Bringing Bailouts to Court: Applying Previously Unrealized Parallels Between Finance and Patents to Solve Economic Crises

Timothy Li
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Timothy Q. Li*

Abstract

This Note argues that the Dodd-Frank Act will not prevent future government bailouts of failing banks, because Congress already promised and failed to end bank bailouts only twenty years earlier in response to the Savings and Loans Crisis. Rather than rely on extra-judicial remedies like the Orderly Liquidation Authority, banks should be brought to court in expedited finance trials subject to appeal to the Federal Circuit. One possible model could be expedited patent trials at the U.S. International Trade Commission. In fact, many previously unrealized parallels exist between finance and patents. Both require high technical expertise, benefit from nationwide jurisdiction, and depend on speedy trial and appellate resolutions. Even if this proposed solution does not guarantee the end of bailouts, it does compel regulators to argue for each bailout in a formal hearing with a public record before an impartial decision-maker. Alternative strategies to end bailouts, by contrast, do not address moral hazard, regulatory discretion, and the global nature of finance.

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Introduction

When Lehman Brothers, Inc. (“Lehman”) filed for bankruptcy protection on September 15, 2008, it held more than $600 billion in assets, making its filing the largest bankruptcy in U.S. history.

Three days after Lehman declared bankruptcy, Lehman sold its investment banking business to Barclays Capital (“Barclays”). Lehman then sold its Europe, Middle East, and Asia business to Nomura, a large Japanese brokerage firm. By September 29, Lehman had also sold its investment management business. Lehman illustrated that bankruptcy could facilitate other financial institutions’ rapid acquisition of viable assets. Yet despite the positive economic benefits provided by bankruptcy, regulators still resorted to mass bailouts of large financial institutions during the 2008 Financial Crisis.

These bailouts cost the U.S. government a “staggering sum.” Although the bailouts took a variety of forms, “[b]rand-name financial firms like Merrill Lynch, Lehman Brothers, Bear Stearns, Citibank, Bank of America, AIG, Fannie Mae, and Freddie Mac—all once highly

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5 See id. at 30.
6 See id.
7 See id. at 28.
8 See Jonathan R. Macey & James P. Holdcroft, Jr., Failure is an Option: An Ersatz-Antitrust Approach to Financial Regulation, 120 YALE L.J. 1368, 1373 (2011) (“Despite serious prior efforts to refrain from using taxpayer funds to bail out companies like AIG, Citigroup, and Goldman Sachs, the political fallout from the failures of these or other financial behemoths was deemed too great for bailouts to be avoided in time of crisis.”).
regarded—either failed or required extraordinary assistance to stay afloat.”

In October 2008, the Troubled Assets Relief Program committed $700 billion to national banks despite a national debt exceeding $10 trillion. This debt increased to $15.4 trillion by January 31, 2012. In 2011, partly in response to the increase in U.S. debt, Standard & Poor’s downgraded the U.S. credit rating for the first time in U.S. history. The staggering costs that mass bailouts impose on U.S. taxpayers prove that such bailouts are not sustainable, even if some commentators have argued that the bailouts were necessary due to a systemic crisis.

In 2010, Congress promised to end bailouts by passing the Dodd-Frank Wall Street Reform & Consumer Protection Act (“Dodd-Frank”), a comprehensive reform to address the systemic risk posed by large financial institutions. Dodd-Frank created a Financial Stability Oversight Council and an Orderly Liquidation Authority to take over large financial institutions close to default, and liquidate them. According to Congress, Dodd-Frank was the “biggest overhaul of financial regulation since the Great Depression.”

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10 Macey & Holdcroft, supra note 8, at 1376.
14 See MONTHLY STATEMENT OF THE PUBLIC DEBT OF THE UNITED STATES: JANUARY 31, 2012, WWW.TREASURYDIRECT.GOV.
15 See United States of America Long-Term Rating Lowered to ‘AA+’ on Political Risks and Rising Debt Burden; Outlook Negative, STANDARD & POOR’S, August 5, 2011.
16 For example, Congress estimates that just the cost of bailing out Fannie Mae and Freddie Mac alone has cost U.S. taxpayers $317 billion. See CONGRESSIONAL BUDGET OFF., THE BUDGETARY COST OF FANNIE MAE AND FREDDIE MAC AND OPTIONS FOR THE FUTURE FEDERAL ROLE IN THE SECONDARY MORTGAGE MARKET 11 (2011).
19 Id.
20 See infra Part I.B.
declared that Dodd-Frank brought clarity to regulators “overwhelmed by the speed, scope, and sophistication of a 21st century global economy.”

This Note argues, however, that Dodd-Frank will not prevent future bailouts, because Congress already promised and failed to end bank bailouts only twenty years earlier in response to the Savings and Loans Crisis. Regulators did not enforce the rules when banks began to fail again en masse in the 2008 Financial Crisis. Dodd-Frank provides no guarantee that regulators will enforce rules to end bailouts during the next financial crisis. Furthermore, even though regulators know that liquidating banks costs money because the Federal Deposit Insurance Corporation charges fees to its member banks, Dodd-Frank fails to impose similar fees on large banks to cover the costs of liquidations.

This Note proposes that financial institutions be brought to court, in expedited trials before an administrative law judge, with a right to appeal to the Federal Circuit. These expedited finance trials should be modeled on expedited patent trials before the U.S. International Trade Commission. In fact, many previously unrealized similarities exist between finance and patents: both require high technical expertise, benefit from nationwide jurisdiction, and depend on speedy trial and appellate resolutions. Even if this solution does not

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22 See Off. of the Press Secretary, Remarks by the President on 21st Century Financial Regulatory Reform (2009) [hereinafter President’s Remarks].
23 During the Savings and Loans Crisis, one thousand banks failed, costing U.S. taxpayers $123.8 billion. See infra Part II.B.
24 See infra Part II.B.
25 See Macey & Holdcroft, supra note 8, at 1389 (“While the Act gives regulators new resolution authority over large financial firms and encourages regulators to take prompt corrective action against insolvent firms, regulators have received similar powers before and opted to continue bailouts rather than impose resolution strategies that shut down insolvent firms.”).
26 See infra Part II.
27 Jurisdiction would be limited to that of the Orderly Liquidation Authority.
28 See infra Part III.C.1.
guarantee the end of bailouts of financial institutions, it does compel regulators to argue for each bailout in a formal hearing with a public record before an impartial decision-maker.\textsuperscript{29}

