last updated June 30, 2016).

145 U.S. CONST. art. II, § 2, cl. 2.

146 Freedom of Information Act, 5 U.S.C. § 552 (2012). For a comprehensive resource on the FOIA, see generally U.S. DEPT. OF JUST., GUIDE TO THE FREEDOM OF INFORMATION ACT (2009 ed.), https://www.justice.gov/oip/doj-guide-freedom-information-act-0 [https://perma.cc/PB5H-C7LA]. This publication is the Department of Justice's official 1,000-page guide explaining the provisions of FOIA and a summary of relevant case law. *See also* JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE (3d ed. 2009). This is O'Reilly's exhaustive, two-volume, 2,000-page treatise, and a leading non-government legal practice guide for litigation under FOIA.

147 Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. §§ 1–15).

148 *See supra* note 136.

of information have been exempted.[149] This decreases the ability of journalists and citizen watchdogs to provide oversight of the Fed through the document disclosure process.

A. FOIA Exemption 4: Legislative History and Court Rulings

Recall from the above discussion of the Bloomberg FOIA dispute that the Fed has claimed FOIA Exemption 4, which protects trade secrets information furnished by businesses,[150] as a reason to withhold requested documents.[151] The financial industry regularly claims that its investment tools, such as customized credit default swaps and derivative trading techniques, as well as business plans and strategies for increasing deposits and investments from their customers, are trade secrets that should be protected from disclosure by the government agencies that require the filing of pertinent documents.[152] The industry is usually allowed to self-report on which practices and documents are "privileged" or "confidential."[153] Banks often require their employees to sign non-disclosure agreements to keep internal operations secret from competitors,[154] and the industry has lobbied Congress for new statutory protection of such secrets.[155] The industry's obsession with trade secrets has reached absurd proportions; in a recent effort by some of the largest banks involved in the financial crisis (Citigroup and J.P. Morgan) to prevent insurance companies from investigating why several of their employees committed suicide in the wake of the crisis, lest crucial internal policy documents be revealed.[156]

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[149] *See supra* Part II.

[150] 5 U.S.C. § 552(b)(4) (2012).

[151] *See supra* notes 120–28 and accompanying text.

[152] There has been very little published research on the forms that these trade secrets take, because of the shortage of information from companies that would like to keep them secret. For an exemplary story of industry efforts to prevent their own customers from understanding their business models, see Neil Weinberg & Darrell Preston, *7 Ways Private Equity is Gaming Your Pension*, BLOOMBERG (Mar. 23, 2015, 10:33 AM), http://www.bloomberg.com/news/articles/2015-03-23/7-ways-private-equity-is-gaming-your-pension [http://perma.cc/FUX3-7AMU] (last updated March 24, 2015).

[153] In addition to Exemption 4 of the FOIA, which applies to the world of business in general, there are also specific federal regulations for financial trade secrets. *See* 36 C.F.R. § 902.54 (2012).

[154] *See, e.g.*, Maria Bruno-Britz, *Banks' Intellectual Property at Great Risk Amid Layoffs*, BANK SYS. & TECH. (Jan. 13, 2009, 5:00 PM), http://www.banktech.com/banks-intellectual-property-at-great-risk-amid-layoffs/d/d-id/1292548? [http://perma.cc/HD8Q-49PD].

[155] *See* David Post, *A Misguided Attempt to "Defend Trade Secrets*,*"* WASH. POST (Dec. 2, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/02/and-we-need-stronger-protection-for-trade-secrets-because/ [http://perma.cc/9C4H-LWEG].

[156] *See Insurance Policies Pertaining to Bankers' Suicides Classified as Containing 'Trade Secrets*,*'* RT (Apr. 29, 2014, 7:09 PM), https://www.rt.com/usa/155712-martens-policies-deaths-jpmorgan [http://perma.cc/GW53-RC4R]; Pam Martens & Russ Martens, *Suspicious Deaths of Bankers Are Now Classified as "Trade Secrets*,*"* GLOBAL RES. (Apr. 29,

The judicial history of FOIA Exemption 4 is likely to encourage the Fed to claim that trade secrets protection can justify the withholding of information received from its member banks, or internal information *about* those banks, as it already has in the Bloomberg lawsuit.[157] Litigation concerning Exemption 4 raises two important questions. First, is a government agency justified in withholding information that has been submitted voluntarily by the private companies it regulates? Second, can citizens effectively understand industries and business operations that have an impact on the public interest, while the companies or the government agencies that regulate them keep that information secret?

The original rationale for protecting trade secrets was distinctly pro-business.[158] For various regulatory purposes like oversight of labor relations, tax payments, environmental compliance, and many others, businesses have to furnish documents and reports to government agencies. But companies should not have to worry about their competitors using FOIA to get a hold of such documents, which could very well contain information about proprietary technology or strategic business plans.[159] Starting in the late 1960s, several cases were brought to court involving disputes over agency use of FOIA Exemption 4, though at first the basic meaning of the exemption was rarely a matter under consideration.[160]

The U.S. Supreme Court has not yet heard a case in which the definitions or parameters of FOIA Exemption 4 were in dispute. The District of Columbia Circuit, where many disputes with federal government agencies are litigated, has formed most of the precedents for determining whether the trade secrets exemption has been used properly or improperly by a government agency.[161] Legal scholars have

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2014), http://www.globalresearch.ca/suspicious-deaths-of-bankers-are-now-classified-as-trade-secrets/5379644 [http://perma.cc/GW53-RC4R].

157 Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 262, 269 (S.D.N.Y. 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

158 *See* Charles N. Davis, *A Dangerous Precedent: The Influence of* Critical Mass III *on Exemption 4 of the Federal Freedom of Information Act*, 5 COMM. L. & POL'Y 183, 184–85 (2000).

159 *See id.* at 188. Note that trade secrets law, a segment of intellectual property law, contains its own mechanisms for protecting innovators from theft of their trade secrets by competitors. This body of law applies primarily to interactions between businesses, while the trade secrets exemption to the FOIA is only relevant in matters of government disclosure of information that businesses have submitted to agencies. *See* Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 42 CAL. W. L. REV. 209, 215–28 (2006). *See generally* Jonathan R. Chally, *The Law of Trade Secrets: Toward a More Efficient Approach*, 57 VAND. L. REV. 1269 (2004).

160 *See, e.g.*, Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971); Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970); Consumers Union of the U.S., Inc. v. Veterans Admin., 301 F. Supp. 796 (S.D.N.Y. 1969).

