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THE FRACAS AT THE FDIC

TODD PHILLIPS†

ABSTRACT

In December 2021, the Democratic members of the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) attempted to use their majority to issue a request for information but were blocked by the Republican Chair. Although the Democrats outnumbered the Chair three-to-one, the agency's General Counsel declared the move invalid, and the request went unpublished. After weeks of hostility, the Chair resigned, effectively conceding her inability to lead the agency. Although governance at the FDIC is now settled, concern over the Democratic directors' actions and the Chair's resignation have reverberated beyond that singular agency. Republicans are concerned that the fracas at the FDIC could be replicated elsewhere—particularly at the Board of Governors of the Federal Reserve System, where a Republican chair leads a Democratic-majority Board. But could it?

This essay examines the membership of the FDIC's Board and the legal authorities underlying its decision-making to explain how and why the fracas occurred. It also examines the structure and authorities governing the Federal Reserve's decision-making to conclude that not only is it structurally unlikely that a majority of Federal Reserve governors would wish to override the Chair, but also, associate governors lack authority under existing policy and case law to compel votes on items. However, there is limited case law on the issue and

† Director, Financial Regulation and Corporate Governance, Center for American Progress and nonresident fellow, Duke Global Financial Markets Center. The author thanks Peter Conti-Brown and Adam Levitin for their helpful comments, and Julianna Ricigliano, Zachary Sanfilippo, Brett Ries, and Rebekah Strotman of the Duke Law Journal for their constructive edits. All thoughts and opinions are the author's own and are not representative of any affiliate or employer.

imbuing agenda authority solely in multimember agency chairs is antidemocratic and inconsistent with statutes that bestow policymaking authority to collective bodies. Accordingly, it is conceivable that a court could create new legal doctrines were associate governors to take the unprecedented step of suing the Chair.

INTRODUCTION

In December 2021, the Democratic members of the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) attempted to use their majority to issue a request for information (RFI) on bank mergers[1] but were blocked by Republican Chair Jelena McWilliams.[2] The Democrats outnumbered Chair McWilliams three-to-one, but, because agency staff report to the Chair, the Chair dictates meeting agendas, and the Chair decides which potential agency actions receive a vote, the FDIC's General Counsel declared the move invalid and refused to allow the request to be published in the *Federal Register*.[3]

Reactions to these events were described by the left and the right in starkly different terms. On the right, two Republican senators called the Democrats' actions a "publicity-seeking attempted coup" and "illegitimate,"[4] and McWilliams, herself, described the Democrats as "attempt[ing] a hostile takeover of the FDIC internal processes, staff[,] and board agenda."[5] On the left, McWilliams's refusal to publish the RFI was described as an "unprecedented departure from FDIC tradition"[6] and "not only undemocratic but also unlawful."[7] Director

1. Emily Flitter, *How Bank Regulators Are Trying to Oust a Trump Holdover*, N.Y. TIMES (Dec. 13, 2021), https://www.nytimes.com/2021/12/10/business/jelena-mcwilliams-fdic-bank-regulation-trump.html [https://perma.cc/JA3P-GQQ8]; Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions, 87 Fed. Reg. 18740 (proposed Mar. 31, 2022).

2. Flitter, *supra* note 1.

3. *Id.*; Jelena McWilliams, *A Hostile Takeover of the FDIC*, WALL ST. J. (Dec. 15, 2021, 6:30 PM), https://www.wsj.com/articles/hostile-takeover-fdic-board-rohit-chopra-michael-hsu-jelena-mcwilliams-abuse-power-11639432939 [https://perma.cc/Z7UL-9BUL] ("Board members were immediately notified by the FDIC's general counsel that the CFPB's communication didn't constitute a valid board distribution and therefore couldn't be recorded as official board action.").

4. Flitter, *supra* note 1.

5. McWilliams, *supra* note 3.

6. Adam J. Levitin, *It's Time for Biden to Fire the FDIC Chief*, POLITICO (Dec. 16, 2021, 4:48 PM), https://www.politico.com/news/magazine/2021/12/16/biden-fire-fdic-chief-525140 [https://perma.cc/WE8U-XGHG].

7. Mehrsa Baradaran & Jeremy Kress, *Your Pocketbook Is Ruled by This Agency, and It's in the Middle of a Huge Fight*, N.Y. TIMES (Dec. 14, 2021), https://www.nytimes.com/2021/12/14/opinion/jelena-mcwilliams-fdic-bank-regulation.html [https://perma.cc/J2DX-68AD].

Martin Gruenberg released a statement explaining that "[n]o individual member of the Board may override the authority of the majority."[8]

The fact that these events were so shocking that articles on the internal workings of the FDIC were published in major media outlets is the result of an accidental development. In an effort to streamline agency processes,[9] Congress granted a majority of commission chairs immense control over their agencies through the combination of agenda-setting authority (i.e., the privilege of setting meeting agendas and deciding which items receive votes) and chief-executive authority (i.e., the privilege of managing agency staff and setting their work priorities).[10] With these two authorities, commission chairs across the government work with agency staff to decide which enforcement actions to bring, which applications to approve, and which rules to write, leaving associate commissioners with little latitude to affect their agencies' agendas except for the threat that they will vote against their chairs' priorities. An associate commissioner at an agency once noted that his "chairman and a handful of staff—usually selected by the chair—can and usually do exercise nearly total control over that agency's basic policy agenda."[11] Accordingly, when a majority of the FDIC's Board acted to publish a mere RFI opposed by their Chair, it was newsworthy.

Although the Democrats were unsuccessful in publishing their RFI at the time, they accomplished an even bigger feat: perhaps having concluded that she had lost her ability to control the agency, McWilliams submitted her resignation to President Biden on New

8. @BrendanPedersen, TWITTER (Dec. 9, 2021, 7:19 PM), https://twitter.com/BrendanPedersen/status/1469099427088457732 [https://perma.cc/7RJT-UCKZ].

9. *See* COMM. ON INDEP. REGUL. COMM'NS, A REPORT WITH RECOMMENDATIONS: PREPARED FOR THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 44, 46 – 47 (1949) (finding that "[i]t is very difficult for five or more commissioners to direct the work of the bureaus, or for the bureau chief to report to five or more masters" and recommending that "the chairman should be specifically designated as the person responsible for administration within the commission"); *see also* 96 CONG. REC. 3239, 3240 (1950) (Message from the President of the United States) (explaining that proposed reorganization plans would give several agencies' chairs responsibility for "the day-to-day direction and internal administration of the complex staff organizations").

10. *See* Todd Phillips, *Commission Chairs*, 40 YALE J. ON REG. (forthcoming) (discussing the extent of commission chairs' authorities).

11. Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 245 n.24 (1988).

Year's Eve.[12] As of publication, the Board consists of three Democratic appointees led by Acting Chair Gruenberg, and the RFI was published on March 31, 2022.[13]

Concern over the Democratic FDIC directors' actions and McWilliams' subsequent resignation (in whole, "the fracas") reverberated beyond that singular agency. In recent hearings for President Biden's nominees to the Board of Governors of the Federal Reserve System (Federal Reserve), Republican senators questioned whether such actions could occur at that agency as well. Questioning Federal Reserve Chair Jerome Powell during his renomination hearing, Senator Bill Hagerty asked whether the Federal Reserve is "vulnerable to similar unfortunate politically motivated hijacking of an organization like we just witnessed at the FDIC."[14] Questioning Governor Lael Brainard during her Vice Chair hearing, Senator Pat Toomey asked if she could explain "how you view the coup," and Senator Thom Tillis asked if the Vice Chair position "provides you with any special power or authority to set Board agenda items."[15] In Sarah Bloom Raskin's hearing to be Federal Reserve's Vice Chair of Supervision, Senator Hagerty asked whether she "committed to deferring to the Fed Chairman to set the agenda," as he did not want a "coup d'etat like we saw at the FDIC."[16]

Senate Republicans were concerned that the fracas at the FDIC could be replicated at the Federal Reserve. As of publication, the seven-member Board of Governors has a Democratic majority with a

12. Letter from Jelena McWilliams, Chairman, Fed. Deposit Ins. Corp., to Joseph R. Biden, Jr., President, U.S. (Dec. 31, 2021), https://www.fdic.gov/news/press-releases/2021/pr21107.html [https://perma.cc/VW8H-ED62] [hereinafter Letter from McWilliams].

13. *See About FDIC: Board of Directors & Senior Executives*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/about/leadership/index.html [https://perma.cc/JBD2-4QTF] (last updated Sept. 12, 2022) (explaining that the Board consists of Martin J. Gruenberg, Michael J. Hsu, and Rohit Chopra, and Gruenberg serves as Acting Chair); Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions, 87 Fed. Reg. 18740 (proposed Mar. 31, 2022).