Part I of this Note provides an overview of U.S. banking, previous U.S. financial crises, the 2008 Financial Crisis, and the Dodd-Frank Act. Part II argues that Dodd-Frank will not prevent bailouts because it provides no guarantee that regulators will enforce the rules against bailouts. Part III argues that previously unrealized parallels between finance and patents include high technical expertise, reliance on nationwide jurisdiction, and reliance on speed. Part IV proposes that financial institutions be subject to an expedited trial before an administrative law judge with appellate review before the Federal Circuit. Part V addresses counterarguments to the proposed framework. This Note then concludes by arguing that alternative strategies to address bailouts do not resolve significant issues such as moral hazard and regulatory capture.

I. National Banks, Financial Crises, And the Dodd-Frank Act

Financial institutions have significantly affected systemic risk throughout United States history. Through Dodd-Frank, the national government committed itself even more to the viability of large financial institutions.\textsuperscript{30} Even before Dodd-Frank, the national government has had a long history of taking a special interest in national banks because banking as a whole affects systemic risk and the national economy.\textsuperscript{31}

A. One Financial Crisis After Another: A Snapshot of U.S. History

Banking has been associated with financial crises ever since President George Washington signed the charter for the first Bank of the United States (“National Bank”) in 1791.\textsuperscript{32} The first National Bank faced significant opposition,\textsuperscript{33} and it ceased after its twenty-year

\textsuperscript{29} See infra Part IV.
\textsuperscript{30} See infra Part I.B.
\textsuperscript{31} See infra Part I.A.
\textsuperscript{32} Act of Feb. 25, 1791, ch. 10, SS 1–3, 9–11, 1 Stat. 191.
term expired.\textsuperscript{34} Severe financial crises during the War of 1812, however, led to the creation of the second National Bank in 1816.\textsuperscript{35} The second National Bank continued to remain controversial, and despite a Supreme Court opinion upholding the National Bank’s constitutionality,\textsuperscript{36} President Andrew Jackson vetoed its rechartering bill in 1832.\textsuperscript{37}

Financial panics continued to affect the United States throughout the nineteenth century. During the U.S. Civil War, yet another crisis led to the passage of the National Currency Act of 1863 (“NCA”),\textsuperscript{38} later refined as the National Bank Act of 1864 (“NBA”).\textsuperscript{39} The NCA created the Office of the Comptroller of the Currency (“OCC”) and a system “of ‘national’ banks with authority to issue bank notes secured by government bonds.”\textsuperscript{40} The NBA provided for a uniform national currency and gave the OCC regulatory power over the banking system.\textsuperscript{41} But there was still no central bank to regulate U.S. monetary policy, or prevent financial panics in 1873, 1884, 1890, 1893, and 1907.\textsuperscript{42}

1. \textbf{The Federal Reserve System, the Federal Reserve Board, and the Great Depression}

In 1913, Congress passed the Federal Reserve Act,\textsuperscript{43} which required all national banks to become members of the Federal Reserve System, with membership optional for state banks.\textsuperscript{44}

The Federal Reserve System “blended decentralization, private ownership, and government

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\textsuperscript{34} See Jerry L. Mashaw, Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829-1861, 117 YALE L.J. 1568, 1587 (2008).

\textsuperscript{35} See id.

\textsuperscript{36} See McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

\textsuperscript{37} See Mashaw, supra note 34, at 1587.

\textsuperscript{38} National Currency Act, ch. 58, 12 Stat. 665 (1863).


\textsuperscript{42} See id.


\textsuperscript{44} See CARNELL ET AL., supra note 41, at 13.
\end{flushleft}
control.” The newly created Federal Reserve Board (the “Fed”), appointed by the U.S. President and confirmed by the Senate, would supervise member banks and establish U.S. monetary policy.

Yet only twenty years later, during the Great Depression, “[t]he unimaginable happened as President Franklin D. Roosevelt took office on March 4, 1933: the banking system collapsed.” President Roosevelt declared a nationwide bank holiday, from which more than 2000 banks never reopened. In response, Congress passed the Banking Act of 1933, which separated commercial and investment banking, created federal deposit insurance, limited interest rates banks could pay on deposits, and began the federal regulation of bank holding companies. The newly created Federal Deposit Insurance Corporation (“FDIC”) would supervise and provide the federal deposit insurance.

2. The Federal Deposit Insurance Corporation

Although the FDIC insurance system would be revised and refined in subsequent years, the basic concept of FDIC insurance remains the same today. Banks are subject to takeover by the FDIC rather than being allowed to declare bankruptcy. The FDIC prevents deposit consumers from panicking and withdrawing their funds from a bank that is facing imminent

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45 See CARNELL ET AL., supra note 41, at 13.
46 See CARNELL ET AL., supra note 41, at 13.
47 See CARNELL ET AL., supra note 41, at 17.
48 See CARNELL ET AL., supra note 41, at 17.
50 See CARNELL ET AL., supra note 41, at 18.
insolvency. The FDIC achieves this goal by promising deposit customers that, even if a bank fails, customer deposits are still safe up to $250,000.

Through FDIC insurance, the government assumed an even greater interest in the sustainability of each bank because each unanticipated bank failure would cost the FDIC insurance fund money. Banks were now quasi-public entities not only because bank failures could create financial panic, but also because the government became each bank’s insurer of last resort. Jonathan R. Macey, Professor of Corporate and Securities Law at Yale Law School, argues that recent actions of the FDIC and the Fed have only increased the public’s “assumption that the government is responsible not only for managing financial crises but also for preventing financial crises from occurring in the first place.”