161 *See generally Freedom of Information Act Guide, 2004 Edition: Exemption 4*, U.S. DEP'T JUST. (July 23, 2014), https://www.justice.gov/oip/foia-guide-2004-edition-exemption-4 [http://perma.cc/D7JP-DUMM].

concluded that there are two crucial Circuit Court precedents on the statutory intentions of Exemption 4: the *National Parks* decision of 1974[162] and the *Critical Mass* decision of 1992.[163]

National Parks was the first noteworthy case in which the true meaning and ramifications of the trade secrets exemption were contested. An environmental advocacy group disagreed with a refusal by the Department of the Interior, via FOIA Exemption 4, to disclose licensing documents related to concession stands at national parks by claiming that the requested files were "confidential."[164] The court lamented the lack of definition for the word "confidential" in Exemption 4,[165] and formulated what became known as the *National Parks* test for the applicability of that term:

> [A] commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[166]

This test became the norm for Exemption 4 cases throughout the federal courts, and was applied without significant controversy for the next two decades.[167]

The court in *National Parks* also added an important distinction to the meaning of "trade secret" by quoting the original Senate debates leading to the passage of FOIA: "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, *but which would customarily not be released to the public by the person from whom it was obtained*."[168] In other words, when a party submits information voluntarily to a government agency, it is not automatically assumed that the agency should release that information to the public (including business competitors) just because it was originally submitted without direct compulsion from the government.[169] This distinction

[162] Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

[163] Critical Mass Energy Project v. NRC (*Critical Mass III*), 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993).

[164] *Nat'l Parks*, 498 F.2d at 766.

[165] *Id.*

[166] *Id.* at 770.

[167] *See, e.g.*, *Critical Mass III*, 975 F.2d at 872 (stating that the court reaffirmed the two-part test established in *National Parks*).

[168] *Nat'l Parks*, 498 F.2d at 766 (quoting 111 CONG. REC. S26820, at 26823 (daily ed. Oct. 13, 1965)). Here the court cited earlier cases that in turn cited this quotation from the Senate debates. *See* Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 425 F.2d 578, 580 n.6, 582 n.19 (D.C. Cir. 1970); Sterling Drug, Inc. v. Fed. Trade Comm'n, 450 F.2d 698, 709 (D.C. Cir. 1970). Those cases involved agency withholding of information under FOIA Exemption 4, though the text of the exemption was not a matter under consideration.

[169] *Nat'l Parks*, 498 F.2d at 766–67.

effectively reinforced the rights of parties that are compelled (though not forcefully required) to provide information to government agencies[170]—and this focus on *voluntary* information would later cause a schism in Exemption 4 jurisprudence.[171]

The difference between voluntarily and involuntarily submitted information became a matter of dispute in the *Critical Mass* case of 1992, in which the D.C. Circuit Court abruptly formulated a new test to distinguish between these two categories of government-held information, but possibly opened the door for over-reporting of "voluntary" claims.[172] The court dispute was brought by a citizens' group known as the Critical Mass Energy Project, which contested an Exemption 4 withholding by the Nuclear Regulatory Commission (NRC).[173] The documents in question were provided voluntarily by the Institute for Nuclear Power Operations, a consortium representing companies regulated by the NRC.[174] The NRC denied the FOIA request;[175] in the resulting court challenge the District Court upheld the denial under the *National Parks* test for confidentiality.[176] After multiple appeals and remands,[177]

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170 *Id.* at 769.

171 *See, e.g.*, Davis, *supra* note 158, at 190–91.

172 *Critical Mass III*, 975 F.2d at 879. This case is known informally as "Critical Mass III" due to multiple appeals, remands, and summary judgments all related to the same FOIA denial by the NRC. The Critical Mass Energy Project was a now-defunct effort undertaken by Public Citizen, the consumer rights group founded by Ralph Nader. The project sought to increase the transparency of government licensing of nuclear power plants. Public Citizen still opposes unfettered construction of nuclear power plants, but now does so under an endeavor to promote sustainable energy. *See Stopping the Nuclear Relapse*, PUB. CITIZEN, https://www.citizen.org/Page.aspx?pid=570 [http://perma.cc/Q3ZF-BR9A].

173 *Critical Mass III*, 975 F.2d at 871.

174 *Id.* at 874.

175 *Id.*

176 Critical Mass Energy Project v. NRC, 644 F. Supp. 344, 346–47 (D.D.C. 1986), *vacated*, 830 F.2d 278 (D.C. Cir. 1987), *vacated en banc*, 975 F.2d 871 (D.C. Cir. 1992).

177 Critical Mass's refusal to accept the FOIA denial by the NRC resulted in an extended cycle of litigation. In the first appeal, the D.C. Circuit Court ruled that the district court's judgment was a proper application of the *National Parks* test. Critical Mass Energy Project v. NRC, 830 F.2d 278, 281–82 (D.C. Cir. 1987), *vacated en banc*, 975 F.2d 871 (D.C. Cir. 1992). However, the court also ruled that the NRC had not fully proven that the information in question was submitted voluntarily, and remanded the case for further findings on that matter. *Id.* After remand, the defendants filed a motion for summary judgment, which the district court granted because the defendants had shown sufficiently that disclosing the requested information would harm the government's interest in efficiently licensing nuclear power facilities. Critical Mass Energy Project v. NRC, 731 F. Supp. 554, 557 (D.D.C. 1990). This ruling was then appealed by Critical Mass, at which time the appeals court remanded the case again for further findings on the effects of disclosure on the quality of INPO reports. Critical Mass Energy Project v. NRC, 931 F.2d 939, 947 (D.C. Cir.), *vacated per curiam and reh'g en banc granted*, 942 F.2d 799 (D.C. Cir. 1991). This ruling inspired petitions from the defendants to vacate, which were granted by the Circuit Court. Critical Mass Energy Project v. NRC, 942 F.2d 799 (D.C. Cir. 1991). After this ruling, the court resolved to reexamine all the previous decisions and reconsider the definition of "confidential" under the *National*

the D.C. Circuit Court agreed to rehear the facts of the case and reconsider whether the *National Parks* test was appropriate for voluntarily submitted information, choosing to "correct some misunderstandings as to [the] scope and application" of the test.[178]

In the 1992 appeal, the circuit court formulated a distinction between voluntary and involuntary submissions of data and reports to government agencies.[179] In situations in which information is furnished voluntarily, the government interest is the continued *availability* of data.[180] On the other hand, for involuntary submissions the government interest is the continued *reliability* of the data.[181] This distinction between availability and reliability is not found in the *National Parks* test.[182] In turn, that test of the meaning of "confidential" under FOIA Exemption 4 was found to be workable only for data furnished to the government involuntarily.[183] The court then determined that voluntarily submitted information was "confidential" for purposes of the trade secrets exemption "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."[184]

The court ruled en banc not to overturn the *National Parks* test because of its longstanding precedent.[185] However, that test was now confined to *involuntary* information only.[186] And while the court did not state that it was forming a new test for *voluntary* information, this was effectively the outcome of the ruling, as courts in future disputes surrounding FOIA Exemption 4 would have to differentiate voluntary information, which a government agency apparently only requests, from that which the agency apparently requires by compulsion.[187] This new test was heavily and quickly criticized in unfavorable articles by legal experts and government transparency advocates.[188] The most telling criticism of the *Critical Mass* decision concerns its impact on government watchdogs, who would find major

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Parks test. This was the impetus for the 1992 proceeding under discussion in the main text. *See Critical Mass III*, 975 F.2d 871.

