Judicial review of the ECB and the Federal Reserve: contrasting approaches

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Abstract

This article compares the availability of judicial review in principle and practice for the European Central Bank (ECB) and the US Federal Reserve (the Fed). The central focus is on these two central banks as monetary policymakers, leaving aside their role as lenders of last resort and as regulators, for which the assessment of judicial review differs. Our main finding is that judicial review is much less important for the Fed, where it has not played a significant role to date, compared to the ECB. This divergence to date notwithstanding, we explore the possibility of major legal challenges to both the ECB and the Fed in the future.

Keywords: central banks, central bank independence, European Central Bank, Federal Reserve, judicial review, *Weiss*

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A. Introduction

This paper compares the availability of judicial review in principle and practice for the European Central Bank (ECB) and the US Federal Reserve (the Fed). The central focus is on these two leading central banks as monetary policymakers, leaving aside their role as lenders of last resort and as regulators, for which the assessment of judicial review differs.[1]

Our main finding in this article is that judicial review is much less important for the Fed, where it has not played a significant role to date, compared to the ECB. The Fed is a Prometheus unbound by judicial review, whereas the ECB is a Prometheus bound by judicial review. This marked difference may also be a product of the time when the Fed and the Eurosystem were established. When the Fed was established in the early twentieth century, judicial review of the administrative state was much less developed and extensive than when European Monetary Union was created in the late twentieth century.

This availability of judicial review of the ECB before the Court of Justice counterbalances the ECB's supranational character and its high degree of independence. Unlike the Fed and almost uniquely among central banks, the ECB is not embedded in a national system of checks and balances, and in particular, the accountability of the ECB to the legislature is less developed than the Fed's, being primarily a matter of submitting regular reports to the European Parliament.[2] In exercising its monetary policy mandate, the ECB is intended to be subject only to the jurisdiction of the Court of Justice of the European Union (CJEU).[3] This has not stopped enterprising courts from asserting jurisdiction over the ECB indirectly, in particular the German Federal Constitutional Court (FCC), in a series of cases relating to the ECB's asset purchase programs culminating in *Weiss.* The result has been that the ECB has been subjected to an exceptional level of judicial review for a central bank.

This article proceeds as follows. It begins by considering commonalities and contrasts in the structure and oversight of the ECB and the Fed. It then examines, first in respect of the ECB, then in respect of the Fed, key cases of judicial review, including the legal standards applied, and possible ramifications. In respect of the Fed, it considers non-judicial limitations on decision-making and discretion in monetary policy, including legislative influence and institutional legal culture. Lastly, it concludes with a look at the road ahead for judicial review of the Fed and the ECB.

1 See, e.g., *Goodhart/Lastra*, SUERF Policy Note 2018/32, pp. 1–8 (surveying various policy considerations) and *International Law Association*, Committee on International Monetary Law, Report to the Athens Conference (2024), VI. Judicial Review of Banking Supervision (by *Michael Waibel*).

2 See, e.g., *Dreher* et al., ECB Economic Bulletin 2024/7, pp. 75 et seq.

3 Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank (Statute of the ESCB/ECB), OJ C 202 of 7/6/2016, Art. 35, para. 1: "The acts or omissions of the ECB shall be open to review or interpretation by the Court of Justice of the European Union in the cases and under the conditions laid down in the Treaty on the Functioning of the European Union."

B. Commonalities and contrasts

A commonality between the ECB and the Fed is that both have engaged in large-scale asset purchase programmes since the transatlantic financial crisis in 2007-2008. Both central banks consider these programmes to be part of their monetary policy mandate.

There are also several points of contrast that are directly relevant to judicial review of monetary policymaking.

First, the primary objective of the ECB's monetary policy is to maintain price stability.[4] The difference between the ECB's mandate and the Fed's broader one is the first and the most widely known point of contrast with the Fed.[5]

Second, the ECB is a supranational central bank and enjoys a higher degree of *de jure* independence than the Fed.[6] A detailed EU law framework underpins this independence, which enjoys primacy over the national laws of each Member State. This framework includes the prohibition on monetary financing, the non-bailout clause and the availability of judicial review before the CJEU.[7] Even though the Fed's legal framework is also detailed, it is entirely domestic.[8] It is part of a domestic system of checks and balances, and the executive, namely the president, may constrain the chair and the other board members in practice in the exercise of their functions.[9]

4 Art. 127 para. 1 TFEU provides: "The primary objective of the European System of Central Banks (hereinafter referred to as 'the ESCB') shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119."