14. *Nomination Hearing Before the U.S. S. Comm. on Banking, Hous., & Urb. Affs.*, 117th Cong. (2022), https://www.banking.senate.gov/hearings/01/04/2022/nomination-hearing [https://perma.cc/5VL2-WBLC]. As of publication, the transcripts for these hearings have not been made available.

15. *Federal Reserve Vice Chair Nomination Hearing*, C-SPAN (Jan. 13, 2022), https://www.c-span.org/video/?517105-1/federal-reserve-vice-chair-confirmation-hearing [https://perma.cc/B5BL-CYE9].

16. *See Nomination Hearing Before the U.S. S. Comm. on Banking, Hous., & Urb. Affs.*, 117th Cong. (2022), https://www.banking.senate.gov/hearings/01/25/2022/nomination-hearing [https://perma.cc/W96R-KFRM]. Raskin responded "Yes, I do, Senator" to committing to defer to the Chairman. *Id.*

Republican Chair, and Chair Jerome Powell's values and priorities may not be shared by the Board's majority for the duration of his term.

But could a fracas like that which transpired at the FDIC similarly occur at the Federal Reserve? Is the federal agency with the largest say over the national economy at risk of a coup, putsch, revolt, or revolution by associate governors?

The answer is likely "no"—at least not without unprecedented litigation and the creation of new, groundbreaking case law. This paper comes to this conclusion in two parts. Part I explains the details of the fracas, its impetus, and the legal mechanisms used by the Democratic FDIC directors. Part II explains the current law and policy governing decision-making at the Federal Reserve and why attempts by associate governors to wrest agenda control from the Chair are unlikely to be attempted and would likely fail if tried. Finally, Part II also explains that, although the case law on commission governance as it stands today is unlikely to support a motion by associate governors to force a vote, a court may find it equitable to create new case law permitting such a vote.

I. THE FRACAS AT THE FDIC: WHAT, WHY, AND HOW

A. *Background on the FDIC's Abnormal Governance Structure*

The fracas at the FDIC came about because of the FDIC's abnormal governance structure. The FDIC is led by a five-member Board of Directors of which no more than three may be of one political party.[17] The Comptroller of the Currency and the Director of the Consumer Financial Protection Bureau (CFPB) are *ex officio* members of the Board and are considered "outside" directors.[18] Three "inside" directors are nominated by the President and confirmed by the Senate to six-year terms, one of which is confirmed by the Senate to the position of Chair for a five-year term.[19] At the time the fracas occurred, the FDIC's bylaws stated that the Chair "shall manage and direct the daily executive and administrative functions and operations of the Corporation and shall otherwise have the general powers and duties usually vested in the office of the chief executive officer of a corporation."[20] In practice, all FDIC staff report up to the Chair.

17. 12 U.S.C. § 1812(a).

18. *See id.* § 1812(a)(1).

19. *See id*. § 1812(a)–(c).

20. FED. DEPOSIT INS. CORP., BYLAWS, ART. VI § 4. (2019) (available at https://web.archive.org/web/20220119061659/https://www.fdic.gov/about/governance/bylaws.pdf [https://per

This structure, despite changes over time, worked well for the first 88 years of the FDIC's existence. Like the other financial regulators, the FDIC is considered an "independent regulatory agency,"[21] and its membership has been largely free from presidential interference: it has been presumed that the FDIC's three inside directors may not be fired by the President except for cause,[22] and, before 2020, the CFPB Director had explicit for-cause removal protection.[23] No Senate-confirmed FDIC director (inside or outside) has ever been removed from office by the President. The governance of the FDIC was stable.

The change in tenor at the FDIC arose because of politics and litigation involving the CFPB. Conservatives abhorred the CFPB following its creation in 2010 (for reasons including that it maintained extensive legal authorities and that, rather than being run by a multi-member commission, it was run by a single Director with a five-year term and for-cause removal protections)[24] and waged a "bruising, bare-knuckle, decade-long fight" to weaken its authority,[25] restructure its governance,[26] and abolish it entirely.[27] President Trump further politicized the CFPB by naming Mick Mulvaney—who had called the CFPB "a joke . . . in a sick, sad kind of way"[28] while in Congress and

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ma.cc/S7TZ-LFZM]). This article discusses the 2019 bylaws, since those are what applied from late 2021 and early 2022 (the timeframe of the events in this Article). The bylaws have been updated since then. *See* FED. DEPOSIT INS. CORP., BYLAWS (2022) (available at https://www.fdic.gov/about/governance/bylaws.pdf [https://perma.cc/U2UN-D4AF]) (providing that the bylaws were "adopted by the Board of Directors on October 18, 2022"). Subsequent bylaws changes do not affect the analysis in this article.

21. 44 U.S.C. § 3502(5).

22. The statute governing the FDIC is silent as to whether or how the President may remove any of the Directors. However, the FDIC is similar in many ways to the Securities and Exchange Commission, the commissioners of which the Supreme Court presumed to be protected against removal except for "'inefficiency, neglect of duty, or malfeasance in office.'" *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 487 (2010) (citation omitted); *see also* Calcutt v. Fed. Deposit Ins. Corp., 37 F.4th 293, 303 (6th Cir. 2022) ("[T]he parties agree that [the FDIC's internal directors] are not removable at will.").

23. *See* 12 U.S.C. § 5491(c)(3) ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.").

24. *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 336–43 (2013) (describing various rationales given for opposing the governance structure of the CFPB and the CFPB as an institution).

25. Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 353 (2020); *see also* Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543, 2567–2572 (2019) (describing the various assaults on the CFPB's structure).

26. *Id.*

27. *See* S. 370, 115th Cong. (2017); H.R. 1031, 115th Cong. (2017).

28. Credit Union Times, *Rep. Mick Mulvaney: CFPB 'Sick, Sad Joke'*, YOUTUBE (Sept. 10, 2014), https://www.youtube.com/watch?v=RaVeNafdyVA [https://perma.cc/W6A9-KKFW].

had co-sponsored legislation to eliminate the agency[29]—as Acting Director while he simultaneously served as Director of the Office of Management and Budget.[30] According to Professor Adam Levitin, having Mulvaney "work[] double-duty as OMB director (serving at the pleasure of the president) and Acting CFPB director (nominally independent) showed that Republicans had little regard for the [CFPB's] independence when it was inconvenient."[31]

Conservatives also litigated the CFPB's structure, resulting in the *Seila Law v. CFPB*[32] decision—the true catalyst of the FDIC fracas. In *Seila Law*, the Supreme Court declared that the CFPB's governance structure—"leadership by a single individual removable only for inefficiency, neglect, or malfeasance[—]violates the separation of powers" requirements of the U.S. Constitution.[33] The Court severed "the Director's removal protection . . . from the other provisions of Dodd-Frank that establish the CFPB," leaving the CFPB Director removable at-will by the President.[34] *Seila Law* also reaffirmed the President's ability to "remove the Comptroller [of the Currency] for any reason."[35]

Accordingly, from President Biden onward, it is likely that new administrations will replace the prior President's CFPB Director and Comptroller on their first day in office, and these officials' partisan affiliations will change with the President's. Because of the FDIC Board's partisanship requirement, when these two officials' party affiliation changes it is likely that the FDIC Board's majority party changes as well.[36] The table below shows what happened when President Biden succeeded President Trump.[37]

29. *See* H.R. 3118, 114th Cong. (2015).

30. *See* Levitin, *supra* note 6.

31. *Id.*

32. Seila Law v. CFPB, 140 S. Ct. 2183 (2020).

33. *See id.* at 2197.

34. *Id.* at 2211.

35. *Id.* at 2201, n.5.

36. The only way that change would not happen is if a President had a CFPB Director and Comptroller who were of a different party than the three inside directors. This could potentially happen: a Republican President could have three Republican inside directors and a Democratic or registered Independent CFPB Director and Comptroller. However, Congress would have to approve three inside directors of the same party, which could be difficult. Frequently, Congress moves nominees for multi-member agencies in pairs (i.e., one Republican and one Democrat). *See generally* Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018) (discussing the politics of agency partisan balance requirements).

37. *See About FDIC: Board of Directors & Senior Executives*, FED. DEPOSIT INS. CORP., http://web.archive.org/web/20210120165920/https://www.fdic.gov/about/leadership/index.html [https://perma.cc/N2ZT-TKAY] (last updated Jan. 14, 2021) (noting that Jelena McWilliams was

FDIC Position	Trump (Republican)	Biden (Democrat)
Inside Director (Chair)	Republican	Republican
Inside Director	Democrat	Democrat
Inside Director	Vacant	Vacant
Comptroller	Republican	Democrat
CFPB Director	Republican	Democrat

Following *Seila Law*, three of the four banking agencies are likely to change parties when the presidency does—the CFPB, OCC, and FDIC will flip while the Federal Reserve will not. Consequently, it is no stretch to say that *Seila Law* opened the floodgates to the politicization of the federal banking regulators; "[t]he new reality is that bank regulation is an ugly, partisan blood sport."[38]

B. A Narrative of the Fracas

While the fracas may or may not have been ugly, it certainly was partisan and ideological. From public information, a timeline of events can be compiled that shows how this partisan power struggle fomented and intensified.