178 *Critical Mass III*, 975 F.2d at 875.

179 *Id.* at 878.

180 *Id.*

181 *Id.*

182 *See id.* at 878.

183 *Id.* at 879.

184 *Id.* Note that this language was borrowed from the *National Parks* ruling, but in that ruling the requirement was not applied only to voluntarily submitted information. *See* Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 766–67 (D.C. Cir. 1974).

185 *Critical Mass III*, 975 F.2d at 880.

186 *Id.*

187 *See, e.g.*, Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin., 290 F. Supp. 2d 124, 134 (D.D.C. 2003).

188 *See, e.g.*, Davis, *supra* note 158; Rocco J. Maffei, *The Impact on FOIA after* Critical Mass, 22 PUB. CONT. L.J. 757 (1993); Scott Raber, *Reinventing a Less Vigorous Freedom of Information Act: The Aftermath of* Critical Mass Energy Project v. Nuclear Regulatory Commission, 1994 ANN. SURV. AM. L. 79; G. Branch Taylor, *The Decision: A Dangerous Blow to Exemption 4 Litigation*, 2 COMMLAW CONSPECTUS 133 (1994).

categories of previously attainable information falling under the trade secrets exemption, if the regulated parties or the government agency could claim plausibly that voluntarily submitted data was not to be released to the public by "custom."[189] Regarding the topic of this Article, *Critical Mass* is a favorable precedent for the Federal Reserve, because as discussed above, it has never been the "custom" of the Fed to release most types of internal documents,[190] and it could claim that its regulated parties furnished the information "voluntarily," thus allowing an enhanced presumption of confidentiality for the documents in question.[191]

The fractured judicial precedents for FOIA Exemption 4 can prohibit the disclosure of documents originating in the banking system, as long as the regulated entities claim that trade secrets are at risk. This raises the important question of who is most affected by the disclosure of the trade secrets in question. Would the disclosure of those secrets be truly harmful to the private company, or is withholding the information *more* harmful to the citizen watchdog attempting to assess the quality of the company's products and services—or in the cases of banks and their overseers, financial manipulations that have an impact on the economy? And furthermore, it is difficult to determine if the Fed member banks furnish information to the leadership voluntarily or involuntarily, further muddying the applicability of FOIA if Exemption 4 is invoked.

B. FOIA Exemption 8: Legislative History and Court Rulings

Exemption 8 of the FOIA shields information from disclosure if the material is "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[192] Courts have identified two core values that Exemption 8

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[189] *See* Rena Steinzor, *"Democracies Die Behind Closed Doors": The Homeland Security Act and Corporate Accountability*, 12 KAN. J.L. & PUB. POL'Y 641, 653 (2003). Similar concerns were voiced in the dissent to the *Critical Mass* decision, supplied by future Supreme Court Justice Ruth Bader Ginsburg, who called the new test "slackened" and likely to inspire agency and business abuse of the phrase "customarily not be released to the public." *See* 975 F.2d at 883 (Ginsburg, J., dissenting).

[190] *See supra* Parts I–II.

[191] *See Critical Mass* III, 975 F.2d at 880 (stating that, "[s]o long as that information is provided voluntarily . . . it must be treated as confidential").

[192] 5 U.S.C. § 552(b)(8) (2012); Memorandum for Heads of Executive Departments and Agencies from Eric Holder, Att'y Gen. of the U.S., 74 Fed. Reg. 194 (Mar. 19, 2009); *OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines: Creating a "New Era of Open Government,"* U.S. DEP'T JUST. (Apr. 17, 2009), https://www.justice.gov/oip/blog/foia-post-2009-creating-new-era-open-government [http://perma.cc/A7X3-PQWN]; U.S. DEP'T OF JUST., *supra* note 146. The FOIA Guide is the Department of Justice's official 1,100-page guide explaining the provisions of the FOIA and Privacy Act and summarizing the case law pertaining to these two statutes. *See generally* O'REILLY, *supra* note 146. O'Reilly's exhaustive, two-volume, 2,000-page treatise is the leading nongovernment legal practice guide for litigation under the FOIA and Privacy Act.

exemplifies. Its primary purpose is to ensure the security of financial institutions,[193] which could be threatened by "unwarranted runs on banks" resulting from public disclosures of "candid evaluations of financial institutions."[194]

Second, Exemption 8 is intended to safeguard the relationship between the banks and their regulatory agencies.[195] Courts concluded that banks would be reluctant to cooperate with agency examiners "if details of the bank examinations were made freely available to the public and to banking competitors."[196] Additionally, records of banks no longer in operation are shielded to foster a policy of "frank cooperation" between bank and agency officials.[197]

Indeed, the D.C. Circuit has declared that Congress has provided "absolute protection [in Exemption 8] regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports."[198] The exemption also protects bank examination reports and related documents prepared by state regulatory agencies.[199] The exemption's objectives, the District Court for the District of Columbia observed, are furthered by non-disclosure of such documents and information because of the "interconnected" purposes and operations of federal and state banking authorities.[200]

Moreover, matters that are "related to" such reports—that is, documents that "represent the foundation of the examination process, the findings of such an examination, or its follow-up"—have also been held exempt from disclosure by several courts.[201] Courts also ruled that bank examination reports and memoranda pertaining to insolvency proceedings,[202] cease-and-desist orders following a bank examination,[203] and agency reports regarding bank compliance with consumer laws and regulations were found to also "fall squarely within the exemption."[204]

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[193] Gregory v. FDIC, 631 F.2d 896, 898 (D.C. Cir. 1980) (per curiam) ("It is clear from the legislative history that the exemption was drawn to protect not simply each individual bank but the integrity of financial institutions as an industry.").

[194] Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin., 290 F. Supp. 2d 124, 135 (D.D.C. 2003) (internal quotation marks omitted).

[195] McKinley v. FDIC, 744 F. Supp. 2d 128, 144 (D.D.C. 2010), *aff'd sub nom.* McKinley v. Bd. of Governors of the Fed. Reserve Sys., 647 F.3d 331 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1026 (2012) (mem.).

[196] *Id.* (quoting Consumers Union v. Heimann, 589 F.2d 531, 534 (D.C. Cir. 1978)).

[197] *Gregory*, 631 F.2d at 899.

[198] *Id.* at 898.

[199] Atkinson v. FDIC, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, at *3 (D.D.C. Feb. 13, 1980).

[200] *Id.* at *3–4 (providing protection to "communications between federal and state agencies when the underlying purposes of FOIA were thereby promoted").

[201] *Id.* at *3.

[202] *See, e.g.*, Tripati v. U.S. Dep't of Justice, No. 87-3301, 1990 U.S. Dist. LEXIS 6249, at *2–3 (D.D.C. May 23, 1990).

[203] *Atkinson*, 1980 U.S. Dist. LEXIS 17793, at *6–7.

[204] *Id.* at *6; *see also* Snoddy v. Hawke, No. 99-WM-1636, 1999 WL 34981534, at *1 (D.