3. Moral Hazard and Bank Bailouts

This quasi-public status of banks due to FDIC insurance has also led to increased moral hazard. Moral hazard occurs when a bank benefits from taking on increased risk without paying for its costs. If a bank makes a bet on a risky loan and the loan pays off, the bank collects the profits and pays bonuses to its managers. But if the bet on the risky loan fails, the bank does not pay for the cost of the bet because it can rely on the government for a bailout from the FDIC insurance fund. FDIC insurance is thus an “explicit federal guaranty” underwriting

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55 Initial insurance coverage on January 1, 1934 was $2,500, but increased to $100,000 by 1980. See FDIC, supra note 52, at 67–68. Dodd-Frank increased FDIC insurance to $250,000. See Dodd-Frank Act, Pub. L. No. 111-203 § 335(a), 124 Stat. at 1540 (2010).
56 See Boyack, supra note 54, at 1519.
57 See Macey & Holdcroft, supra note 8, at 1376.
58 See Macey & Holdcroft, supra note 8, at 1376.
59 For an overview of moral hazard, see Boyack, supra note 54, at 1518–20.
60 See Boyack, supra note 54, at 1520.
61 See Boyack, supra note 54, at 1519.
62 See Boyack, supra note 54, at 1519.
banks and spreading the “costs of bank failures over the entire public.” Moral hazard is “implicit in governmental guaranties and underwriting, whether this underwriting results from federal conservatorship, government insurance, or [a] direct bailout.”

Moral hazard can also occur if a bank makes any other kind of risky bet, including credit default swaps, repurchase agreements (“repos”), or other derivatives. A credit default swap resembles insurance because one party promises a second party that it will pay the second party if a third party defaults. A repo is a transaction where one party sells securities to a second party and promises to buy the securities back in the future. Derivatives are financial contracts with a value determined by the performance of another security—e.g., a bond, commodity, or index. Derivatives are also a catchall term that includes any contracts where counterparties take opposite positions on whether a future event will take place—if the event takes place, one counterparty wins, but if the event does not take place, the other counterparty wins. Derivatives counterparties can include individuals, corporations, banks, or other financial institutions.

4. The 2008 Financial Crisis: Bank Bailouts En Masse

Many commentators argue that the 2008 Financial Crisis retroactively extended FDIC-like insurance to nonbank financial institutions in the form of bailouts. In 2008, when the Bear Stearns Companies, Inc. (“Bear Stearns”) became insolvent, it had been the fifth largest
investment bank and had an exposure of $100 billion in overnight repos. These repos became “de facto long-term financing” because they were typically rolled over each day. Financing in this form was common and “repeated day after day for some thirty years. . . . Goldman Sachs, Morgan Stanley, Merrill Lynch, Lehman Brothers, and Bear Stearns . . . w[ere] always just twenty-four hours away from a funding crisis.” Eventually, massive losses at Bear Stearns caused its investors to lose confidence and demand more collateral, raising the bank’s borrowing costs in a vicious cycle. Bear Stearns faced a crisis when it could not roll over the overnight loans.

Bear Stearns received a bailout because regulators feared a domino effect, where the failure of Bear Stearns would lead the next weakest bank to fail, and so on down the line. Yet the Bear Stearns bailout did not stem the subsequent failures of Lehman, Merrill Lynch & Co., American International Group (“AIG”), Citigroup Inc., and many others. Even though regulators did not bail out Lehman, they immediately bailed out AIG only one day after Lehman declared bankruptcy. In effect, bailouts became a “self-fulfilling prophecy” because investors expected bailouts to occur and planned as if they would occur. Professor Macey argues that these “expectations” and “lack of planning by bank managers” made it “impossible for

73 Id. (internal quotation marks omitted).
74 See Perdue, supra note 71, at 306.
75 See Roe, supra note 72, at 551.
76 See Roe, supra note 72, at 565.
77 See Roe, supra note 72, at 565.
80 See Macey & Holdcroft, supra note 8, at 1376.
81 See Andrews, supra note 9.
82 See Macey & Holdcroft, supra note 8, at 1376.
politicians to decline to respond to crises with bailouts.” These bailouts would cost the U.S. government a staggering sum, contributing to a national debt that now exceeds $15 trillion.

Thus, even if some commentators have argued that the bank bailouts were a necessary response, the staggering costs that those bailouts imposed on U.S. taxpayers prove that such bailouts are not sustainable.

B. The Government Promise: No More Bailouts

After the 2008 Financial Crisis and its mass bailouts, the government promised that there would be “no more bailouts.” Congress passed the Dodd-Frank Act, a comprehensive reform to address the systemic risk posed by financial institutions. Dodd-Frank created the Financial Stability Oversight Council (“FSOC”) with ten voting members and an Orderly Liquidation Authority to wind down Too-Big-to-Fail (“TBTF”) institutions.

The objective of the FSOC is to identify systemic risk in the marketplace and ensure that appropriate safeguards prevent that risk from causing systemic failure. Systemic risk includes situations where “a disruption to the functioning of a financial market utility or the conduct of a payment, clearing, or settlement activity could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the

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83 See Macey & Holdcroft, supra note 8, at 1376.
84 See supra notes 9–15 and accompanying text.
85 See supra notes 16–17 and accompanying text.
88 Id.
89 See Paul L. Lee, The Dodd-Frank Act Orderly Liquidation Authority: A Preliminary Analysis and Critique Part I, 128 BANKING L.J. 771, 775 n.22 (2011) (voting members include the Treasury Secretary, the Fed chairman, the FDIC chairman, the SEC chairman, the Commodities Futures Trading Commission chairman, the National Credit Union Administrative Board chairman, the comptroller of the currency, the Federal Housing Finance Agency director, the Consumer Financial Protection Bureau director, and a final member with insurance expertise who is appointed by the President with the advice and consent of the senate) (citing Dodd-Frank Act § 111(b)(1)–(2)).
90 See SKEEL, supra note 4, at 79.
91 See Dodd-Frank Act § 803(9).
stability of the financial system.” The FSOC identifies systemically important financial institutions (“SIFIs”) and works in tandem with the Fed to address the risk SIFIs pose.

When a SIFI is close to default, the Orderly Liquidation Authority allows government regulators to bypass Chapter 11 bankruptcy proceedings and systematically unwind the SIFI. To start the process, the Treasury Secretary proposes a takeover of the SIFI with the concurrence of a two-thirds vote from the Fed and the FDIC. After receiving the required votes, the Treasury Secretary files a petition in United States District Court for the District of Columbia (“D.C. District Court”).