On October 31, 2021, less than three weeks after he was sworn into office,[39] CFPB Director Rohit Chopra presented the FDIC's Board with an initial draft of the bank mergers RFI, with the intention that

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Chair; the Vice Chair position was vacant; Martin J. Gruenberg was an inside director; Blake Paulson was Acting Comptroller of the Currency; and Kathleen Laura Kraninger was CFPB Director); *Brian P. Brooks to Step Down, Blake Paulson to Become Acting Comptroller of the Currency on January 14, 2021*, OFF. COMPTROLLER CURRENCY (Jan. 13, 2021), https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-7.html [https://perma.cc/V3VP-GYBP] (identifying Paulson as Acting Comptroller during the Trump Administration); Sylvan Lane, *Consumer Bureau Director Resigns After Biden's Inauguration*, THE HILL (Jan. 20, 2021 1:33 PM), https://thehill.com/policy/finance/535053-consumer-bureau-director-resigns-after-bidens-inauguration [https://perma.cc/4TXK-4RKC] (identifying Kraninger as a Republican); *About FDIC: Board of Directors & Senior Executives*, FED. DEPOSIT INS. CORP., http://web.archive.org/web/20211102145527/https://www.fdic.gov/about/leadership/index.html [https://perma.cc/ECC7-5FNY] (last updated Oct. 20, 2021) (noting that Jelena McWilliams was Chair; the Vice Chair position was vacant; Martin J. Gruenberg was an inside director; Rohit Chopra was CFPB Director; and Michael J. Hsu was Acting Comptroller of the Currency); Flitter, *supra* note 1 (identifying McWilliams as a Republican and Gruenberg, Chopra, and Hsu as Democrats).

38. Levitin, *supra* note 6.

39. *See* Rohit Chopra, *The CFPB Is Looking Out For Families, Workers, and Communities*, CFPB (Oct. 12, 2021), https://www.consumerfinance.gov/about-us/blog/the-cfpb-is-looking-out-for-families-workers-and-communities [https://perma.cc/CJL8-CD75] ("Today, I was sworn in as Director of the CFPB.").

the RFI be a joint release between the FDIC and OCC.[40] After sitting on the draft for two weeks, Chair McWilliams informed Chopra and the other directors that FDIC staff would draft an alternate RFI that would be available within three weeks, or "no later than Dec[ember] 6."[41] Just over an hour later, the Democratic directors instructed FDIC staff to provide technical assistance to Chopra's initial document instead.[42] Despite the joint request, the Executive Secretary refused to circulate the document to FDIC staff, and two days later the Democratic directors "made a direct request to the heads of [three FDIC divisions] and the General Counsel to directly solicit staff input," but received no comments.[43] Following Chair McWilliams' direction, FDIC staff began drafting their own document.[44]

After receiving no technical assistance from FDIC staff, Chopra's deputy sent an email calling a vote on the initial draft, claiming the vote was open between November 26 and December 6—the day by which McWilliams had promised FDIC staff would produce an alternate proposal.[45] Later that day, the FDIC's General Counsel determined and notified the Board that "the communication . . . [did not] constitute a valid circulation of a notational vote and [could not] be recorded in the minutes of the proceedings of the Board of Directors" on the basis that "[t]he Bylaws of the Federal Deposit Insurance Corporation do not confer authority to an individual Board member to circulate an item for notational vote"; rather, that authority "rests with the Executive Secretary under the supervision of the General Counsel and at the direction of the Chairman."[46] Chopra later described the

40. *See* McWilliams, *supra* note 3; Statement of Rohit Chopra, Dir., Consumer Fin. Prot. Bureau, Member, Fed. Deposit Ins. Corp. Bd. of Dirs., December Open Meeting of the Board (Dec. 14, 2021), https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-member-fdic-board-of-directors-december-open-meeting-of-the-board [https://perma.cc/55BN-ZFTD].

41. McWilliams, *supra* note 3.

42. *See* McWilliams, *supra* note 3 ("Seventy-five minutes later, the [Democratic] directors sent a joint letter instructing FDIC staff to mark up their original document instead."); Statement of Rohit Chopra, *supra* note 40 (noting that the three directors "ask[ed] the FDIC's Executive Secretary to circulate the draft to key divisions of the agency for technical and legal review"). Importantly, whoever controls the pen on a document gets to set the tone for that document, and any responses must be made on their terms.

43. Statement of Rohit Chopra, *supra* note 40.

44. McWilliams, *supra* note 3.

45. *Id.*; Statement of Rohit Chopra, *supra* note 40.

46. Letter from Nicholas Podsiadly, Gen. Couns., Fed. Deposit Ins. Corp., to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau (Nov. 26, 2021), https://www.fdic.gov/foia/files/fdicboardgovernanceandbylaws.pdf [https://perma.cc/KR8Y-RNNB].

General Counsel's legal reasoning as "frivolous" and made "without any factual basis or legal citation."[47]

Despite the claim made by the FDIC's General Counsel that the vote was illegitimate, the three Democratic directors all voted electronically on the CFPB's document.[48] Chopra later wrote that he "anticipated that the Chairperson would redirect the matter to a Board meeting," as would be her right under the bylaws, "which would at least guarantee discussion and a path to resolution."[49] Because McWilliams did not vote, the result was 3-0 in favor of the CFPB's document.[50]

As McWilliams promised, FDIC staff delivered to the Board an alternate RFI on December 6.[51] McWilliams would later describe this document as "factual and neutral in tone, informed by the expertise of career staff—a genuine effort to solicit public feedback without politicizing the agency or the process,"[52] whereas Chopra and another CFPB official would describe the document as "wholly unacceptable," "gutted," and "clearly a tactic to delay action."[53] Along with the alternate RFI, the General Counsel sent a letter to the directors reiterating the assertion that authority to circulate an item for notational vote "rests solely with the Executive Secretary under the supervision of the General Counsel at the direction of the Chairman."[54] Chopra later described the General Counsel's assertion as implying that "the Chairperson has total control over the FDIC, not the Board

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47. Letter from Rohit Chopra, Dir., Consumer Fin. Prot. Bureau, to Nicholas Podsiadly, Gen. Couns., Fed. Deposit Ins. Corp. (Dec. 7, 2021) [hereinafter Letter from Chopra to Podsiadly] (on file with author). The assertion provided by the General Counsel has been redacted.

48. *See* McWilliams, *supra* note 3 ("Within hours of receiving that document, board members responded by attempting to vote on the original CFPB document. Board member Martin Gruenberg, a former chairman, electronically signed his alleged vote on Dec. 3, three days before receiving the FDIC document for review.").

49. Statement of Rohit Chopra, *supra* note 40; *see also* FED. DEPOSIT INS. CORP., BYLAWS, ART. IV § 6(g) (2019) (providing for notational voting "unless any one member of the Board of Directors provides written notice to the Executive Secretary of his or her request to transact said business at a meeting of the Board of Directors").

50. Statement of Rohit Chopra, *supra* note 40.

51. McWilliams, *supra* note 3.

52. McWilliams, *supra* note 3.

53. Statement of Rohit Chopra, *supra* note 40; Kate Davidson and Aubree Eliza Weaver, *FDIC Revolt on Bank Rule Sparks Deeper Governance Questions*, POLITICO (Dec. 13, 2021, 8:00 AM), https://www.politico.com/newsletters/morning-money/2021/12/13/fdic-revolt-on-bank-rule-sparks-deeper-governance-questions-799432 [https://perma.cc/5S9Z-SLCQ].

54. Letter from Nicholas Podsiadly, Gen. Couns., Fed. Deposit Ins. Corp., to Dirs., Fed. Deposit Ins. Corp. (Dec. 6, 2021), https://www.fdic.gov/foia/files/fdicboardgovernanceandbylaws.pdf [https://perma.cc/KR8Y-RNNB].

created by Congress and composed of members appointed by the President."[55]

Chopra the next day replied to the General Counsel with a memorandum detailing the legal authorities for the vote called by his deputy,[56] and, on December 9, the CFPB published on its website the RFI and a joint statement by Gruenberg and Chopra.[57] The joint statement noted that the Board "instruct[ed] the Executive Secretary to record the vote in the minutes of the proceedings of the Board and authorize[d] the Executive Secretary to transmit the Request for Information to the Federal Register for publication."[58] It was publication of this document—specifically on the CFPB's website—that caught the public's attention that something of significance was occurring inside the FDIC.[59]

The FDIC Board held a previously scheduled public meeting the next week that included, among other items, a vote to approve a summary agenda that recorded the votes of actions taken by notational vote between that meeting and the one prior.[60] Chopra noted that the summary agenda did not include the vote taken on the RFI and made

55. Letter from Chopra to Podsiadly, *supra* note 47.

56. *See* Memorandum from Rohit Chopra, Dir., Consumer Fin. Prot. Bureau, to Nicholas Podsiadly, Gen. Couns., Fed. Deposit Ins. Corp., Authority of FDIC Board, Particularly with Respect to Written Voting (Dec. 7, 2021) [hereinafter CFPB Memo] (on file with author) (arguing that "under the FDIC bylaws, the Board of Directors clearly may vote by writing on FDIC business, and the circulation and recognition of such voting is not under the control of the FDIC Chairperson, General Counsel, or Executive Secretary").