5 We examine the Fed's mandate below at section E.

6 Notwithstanding the nominally superior legal protections of the ECB, certain rankings of central bank independence have found the ECB to be comparable in independence to, or marginally less independent than, the Fed. See, e.g., *Forschner/Weber*, Intereconomics 2014/1, pp. 45 et seq.

7 See Art. 123 (prohibition on monetary financing) and 125 (non-bailout clause) TFEU as well as Art. 35 para. 1 Statute of the ESCB/ECB (judicial review).

8 Key legislation on the Fed is codified at 12 United States Code (U.S.C.) Chapter 3 (Federal Reserve System).

9 By statute, members of the Board of Governors of the Fed can only be removed for "cause". Whether the president has authority to demote the Fed chair to a regular board member without cause is legally uncertain. See, e.g., *Conti-Brown,* What happens if Trump tries to fire Fed chair Jerome Powell?, available at: https://www.brookings.edu/articles/what-happens-if-trump-tries-to-fire-fed-chair-jerome-powell/ (10/1/2025). At the same time, while suggesting that he will not fire Chair *Jerome Powell,* President *Trump* has identified a variety of options he may pursue to pressure *Powell*, including naming a "shadow Fed chair" to serve alongside him. See *Hyatt,* Powell Defends Federal Reserve Independence, available at: https://www.investopedia.com/powell-defends-fed-independence-8756337 (10/1/2025).

Third, the Eurosystem[10] does not have a unified legal culture, and the legal culture within the Eurosystem may vary more than within the Fed system. The legal cultures of the various national central banks in the Euro area and the ECB may differ more than the legal cultures of the Board of Governors of the Federal Reserve Board and the Federal Reserve Bank of New York, a point to which we will return. Diverse legal cultures within the Euro area deserve special mention. For example, there is the question of to what extent the legal cultures of the ECB and the German *Bundesbank* differ and how these differences have played out in assessing legality internationally, for example in the context of the ECB defending asset purchase programmes against constitutional complaints before Germany's FCC. Different degrees of *de jure* independence of central banks could be an important contributing factor to these cultures.[11]

C. Judicial review of the ECB's asset purchase programs

It has been observed that "central banks are the first responders of economic policy. They hold the reins of the global economy."[12] The 2010s in Europe witnessed a trend towards more influence for executives at the national and EU level, including the Eurozone's independent central bank, and away from parliaments. This shift has been particularly visible in the crisis of the euro area from 2010 onwards and manifested itself in an increase in intergovernmental action, such as the establishment of the European Stability Mechanism by treaty outside the EU treaty framework.[13] A series of constitutional complaints and inter-institutional complaints (so-called *Organstreit* proceedings) before the German FCC arose as a reaction against this trend and amidst strident criticism by some groups of the ECB's asset purchase programmes. In particular, the ECB's critics in Germany and elsewhere alleged that the ECB's asset purchase programmes were for the benefit of crisis-hit debtor countries, such as Ireland and Greece, at the expense of "frugal" creditor countries, such as Germany and the Netherlands.

An early such intervention by the ECB was its programme on Outright Monetary Transactions (OMT), the announcement of which via press release in August

10 The Eurosystem is comprised of the ECB and the national central banks of Member States having the euro as their currency. Each national central bank is subject to its own domestic law, and disputes between the ECB and any entity "shall be decided by the competent national courts, save where jurisdiction has been conferred upon the Court of Justice of the European Union." See Art. 35 para. 2 Statute of the ESCB/ECB.

11 The influential index of measuring central bank independence from the early 1990s puts Germany, Switzerland, Austria in the top three spots in the ranking. The *Bundesbank*'s index of independence is 0.21 points higher than the Fed. See *Cukierman/Webb/Neyapti,* The World Bank Economic Review 1992/3, pp. 353–358.

12 *Tooze,* The Death of the Central Bank Myth, available at: https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/ (10/1/2025).

13 *Hinarejos,* Cambridge Law Journal 2013/2, pp. 237 et seq.