At the heart of disclosure disputes is the problem that there is no explicit definition for "financial institutions" in the Act's plain language, its legislative history, or subsequent amendments.[205] Consequently, transparency advocates have criticized congressional lawmakers for allowing the exemption's definition to remain "overbroad and superfluous" despite opportunities to do so in revisions to the Act over the years.[206]

The District Court for the Northern District of California—"following the logic of these" and other earlier cases in which the D.C. Court broadly interpreted the term "financial institutions"—held that, "'financial institutions' encompasses brokers and dealers of securities or commodities as well as self-regulatory organizations, such as the [National Association of Securities Dealers]."[207] The District Court for the District of Columbia has noted the absence of any controlling case law to support "a distinction between factual versus analytical or deliberative material under [Exemption 8]."[208] And the D.C. Circuit concluded that "an entire examination report, not just that related to the 'condition of the bank' may properly be withheld."[209]

The court reasoned that non-disclosure of factual and other materials under Exemption 8 advances its objective "of safeguarding the public appearance of financial institutions and encouraging cooperation between regulatory agencies and financial institutions."[210] Some district courts in other circuits have refused to allow the protection of Exemption 8 to "purely factual material" when analyzing Exemption 8.[211]

Colo. Dec. 20, 1999) (holding that Exemption 8 protection applied to Citibank's e-mail, notes, and other correspondence in a dispute over whether the bank violated industry regulations).

205 FOIA was amended in significant respects in 1974, 1976, 1986, 1996, and 2007. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. §§ 1–15).

206 *See* LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 2010, at 262 (Harry Hammitt et al. eds., 2010).

207 Feshbach v. SEC, 5 F. Supp. 2d 774, 781 (N.D. Cal. 1997); *see also* Pub. Citizen v. Farm Credit Admin., 938 F.2d 290, 292 (D.C. Cir. 1991) (holding that "institutions providing credit services . . . are included within the term 'financial institutions'"); Pub. Inv'rs Arbitration Bar Ass'n v. SEC, 930 F. Supp. 2d 55, 69–70 (D.D.C. 2013) (construing a broad definition of "financial institution" for Exemption 8), *aff'd*, 771 F.3d 1 (D.C. Cir. 2014).

208 Bloomberg, L.P. v. SEC, 357 F. Supp. 2d 156, 170 (D.D.C. 2004).

209 *Atkinson*, 1980 U.S. Dist. LEXIS, at *7; *see also* Consumers Union of U.S., Inc. v. Heimann, 589 F.2d 531, 534 (D.C. Cir. 1978).

210 *Department of Justice Guide to the Freedom of Information Act: Exemption 8*, U.S. DEP'T JUST. (Apr. 22, 2015), https://www.justice.gov/sites/default/files/oip/pages/attachments/2015/04/21/exemption_8_posted_april_22_2015.pdf [https://perma.cc/2TM4-DC28] (citing Wachtel v. Office of Thrift Supervision, No. 3-90-833, slip op. at 19–20, 23, 26–28, 30, 33 (M.D. Tenn. Nov. 20, 1990) (concluding that factual material pertaining to financial institutions may be withheld)).

211 Pentagon Fed. Credit Union v. NCUA, No. 95-1475-A, 1996 U.S. Dist. LEXIS 22841, at *11 (E.D. Va. June 7, 1996) (declining to extend Exemption 8 protection to "purely factual material"); *see also* Lee v. FDIC, 923 F. Supp. 451, 459 (S.D.N.Y. 1996) (likewise denying protection for information found to be "primarily factual"); *cf.* Schreiber v. Bd. of Governors of the Fed. Reserve Sys., 11 F.3d 217, 220 (D.C. Cir. 1993) (declaring, in context of civil discovery, that "bank examination privilege protects only agency opinions and recommendations

Lastly, it should be noted that a provision of the Federal Deposit Insurance Corporation Improvement Act of 1991 explicitly lists Exemption 8's applicability with respect to specific reports prepared pursuant to it.[212] That statute requires all federal banking agency inspectors general to conduct a review and to make a written report when a deposit insurance fund incurs a material loss with respect to an insured depository institution.[213] The statute further provides that, with the exception of information that would reveal the identity of any customer of the institution, the federal banking agency "shall disclose any report . . . upon request under [the FOIA] without excising . . . any information about the insured depository institution under [Exemption 8]."[214]

The track record of judicial rulings in Exemption 8 disclosure disputes thus shows how the courts have systematically strengthened withholding protections by broadly defining "financial institutions" and broadly framing the exemption. Indeed, the courts' sweeping breadth of the exemption has created a virtually unrebuttable presumption of non-disclosure of information pertaining to government monetary policy of significant public interest.[215] As a result, rulings have left information seekers unable to prevail, initially, on the agency level and, ultimately, in the courts.

There is a long history of how activist courts have broadly interpreted Exemption 8, consistently refusing to limit the exemption's judicially framed "broad all-inclusive" scope,[216] despite persuasive arguments to the contrary. In 1976, for instance, Congress approved the Government in Sunshine Act,[217] the federal open-meetings law. This is a sister statute of the FOIA, in that the Sunshine Act applies to the same administrative and regulatory federal agencies to which the FOIA (the federal open-records law) applies.[218] In fact, the Sunshine Act shares the same nine exemptions[219] as the FOIA, plus a tenth exception—agency meetings can be closed in the event that the

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from disclosure; purely factual information falls outside the privilege") (non-FOIA case); *In re* Subpoena Served upon Comptroller of Currency & the Sec'y of the Bd. of Governors of the Fed. Reserve Sys., 967 F.2d 630, 634 (D.C. Cir. 1992) ("The bank examination privilege, like the deliberative process privilege, shields from discovery only agency opinions or recommendations; it does not protect purely factual material.") (non-FOIA case).

[212] 12 U.S.C. §1831o(k)(4) (2012).

[213] *Id.*

[214] *Id.*

[215] *See supra* note 207 and accompanying text.

[216] Consumers Union of U.S. v. Heimann, 589 F.2d 531, 533 (D.C. Cir. 1978).

[217] 5 U.S.C. § 552b (2012).