The affected SIFI has two alternatives: accept the petition or reject it. If the SIFI accepts the petition, the Orderly Liquidation Authority immediately begins unwinding the SIFI. The FDIC takes over the SIFI as its receiver. If the SIFI objects to the petition, it must overcome a strict “arbitrary and capricious” standard of review against the Treasury Secretary before the D.C. District Court can stop the Orderly Liquidation Authority. If the petition is not arbitrary and capricious, the D.C. District Court must authorize the Treasury Secretary to appoint the FDIC as receiver; otherwise the court must provide the Treasury Secretary with an opportunity to amend and refile the petition. The D.C. District Court has twenty-four hours to reject the

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92 See Dodd-Frank Act § 803(9).
93 See Skeel, supra note 4, at 80; see also Dodd-Frank Act § 804(a)(1).
94 See Dodd-Frank Act § 202(c)(2) (providing that no provision of the Bankruptcy Code applies to SIFIs for which the FDIC has been appointed as receiver).
95 See Dodd-Frank Act § 203(a)(1)(A).
96 See Dodd-Frank Act § 202(a)(1)(A)(i).
98 See Dodd-Frank Act § 204–207.
100 See Dodd-Frank Act § 202(a)(1)(A)(i)–(iv).
Treasury Secretary’s petition. Liquidation automatically commences “[i]f the Court does not make a determination within 24 hours.”

Thus, the FDIC unwinds SIFIs by acting as their receiver, paying off their obligations, and selling off their assets. Because the FDIC acts as receiver, the Orderly Liquidation Authority resembles the FDIC. Despite creating the Orderly Liquidation Authority based on the FDIC model, however, Dodd-Frank does not truly follow the FDIC model because Dodd-Frank does not impose a fee on SIFIs to cover the costs of the FDIC takeovers. Dodd-Frank, moreover, has two other problems that will prevent it from ending future bailouts.

II. Dodd-Frank Will Not Prevent Future Bailouts

Two problems with the Orderly Liquidation Authority illustrate why it will not prevent bailouts: Dodd-Frank’s regulatory discretion and its failure to provide SIFIs with their right to due process and a fair hearing. Congress also promised and failed, moreover, to end bank bailouts only twenty years earlier, when the Savings and Loan Crisis forced thousands of banks to declare bankruptcy en masse. Thus, the Orderly Liquidation Authority will be no more successful than Prompt Corrective Action was after the Savings and Loans Crisis.

A. The Orderly Liquidation Authority Will Not Prevent Bailouts

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102 See Dodd-Frank Act § 202(a)(1)(A)(v).
103 See Dodd-Frank Act § 204–207.
104 See Dodd-Frank Act § 204–207.
105 See Regulating and Resolving Institutions Considered “Too Big to Fail”: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 111th Cong. 22 (2009) (statement of Sheila C. Bair, Chairman, FDIC) (“To be truly credible, a new systemic resolution regime should be funded by fees or assessments charged to systemically important firms. Fees imposed on these firms could be imposed either before failures, to pre-fund a resolution fund, or fees could be assessed after a systemic resolution.”); Arthur E. Wilmarth, The Dodd-Frank Act: A Flawed and Inadequate Response to Too-Big-to-Fail Problem, 89 Or. L. Rev. 951, 1015 (2011) (“Dodd-Frank does not require SIFIs to pay insurance premiums to pre-fund the orderly liquidation fund.”).
106 See infra Part II.A.
107 See infra Part II.A.
109 See infra Part II.B (discussing Prompt Corrective Action).
Two problems with Dodd-Frank are regulatory discretion and due process. First, Dodd-Frank provides no guarantee that the Treasury Secretary will propose timely takeovers of SIFIs when the next financial crisis takes place.\footnote{See Macey & Holdcroft, supra note 8, at 1389.} In fact, “elected officials and regulators, all of whom can be replaced (either by voters or by politicians), cannot make a credible commitment to refrain from bailing out large institutions.”\footnote{Macey & Holdcroft, supra note 8, at 1376.} Even regulators “who will not orchestrate bailouts in times of crisis will inevitably be replaced by others who will.”\footnote{Macey & Holdcroft, supra note 8, at 1376.} Any nonjudicial-based solution to end SIFI bailouts suffers from this problem. Article III federal judges, by contrast, have life tenure and cannot be replaced by voters or politicians based on a mere disagreement.\footnote{See U.S. CONST. art. III, § 1.} For this reason, SIFIs should be brought to court.

Second, even in cases where the Treasury Secretary does propose a timely takeover of a SIFI, the district court has only twenty-four hours to decide the petition based on the “arbitrary and capricious” standard.\footnote{See supra notes 99–101.} A SIFI in distress is given no time and no opportunity to resist a takeover by the FDIC, which violates the SIFI’s right to due process and a fair hearing before an impartial judge.\footnote{See SKEEL, supra note 4, at 152.} Thus, two problems with Dodd-Frank are its regulatory discretion and its failure to provide SIFIs with their right to a fair hearing.\footnote{See infra Part IV.} However, bringing SIFIs to court could address both of these problems.\footnote{See infra Part IV.}

**B. Prompt Corrective Action After the Savings and Loans Crisis Did Not Prevent Bank Bailouts in 2008**

Dodd-Frank, moreover, was not the first time that the government promised to end taxpayer-funded bank bailouts. During the Savings and Loans Crisis, more than 1,000 banks
failed. The cost of closing 1,043 banks holding $519 billion in assets during the Savings and Loan Crisis led to direct and indirect losses of $152.9 billion, of which U.S. taxpayers lost $123.8 billion and the industry lost $29.1 billion. The aftermath of that Crisis was “Congress’ response to the greatest collapse of U.S. financial institutions since the 1930’s.”

After the Savings and Loans Crisis, Congress proclaimed strict rules—known as Prompt Corrective Action—to eliminate taxpayer-funded bailouts of financial institutions. Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), and the Federal Deposit Insurance Corporation Improvement Act of 1991 (“FDICIA”), Congress greatly expanded the powers of the FDIC to close a bank preemptively to avoid taxpayer losses and liquidate banks. Prompt Corrective Action required regulators to apply increasingly severe sanctions as a bank’s financial condition deteriorated from well-capitalized to critically undercapitalized. FIRREA and FDICIA should have prevented bank bailouts during the 2008 Financial Crisis.