2012 was enough to calm financial markets.[14] Although the ECB had not bought a single bond under the OMT, the German FCC subjected the programme to detailed scrutiny all the same. On that occasion, the FCC granted the ECB a substantial margin of appreciation, albeit reluctantly, after the CJEU–in response to the German FCC's first ever request for a preliminary reference–had found that the OMT programme complied with EU law.[15]

The FCC was less sanguine when returning to the ECB's asset purchase programmes in *Weiss,* a case regarding the ECB's Public Sector Purchase Programme (PSPP) initiated in 2015. In *Weiss,* the FCC engaged in proportionality review of the German government's, parliament's and the *Bundesbank*'s conduct vis-à-vis the ECB, purporting to arrogate judicial review of the ECB from the CJEU and subjecting the ECB to *de facto* judicial review by a national high court.

The PSPP involved Eurosystem central banks purchasing government securities of euro area Member States on the secondary market. The complainants in *Weiss* challenged the PSPP, alleging that the decisions of the ECB that established the PSPP were *ultra vires* acts under the German Basic Law (*Grundgesetz*) and German constitutional organs, including the *Bundesbank*, could play no part in their implementation. They also alleged that the PSPP breached the prohibition of monetary financing in Art. 123 para. 1 TFEU[16] and the principle of conferral in Art. 5 para. 1 TEU[17] and were incompatible with German constitutional identity insofar as they limited the *Bundestag*'s overall budgetary responsibility.[18]

The FCC referred four questions to the CJEU for a preliminary ruling. In *Weiss*, the CJEU found in 2018 that the ECB had not exceeded its monetary policy mandate.[19] Applying a standard of manifest error, the CJEU found that the PSPP did not manifestly exceed what was necessary to achieve the ECB's mandate. As regards the proportionality of the PSPP, the CJEU highlighted the broad discretion the ESCB enjoys with respect to asset purchases, given their technical character and the complexity of forecasts. Disagreement about the goals and means of monetary policy was a normal feature of central banking. The PSPP was suitable for achieving its objective of lifting the rate of inflation closer to the ECB's target to maintain

14 *ECB*, Technical Features of Outright Monetary Transactions, available at: www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (10/1/2025).

15 German Federal Constitutional Court, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13.

16 Art. 123 para. 1 TFEU provides: "1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments."

17 Art. 5 para. 1 TEU provides: "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality."

18 For in-depth treatment, see *Dietz*.

19 ECJ, Case C-493/17, *Weiss*, judgment of 11 December 2018, ECLI:EU:C:2018:1000.

price stability in the euro area. The CJEU referred to the practices of other central banks and research on the effects of asset purchase programmes. Considering persistently low inflation and the lack of alternative monetary policy tools, the CJEU found that the PSPP did not manifestly exceed what was necessary to achieve the ECB's objective.

After the CJEU's judgement, the FCC ruled the complaints admissible only to the extent that they challenged the inaction of the German Federal Government and the *Bundestag*. The FCC regarded itself as generally bound by the CJEU on matters of EU law, but not bound in exceptional cases, such as *Weiss,* in which the CJEU's reasoning was "simply untenable", "not comprehensible" and "objectively arbitrary",[20] faulting the CJEU for not assessing the proportionality of the PSPP when delimiting the competences of the ECB and Member States. The FCC found the judgement of the CJEU and the PSPP programme itself to be *ultra vires*[21] and that ECB decisions have no legal effect on the *Bundesbank*, forbidding the *Bundesbank* from participating in the implementation of the PSPP unless the ECB's Governing Council adopted a new decision within three months including a proportionality analysis meeting the proportionality requirements of the FCC, not the CJEU, by that time.[22]

The ECB reacted unusually with a press release on the judgement, underscoring that the CJEU had already found the ECB within its mandate for price stability.[23] The CJEU, even more unusually, issued a press release as well, emphasizing that preliminary rulings are binding in the interest of the uniform application of EU law, that the Court has exclusive jurisdiction to rule on whether an act of the ECB is contrary to EU law to safeguard the unity of the EU legal order, that Member States are obliged to ensure that EU law takes full effect, and that it will not comment further on the matter.[24]

Five days after the judgement, *Ursula von der Leyen*, President of the European Commission, also issued a statement, underscoring that "the Union's monetary policy is a matter of exclusive competence", "EU law has primacy over national law", and CJEU rulings are final and "binding on all national courts". She also

20 German Federal Constitutional Court, Judgement of the Second Senate of 5 May 2020–2 BvR 859/15, paras. 117–118.

21 *Ibid.,* para. 119.