[218] *Id.*

[219] 5 U.S.C. § 552(b)(1–9) (2012). The FOIA does not apply to matters that fall under the categories of (1) classified information and national security, (2) internal agency personnel information, (3) information exempted by other statutes, (4) trade secrets and other confidential business information, (5) inter- and intra-agency memoranda, (6) disclosures that constitute a clearly unwarranted invasion of privacy, (7) law enforcement investigation records, (8) reports from regulated financial institutions, and (9) geological and geophysical information. 5 U.S.C. § 552b(c).

subject of the discussion involves litigation to which the government is a party, i.e., attorney-client privilege.[220]

In an attempt to reduce Exemption 8's sweep, the legislative history of the 1976 Sunshine Act shows that Congress broadly defined "financial institutions." Two years later, however, the D.C. Circuit—in apparent contravention of the Sunshine Act's congressional intent—declared that Exemption 8 in the context of the FOIA was "intentionally and unambiguously crafted" in order to have "a particularly broad, all-inclusive definition."[221] In 1980, the D.C. District Court reiterated, "Congress has left no room for a narrower interpretation of [E]xemption 8."[222]

To bolster this view, in 1986 the D.C. District Court further thwarted FOIA requestors seeking to penetrate the Federal Reserve's fortifications against transparency.[223] Requestors had been citing a 1972 District Court ruling when a more progressive and FOIA-friendly D.C. District Court held that national financial exchanges and dealers and brokers are not "financial institutions" and therefore are not subject to protection under Exemption 8.[224] In response, the district court reversed its own ruling of fourteen years earlier.[225] In the 1986 about-face that took place during the President Reagan era, the district court ruled that Exemption 8 does indeed apply to stock exchanges, allowing them to raise Exemption 8 as a bar to disclosure.[226] As another court said: "Exemption 8 was intended by Congress—and has been interpreted by courts—to be very broadly construed."[227]

Along with transparency and FOIA advocates, there were also some jurists whose opinions clashed with the D.C. District and D.C. Circuit positions. In 2001, a New Mexico District Court opinion observed in an Exemption 8 opinion that the result of such sweeping protection of the banking industry is to allow the public little substantive oversight precisely of monetary oversight.[228] Indeed, the opinion declared, Exemption 8 does not "shield everything banking institutions accumulate . . . [that] might be reviewed in the process of a bank examination," adding that "[s]uch a vague and sweeping definition of what Exemption 8 encompasses can only be regarded as antithetic to . . . . FOIA's disclosure requirements."[229] Such voices were not heeded.

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220 5 U.S.C. § 552b(c)(10).

221 *Consumers Union*, 589 F.2d at 533.

222 McCullough v. FDIC, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at *2 (D.D.C. July 28, 1980).

223 *See* Mermelstein v. SEC, 629 F. Supp. 672 (D.D.C. 1986).

224 *Id.* at 673–75; M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 470 (D.D.C. 1972).

225 *Mermelstein*, 629 F. Supp. at 674–75.

226 *Id.*

227 Pentagon Fed. Credit Union v. Nat'l Credit Union Admin., No. 95-1475, 1996 U.S. Dist. LEXIS 22841, at *11 (E.D. Va. June 7, 1996).

228 *See* Forest Guardians v. U.S. Forest Serv., No. 99-615m/KBM, 2001 U.S. Dist. LEXIS 26121, at *85 (D.N.M. Jan. 29, 2001).

229 *Id.*

The chickens came home to roost in 2007. It is indeed ironic that in 2007, the Court of Appeals for the Fifth Circuit declared that if Congress intended a more narrow interpretation of Exemption 8's scope, then "it could have easily accomplished that by specifying as much."[230] Weeks later, the world's news media publicized the subprime-mortgage meltdown that caused a near-collapse of the global financial markets, leaving the Fed along with the rest of the Western world's central banks facing a catastrophic recession unseen since the 1930s.[231] The Fed and the bankers who controlled the U.S. financial markets solved the problem by bailing themselves out with over a trillion dollars of public money.[232]

In consistently construing Exemption 8 broadly at the cost of keeping the public in the dark about monetary policy matters of high public interest, the courts were, in effect, complicit along with the Fed in raising a cloak of secrecy that promulgated a climate of moral hazard—the hazard being to allow the vast majority of American investment banks to fleece tens of millions of people without the banks themselves suffering the financial consequences.

While the intention of FOIA Exemption 8 is to prevent financial panics if unfavorable information about banks and their regulators gets into the hands of the public, the statutory text of that exemption is vague enough to allow the courts to make it an ineffective tool for finding information that may be in the public interest. Overall, judicial history has given the banking sector a nearly impenetrable presumption of secrecy.

C. Federal Advisory Committee Act: Legislative History and Court Rulings

It is important to remember that the Fed's Board of Governors has been deemed a federal agency and is therefore at least cursorily subjected to executive branch transparency rules.[233] However, the Fed member banks are for-profit operations led by non-elected business managers and are not parts of the government.[234] If the boards of directors within the Fed banking system advise the Board of Governors in a structured fashion, they could possibly be deemed "advisory committees" that interact with the executive branch. The FACA attempts to make this type of group more transparent, but the problem is determining what exact kind of group qualifies for the distinction.

Federal advisory committees have been dubbed the "fifth branch of government" and they have critics who question their public accountability and their

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230 Abrams v. Dep't of Treasury, 243 F. App'x 4, 6 (5th Cir. 2007).

231 Michael D. Bordo, *An Historical Perspective on the Crisis of 2007–2008* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 14569, 2008).

232 *See supra* note 129.

233 *Introduction to the Board of Governors*, FED. RES. BANK ST. LOUIS, http://www.stlouisfed.org/in-plain-english/federal-reserve-board-of-governors [http://perma.cc/95JU-9ACT].

234 *Federal Reserve Membership*, FED. RES. BANK RICHMOND, https://www.richmondfed.org/banking/federal_reserve_membership [http://perma.cc/TVH8-ZHGM].

susceptibility to private interests.[235] This raises many questions about government secrecy and the behavior of advisory committees, both of which are addressed in the FACA.[236] This statute is a potentially powerful, though relatively obscure, member of the family of government transparency laws. However, citizens and the media have been largely unable to utilize FACA in attempts to uncover the activities of the most influential advisory committees, largely due to ambiguous terminology in the act's language and the precedents formed during its judicial history.

Advisory committees were uncommon before World War II, but the technical and administrative requirements of the Cold War era made them much more prevalent.[237] The FACA, the nation's first significant legislation covering such bodies, was passed by Congress in 1972.[238] The act was a "compromise between supporters and detractors of the advisory committee process" in the federal government, and it allows those bodies to operate with a certain degree of confidentiality while recognizing the need for public accountability and transparency.[239]

FACA defines an "advisory committee" as any committee that has been established by the President, or one or more federal agencies, "in the interest of obtaining advice or recommendations for the President or one or more agencies or other officers of the federal government."[240] An advisory committee does not include any committee made up *only* of permanent officers or employees of the federal government.[241] Therefore, by definition in the act, an advisory committee includes members from outside the government, and possibly from private industry.[242] This would indeed be the case for the boards of directors from member banks that advise the Fed's Board of Governors on monetary policy.

FACA recognizes that advisory committees are frequently a beneficial and useful means of furnishing advice, ideas, and diverse opinions to the federal government, but that their previous use had not been adequately regulated. Most importantly, FACA states that the public should be kept informed of the membership and

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235 *See, e.g.*, Allan Jonathan Stein, *FOIA and FACA: Freedom of Information in the "Fifth Branch"?*, 27 ADMIN. L. REV. 31 *passim* (1975).

236 Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. §§ 1–15).