57. *See* Jesse Hamilton, *U.S. Bank Regulators Tussle Over Effort to Scrutinize Mergers*, BLOOMBERG (Dec. 9, 2021 12:33 AM), https://www.bloomberg.com/news/articles/2021-12-10/u-s-bank-regulators-tussle-over-effort-to-scrutinize-mergers [https://perma.cc/8TBL-KCNQ] (noting "a review of bank-merger policies [was] announced on the Consumer Financial Protection Bureau website by FDIC directors"); *see also* Joint Statement of Martin J. Gruenberg & Rohit Chopra, Members, Fed. Deposit. Ins. Corp. Bd. of Dirs., Request for Public Comment on the Bank Merger Act (Dec. 9, 2021), https://files.consumerfinance.gov/f/documents/cfpb_bank-merger-act-rfi_joint-statement_2021-12.pdf [https://perma.cc/RCE2-WSVY].

58. Joint Statement of Martin J. Gruenberg & Rohit Chopra, *supra* note 57, at 1, n.1.

59. *See, e.g.*, @BrendanPedersen, TWITTER (Dec. 9, 2021, 4:11 PM), https://twitter.com/BrendanPedersen/status/1469052060452728832 [https://perma.cc/2BN6-BBV8]; @byclairew, TWITTER (Dec. 9, 2021, 4:15 PM), https://twitter.com/byclairew/status/1469053172387876868 [https://perma.cc/V3AP-WWUD].

60. *Meeting of the Board of Directors of the Federal Deposit Insurance Corporation*, FED. DEPOSIT INS. CORP. (Dec. 14, 2021), http://fdic.windrosemedia.com/index.php?category=FDIC+Board+Meetings [https://perma.cc/GL78-FZMK] (FDIC Board Meeting on Dec. 14, 2021).

a motion to include it.[61] McWilliams rejected that movement as out of order and did not allow a vote to take place.[62]

The day after the public meeting, McWilliams published an editorial in the *Wall Street Journal* laying out her perspective on the fracas. In her first public statement about the events, she portrayed the "episode [as] an attempt to wrest control from an independent agency's chairman with a change in the administration" and "an example of the erosion of America's democracy."[63]

Finally, on December 31, McWilliams submitted a letter of resignation to President Biden.[64]

Throughout, members of Congress attempted to influence the course of events. The day the fracas exploded into public view, Senator Pat Toomey, the top Republican on the Senate Banking Committee, called the event a "failed, publicity-seeking attempted coup" that "undermines the independence and integrity of the FDIC"; "a radical politicization of a long-respected financial regulator"; an "unprecedented, illegitimate attempt to depose a bona fide and Senate-confirmed chairman"; and an "unlawful attempt to circumvent" McWilliams.[65] Later, three top Republicans on the House Financial Services Committee declared Chopra's "attempt to bypass the Chairman and set the agency's agenda [a]s illegitimate," an "attempt to co-opt the authority of the Chairman," and an effort to "upend the FDIC's 88-year tradition of considering the Chairman's agenda on a collegial basis and independent from the White House's influence."[66] And, the Democratic Chair of the House Financial Services Committee, Maxine Waters, asked McWilliams to "promptly cite the legal authority and provide any legal analysis that you are

61. *Id.* (statement of Rohit Chopra).

62. *See id.* (Statement of McWilliams: "these actions did not constitute a valid circulation of a notational vote and therefore the document cannot be added to the minutes." Statement of Chopra: "Are you ruling my motion out of order?" Statement of McWilliams: "Yes, I am.").

63. McWilliams, *supra* note 3.

64. Letter from McWilliams, *supra* note 12.

65. Press Release, U.S. S. Comm. on Banking, Hous., and Urb. Affs., Toomey Statement on Chopra's Illegitimate FDIC Coup (Dec. 9, 2021), https://www.banking.senate.gov/newsroom/minority/toomey-statement-on-chopras-illegitimate-fdic-coup [https://perma.cc/NB5P-DEQ5].

66. Letter from Patrick McHenry, Tom Emmer, and Blaine Luetkemeyer, Ranking Members, H.R. Comm. on Fin. Servs. to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau (Dec. 14, 2021), https://republicansfinancialservices.house.gov/uploadedfiles/2012-14-12_final_pmc_bl_te_to_chopra_-_fdic_doc_preservation_request.pdf [https://perma.cc/YW9N-5B6U].

relying on in your attempt to unilaterally block the will of the majority of the FDIC Board to carry out the agency's responsibilities."[67]

C. The Democratic Directors Acted Pursuant to Legal Authority

An analysis shows that the Democratic directors acted pursuant to legal authority and that their directives must be executed by the agency's chief executive officer and staff, and the Office of Legal Counsel (OLC), in a recent opinion, agrees.[68] The FDIC's organic statute, the Federal Deposit Insurance Act (FDI Act), combined with Supreme Court precedent, allows a Board majority to act on behalf of the FDIC; the FDIC's bylaws allow that majority to act by written vote without items first being circulated by the Chair or Executive Secretary; and the bylaws require staff to effectuate the Board's directives.

The FDI Act provides that "[t]he management of the Corporation shall be vested in a Board of Directors . . . ."[69] It also provides the FDIC's ten enumerated corporate powers that, among others, allow the Board to "exercise . . . all powers specifically granted by the provisions of this chapter, and such incidental powers as shall be necessary" to "prescribe . . . bylaws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed" and to "prescribe . . . such rules and regulations as it may deem necessary to carry out" its legal responsibilities.[70] Further, although there are several FDI Act provisions that give the Chair certain limited responsibilities over discrete bank regulation functions,[71] there is nothing in the FDI Act that allows the Chair management or executive authority over the agency, let alone the ability to stop the Board from

67. Letter from Maxine Waters, Chairwoman, H.R. Comm. on Fin. Servs. to Jelena McWilliams, Chairman, Fed. Deposit Ins. Corp., (Dec. 21, 2021), https://financialservices.house.gov/uploadedfiles/1221_-_waters_ltrto_fdic_bank_merger_rfi.pdf [https://perma.cc/28MJ-3RZL].

68. *See* Auth. of a Majority of the FDIC Bd. to Present Items for Vote and Decision, 46 Op. O.L.C. 1, 1 (2022) [hereinafter OLC FDIC Opinion].

69. 12 U.S.C. § 1812(a)(1); *see also id.* § 1820(a) ("The Board of Directors shall administer the affairs of the Corporation fairly and impartially and without discrimination.").

70. *Id.* § 1819.

71. *See, e.g.*, *id.* §§ 1820(k)(5), 1831z(b), 1834a(d)(2)(C), 1831o(h)(3)(C)(ii); *see also* CFPB Memo, *supra* note 56, at 5 ("[T]he other references to the Chairperson in the FDI Act also cannot plausibly be viewed as contradicting those provisions [vesting authority in the Board], as the other references do not provide the Chairperson with administrative, executive, or managerial authority over the Corporation.").

making management decisions.[72] In sum, the FDI Act provides the FDIC Directors with inherent authority to make policy decisions on behalf of the agency.[73]

A prior Supreme Court decision explains what is necessary for multimember agencies to make use of their statutory authorities. In *FTC v. Flotill Products*, the Court declared that "[t]he almost universally accepted common-law rule is . . . [that] in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body."[74] In that case, three of four sitting FTC commissioners voted on whether the defendant had violated a provision of law, and two of those three found that it had.[75] The Court upheld the decision of the two commissioners; in instances in which a multi-member agency's "enabling statute is silent on the question [of how many members is required to take action on behalf of an agency], the body is justified in adhering to that common-law rule."[76]

However, the FDI Act and Supreme Court precedent are alone insufficient to determine when or how the FDIC's Board may act, as the Board's bylaws governed its activities and must be considered.[77] These bylaws provided explicit authority for the three Democratic directors' action: they stated that "[r]egular meetings of the Board of Directors shall be held at such times as the Chairperson shall direct," but they also provided two additional avenues by which associate

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72. *See* OLC FDIC Opinion, *supra* note 68, at 3 ("The Act, however, is perfectly clear that the Board, not the Chairperson, has the authority to determine how the FDIC should exercise its substantive powers, as well as the authority to prescribe procedures for making such substantive decisions—an 'incidental power[] . . . necessary to carry out the powers so granted.'") (quoting 12 U.S.C. § 1819(a)); *see also CFPB Memo*, *supra* note 56, at 4 ("[T]here is no indication in the FDI Act that the Chairperson, General Counsel, or Executive Secretary has the authority to prevent the majority of the FDIC Board from making decisions for the Corporation."). The CFPB Memo notes that although the FDI Act provides that one inside director "shall be designated by the President, by and with the advice and consent of the Senate, to serve as Chairperson of the Board of Directors," this provision "gives no indication of contradicting the provisions cited above that state that the management of the Corporation is vested in the Board itself." *Id.* at 5.