22 *Ibid.,* para. 235.

23 *ECB*, ECB Takes Note of German Federal Constitutional Court Ruling and Remains Fully Committed to its Mandate, available at: www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html (10/1/2025).

24 *CJEU*, Press Release Following the Judgment of the German Constitutional Court of 5 May 2020, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (10/1/2025).

raised infringement proceedings as a possible reaction to the judgement, which were subsequently instituted and closed.[25]

D. Weiss and the Consequences

As a practical matter, *Weiss* has had limited consequences to date. The ECB has expanded the proportionality analysis contained in its decisions, and the FCC has not upheld further claims against other ECB asset purchase programmes. Yet *Weiss* may still prove momentous. Given the structure of the Eurosystem, the German FCC's ruling amounted to judicial review of the ECB and the *Bundesbank* through the back door. Whereas other jurisdictions, such as the United States, to which we will return below, set a high bar for standing to demand judicial review of central banks, the FCC has set the bar solely at having the right to vote in Germany, permitting actions to be brought by any voter alleging an abstract loss of democratic sovereignty.[26] That the FCC has purported to adjudicate political, rather than legal, questions is clear from the astonishing numbers of "little attorney general" complainants in the home state of the *Bundesbank*, which accounts for approximately one quarter of the ECB's capital. The *Gauweiler*[27] case involved 11,692 unnamed complainants, the *Weiss* case 1,729.

Constitutional complaints before the German FCC and similar cases before other national courts could constrain the ambition, scale and modalities of asset purchase programmes and other ECB decisions in the future. Indeed, challenges remain pending before the FCC on the ECB's Next Generation EU programme (ended 2023)[28] and PEPP (ended 2024).[29] Although the resolution of these challenges to now-concluded programmes may have little practical significance, they stand as a reminder to, and potentially as pressure on, ECB decisionmakers to bear in mind threats of intervention by Member States. At a policy level, key questions include whether such review improves decision-making by the ECB and whether such judicial review is necessary for democratic societies to improve the ECB's

25 *European Commission*, Statement by President VON DER LEYEN, available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_846 (10/1/2025). The Commission brought infringement proceedings against the Federal Republic of Germany on 9 June 2021, infringement case number INFR (2021) 2114, which were closed on 2 December 2021. The response provided by the federal government of Germany to the Commission on 3 August 2021 is available at: https://fragdenstaat.de/anfrage/korrespondenz-zwischen-europaischer-kommission-und-der-bundesrepublik-deutschland-im-vertragsverletzungsverfahren-az-infr20212114/668051/anhang/doc2DEreplytoLFN_de.pdf (10/1/2025). The German federal government notes in section 1 of its response that the FCC rejected further applications brought in 2021 for execution of *Weiss* and has permitted the *Bundesbank* to continue supporting the ECB without restriction.

26 For a critical perspective, see *Wiederin,* Österreichische Juristen-Zeitung 2010/48, pp. 398–406.

27 ECJ, Case C-62/15, *Gauweiler*, judgement of 16 June 2015, ECLI:EU:C:2015:400.

28 German Federal Constitutional Court, 2 BvR 547/21.

29 German Federal Constitutional Court, 2 BvR 547/21 (Next Generation EU) and 2 BvR 420/21 (PEPP).

accountability. The existing survey evidence does not suggest that the cases before the FCC in Germany have improved trust in the ECB and belief in its legitimacy among the European public.[30]

Judicial review by national courts could undermine the ECB's independence and its ability to act as the monetary policy maker for the entire Eurozone, particularly if national courts carry out intrusive proportionality review, as opposed to the CJEU's highly deferential standard of review of "manifest error" in *Weiss*. The CJEU effectively applied a rational basis review, highlighting the broad discretion the ESCB enjoys with respect to asset purchases, given their technical character and the complexity of forecasts. The FCC opted for an intermediate standard of review, undertaking the three-stage proportionality analysis established in its constitutional rights adjudication and taking issue with the CJEU's approach for not balancing the economic effects of the PSPP against the expected benefits of the monetary policy objectives defined by the ECB. One possibility for future judicial review of the ECB could be that the CJEU will feel pressured to apply a stricter standard of review than they would otherwise find legally appropriate, to avoid conflict with the FCC and other national courts. This outcome would be problematic in respect of the independence of central banks and the independence of courts.