237 *See* Richard O. Levine, *The Federal Advisory Committee Act*, 10 HARV. J. ON LEGIS. 217, 219–20 (1973). Since no elected official can possibly possess all the necessary knowledge on all issues, federal advisory committees have been present throughout American history, though in varying quantities. The very first may have been a committee recruited by President George Washington for advice in dealing with the Whiskey Rebellion. *See* Barbara W. Tuerkheimer, *Veto by Neglect: The Federal Advisory Committee Act*, 25 AM. U. L. REV. 53, 54 (1975).

238 5 U.S.C. app. §§ 1–15 (2000).

239 *See* Levine, *supra* note 237, at 217.

240 5 U.S.C. app. § 3(2).

241 *Id.*

242 *Id.*

activities of advisory committees, and that their function should be advisory *only*.[243] This is a problem for transparency at the Fed because advice to the Board of Governors from the industry leaders is probably not advisory only, as decisions will eventually have an impact on the member banks' profitability. In addition, FACA requires all advisory committee meetings to be open to the public.[244] This is another problem for transparency at the Fed because the Board of Governors has been allowed, apparently by fiat, to declare that some meetings will be closed to the public.[245]

While advisory committees come in many forms with representation from various segments of society, for statutory purposes they basically fall into five categories. The first four are citizens' committees that provide advice on general areas of concern (such as tax policy or environmental issues), scientific or technical committees that perform and analyze experimental research (often utilized by the Departments of Defense and Health, Education, and Welfare, among others), committees that informally assist federal agencies on specific tasks, and research commissions that create reports for use by the public.[246] Of interest for this Article's discussion of the Fed is the fifth type of committee, consisting of representatives from an industry that interacts with, or is regulated by, a particular federal agency.[247] These industry advisory committees have been known to become involved in creating or overturning the regulations of the very same federal agencies that are mandated to oversee them, and which (innocently or otherwise) utilize them for policy advice.[248]

Arguably, the most important reason for the passage of FACA was concern about the influence of special interest groups. The Act attempted to require "fairly balanced" points of view among the membership of advisory committees, and also attempted to prohibit industry-only committees.[249] As discussed herein, there are

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[243] 5 U.S.C. app. § 2(b)(1)–(2); *see also* Levine, *supra* note 237, at 225.

[244] *See* Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 460–61 (1997). The relevant sections of FACA referenced are 5 U.S.C. app. §§ 2(a), 5(a), 5(b), 10(a)(1) (2000).

[245] *See Government in the Sunshine Meeting Memorandum*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/aboutthefed/boardmeetings/sunshine.htm [http://perma.cc/S7MK-QY3X].

[246] *See* Levine, *supra* note 237, at 217–18. The five categories of advisory committees are based upon a typology proposed by Levine. *See also* Benjamin W. Cramer, *The Power of Secrecy and the Secrecy of Power: FACA and the National Energy Policy Development Group*, 13 COMM. L. & POL'Y 183, 198–99 (2008).

[247] Levine, *supra* note 237, at 218.

[248] *See id.* An early case of controversial advisory committee behavior, and suspicions of conflicts of interest, was the recruitment of chemical manufacturing industry insiders for an EPA committee investigating the air pollution caused by that same industry. *See* Robert W. Dietsch, *The Invisible Bureaucracy*, NEW REPUBLIC, Feb. 20, 1971, at 19, 19. Within administrative law, this concern is embodied in "capture theory," which builds upon the supposition that federal agencies will become unduly influenced by the industries that they regulate. *See* JAMES Q. WILSON, THE POLITICS OF REGULATION vii–xii, 372–94 (James Q. Wilson ed., 1980).

[249] 5 U.S.C. app. §§ 5(b)(2), 5(c) (2000). These provisions of FACA have not been

banking industry-exclusive groups advising the Fed.[250] Regardless of its subsequent enforcement and legislative history, FACA mandated several reforms in the unfettered use of advisory committees by regulating their formation and operations.[251]

Although FACA is uncommonly utilized by opponents of government secrecy, it has potential as a powerful legal and legislative weapon in enforcing the transparency of government—and its advisors. FACA applies directly to the advisory committees themselves, providing a potentially powerful tool for Congressional oversight.[252] But this power has possibly been thwarted by court precedent regarding the meaning of the statutory language.

Enforcement of FACA is often thwarted by government agencies utilizing the special exemptions in the more publicly understood (and popular) FOIA, in order to avoid making the records of advisory meetings public.[253] Over time, the exact definition of what actually *is* an advisory committee, to be subject to the requirements of FACA, has become a matter of dispute in the courts. In particular, FOIA Exemption 5, which allows the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the [former] agency,"[254] has been applied frequently in FACA disputes.[255] Several cases in the early history of FACA, including one brought by consumer advocate Ralph Nader, challenged the use of FOIA Exemption 5 in government efforts to keep advisory committee meeting records secret.[256] In all of the relevant precedents on this question, the courts ruled that the FOIA exemption cannot be invoked in that fashion.[257] Meanwhile, the direct application of FACA to advisory committees, and not just to the agencies that utilize them, was confirmed by the D.C. Circuit Court in *Association of American Physicians and Surgeons, Inc.*

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subjected to strong enforcement. *See also* Croley & Funk, *supra* note 244, at 462–64; Levine, *supra* note 237, at 219–35.

250 *Federal Advisory Council*, *supra* note 100.

251 *See* Levine, *supra* note 237, at 234–35.

252 5 U.S.C. app. § 4(a) (2000) (The act "shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise").

253 *See* Tuerkheimer, *supra* note 237, at 64–66. For mathematical evidence of the far more prevalent use of FOIA, as opposed to FACA, by government watchdogs, see Cramer, *supra* note 246, at 200 & n.80.

254 5 U.S.C. § 552(b)(5) (2012).

255 *See, e.g.*, Nader v. Dunlop, 370 F. Supp. 177, 180 (D.D.C. 1973).

256 *Id.* at 178.

257 Three of the most noteworthy cases are Aviation Consumer Action Project v. Washburn, 535 F.2d 101 (D.C. Cir. 1976), concerning a consumer advocacy group's efforts to access records of meetings held by the Travel Advisory Board; Gates v. Schlesinger, 366 F. Supp. 797 (D.D.C. 1973), concerning citizen requests for the Defense Advisory Committee on Women in the Services to conduct open meetings; and *Nader*, 370 F. Supp. 177, in which Ralph Nader challenged a prohibition of public attendance at meetings of the Cost of Living Council. *See generally* Tuerkheimer, *supra* note 237, at 64–66.

v. Clinton,[258] a case brought against First Lady Hillary Clinton and her use of advisory committees while formulating national health care policy in the 1990s.[259]