73. *See* OLC FDIC Opinion, *supra* note 68, at 3 (noting, for example, that "[t]he Board could not exercise its power to impose reporting requirements on insured depository institutions . . . without first presenting such action to the Board for a vote and decision").

74. FTC v. Flotill Products, 389 U.S. 179, 183 (1967).

75. *Id.* at 180.

76. *Id.* at 183–84.

77. *See generally* FED. DEPOSIT INS. CORP., BYLAWS (governing the activities of the FDIC's Board of Directors).

directors may induce votes on matters upon which the Chair refuses to hold votes.[78]

First, the bylaws provided that "[s]pecial meetings of the Board of Directors may be called by the Chairperson or, upon the written request of any two members of the Board of Directors, by the Executive Secretary."[79] Second, Article IV Section 6(g) of the bylaws provided a process for notational or written voting. It read in full:

> The Board of Directors may transact business by the circulation of written items to all members of the Board of Directors who can be contacted after a reasonable effort and in sufficient time to permit action where a majority of the members participate, in writing, in the disposition of each item of business and where such disposition, including the vote of each member with respect to each item of business, is recorded in the minutes of the proceedings of the Board of Directors, unless any one member of the Board of Directors provides written notice to the Executive Secretary of his or her request to transact said business at a meeting of the Board of Directors.[80]

The FDIC's Democrats used this notational voting process to approve the RFI,[81] and they appear to have followed the bylaws' text to the letter, at least as best they could with an intransigent Executive Secretary. There are some facts that are not public, but it is clear that Chopra's deputy circulated the document by email to all directors, including McWilliams, and a majority of directors participated in writing.[82] The disposition appears to have not been recorded in the minutes of the proceedings, but that is a record kept by the Executive Secretary, not any of the directors. Although the Executive Secretary may have historically been the circulator of documents for notational voting, which appears to be the implication from the General Counsel's

78. *Id.* at ART. IV, § 6(a) (2019). OLC notes that this authority and the authority of the Chair to preside at meetings, "together have been understood within the FDIC to authorize the Chairperson to set the agendas for Board meetings. But neither delegation—nor the inferred authority to set agendas—speaks to the power to block a Board majority from voting to consider an additional item of business or, in the absence of a meeting, from circulating an item for a written vote of the Board." OLC FDIC Opinion, *supra* note 68, at 6 (citations omitted).

79. FED. DEPOSIT INS. CORP., BYLAWS, ART. IV, § 6(b) (2019).

80. *Id.* at ART. IV, § 6(g).

81. *See* Statement of Rohit Chopra, *supra* note 40 (detailing a series of events leading to a vote, including the "anticipat[ion] that the Chairperson would redirect the matter to a Board meeting," that align with the procedures of article IV section 6(g) of the FDIC Bylaws).

82. *See* McWilliams, *supra* note 3 ("Within hours of receiving that document, board members responded by attempting to vote on the original CFPB document.").

statement that an email did not constitute a valid board distribution,[83] the bylaws contain no such requirement.

Finally, it is clear that the RFI should have been published in the *Federal Register* by FDIC staff (and, following McWilliams' resignation, it was).[84] The bylaws provided that "[t]he General Counsel shall . . . render all legal services necessary to enable the Board of Directors and the Corporation's various organizational units to discharge their respective duties and responsibilities" and "shall also be responsible for performing or overseeing the duties of the secretary of the Board of Directors of the Corporation."[85] As the Executive Secretary received a valid directive from the Board to act, the General Counsel was responsible for ensuring the directive was fulfilled. Beyond the dictates of the bylaws, FDIC staff—like all federal employee staff—must "'faithfully discharge the duties of the office[s]'" they hold.[86]

Were a court to review the Democratic directors' activities as described above, this author expects the vote would be found valid.[87]

83. *See* Letter from Nicholas Podsiadly, Gen. Couns., Fed. Deposit Ins. Corp., to Dirs., Fed. Deposit Ins. Corp., *supra* note 54 ("Director Chopra's communication dated November 26, 2021, did not constitute a valid circulation of a notational vote, subsequent responses do not constitute valid votes, and neither can be recorded in the minutes of the proceedings of the Board of Directors.").

84. *See* Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions, 87 Fed. Reg. 18740 (proposed Mar. 31, 2022).

85. FED. DEPOSIT INS. CORP., BYLAWS, ART. VI § 4(k) (2019).

86. *See* 5 U.S.C. § 3331; *see also* Mark R. Rutgers, *The Oath of Office as Public Value Guardian*, 40 AM. REV. PUB. ADMIN. 428, 428 (2010) ("The oath of office establishes a moral commitment to the office that transcends a contractual, managerial, and/or legal approach to public authority.").

To support the proposition "that the instructions of the FDIC Board of Directors must be implemented by the Corporation's officers," see CFPB Memo, *supra* note 56, at 10, the CFPB Memo posits that the principles of corporate law, as applied to federal agencies, require FDIC staff to effectuate the Board majority's actions. Because the FDIC is a corporation, *see* 12 U.S.C. § 1811(a), the memo argues that it is "appropriate to look to the law of corporations in interpreting the FDI Act." *See id.* at 9. The memo cites *Atherton v. Federal Deposit Insurance Corp.*, which held that "Congress acts . . . against the background of the total *corpus juris* of the states." 519 U.S. 213, 218 (1997) (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)). Then, the memo quotes several state court opinions that provide that "[a] chief executive office . . . may not act in a manner contrary to the express desires of the board of directors" and that "officers have a duty to comply with the board's directives." *See* Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752., 781 (Del. Ch. 2016); Lebanon Cnty. Emps.' Ret. Fund v. Amerisourcebergen Corp., No. 2019-0527-JTL, 2020 WL 132752, at *21 (Del. Ch. Jan. 13, 2020), *aff'd on other grounds*, 243 A.3d 417 (Del. 2020).

87. In the alternative, rather than suing, the three Democratic directors could have encouraged the President to remove McWilliams from office. Unlike some other statutes, the FDI Act does not provide for-cause removal protections for agency officials. *See, e.g.*, 15 U.S.C. § 41

Even as the Democratic directors followed the bylaws as best they could to vote on the RFI, OLC's opinion—which the FDIC indicates it will follow going forward[88]—provides that "the most natural reading" of the bylaws is that they "preserv[e] the power of a Board majority to present items for Board decision and vote," regardless of the Chair's agenda-setting authority.[89] OLC notes that as an initial matter, "[n]othing in the [FDI] Act can be read as authorizing the Chairperson to prevent a majority of the Board from presenting items to the Board for a vote and decision,"[90] and while such an authorization could be enacted in the bylaws, none has been. Further, OLC notes that "[a]lthough the Bylaws do not directly address the authority to present items to the Board" and that "the Board has historically construed them . . . to give the Chairperson the authority to set the agenda for meetings," this authority "is distinct . . . from the authority to prevent the Corporation's Board from voting on FDIC business by unilaterally blocking Board consideration of certain items entirely."[91] Lastly, OLC notes that parliamentary procedure provides that "presiding officers exercise generally ministerial duties that are not understood to include

(providing Federal Trade commissioners protection from removal except for inefficiency, neglect, and malfeasance in office). According to the Supreme Court, a statute's failure to provide explicit removal protections means that no such protections exist. *See* Collins v. Yellen, 141 S.Ct. 1761, 1782 (2021) ("The term ['independent'] does not necessarily mean that the Agency is 'independent' of the President. It may mean instead that the Agency is not part of and is therefore independent of any other unit of the Federal Government. And describing an agency as independent would be an odd way to signify that its head is removable only for cause because even an agency head who is shielded in that way would hardly be fully 'independent' of Presidential control."). However, academics have provided arguments that would counsel for finding protections inherent in the statutes. *See*, *e.g.*, Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of Myers, Humphrey's Executor, Morrison, and Freytag*, 32 CARDOZO L. REV. 2255, 2276 (2011) (arguing that agencies created in the period between *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be read to infer removal protections because Congress may have been "unwilling to take the risk that if that provision [providing limitations on the president's removal power] was found unconstitutional, the result would be to jeopardize the whole scheme" of an agency regulating some industry); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 1 (2021) (arguing that a term of years implicitly prohibits removal). However, even if one were to assume that the three permissions apply to the FDIC, it is plausible, and even likely, that a court would find that Chair McWilliams' refusal to publish the RFI constitutes malfeasance.