At times, the mandate of a central bank can require it to act in a manner that may seem disproportionate, doing, in *Mario Draghi*'s phrase, "whatever it takes" to protect the integrity of the financial system.[31] Countermajoritarian institution–courts[32]–ought to accord decisions of another countermajoritarian institution greater deference than a non-countermajoritarian institution that enjoys little or no independence from the executive or legislative branches. It should be careful not to substitute its own assessment that an expert decision to fulfil the central bank's mandate was purportedly disproportionate

The German FCC's approach is an outlier in respect of the judicial review of leading central banks. A more mainstream approach is that taken to judicial review in respect of the Fed in the United States, to which we will turn now.

30 Data gathered by *Dreher*, ECB Economic Bulletin 2024/3, pp. 79 et seq., shows that trust levels in the ECB had already recovered after the Euro area crisis that reached its crescendo in 2011-12 and prior to the FCC's judgment in *Weiss*. However, trust remains at a lower level than during the first decade of European Monetary Union. The survey does not disaggregate results at the level of individual Member States, and thus does not show how the trust level has evolved specifically in Germany over time (which is the trust that the FCC is most likely to influence).

31 On the impact of this pronouncement, see *Waibel,* European Journal of International Law 2020/1, pp. 345–352.

32 There is a large literature on the countermajoritarian underpinning of judicial review, see, e.g., *Bickel,* pp. 16–17; *Shugerman,* Harvard Law Review 2010/5, pp. 1061–1151; *Barroso,* The American Journal of Comparative Law 2019/1, pp. 109–143. By contrast, central banks are not as regularly cast as countermajoritarian institutions. Central bank independence serves the objective of freeing monetary policymakers from the short-term concerns of politicians. *Tooze,* The Death of the Central Bank Myth, available at: https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/ (10/1/2025).

E. Judicial review of the Fed's dual mandate

As discussed, the ECB's single mandate of price stability has been subjected to detailed scrutiny by courts, especially by the CJEU but also by national courts such as the FCC. By contrast, the Fed's dual mandate of price stability and maximum employment has been subjected to very limited judicial examination. The original Federal Reserve Act of 1913 did not mention monetary policy or provide criteria for setting discount rates. Instead, the Act required the Reserve Banks to maintain gold reserves equal to a percentage of outstanding note and deposit liabilities, which was intended to limit the amount of currency and loans the Fed could issue and thus limit inflation.[33] The current statutory mandate of the Fed dates from 1977 and is contained in Section 2A of the Federal Reserve Act:

> "The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, *so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."*[34]

The insertion of "maximum employment" into the Fed's mandate by the US Congress in 1977 coincided with stagflation and was soon followed by high interest rates under Fed chair *Paul Volcker*, who deflected congressional criticism that he was ignoring the employment component of the Fed's mandate. Just as members of Congress have failed to convince the Fed to prioritize employment, in spite of a statutory text in which "maximum employment" comes before "stable prices", so have members of Congress failed in legislative initiatives to take employment back out of the Fed's mandate.[35]

F. Judicial review of the Fed's monetary policy

The Fed has been subject to judicial challenges in a variety of ways, including in respect of its functions as a (i) regulator, (ii) enforcer and (iii) lender, as well as in respect of constitutional challenges to its agency structure, but to date there has been no significant judicial review of the Fed as a monetary policymaker.

US courts have applied different standards of review and deference depending on the function in question and whether the challenge relates to a specific case or fundamental questions of policy and structure. On broad questions, US courts typically treat the Fed as uniquely independent and unreviewable, a technocratic

33 See generally *Wheelock,* Overview: The History of the Federal Reserve 1913 to today, Federal Reserve History, available at: https://www.federalreservehistory.org/essays/federal-reserve-history (10/1/2025).

34 12 U.S.C. § 225a (emphasis added).