Some legal definitions and requirements within FACA have been challenged by the agencies subjected to citizen or media requests for information, resulting in the need for judicial review of portions of the act.[260] *Washington Legal Foundation v. U.S. Department of Justice*[261] was a noteworthy dispute over the Justice Department's use of advisory committees in efforts to evaluate potential federal judges—such groups are often suspected of exercising ideological biases.[262] The Justice Department resisted disclosing information about these committees by claiming that to do so would violate the Separation of Powers clause of the U.S. Constitution.[263] The D.C. District Court ruled that the committee in question was indeed an advisory committee under FACA, but applying the FACA open-meetings and open-records requirements to that committee would be unconstitutional, because to do so would allow Congress to interfere with the President's ability to appoint judges, thus violating separation of powers.[264] The case also raised questions about who exactly can bring a FACA suit against an advisory committee, with the Justice Department questioning the legality of private citizens and advocacy groups mounting such legal challenges.[265]

The Supreme Court added much-needed definition to the *Washington Legal* ruling in a related case brought by the group Public Citizen, challenging the secrecy of the same judicial recruitment committees.[266] While not overturning the ruling of unconstitutionality (specifically regarding the Justice Department), in the *Public Citizen* case the Supreme Court found that under FACA, public interest groups do indeed have standing to bring suit against the secrecy of advisory committees.[267] Of

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[258] 997 F.2d 898 (D.C. Cir. 1993), *aff'g* 813 F. Supp. 82 (D.D.C. 1993).

[259] *Id.* at 900–02. This case set the precedent that FACA applies directly to advisory committees. However, the ultimate result of this case was the ruling that Hillary Clinton's National Health Care Task Force was not in actuality an advisory committee subject to FACA. *Id.* at 915–16.

[260] *See generally* Croley & Funk, *supra* note 244, at 513–26.

[261] 691 F. Supp. 483 (D.D.C. 1988), *aff'd sub nom.* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989). The Department of Justice's claim of unconstitutionality, citing the separation of powers doctrine, was purportedly compelling to the court because FACA requirements were framed by the defendants as an attempt by Congress to unduly regulate the activities of the executive branch. *Id.* at 491–92.

[262] *Id.* at 484–85.

[263] U.S. CONST. art. II, § 2, cl. 2; *Washington Legal Found.*, 691 F. Supp. at 491.

[264] *Washington Legal Found.*, 691 F. Supp. at 496.

[265] *Id.* at 485–86. The ruling cites a quantity of then-recent cases that raise this question, but no potential answer is discussed.

[266] *See Pub. Citizen*, 491 U.S. at 443.

[267] *Id.* at 450–51; *see* 5 U.S.C. app. § 10 (2000). Public Citizen was founded by Ralph Nader to represent consumer interests in the federal government. For an analysis of this case, see Mary Kathryn Palladino, *Ensuring Coverage, Balance, Openness and Ethical Conduct for Advisory Committee Members Under the Federal Advisory Committee Act*, 5 ADMIN. L.J. 231, 239–50 (1991).

special interest for this Article's arguments is a case brought by another citizens' group against an advisory committee that was advising the President on federal food-assistance programs. In *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*,[268] the advisory committee in question was believed by activists to be made up entirely of corporate executives, with no representation from public interest advocates or the beneficiaries of government assistance.[269] The court confirmed that the citizens' group had standing to sue under FACA.[270] For purposes of the argument in this Article, this precedent at least gives citizen watchdogs standing to sue for access to the meetings of any group that is advising the Fed, if such a group can be defined as an "advisory committee" under FACA.[271]

Though the above cases clarified who *can sue* under FACA, some other cases have confirmed who exactly *can be sued* under the act.[272] Recall that the requirements of FACA can be applied directly to the advisory committees themselves.[273] However, whether a citizen request for information should be directed toward the advisory committee in question, or to the agency utilizing it, was left unclear in the act's text. The pitfalls of this lack of clarity were illustrated in a court dispute involving the Federal Highway Administration, which resulted in a ruling that FACA more directly regulates the agency rather than the committee, and the agency is responsible for legal challenges from citizens.[274] This ruling was affirmed in a case challenging the use of members of the American Bar Association in a committee advising the Department of Justice, in which a District Court ruled, "[i]f the Act regulates the government's *use* of the advisory committee and not the committee itself, it follows that the proper defendant in a suit brought to enforce the Act is the government, not the advisory committee 'utilized' by the government."[275]

The efforts of FACA's crafters to promote the evenhandedness (or to control conflicts of interest) in an advisory committee's policy recommendations have also been the source of legal challenges, because the language about what constitutes

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[268] 557 F. Supp 524 (D.D.C. 1983).

[269] *Id.* at 528.

[270] *Id.* at 527. Despite the favorable ruling on standing, the plaintiffs in this case were still unable to make use of FACA's disclosure provisions because the court also ruled that the advisory committee in question was not found to violate the act's requirements for a "fairly balanced" viewpoint. *Id.* at 530; *see also* 5 U.S.C. app. § 5(b)(2) (2000).

[271] *See* 5 U.S.C. app. § 3(2).

[272] *See, e.g.*, Ctr. for Auto Safety v. Cox, 580 F.2d 689 (D.C. Cir. 1978).

[273] 5 U.S.C. app. § 4(a).

[274] *Ctr. for Auto Safety*, 580 F.2d at 693–95.

[275] Wash. Legal Found. v. Am. Bar Ass'n Standing Comm. on the Fed. Judiciary, 648 F. Supp. 1353, 1359 (D.D.C. 1986). This ruling affirms 5 U.S.C. app. § 10 (2000). The two suits brought by Washington Legal Foundation described here were part of a lengthy effort by that group to reduce the secrecy of the U.S. Department of Justice, a goal that the group had pursued since 1977.

such evenhandedness is insufficiently clear in the act.[276] Unfortunately the courts have not clarified this issue, resulting in a series of mixed rulings on the matter of "evenhanded" or "balanced" committees.[277] For example, in a case brought by Public Citizen against the Department of Health and Human Services, the D.C. District Court ruled that it would be impractical for the judiciary "to examine the background of every person on the committee to determine whether anyone already represents the interests of the person or group challenging the committee's composition."[278]

Another source of legal difficulty is the fact that FACA provides no remedies for its own violation.[279] If a committee is found to be an *advisory committee* that is subject to the requirements of FACA, and it does not fulfill all of those requirements (such as opening its meetings or making its records available to the public), then the act does not provide any punishments for the offending committee or the agency that utilized it, nor any remedies for the interested citizen.[280] Thus, the courts have had to formulate remedies, or more commonly, have tried to avoid doing so.[281]

In a case concerning a committee advising the President on the use of private contractors in national forests, a district court tried to avoid the issue of judicial remedies by ruling that "[t]his court has . . . rejected the opportunities offered by defendants to engage in similar [to what Congress should have done] creative statutory construction and interpretation."[282] The Eleventh Circuit formulated a potentially useful remedy in a case regarding an advisory committee that recommended endangered species status for the Alabama sturgeon.[283] In effect, the policy that was enacted, based on the committee's recommendation, was invalidated.[284]

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[276] 5 U.S.C. app. §§ 5(b)(2)–(3) (2000). Section 5(b)(2) uses the term "fairly balanced," and section 5(b)(3) states that an advisory committee should not be "inappropriately influenced" by "any special interest." *Id.* For ease of discussion, the term "evenhandedness" is used here to represent these concepts.