88. OLC FDIC Opinion, *supra* note 68, at 1 n. 1.

89. *Id.* at 6. OLC also argues that "the Board itself has the prerogative to construe the scope of its delegations to the Chairperson as falling short of giving the Chairperson the power to disregard the will of a majority of the Board," though it is unclear how this construction could occur if the presiding officer refuses to permit a vote to occur. *See id.* at 5.

90. *Id.* at 3.

91. *Id.* at 3–4.

the authority to defeat the will of the majority"[92] and that "[a] presiding officer cannot arbitrarily defeat the will of the majority by refusing to entertain or put motions . . . or by refusing to permit the expression by the majority of its will."[93]

II. COULD IT HAPPEN AT THE FEDERAL RESERVE?

A. *The Federal Reserve's Structure and Governance Makes a Similar Fracas Unlikely*

Like the FDIC, the Federal Reserve is a multimember regulatory agency. Seven governors serve staggered, fourteen-year terms, and—unlike the FDIC—none serve as the head of another agency.[94] Also unlike the FDIC, the Federal Reserve Act contains no partisan balance requirement. Three of the seven governors are selected by the President and confirmed by the Senate to serve four-year terms as Chair, Vice Chair, and Vice Chair for Supervision congruent with their terms as governors.[95]

The reasons why the fracas at the FDIC is unlikely to be replicated at the Federal Reserve are several. First, the structure of the Federal Reserve is quite different from the FDIC. Unlike the FDIC, the Federal Reserve does not see a substantial minority of its members immediately change party affiliation at the start of new presidential administrations. Although most Federal Reserve governors do not serve their full 14-year terms,[96] it is unlikely that the majority party will change as abruptly as at the FDIC while the Chair's party remains the same.[97] There is less likely to be the "need" for a partisan majority to override the minority-party Chair in order to effectuate their agenda.

92. *Id.* at 6–7.

93. *Id.* at 7 (quoting 59 AM. JUR. 2D PARLIAMENTARY LAW § 8 (2022) (internal quotations removed)).

94. *See* 12 U.S.C. §§ 241–42.

95. *See id.* § 242.

96. *See* Peter Conti-Brown, Restoring the Promise of Federal Reserve Governance 41 tbl.3 (Jan. 3, 2020) (unpublished manuscript) (on file with the Mercatus Center, George Mason University), https://www.mercatus.org/system/files/conti-brown-fed-governance-mercatus-working-paper-v1.pdf [https://perma.cc/NRJ6-FVNG] (finding the median tenure for a Federal Reserve governor to be 5.18 years).

97. While a change in majority party but not the Chair's party happened in 2022, this only occurred because of a confluence of events: the prior administration left one opening for President Biden to fill, one governor decided to resign at the end of 2021, and a third's term expired in January 2022. *See* Sylvan Lane, *Biden Says He'll Announce Fed Picks 'Fairly Quickly'*, THE HILL (Nov. 11, 2021 4:54 PM), https://thehill.com/policy/finance/579699-biden-says-hell-announce-fed-picks-fairly-quickly [https://perma.cc/LY6S-ULWB] ("Fed Vice Chairman Richard Clarida's stint as the board's No. 2. runs out in January . . . and there is a vacant seat on the Fed

Second, power at the Federal Reserve is at once both more statutorily concentrated in the Chair and practically more diffuse than at the FDIC. The Federal Reserve Act deems the Chair to be the Federal Reserve's "active executive officer"[98] and provides that the Chair "assign[s] . . . responsibility for the performance of any function that the [Federal Reserve] determines to delegate," such as delegations to staff.[99] Consequentially, unlike the FDIC, for which the role of the Chair is not defined in statute, the Federal Reserve's Chair maintains statutory authority over staff activities. However, practice dictates that policies are crafted by staff who report to various governors, rather than the Chair.[100] The Federal Reserve has eight policy committees, each chaired by a governor. Unlike the FDIC, in which all staff in practice report to the Chair, Federal Reserve staff report to the chairs of the different policy committees.[101] For example, the Federal Reserve's Division of Consumer and Community Affairs reports directly to the Chair of the Committee on Consumer and Community Affairs; the Division of Reserve Bank Operations and Payment Systems reports to the Chair of the Committee on Federal Reserve Bank Affairs;[102] and following the enactment of the Dodd-Frank Act, the Division of Supervision and Regulation reports to the Vice Chair for Supervision (VCS), a position which that statute created.[103] Accordingly, the Chair sets the agendas for Board meetings, but only after other governors have developed, reviewed, and fully ventilated the items that are to receive a vote.

Third, the processes for decision-making at the Federal Reserve are also quite different from those at the FDIC. Unlike the FDIC, the

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board left unfilled by former President Trump."); Sylvan Lane, *Fed Governor Quarles to Step Down, Opening Seat for Biden Pick*, THE HILL (Nov. 8, 2021 11:33 AM), https://thehill.com/policy/finance/580537-feds-quarles-to-step-down-in-december-opening-seat-for-biden-pick [https://perma.cc/QV7Z-PKUR] ("Federal Reserve Governor Randal Quarles will resign from the central bank at the end of December.").

98. 12 U.S.C. § 242.

99. *See id.* § 248(k).

100. *See* Brendan Pedersen & Hannah Lang, *Sidelining of Quarles Complicates Fed's Policymaking*, AM. BANKER (Oct. 14, 2021 3:30 PM), https://www.americanbanker.com/news/sidelining-of-quarles-complicates-feds-policymaking [https://perma.cc/A6GQ-DTYH] ("'The head of the supervision and regulation committee at the Fed directs the supervision and regulation staff and tells them what to work on, or what not to work on,' said Todd Phillips.").

101. *See Board Members*, FED. RSRV. BD. (last updated Sept. 30, 2022), https://www.federalreserve.gov/aboutthefed/bios/board/default.htm [https://perma.cc/CU44-BE36].

102. *See id.*

103. *See* Kyle Campbell, *Without a Supervision Chief at Fed, Full Board Owns Regulation*, AM. BANKER (Apr. 12, 2022, 1:05 PM), https://www.americanbanker.com/news/quarles-fed-needs-vice-chair-to-take-the-heat-on-divisive-policies [https://perma.cc/6AG6-54N8].

Federal Reserve has no bylaws governing Board decision-making that allow associate governors to call votes. Instead, the Federal Reserve Act provides that the Chair "shall preside" at board meetings.[104] There are minor regulations governing several Board activities,[105] including creating regulations[106] and adjudicating a variety of applications,[107] but none detail how items are to be voted upon.[108] A Freedom of Information Act request to the Federal Reserve for bylaws, rules, or legal opinions governing board meetings resulted in nothing that would give associate governors agenda authority or the ability to circulate items for notational vote.[109]

Accordingly, not only is it structurally unlikely that a majority of Federal Reserve governors would wish to override the Chair, there also does not appear to be any existing mechanism by which associate governors may compel votes on items the Chair does not wish to place on meeting agendas.[110]

B. *If a Fracas Were To Occur, a Court May Find It Equitable To Intervene*

Of course, courts may find it equitable to intervene over questions of Federal Reserve governance and find that associate governors have

104. 12 U.S.C. § 244.

105. *See* 12 C.F.R. § 262 (2021) (Rules of Procedure).

106. *See id.* § 262.2.

107. *See id.* § 262.3.

108. The Federal Reserve's regulations also provide that "a majority of its members" is "required to take action on behalf of the agency" except in three rare circumstances that require an affirmative vote of more than a majority of the Board. *Id*. § 261b.2(d).

109. Response on file with author. *See also Federal Reserve Vice Chair Nomination Hearing*, C-SPAN (Jan. 13, 2022), https://www.c-span.org/video/?517105-1/federal-reserve-vice-chair-confirmation-hearing [https://perma.cc/B5BL-CYE9] (providing statement of Vice Chair Lael Brainard that "the Chair determines what goes to the Board for votes" in response to a question from Senator Hagerty).