Yet despite the mandate of Prompt Corrective Action, the government did not enforce Prompt Corrective Action when banks began to fail again. Between 1995 and 2009, the FDIC closed ninety-nine banks with less than $1 billion in assets and twenty banks with more than $1

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118 See Niles, supra note 108, at 166.
120 See id. at 33.
121 See CARNELL ET AL., supra note 41, at 279.
124 See SKEEL, supra note 4, at 130–31.
125 See CARNELL ET AL., supra note 41, at 284.
126 See David Zaring, A Lack of Resolution, 60 EMORY L.J. 97, 110 (2010).
127 See SKEEL, supra note 4, at 124.
billion in assets.\textsuperscript{128} The FDIC should have intervened early enough to prevent taxpayer losses,\textsuperscript{129} but issued Prompt Corrective Action in only 19\% of those cases.\textsuperscript{130}

In fact, in more than two-thirds of bank closures during the 2008 Financial Crisis, the FDIC’s first intervention was already too late.\textsuperscript{131} By then, the FDIC had no choice but to take over the bank.\textsuperscript{132} Although the FDIC closed many small banks with fewer losses, it lost approximately $9 billion when it closed IndyMac, a Savings and Loan bank that collapsed in 2008.\textsuperscript{133} Dodd-Frank provides no guarantee that regulators will comply with the mandate of the Orderly Liquidation Authority any more than they followed that of Prompt Corrective Action in 2008.\textsuperscript{134}

Thus, just as in the Savings and Loan Crisis, the 2008 Financial Crisis was characterized by a mass panic wherein regulators did not trust bankruptcy. Dodd-Frank, however, will no more likely prevent SIFI bailouts than Prompt Corrective Action prevented bank bailouts after the Savings and Loans Crisis. This Note argues that rather than resorting to extra-judicial remedies, the government should bring SIFIs to court.

III. Previously Unrealized Parallels Between Finance and Patents

Despite the highly technical nature of the U.S. financial landscape, SIFIs can still be brought to court, and many previously unrealized similarities exist between finance and patents. Both areas require high technical expertise,\textsuperscript{135} benefit from nationwide jurisdiction,\textsuperscript{136} and

\textsuperscript{128} See SKEEL, supra note 4, at 124.
\textsuperscript{129} See SKEEL, supra note 4, at 124.
\textsuperscript{130} See Zaring, supra note 126, at 110.
\textsuperscript{131} See SKEEL, supra note 4, at 124.
\textsuperscript{132} See SKEEL, supra note 4, at 124.
\textsuperscript{133} See SKEEL, supra note 4, at 124.
\textsuperscript{134} See Macey & Holdcroft, supra note 8, at 1389.
\textsuperscript{135} See infra Part III.A.
\textsuperscript{136} See infra Part III.B.
depend on speedy trial and appeal resolutions.\textsuperscript{137} Courts with the ability to resolve issues in patents should have the ability to resolve issues in finance.

A. Both Finance and Patents Require High Technical Expertise

The first similarity between finance and patents is that they are both highly technical subject areas. With regard to patents, more than one hundred years ago, in \textit{Parke-Davis \& Co. v. H.K. Mulford Co.},\textsuperscript{138} Judge Learned Hand wrote:

\begin{quote}
I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these. . . . How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows.\textsuperscript{139}
\end{quote}

One century later, the exponential growth of technology has only provided more challenges to a “generalist judge’s comprehension and capabilities.”\textsuperscript{140} In 1973, Chief Judge Henry J. Friendly of the Second Circuit proposed specialized courts for cases involving taxes and patents.\textsuperscript{141} Chief Judge Clement Haynsworth of the Fourth Circuit agreed, arguing that a patent court could “improve the quality of adjudication” because “federal judges lack the training and technical turn of mind for understanding the scientific problems confronting them in patent cases.”\textsuperscript{142} Thus, a crucial reason to create a specialized patent court was to improve the adjudication of cases with complex technology.

\textsuperscript{137} See infra Part III.C.
\textsuperscript{138} \textit{Parke-Davis \& Co. v. H.K. Mulford Co.}, 189 F. 95 (S.D.N.Y. 1911).
\textsuperscript{139} Id. at 115.
\textsuperscript{140} See LeRoy L. Kondo, \textit{Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases}, 2002 UCLA J.L. TECH. 1 (2002).
\textsuperscript{141} Judge Friendly’s principal concern was “the difficulty encountered by some federal judges of obtaining a full understanding of the subject matter of the more complicated patents.” Clement F. Haynsworth, Jr., \textit{Federal Jurisdiction: A General View}, 87 HARV. L. REV. 1082, 1087–88 (1974) (reviewing \textbf{H}ENRY \textbf{J}. \textbf{F}RIENDLY, \textbf{F}EDERAL JURISDICTION: A \textbf{G}ENERAL \textbf{V}IEW (1973)).
\textsuperscript{142} Id. at 1088.
Similarly, a specialized finance court would improve the adjudication of the highly technical areas of credit default swaps, repos, and other derivatives.\textsuperscript{143} The explosive growth in financial instruments parallels the growth in technology and patents. Even President Barack Obama noted that regulators were “overwhelmed by the speed, scope, and sophistication of a 21st century global economy.”\textsuperscript{144} Judges must have the expertise to stay up-to-date with financial instruments, apply laws while anticipating new technologies, and understand how their decisions contribute to systemic risk.\textsuperscript{145} Regulatory policies would also benefit from judges who “understand complex financial instruments, and are comfortable applying regulations to market innovation and facts unforeseen by the draftsmen.”\textsuperscript{146}

There is, moreover, a court of appeals with the technical expertise to understand issues in finance: The Court of Appeals for the Federal Circuit.\textsuperscript{147} In fact, the Federal Circuit has already adjudicated many cases concerning business methods using complex financial products such as derivatives.\textsuperscript{148} Thus, because both finance and patents require high technical expertise, the Federal Circuit should be given jurisdiction over SIFIs.