[277] A noteworthy case that is not discussed *infra* is *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d. 419, 419–20, 424–26 (D.C. Cir. 1989), in which the Circuit Court found that the advisory committee in question did not violate the "fairly balanced" provision of FACA, *id.* at 424–26.

[278] Pub. Citizen v. Dep't of Health and Human Servs., 795 F. Supp. 1212, 1221 (D.D.C. 1992).

[279] Croley & Funk, *supra* note 244, at 522.

[280] *Id.* at 524.

[281] *See id.* The concerns about judicial infringement are typically influenced by the separation of powers doctrine of the Constitution. U.S. CONST. art. II, § 2, cl. 2.

[282] N.W. Forest Res. Council v. Espy, 846 F. Supp. 1009, 1014 (D.D.C. 1994). The ruling in this case was that the advisory committee was indeed subject to FACA, and that its activities should be made public, but the responsibility for the remedy to these problems was passed to the executive branch. *Id.* at 1014–15.

[283] *See* Ala.–Tombigbee Rivers Coal. v. Dep't of Interior, 26 F.3d 1103 (11th Cir. 1994), *aff'g* No. 93-AR-2322-S, 1993 WL 646410, at *1 (N.D. Ala. Dec. 22, 1993).

[284] *Id.* at 1105. The plaintiffs were a group of businesses and private organizations who opposed the designation of the Alabama sturgeon (which inhabits rivers in Alabama and

However, no useful precedent was set because this strategy has not been used outside of the Eleventh Circuit. Otherwise the courts have generally avoided the issue of FACA remedies. This approach can be seen in *Seattle Audubon Society v. Lyons*,[285] a case in which the agency utilizing the illegally secret (under FACA) advisory committee was not instructed to undo anything it had done based on that committee's recommendations.[286]

This judicial history has resulted in little clarification of the many vague aspects of the FACA, which has not made it easy for concerned citizens to obtain official information about the activities, recommendations, or membership of groups made up of representatives from private industry that advise the executive branch, including the Fed's Board of Governors, which is the only segment of the Fed that has been acknowledged as subject to at least some Executive Branch transparency rules.

CONCLUSION

The American economy crashed in 2007, but despite a large amount of investigative reports, books, and feature films about the practices of the Federal Reserve as the crisis developed, it is still difficult to decipher the Fed's influence on what happened.[287] Perhaps more importantly, it will also be difficult to determine whether the nation's monetary policy decision-makers have changed any of the practices that led to the crisis and if anything is being done to prevent another one. As this Article has demonstrated, the Fed's internal operations are obscured by a peculiar quasi-public legal structure that insulates it from the checks and balances process as typically projected toward the executive branch; court precedents built upon an unrebuttable presumption that the Fed's practices should remain secretive; an ongoing assumption that the release of too much government-held information on monetary policy (particularly if it indicates structural weaknesses) can lead to a panic; and the *de facto* secrecy

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Mississippi) as an endangered species, as per the recommendation of the advisory committee. *Id.* at 1104–05. The ruling invalidated the endangered species designation, because the advisory committee was found to have violated the open meetings provisions of FACA. *Id.* at 1106–07. The result was the loss of endangered species protection for the Alabama sturgeon, because of the secrecy of the committee that had deemed the fish worthy of protection. *See* Croley & Funk, *supra* note 244, at 524–25. *See generally* Ray Vaughan, *State of Extinction: The Case of the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species*, 46 ALA. L. REV. 569 (1995).

285 871 F. Supp. 1291 (W.D. Wash. 1994).

286 *Id.* 1309–10. In this case the court ruled that injunctive relief would be inappropriate because the advisory committee's report had been circulated through agency channels during a period of public comment collection. *Id.* In effect, the court avoided formulating a remedy for the illegal secrecy of the advisory committee due to this technicality.

287 *See, e.g.*, Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES (Oct. 23, 2008), http://www.nytimes.com/2008/10/24/business/economy/24panel.html.

that comes with the sheer complexity of monetary policy. In short, American transparency statutes are unable to penetrate the obscure inner workings of the Fed.

As a result, citizens and journalists, not to mention the other branches of the American government, have been unable to oversee the Fed's monetary policy decisions proactively or (with the exception of announcements about interest rates) even a short time after decisions are made. Furthermore, deeper regulatory/deregulatory decisions by the Fed are undetectable until after financial and economic problems ensue. During Congressional hearings on the Fed's role in the 2007 collapse, former Chair of the Fed, Alan Greenspan, answered pointed questions in the vague and meandering fashion of someone who did not expect his decisions to be analyzed by others.[288] While serving as Chair, Greenspan heavily favored deregulation of the financial services industry, regularly remarking that free markets imposed discipline better than government regulators.[289] Critics charged that Greenspan's focus on low interest rates in the early 2000s encouraged the housing bubble and subprime mortgage market collapse that contributed directly to the financial crisis starting in 2007, enabling traders to focus on short-term profits while gambling with other people's money.[290] When asked by Senator Henry Waxman (D-CA) during a Congressional hearing if his ideology led him into unwise decisions, Greenspan conceded, "Yes, I've found a flaw [in that ideology]. I don't know how significant or permanent it is. But I've been very distressed by that fact."[291] When Waxman later asked if he had been wrong, Greenspan semi-reluctantly answered "partially."[292]

Greenspan's (and for that matter, Waxman's) conception of Fed policy as "ideology" is one reason for greater transparency of the Fed's operations, not less. Leaders who make decisions based on ideology are less likely to acknowledge the potential benefits of public participation. Meanwhile, the complexity of monetary policy and the financial industry indicates that watchdogs and journalists should have access to not less but *more* information that they can then interpret for the general public, because all Americans are eventually impacted by the state of the economy, which is in turn impacted by policy decisions at the Federal Reserve.

The piecemeal transparency statutes that have been directed specifically at the Fed, such as the Federal Banking Agency Audit Act, have done little to allow citizens, journalists, or Congress to gain more than scattered information about decision-making in monetary policy, and practically nothing about the reasons for Fed decisions while they are being made.[293] The nation's most potentially powerful transparency statutes, the FOIA and the FACA, are riddled with vague terminology that might allow flexibility in some contexts, but have been interpreted by the courts to allow

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[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] *See supra* Part II.

secrecy, of a type displayed in few other industries, across the banking sector and its regulators.[294]

Americans might still be learning about the details of the crash of 2007–2008, but learning about the Federal Reserve System's influence on the crisis and whether it could have done anything to prevent it has been made all but impossible without significant reforms to existing transparency laws or the passage of new ones that are directed at the deepest decision-making processes at the Fed. *Res ipsa loquitur* the Fed has gained a largely unrebuttable presumption of secrecy from the courts, allowing it to hide information, about monetary policy and its effects on the American and international economies, that is of crucial public interest.

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294 *See supra* Part III.