110. Likely, if a majority of governors wished to take an action the Chair does not support, the majority would state publicly that they would support taking an action, but the Chair will not allow a vote to occur. While the President could demote the Chair and the Vice Chair could set Board meeting agendas, *see* 12 U.S.C. § 242 (failing to provide for-cause removal protections for governors serving as officers and providing that the Vice Chair "shall serve in the absence of the Chairman"), or the Board could vote to make one of their own Acting Chair, *see* Press Release, Fed. Rsrv. Bd., Federal Reserve Board Names Jerome H. Powell as Chair Pro Tempore, Pending Senate Confirmation to a Second Term as Chair of the Board of Governors (Feb. 4, 2022), https://www.federalreserve.gov/newsevents/pressreleases/other20220204a.htm [https://perma.cc/DFX4-ES7E] (noting that the Board "named Jerome H. Powell as Chair Pro Tempore, pending Senate confirmation to a second term as Chair of the Board of Governors . . . [which] enables him to continue to carry out his duties as Chair after the expiration of his term"), this author predicts such an action would be unlikely to occur as it would roil financial markets to an unacceptable extent.

a right to agenda-setting authority. Federal courts follow a principle of allowing "administrative agencies . . . 'to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[111] The reasoning behind this principle is sensible: courts are understandably loath to interfere in executive branch operations, not only because of separation of powers concerns but also because procedures are necessary for the smooth functioning of government.[112] The Supreme Court has noted that "administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved,"[113] and a court's involvement "clearly runs the 'risk of propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'"[114]

This logic, while appropriate for instances in which agencies decide how best to interact with regulated entities,[115] should also apply to situations in which a commission has written rules governing its voting processes, even if those rules would inhibit a majority from effectuating its will. In the case of the FDIC, although the bylaws in question were not adapted to the peculiarities of banking, they were adapted to the particularities of the FDIC. For example, having rules for holding votes on uncontroversial topics by circulating materials is rational given that two of the five directors lead separate agencies and do not work in the same building as the others.

However, it is less clear that courts should avoid intervening when an agency lacks rules governing how a commission votes and when agenda-setting authority lies by default solely with the chair, as with the Federal Reserve. Although courts lack a test for whether they

111. FCC v. Schreiber, 381 U.S. 279, 290 (1965) (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940)).

112. *See, e.g.*, Ngure v. Ashcroft, 367 F.3d 975, 983 (8th Cir. 2004) ("This tradition of deference is rooted in the separation of powers, and the respect of the judiciary for the functions of a coordinate branch of government.").

113. *Schreiber*, 381 U.S. at 290.

114. Fed. Power Comm. v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 333 (1976) (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

115. *See e.g.*, *Schreiber*, 381 U.S. at 280–81 (noting that the Court was asked to determine whether an agency could "promulgate procedural standards for determining whether testimony taken and documents produced during an investigatory proceeding should be accorded confidential treatment"); Phillips Petroleum Co. v. EPA, 803 F.2d 545, 547 (10th Cir. 1986) (noting that EPA was free "to promulgate underground injection control regulations for Indian lands").

should intervene to allow a commission majority to act by notational vote when its chair stymies the majority's will, decisions should be based on whether Congress intended for the chair to have sole agenda authority, and if indeterminate, whether Congress's policy goals would be better effectuated by granting agenda authority to all members of the body.[116]

There may be some agencies for which Congress intended the chair to have sole agenda authority, but it does not appear that the Federal Reserve is one of them.[117] The structure seems to suggest that other Federal Reserve governors need some agenda authority to rein in the power of the Chair. The Federal Reserve Act provides that the seven governors—all presidentially-appointed and Senate-confirmed officials—have (with a few exceptions) collective decision-making authority.[118] Further, because the Act provides that the Chair is the agency's chief executive but is subject to oversight by the Board,[119] it would be impossible for the other governors to place limitations on the Chair's executive actions if they could only vote on whatever the Chair approved.

The legislative history also does not dispel the notion that Congress would have wanted the Federal Reserve to be majority-ruled. As enacted in 1913, the Federal Reserve Act made the Chair more figurehead than leader and Congress intended for the Board as a whole to make governing decisions.[120] The Act originally provided that the Board would consist of the Treasury Secretary and Comptroller of the Currency as *ex officio* members and five additional members, with the Treasury Secretary being Chair.[121] Because of the difficulty in managing two government agencies, the Act provided that another

116. *See, e.g.*, OLC FDIC Opinion, *supra* note 68, at 3 (opining that "[n]othing in the [FDI] Act can be read as authorizing the Chairperson to prevent a majority of the Board from presenting items to the Board for a vote and decision").

117. For instance, because the Administrative Conference of the United States is governed by a Council composed of one PAS Chair and 10 other members appointed by the President to unpaid part-time positions, it is logical for the Chair to set meeting agendas. 5 U.S.C. §§ 593(b)–(c), 595(b).

118. *See, e.g.*, 12 U.S.C. § 248 (authorizing and empowering "[t]he Board of Governors of the Federal Reserve System" to undertake specific enumerated actions).

119. *See id.* § 242 ("The Chairman of the Board, subject to its supervision, shall be its active executive officer.").

120. *See generally* 50 CONG. REC. 5997 (1913) ("[T]he power to permit the banks to count as reserves the national-bank notes and the Federal reserve notes, we propose to put into the hands of the Federal reserve board . . . ."); *id.* at 5998 ("The Federal reserve board even has the power to remove the directors of the Federal reserve banks . . . ."); *id.* at 6018 ("[T]he Federal reserve board shall issue the currency which the needs of the business require . . . .").

121. Federal Reserve Act § 10, Pub. L. No. 63-43, 38 Stat. 251, 260–61 (1913).

Board member—designated "Governor" by the President—would be the Federal Reserve's "active executive officer."[122] According to a committee report,

> In designating the Secretary of the Treasury as ex officio chairman of the [Federal Reserve] the bill aims to preserve the general concept of official responsibility and duty which is fundamental to the conception of the board. In ordinary times the Secretary of the Treasury's relation to the board would be largely formal. In times of stress or sudden danger he might become an active and effective working member of the board.[123]

Congress's intention may have been for the Governor to run the agency while the Treasury Secretary maintained the ordinary flow of business during Board meetings.[124]

In 1935, Congress removed the Treasury Secretary and Comptroller from the Federal Reserve Board and provided, instead, that the individual selected to be the active executive officer by the President would also serve as Chair.[125] From committee hearings and reports, it does not appear that Congress intended for the role of the Board itself to change.

The legislative history for the next legislative change to the Board demonstrates that Congress then knew the power of the Chair vis-à-vis other governors but, again, does not appear to have contemplated a change in the role of the Board. A 1977 congressional committee

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122. *Id.*; *see also* H.R. REP. NO. 63-69, at 44 (1913) (noting that designation of Governor by the President was "wiser than to throw upon so small a board the duty of selecting executive officers from among its own membership").

123. H.R. REP. NO. 63-69, at 44 (1913).

124. In practice, it appears that the Treasury Secretary may not actually have attended many meetings yet nevertheless used his position to wield power over the Board. *See* 1 ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE 1913–1951 4 (2003) ("Before the 1930s, treasury secretaries rarely participated actively."); W. P. G. HARDING, THE FORMATIVE PERIOD OF THE FEDERAL RESERVE SYSTEM (DURING THE WORLD CRISIS) 7–10 (1925) (noting that Treasury Secretary McAdoo desired for the Board to be a bureau of the Treasury Department and, accordingly, worked to undermine it); *Banking Act of 1935: Hearings on S. 1715 & H. R. 7617 Before a Subcomm. of the S. Comm. on Banking & Currency*, 74th Cong. 90 (1935) (stating that as Treasury Secretary "I would not say in an offensive way that I dominated the Board, but I, at least, had considerable influence with the action of the Board, and I have suspected . . . that frequently since the Secretary of the Treasury has had too much influence upon the Board") (statement of Sen. Carter Glass); *id.* at 930 (noting that as Treasury Secretary "I was able to attend in the beginning almost every meeting, and was glad to attend," but later "found it impossible to attend the meetings of the Board" as World War I broke out) (statement of Sen. McAdoo).

125. *See* Banking Act of 1935 § 203(b), Pub. L. No. 74-305, 49 Stat. 684, 705 ("Of the persons thus appointed, one shall be designated by the President as chairman . . . to serve as such for a term of four years. The chairman of the Board, subject to its supervision, shall be its active executive officer.").

report recognized that "the President can designate as Chairman someone who may have been confirmed by the Senate years earlier and is not questioned again, even though he or she is assuming a position far more important than the one to which he or she was confirmed,"[126] and the Chair of the Senate Committee on Banking, Finance, and Urban Affairs said in a hearing that "we know the great power and influence, psychological and actual, [of] the chairman of the Federal Reserve Board. He's one of the top economic officials in our Government, along with the Secretary of the Treasury."[127] Yet being a top economic official does not mean that the other governors should not be able to override the Chair.[128]

Lastly, with the enactment of the Dodd-Frank Act in 2010, Congress created the one position on the Federal Reserve that may hold a claim to agenda authority beside the Chair: the Vice Chair for Supervision (VCS). That Act provides that the VCS "shall develop policy recommendations for the Board regarding supervision and regulation of depository institution holding companies and other financial firms supervised by the Board, and shall oversee the supervision and regulation of such firms."[129] Given that there have been only two VCSs in history (Randal Quarles served one term from 2017–21, and Michael Barr started in July 2022),[130] it has not been litigated whether the VCS may compel all governors to vote on their policy recommendations. In a congressional hearing, Chair Powell indicated that he would "respect the authority [of the VCS] to bring

126. H.R. REP. NO. 95-559, at 6 (1977).

127. *Federal Reserve Reform and Audit: Hearings on S. 2285 & S. 2509 Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 94th Cong. 136 (1975) (statement of Chairman William Proxmire); *see also* Federal Reserve Reform Act of 1977: Hearings on H.R. 8094 Before the H. Comm. on Banking, Fin., & Urb. Affs., 95th Cong. 4 (1977) ("[T]he President can designate as Chairman someone who was confirmed by the Senate some 13 years previously, yet the Senate be powerless to confirm the appointee to what was recently called the Nation's 'No. 2 position.'") (statement of Chairman Henry S. Reuss).