35 *Steelman,* The Federal Reserve's "Dual Mandate": The Evolution of an Idea, Richmond Fed Economic Brief, December 2011, EB11-12, available at: https://www.richmondfed.org/publications/research/economic_brief/2011/eb_11-12 (10/1/2025).

expert agency that requires independence both from the executive branch and from the judicial branch, given the slowness of the courts and judges' lack of expert training.[36]

Monetary policy is doubtless among the most fundamental matters for central banks. To date the monetary policy of the Fed has not been subject to significant judicial challenges, and those which have been brought have been unsuccessful. The leading case on judicial review of the Fed has long been *Raichle v. Federal Reserve Bank of New York*,[37] denying judicial review of monetary policy. The plaintiff *Raichle* alleged that he was harmed by the Fed's tight money supply, namely "a course of conduct [...] which has had for its object and purpose an arbitrary reduction in the volume of collateral or brokers' loans." *Raichle* invoked the 1921 Supreme Court decision of *American Bank & Trust Co. v. Federal Reserve Bank.*[38] In that case, state banks chose to stay outside the Federal Reserve system to charge fees higher than those permitted by the Fed. The plaintiff alleged that the Fed was actively trying to run it out of business, or in any event force it to join the Federal Reserve system, by "accumulating checks of country banks and presenting them in large quantities"[39] that potentially exceeded the small banks' cash reserves. Justice *Holmes* wrote, "We do not need aid from the debates upon the statute under which the Reserve Banks exist to assume that the United States did not intend by that statute to sanction this sort of warfare upon legitimate creations of the states."

In 1929, eight years later, Judge *Augustus Hand* distinguished the facts of *Raichle* from those of *American Bank & Trust:*

> "In the case at bar the 'principles of policy' point the other way. It would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review. Indeed, the correction of discount rates by judicial decree seems almost grotesque, when we remember that conditions in the money market often change from hour to hour, and the disease would ordinarily be over long before a judicial diagnosis could be made."[40]

This 95-year-old appeals court decision, not reviewed by the Supreme Court, generally still reflects the state of the law today. US courts continue to regard judicial interference in monetary policy as bad public policy, and they have consistently avoided intervening, including in response to legal actions brought by members of Congress, on grounds including lack of standing and "equitable discretion to dismiss". One appeals court wrote that "if a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action."[41]

36 *Ostrowski,* Yale Law Journal 2021/2, pp. 370 et seq.
37 *Raichle v. Federal Reserve Bank of New York*, 34 F.2d 910 (2d Cir. 1929).
38 *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350 (1921).
39 As glossed in *Raichle v. Federal Reserve Bank of New York,* 34 F.2d 915 (2d Cir. 1929).
40 *Ibid*.
41 *Melcher v. Federal Open Market Committee*, 836 F.2d 561, 565 (D.C. Cir. 1987).

G. Legal standards applied to judicial review of the Fed

In sum, as one scholar has written, the US "judiciary is simply disengaged from the project of oversight of the" Federal Open Market Committee. This body sets interest rates at the Fed.[42] The FOMC is subject to judicial review only theoretically. The FOMC must in theory adhere to rationality review under the Administrative Procedure Act. The orders issued by the Committee at its eight annual meetings do not fit within the traditional concepts of administrative rulemaking and adjudication. The orders amount to guidance to the Fed's open market trading desks as to what sort of federal funds rate they should target. Potentially these orders are "informal adjudications" under the APA, but courts simply do not review the orders and defer instead to the agency's discretion.

H. Limitations on decision-making and discretion in monetary policy and open market transactions

As we have noted, US courts do not play a significant role in guiding or influencing the decision-making and discretion of US government actors in monetary policy and open market transactions. Influence comes from other sources, including the legislature and institutional legal culture and custom.

1. Legislative influence

The US Congress has kept a close eye on the Fed throughout its history, and multiple members of Congress have been outspoken critics of US monetary policy and market interventions. Congress regularly receives testimony from officials from the Fed and the Treasury, and it also intervenes in policy. One example involving the US Treasury, rather than the Fed, comes from the transatlantic financial crisis in 2007-2008, when the Treasury used its Exchange Stabilization Fund to prop up struggling money-market funds.[43] The Congress promptly passed a law the same year to prohibit the Treasury from establishing guarantee programs for the money market fund industry in the future. This prohibition was then suspended by the so-called CARES Act, the Coronavirus Aid, Relief, and Economic Security Act*Donald Trump*[44] That same act also authorized the Fed to lend to non-financial businesses in the real economy. This power is not clearly provided for in the Federal Reserve Act itself.[45]

42 *Zaring,* Law and Contemporary Problems 2015/78, pp. 157 et seq.