\textbf{B. Both Finance and Patents Benefit from Nationwide Jurisdiction}

Technical expertise was not the only challenge for judges in patent law before the establishment of the Federal Circuit: nationwide uniformity and predictability were also

\textsuperscript{143} See supra notes 65–69 and accompanying text explaining credit default swaps, repos, and other derivatives and financial instruments.
\textsuperscript{144} See President’s Remarks, supra note 22.
\textsuperscript{145} Jeffrey Golden, \textit{We Need a World Financial Court With Specialist Judges}, \textit{Financial Times} (Sept. 8, 2009 4:28 P.M.), http://www.ft.com/cms/s/0/1975a386-9c89-11de-ab58-00144feabdc0.html#ixzz1Zk5BijBt [hereinafter Specialist Judges].
\textsuperscript{146} Jeffrey Golden, \textit{World financial markets need a world financial court: There are specialist courts for everything from family law to tax, intellectual property and bankruptcy—so why not finance?}, \textit{The Guardian} (Nov. 3, 2010 5:00 A.M.), http://www.guardian.co.uk/law/2010/nov/03/world-financial-markets-court [hereinafter World Financial Court].
Because it was not feasible for the Supreme Court to hear every case, the Courts of Appeals became the de facto final arbiters of patent issues. Precedent on patent law varied from circuit to circuit, and this uncertainty created more litigation.

After hearing testimony on patent law, the Congressional Subcommittee on Improvements in Judicial Machinery “confirmed the dire need for legislative relief.” In response, Congress passed the Federal Courts Improvement Act of 1982 (“FCIA”), which created the Court of Appeals for the Federal Circuit. The Federal Circuit now has both patent jurisdiction and nonpatent jurisdiction under Title 28 of the U.S. Code, section 1295.

Subject matter rather than geography thus defined the Federal Circuit’s jurisdiction. The FCIA “put into place the most comprehensive effort in many years to alleviate the strain and burden which threatened to slowly erode the effectiveness of [the] judicial system.” The Federal Circuit would establish “consistency and uniformity, particularly in the field of patent law.” It would also “help to defray the escalating backlog confronting the Federal appeals

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149 See Dennis DeConcini, The Federal Courts Improvement Act of 1982: A Legislative Overview, 14 GMU L. REV. 529, 532 (1992) (Chairman of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery during the time when the Federal Circuit was created).
150 Id. at 531.
151 Id.
152 Id. at 530.
155 See DeConcini, supra note 149, at 532.
156 See DeConcini, supra note 149, at 534.
157 See DeConcini, supra note 149, at 532.
courts, would create uniformity in some particularly difficult areas of the law, and at the same
time would respect the supremacy of the Supreme Court."\textsuperscript{158}

Furthermore, nationwide predictability and uniformity are as important in finance as they are in patent law. Chief Judge Paul R. Michel of the Federal Circuit noted that Congress has expanded the Federal Circuit’s jurisdiction several times.\textsuperscript{159} Judge Michel argued that courts in general would “become more specialized in order to match the explosion of specialization in law practice and business.”\textsuperscript{160} The Federal Circuit was not only a “science and technology court,” but also a “business” and “corporation court.”\textsuperscript{161} Even without formal changes, the Federal Circuit would be “increasingly important to the national economy and the fortunes of nearly all U.S. corporations, including smaller, privately owned, and start-up corporations.”\textsuperscript{162}

At least one other commentator\textsuperscript{163} has also proposed a world financial court with specialist judges.\textsuperscript{164} Courts of general jurisdiction are ineffective for resolving financial disputes because they are decentralized, inefficient, and expensive.\textsuperscript{165} These courts fail “to produce a settled, authoritative body of law or the predictability that the markets crave and on which financial stability depends.”\textsuperscript{166} There is no reason not to have specialist finance courts when there are “special subject matter courts for everything from family law to tax, intellectual

\textsuperscript{158} See DeConcini, supra note 149, at 532–33.

\textsuperscript{159} Paul R. Michel, The Court of Appeals for the Federal Circuit Must Evolve to Meet the Challenges Ahead, 48 AM. U. L. REV. 1177, 1178–79 (1999) (noting several expansions of Federal Circuit jurisdiction including: “‘no fault’ compensation program for childhood vaccine injuries,” review of the U.S. Court of Veterans Appeals, “‘follow-on’ jurisdiction to that of the Temporary Emergency Court of Appeals,” and “discrimination claims arising from the Senate, the White House, and other special entities.”).

\textsuperscript{160} Id. at 1184.

\textsuperscript{161} Id. at 1185.

\textsuperscript{162} Id.

\textsuperscript{163} Jeffrey Golden is the chairman of P.R.I.M.E. Finance, a financial products dispute settlement program, established on January 16, 2012, and based in The Hague. See Panel of Recognised International Market Experts in Finance, PRIME FINANCE, http://www.primefinancedisputes.org/index.php/about-us (last visited Apr. 10, 2012) (P.R.I.M.E. Finance “includes some of the most senior people in the financial markets with collectively over 2,000 years of experience in these markets.”)

\textsuperscript{164} Specialist Judges, supra note 145.

\textsuperscript{165} Specialist Judges, supra note 145.

\textsuperscript{166} Specialist Judges, supra note 145.
Thus, because nationwide uniformity and predictability would bring clarity to finance, the Federal Circuit should be given jurisdiction over SIFIs.

C. Both Finance and Patents Benefit from Speed

Another similarity between finance and patents is the need for speedy resolutions. By the time a court resolves an issue, the issue may no longer be relevant because financial products can lose significant value within days. Nevertheless, models of expedited trials exist, such as those at the U.S. International Trade Commission ("ITC"). The Supreme Court, moreover, has previously resolved appeals within days of a trial decision.