128. Congress decided to make the Chair more accountable *to Congress* by requiring the President's selection of Chair to be confirmed by the Senate. *See* Federal Reserve Reform Act of 1977 § 204, Pub. L. No. 95-188, 91 Stat. 1387, 1388 (1977).

129. 12 U.S.C. § 242.

130. *See Board of Governors Members, 1914–Present*, FED. RSRV. BD. https://www.federalreserve.gov/aboutthefed/bios/board/boardmembership.htm [https://perma.cc/7E5C-5893] (explaining that Quarles served from Oct. 13, 2017 to Oct. 13, 2021, and Barr began service July 19, 2022).

these proposals," but "they will still have to convince the members of the Board to vote for whatever that person is proposing."[131]

If the legislative history were not sufficient (and, arguably, what is described above is simplified), a court should examine the proper role of commission chairs generally—though this is a question that has not been answered by Congress or by academic literature. There are two principal and contrasting views. The first view is that, by virtue of setting meeting agendas and directing agency staff, chairs should also set agency agendas. Chairs are selected as leaders of their commissions, either by the President (sometimes with Senate approval) or by a vote of the commissioners themselves, and this leadership should manifest in agenda-setting authority. In other words, a majority should be permitted to restrain the agency from acting but not to spur the agency to action. Further supporting this view is that giving chairs selected by the President sole agenda authority facilitates the President's control over the executive branch and supports the logic undergirding the unitary executive theory.[132] Former FDIC Chair McWilliams was a proponent of this view, arguing during the fracas that the Democratic directors' efforts were "an attempt to wrest control from an independent agency's chairman" and implying that she alone had the rightful authority to dictate which items received a vote.[133]

The second view is that chairs should facilitate effective decision-making of the commission as a whole, presiding over meetings as "traffic conductors" that allow a majority to effectively make decisions even if a chair disagrees with a majority.[134] In those agencies for which members are presidentially-appointed and Senate-confirmed, allowing one of several equals to block the majority appears facially unfair: the role of associate commissioners should not be to simply ratify or reject the proposals of the chair, but to be equal participants in the act of governing. It also cuts against Congress's intention to ensure a diversity

131. *Treasury Secretary and Federal Reserve Chair Testify on CARES Act Oversight*, C-SPAN (Nov. 30, 2021), https://www.c-span.org/video/?516333-1/treasury-secretary-federal-reserve-chair-testify-cares-act-oversight [https://perma.cc/78M3-VNG7] (statement of Jerome Powell).

132. *See* Phillips, *supra* note 10 (studying authorities of commission chairs and explaining that the strong-chair model may support the unitary executive theory).

133. McWilliams, *supra* note 3.

134. There is very little literature or case law on the intended role of chief executives in private sector corporations. However, board "chairs are often seen as facilitating the effective processing of information at the board table via their role in developing and overseeing the agenda, ensuring directors are informed and participating, conducting the board meeting as well as keeping track of decisions and their implementation." Pieter-Jan Bezemer, Gavin Nicholson, & Amedeo Pugliese, *The Influence of Board Chairs on Director Engagement: A Case-Based Exploration of Boardroom Decision-Making*, 26 CORP. GOV.: INT'L REV. 219, 220 (2018).

of views and that no individual alone can make decisions.[135] Lastly, because commissions' chief executives are largely to be "governed by general policies of" their commissions,[136] associate commissioners cannot effectively oversee the chief executive's activities when that individual is also chair and can prevent the majority from acting.

The second view is more persuasive, and OLC agrees.[137] OLC has noted that, "against the backdrop of the majority-rule principle," a commission majority may call a special meeting without the ascent of the chair[138] and that, in instances in which a statute "is silent as to a commission's internal organization, practices, and procedures [,] [t]he clear implication is that these matters are to be decided by the members of the [c]ommission."[139] OLC also explains that, much as "a president and CEO of a corporation [may] possess substantial authority over corporate affairs, such authority exists largely as a matter of the board's grace and does not deprive the board of its ultimate authority to manage corporate business," the same is true for government commissions.[140] "[S]etting the agenda is distinct from the authority to block the will of a Board majority."[141]

Simply because the second view is more persuasive, however, does not mean that courts will undoubtedly agree with it; courts need not defer to OLC opinions,[142] and they could decide that supporting the unitary executive theory may be a higher priority for the courts than ensuring commissions are governed in ways that promote equal

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135. *See* Ronald J. Krotoszynski, Jr., Johnjerica Hodge & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 962–72 (2015) (detailing congressional debates over the inclusion of partisan balance requirements in various multimember regulatory agencies).

136. *See, e.g.*, Reorganization Plan No. 8 of 1950 § 1(b)(1), 15 F.R. 3175 (providing that the Chair of the Federal Trade Commission "shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make").

137. *See* Phillips, *supra* note 10 (recommending legislative changes to allow associate commissioners to more easily oversee their chief executives and participate in policymaking).

138. Auth. Advisory Bd. for Cuba Broad. to Act in the Absence of a Presidentially Designated Chairperson, 24 Op. O.L.C. 24, 26 (2000) (citing Letter from Larry L. Simms, Deputy Assistant Att'y Gen., Off. of Legal Couns., to Mason H. Rose V, Chairperson, U.S. Architectural and Transp. Barriers Compliance Bd. (Sept. 17, 1981)).

139. Nat'l Comm'n on Neighborhoods (Pub. L. 95-24) — Powers — Appropriations, 2 Op. O.L.C. 366, 367 n.5 (1977).

140. Div. of Powers and Responsibilities Between the Chairperson of the Chemical Safety and Hazard Investigation Bd. and the Bd. as a Whole, 24 Op. O.L.C. 102, 107 (2000).

141. OLC FDIC Opinion, *supra* note 68, at 8.

142. *See generally* Sonia Mittal, *OLC's Day in Court: Judicial Deference to the Office of Legal Counsel*, 9 HARV. L. & POL'Y REV. 211 (2015) (describing the weight that courts give to OLC opinions).

participation among their members or that the lack of specifics in statute means that past practice should control. But, if the Supreme Court can look to principles of equity and common law rules to declare that a commission majority may act on its behalf[143] or that only a majority of a quorum is necessary to act,[144] then courts could rule that associate commissioner agenda authority exists. Accordingly, were a fracas at the Federal Reserve to occur, no matter how unlikely, it is at least plausible that a court could find that a majority at the Federal Reserve may act by notational vote.

CONCLUSION

Although unprecedented, the fracas at the FDIC was not simply a might-makes-right, majority-rules power struggle. The abnormal makeup of the FDIC's Board was such that half of its membership changed party affiliation on the first day of new presidential administrations. Further, the FDIC's bylaws provided a legal avenue for the Democratic directors to vote on the RFI, and those bylaws appear to have been properly followed. Despite concern of some Senate Republicans, the Federal Reserve is unlikely to have a similar transition at the beginning of new presidential terms, is not governed by similar procedural rules, and, thus, a majority of Federal Reserve governors cannot use a similar maneuver to bypass the Chair.

However, if the issue is litigated, there is a chance that a court could rule that the Federal Reserve *should* be governed by a rule that allows for a majority to act without the acquiescence of the Chair. It does not appear that Congress intended for the Federal Reserve Chair to have the agenda setting authority that he now has, and a core principle of multimember bodies is that one of several equals should not be permitted to block the majority. Further, the Supreme Court has previously ruled on issues of commission governance based neither in agency rules or statute but in equity and common law, and they could do so again.

The validity of notational voting is just one of many governance issues that commissions face for which courts have not yet ruled.

143. *See* Cooley v. O'Connor, 79 U.S. 391, 397 (1871) ("[A]n authority given to several for public purposes may be executed by a majority of their number.").

144. *See* Brown v. D.C., 127 U.S. 579, 586 (1888) ("[A] major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease.") (quoting DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 296 § 283 (3d ed. 1881)); FTC v. Flotill Prods., 389 U.S. 179, 183 (1967) ("[A] majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.").

Commission governance is fraught with challenges, and courts will doubtlessly be called on to adjudicate complex disputes involving power dynamics.