43 See *Humpage,* A New Role for the Exchange Stabilization Fund, available at: https://www.clevelandfed.org/-/media/project/clevelandfedtenant/clevelandfedsite/publications/economic-commentary/2008/ec-20080801-a-new-role/ec-20080801-a-new-role-for-the-exchange-stabilization-fund-pdf.pdf (10/1/2025).

44 15 U.S.C. Chapter 116.

45 *Menand,* Stanford Journal of Law, Business & Finance 2021/26, pp. 295, 332.

2. Institutional legal culture

Beyond the role of Congress in passing laws giving instructions to the Fed, it is worth paying attention to the work of the Fed lawyers who interpret these legislative instructions. There are long legal traditions at different levels of the Fed. There is the Legal Division of the Federal Reserve Board in Washington as well as the Legal & Compliance Group of the Federal Reserve Bank of New York. These specialist lawyers have been elaborating legal guidance and conclusions on US banking laws for over a century.

Although these legal views are for the most part not public, this has not prevented a good deal having been written on these views and the Fed lawyers who prepare them. One author on the Fed, *Peter Conti-Brown*, argues that, after the 2008 global financial crisis,

> "the Fed's lawyers were responsible not just for interpreting law, but also making policy. And they do so behind a veil of secrecy that makes it difficult, even impossible to evaluate their work. [...] [B]ecause the Fed's lawyers are the staff primarily in charge of overseeing [legal] implementation, the ideologies and values of the Fed's chief lawyer is *[sic]* highly relevant to understanding how the Fed will define the space within which it makes its policies."[46]

In his book, *Conti-Brown* is highly critical of *Scott Alvarez*, who spent a total of 36 years as a Fed lawyer and whose tenure as general counsel of the Federal Reserve Board from 2004 to 2017 included the 2008 global financial crisis. *Conti-Brown* seeks to link *Alvarez* to banking deregulation, which he ties to *Alvarez's* legal interpretations, and also to refusing to bail out *Lehman* Brothers in 2008, since Section 13 para. 3 of the Federal Reserve Act authorizes bailout lending only if the borrower posts collateral "to the satisfaction of the Federal reserve bank". However, practicing lawyers outside of academia are instructed by their clients to make possible the outcomes the clients want. It stands to reason that the "ideologies and values of the Fed's chief lawyer" will be more or less the same as the "ideologies and values" of the Fed governors and staff. The Fed bankers would seem to have stipulated to their lawyers that Lehman Brothers lacked collateral satisfactory to the Fed and thus did not meet the legal requirements for a bailout. They then blamed their lawyers for the legal outcome they had just chosen.

The influence of the general counsel of the Federal Reserve Board should also not be overstated. In December 2023, the Fed responded to a public records request by providing limited excerpts from its "Doomsday Book", a compendium of internal legal authorities on the Fed's powers during financial crises. *Imre Kuvvet*, the finance professor who obtained the Doomsday Book in 2023, notes that the Doomsday Book "exposes an apparent split in perspective between the New York Fed and the Fed Board of Governors", in particular on the Fed's emergency lending

46 *Conti-Brown*.

and open market operations under the Federal Reserve Act.[47] The Federal Reserve Bank of New York supports a more expansive reading, including basing legal authorities on "practice" without clear statutory authority; the Federal Reserve Board is more conservative and cautious. The New York Fed's flexible position has tended to prevail during financial crises. *Kuvvet* writes:

> "While this proactive stance might be practical in times of crisis, the board's cautious approach seeks to prevent potential overreach to maintain the integrity of the Fed's mandate. [...] With these and other disclosures, we can understand why the Fed has avoided transparency: It isn't able to speak with a single voice during emergencies."[48]

In sum, there is a voluminous body of institutional legal guidance on the powers of the Fed—or rather there are voluminous bodies of legal guidance from multiple institutions within the Fed, including the Federal Reserve Board and the Federal Reserve Bank of New York—and this material remains largely secret. Since *Conti-Brown* published his book, evidence has emerged suggesting that many leading views are coming from lawyers at the New York Fed, not the Federal Reserve Board. Ultimately the Fed's own views on its legal authority remain a black box. Authors who suggest otherwise should be taken with a grain of salt, bearing in mind that they may overemphasize, positively or negatively, the importance of individuals who have given interviews.