1. Speed in Expedited Trials at the U.S. International Trade Commission

The ITC is a "nonpartisan federal administrative agency" that "performs quasi-judicial, quasi-legislative and quasi-executive functions" while adjudicating "cases involving alleged infringement by imports of intellectual property rights." The U.S. President appoints six ITC commissioners—who head the ITC—for nine-year terms with the advice and consent of the Senate. The ITC has limited nationwide in rem jurisdiction over products imported into the United States, and ITC decisions do not have preclusive effect on the district courts. Although the ITC cannot provide monetary damages, it can issue exclusion orders and cease-and-desist orders. General or limited exclusion orders prevent parties from importing articles

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167 World Financial Court, supra note 146.
168 DAVID KNOX DUVALL ET AL., UNFAIR COMPETITION AND THE ITC § 1:1 (2009 ed.).
169 See infra Part III.C.2.
170 DUVALL ET AL., supra note 168, § 2:2.
171 No more than three commissioners can be of the same political party, and the Chair must alternate every two years between different political parties. DUVALL ET AL., supra note 168, § 2:2.
into the United States. A cease-and-desist order is an administrative remedy that “limits sales of infringing products already imported.”

A tie vote of the commissioners is sufficient to begin an investigation. The commissioners assign the investigation to an Administrative Law Judge (“ALJ”), who holds a hearing and makes an initial determination. The determination becomes the final determination unless at least one commissioner dissents, in which case the commissioners write the final determination. The Office of General Counsel (“OGC”) advises the commissioners on legal issues and represents the ITC on appeals to the Federal Circuit. The ITC also appoints Commission Investigative (“Staff”) Attorneys to represent the public interest throughout the trial. The Staff Attorneys primarily represent the public interest, but can facilitate settlements between the parties, assist the parties in understanding and complying with the rules of the ITC, initiate discovery or produce testimonial evidence on direct or cross-examination, and submit responses to motions and briefs to assure a full and complete record.

ITC trials are well known for speed. The ITC’s enabling statute mandates “expeditious final determinations.” Within forty-five days of the initiation of an investigation, the ITC announces a target date—normally fifteen months—for a final determination. Yet despite fast

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175 See 19 C.F.R. § 210.50 (2010). A general order excludes any product regardless of the manufacturer. See Broughan, supra note 172, at 45. A limited order excludes only the products of the named respondents. See Broughan, supra note 172, at 45.
176 See Broughan, supra note 172, at 45.
177 DUVALL ET AL., supra note 168, § 2:2.
179 DUVALL ET AL., supra note 168, § 2:2.
180 See Broughan, supra note 172, at 45.
resolutions,\textsuperscript{186} the ITC meets due process\textsuperscript{187} by adopting the provisions of the Administrative Procedure Act ("APA").\textsuperscript{188} Thoughtful decisions require careful analysis, whereas rushed decisions can lead to inaccuracy, incompleteness, and less deliberative judgment.\textsuperscript{189} Thus, the APA requires a trial hearing before an ALJ who "renders a written decision, with findings of fact and conclusions of law."\textsuperscript{190} These trial hearings are consistent with the Federal Rules of Civil Procedure and Evidence,\textsuperscript{191} and typically include: (1) opening statements, (2) complainant’s case-in-chief, (3) respondent’s case-in-chief, (4) complainant’s rebuttal, (5) the Staff’s case-in-chief, and (6) closing statements.\textsuperscript{192}

Within sixty days following the initial determination, the ITC commissioners must decide whether they will review the initial determination,\textsuperscript{193} whether an exclusion order will be in the public interest, and whether to issue an exclusion or cease-and-desist order excluding the accused imports.\textsuperscript{194} Whether an exclusion order is in the public interest is important because a negative finding could cause the commissioners to deny a remedy even though a violation has occurred.\textsuperscript{195}

In practice, the ITC has declined to issue a remedy only three times based on the public

\textsuperscript{186}ITC accuracy concerning patent issues seems to be as good as the accuracy concerning patent issues at U.S. District Courts. \textit{Compare} Michael Diehl, \textit{Does ITC Review of Administrative Law Judge Determinations Add Value in Section 337 Investigations?}, 21 FED. CIR. B.J. 119, 120 (2011) (finding that throughout a ten-year period, the Federal Circuit reversal rate was approximately 27\% for appealed ITC determinations), \textit{with} Kimberly A. Moore, \textit{Are District Court Judges Equipped to Resolve Patent Cases?}, 15 HARV. J.L. & TECH. 1, 1 (2001) (finding that the Federal Circuit reversed district courts in approximately 33\% of cases).

\textsuperscript{187}DUVALL ET AL., \textit{supra} note 168, § 2:9 ("[S]evere time constraints imposed by section 337 has sometimes raised serious procedural and substantive due process issues. However, in no case has there been a successful due process challenge by a party on appeal, at least domestically.").


\textsuperscript{189}See DUVALL ET AL., \textit{supra} note 168, § 2:9 ("[D]ue process in section 337 proceedings is substantially assured not only by the ITC Rules of Practice and Procedure, which are consistent with the Federal Rules of Procedure, but by the [APA], which includes provisions for the hearing and adjudicative powers and decisional independence of the [ALJ] hearing the case, and the separation of the judge’s functions from those of the staff attorney, who is a party in every section 337 case, representing the public interest.").

\textsuperscript{190}DUVALL ET AL., \textit{supra} note 168, § 1:2.

\textsuperscript{191}DUVALL ET AL., \textit{supra} note 168, § 2:2.

\textsuperscript{192}DUVALL ET AL., \textit{supra} note 168, § 2:12.

\textsuperscript{193}DUVALL ET AL., \textit{supra} note 168, § 2:14.

\textsuperscript{194}DUVALL ET AL., \textit{supra} note 168, § 2:7.

\textsuperscript{195}DUVALL ET AL., \textit{supra} note 168, § 2:14.
interest. ITC determinations become final when the U.S. President “approves or determines not to approve the ITC determination.” Thus, rather than engage in lengthy district court litigation, parties can file complaints at the ITC and expect a speedy resolution of all issues within fifteen months.