I. The road ahead for judicial review of the Fed and the ECB

Until now we have described the history and the status quo of the legal framework governing the actions of the Fed, including the near-total absence of judicial review of monetary policy and asset purchase programs. The future, however, may look different from the past. In May 2024, *Daniel Tarullo*, a former Fed governor and now a professor at Harvard Law School, published a long article on "The Federal Reserve and the Constitution", noting that the US Supreme Court is increasingly restricting the authority and independence of federal agencies and that the Court's reasoning could result in the structure or the mandate of the Fed (in respect of full employment) being declared unconstitutional. *Tarullo* discusses strategies available to the Court to avoid such an outcome while still permitting the Court to shape its jurisprudence according to its conservative political philosophy.[49]

Then in June and July 2024, the US Supreme Court handed down three major decisions. In the twin decisions *Loper Bright Enterprises v. Raimondo*[50] and *Relentless, Inc. v. Department of Commerce,*[51] the Court struck down the so-called *Chevron*

47 *Kuvvet,* Sun Shines on Fed 'Doomsday Book', available at: https://www.wsj.com/articles/sun-shines-on-new-york-fed-doomsday-book-foia-central-banking-financial-crisis-13d41d51 (10/1/2025) refers "particularly [to] Sections 13(3) and 14(b)(1)" [*sic;* presumably 14(2)(b)(1) is meant].

48 *Ibid.*

49 *Tarullo,* Southern California Law Review 2024/1, pp. 1 et seq.

50 *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

51 *Relentless, Inc. v. Department of Commerce,* et al., 603 US __ (2024).

deference, the basis of deference to administrative agency decisions in US law, which has also provided the doctrinal basis for deference to the Fed since being decided in 1984. In dissent, Justice *Elena Kagan* predicted that the decisions "will cause a massive shock to the legal system." A week later, in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System,*[52] the Supreme Court changed the limitations period for challenging rules made by administrative agencies—indeed, rules made by the Fed—from six years from the date of rulemaking to six years from the date on which any rule injures any litigant. In dissent, Justice *Jackson* wrote,

> "The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses."

With these three decisions in two weeks, the US Supreme Court significantly expanded the scope of challenges to agency action it will hear and the period in which it will hear them. We must consider whether *Raichle* and its progeny are still good law, and if not what kinds of demands for judicial review of Fed policies and actions may be forthcoming. It is conceivable that litigants may wish to repeat *Raichle* and challenge interest rates. Banks may consider suing to demand Fed bailouts, seeking to have judges second-guess the requirement in Section 13(3) to post collateral "to the satisfaction of the Federal reserve bank". Before this June, it was clear that any such determination by the Fed would enjoy deference from the courts. The Court's recent decisions have cast doubt on whether this continues to apply.

Lastly, there are the structural challenges to the Fed. Scholars and politicians have long debated whether the US Constitution permits a central bank at all, whether the Fed's mandate constitutes an unconstitutionally broad delegation by Congress, whether the Fed, with its mixed public-private character, is in fact an unconstitutional delegation of government power to a private entity, and whether the appointments clause of the Constitution requires the President to have greater power over the appointment and in particular the removal of members of the Federal Open Market Committee. A decade ago, *David Zaring* wrote:

> "Because of what I would characterize as the 'settled expectations' check on the logic of constitutional law, the FOMC is probably too old and too important to be vulnerable to life-threatening constitutional challenge. It has been accepted in almost all corners of the Washington establishment; the FOMC has been playing a surpassingly important monetary policy role since passage of the Banking Act of 1933. It is difficult to raise constitutional questions now about something that has been part of the furniture of government for so long."[53]

52 *Corner Post, Inc. v. Board of Governors of the Federal Reserve System,* 603 U.S. 799 (2024).

53 *Zaring,* Law and Contemporary Problems 2015/78, p. 181.

This passage is from 2015. With new justices on the Supreme Court, a new administration and new and different doctrines in 2025, the judicial future of the Fed may be open to question. As we have adumbrated, expanded judicial review and greater legal uncertainty may await the ECB as well. Although the CJEU has arguably shown a more technocratic and consistent approach to jurisprudence than the US Supreme Court in recent decades, the FCC's decision in *Weiss* showed the willingness of the highest national court in the EU's largest economy to diverge from the CJEU's authoritative interpretation of EU law, to require national institutions to comply with its own interpretation and to pressure the ECB to follow its interpretation. *Weiss* is unlikely to be the last word on judicial review of the ECB, nor the FCC the last national constitutional court to (purport to) have its say.

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