2. Speed in Expedited Appeals to the Supreme Court

Even if an expedited trial is successful, appellate review of the case may still cause delays, during which financial products can quickly lose value. The Supreme Court, however, has reviewed at least five cases on an expedited basis—each of which produced nearly instant opinions from the Supreme Court. In *Pentagon Papers*, only fifteen days passed between the Supreme Court and trial court decisions. In *Bush v. Gore*, that time became only eight days. Although *Pentagon Papers* did not address an issue of patents, it did address the burden required for the government to win an injunction (against the publication of allegedly classified documents). This issue in *Pentagon Papers* can be analogized to the burden required for the government to win an injunction or stay against derivatives creditors of a SIFI at

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196 See Broughan, supra note 172, at 45.
197 The President has sixty days to exercise this right to disapprove and has exercised it only five times. See DUVAL ET AL., supra note 168, § 2:15.
201 Id. (decided June 30, 1971).
204 Id. (decided Dec. 12, 2000); Gore v. Harris, 772 So.2d 1243, 1247 (reviewing the trial court’s final judgment issued on December 4, 2000).
205 See *Pentagon Papers*, 403 U.S. at 714.
risk of default.  Thus, the Supreme Court can resolve an expedited appeal within days of a trial court decision if a systemic crisis requires immediate action.

In sum, many unrealized parallels exist between finance and patents, including highly technical subject matter, reliance on nationwide uniformity and predictability, and reliance on speedy trial and appellate decisions. Due to these many similarities, jurisdiction over SIFIs can and should be brought to court.

IV. SIFIs Should Be Brought to Court in an Expedited Finance Trial Before an Administrative Law Judge With Appellate Review by the FSOC and the Federal Circuit

SIFIs should be brought to court in expedited trials before an ALJ with a two-step appellate review process. After the ALJ issues an initial determination, the FSOC should have authority to reverse the ALJ’s determination. The FSOC decision should then be subject to appeal to the Federal Circuit.

A. Expedited Finance Trials before Administrative Law Judges

Expedited finance trials would cure problems of the Orderly Liquidation Authority and provide the decisional independence required by the APA. Not only would ALJs have more time, but they would be able to consider arguments from opposing parties and a party representing the public interest. Even SIFIs should be given a right to a fair trial before an impartial decision-maker. The Orderly Liquidation Authority, by contrast, provides D.C. District Court judges with only twenty-four hours to review the Treasury Secretary’s petition.

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206 See id. For a discussion of the preferential treatment that derivatives creditors receive in SIFI bankruptcies, see infra Part IV.A.3.
207 See infra Part IV.B.1.
208 See infra Part IV.B.2.
209 See supra Part II.A.
210 See supra note 189 and accompanying text.
212 See infra Part IV.A.2.
213 See supra notes 99–101 and accompanying text.
1. Proposed Expedited Finance Trials

Under the expedited finance trial, the Orderly Liquidation Authority should be replaced with a trial hearing to improve transparency and meet APA requirements. As in ITC trials, here, any third party complainant should be able to file a complaint with the FSOC, but the FSOC should retain authority to initiate a trial based on a majority or tie vote. The FSOC still retains regulatory discretion, but that discretion is tempered by the ability of third parties to file complaints to raise issues before the FSOC and to appeal adverse decisions. At the same time, by retaining authority, the FSOC ensures that complainants do not expand the types of cases or claims brought in the expedited finance trial beyond that currently given to the Orderly Liquidation Authority under Dodd-Frank. Regulatory discretion should also be tempered by the FSOC staff attorney, who represents the public interest and calls attention to essential information to ensure an accurate public record.

However, parties should still be given the ability to designate confidential business information that would be eligible for in camera treatment. Confidential business information in ITC trials includes trade secrets or other information that could either (1) impair the ITC’s ability to perform its statutory tasks or (2) cause “substantial harm to the competitive position” of a party. Any such confidential business information “subject to protective orders or orders granting in camera treatment are not made part of the public record, but are kept confidential in an in camera record.” The expedited finance trial should offer the same protections.

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216 See infra Part IV.B.
217 For the Orderly Liquidation Authority’s jurisdiction, see supra Part I.B.
220 See DUVAULT ET AL., supra note 168, § 3:35.
221 DUVAULT ET AL., supra note 168, § 3:36.
2. Proposed Administrative Law Judges

The FSOC should appoint the ALJs, who would qualify for civil service appointments with career status.\(^{222}\) The number of ALJs should be based on the number of FDIC resolutions each year.\(^{223}\) Although the ALJs may not have financial engineering degrees, their expertise in financial products would be enhanced by the frequency of financial cases that come before them.\(^{224}\) The staff attorney representing the public interest should have a technical background in financial engineering.\(^{225}\) Although initial determinations by the ALJs in the expedited finance trial process would be subject to review by the FSOC\(^ {226}\) and the U.S. President for policy reasons,\(^ {227}\) the ALJs would still hold a trial hearing with decisional independence,\(^ {228}\) which would meet APA requirements.\(^ {229}\) The ALJs would also not have life tenure,\(^ {230}\) but they would be subject to controlling precedent established by Federal Circuit judges, who do have life tenure.\(^ {231}\)

3. Proposed Remedies

Although ITC trials do not provide monetary damages, they do issue exclusion orders and cease-and-desist orders,\(^ {232}\) and here, expedited finance trials should also provide nonmonetary remedies. One potential remedy could be a stay against a SIFI’s derivatives creditors. A stay is

\(^{222}\) See DUVALL ET AL., supra note 168, § 2:2.
\(^{223}\) See 5 U.S.C. § 3105 (2006) (“Each agency shall appoint as many [ALJs] as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. [ALJs] shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.”).
\(^{224}\) See Sapna Kumar, Expert court, Expert Agency, 44 DAVIS L. REV. 1547, 1590 (2011) (“Although the ITC Commissioners and ALJs generally lack a patent background at the start of their ITC careers, they see a high volume of patent-related cases relative to the Federal Circuit.”); see also DUVALL ET AL., supra note 168, § 2:2 (noting also that ALJs frequently attend tutorials in complex cases and educate themselves on relevant technology).
\(^{225}\) See DUVALL ET AL., supra note 168, § 2:4.
\(^{226}\) See infra Part IV.B.1 (discussing FSOC review).
\(^{227}\) See infra Part IV.B.1 (discussing U.S. Presidential review).
\(^{228}\) DUVALL ET AL., supra note 168, § 2:2.
\(^{230}\) See U.S. CONST. art. III, § 1.
\(^{231}\) See infra Part IV.B.2 (discussing Federal Circuit review).
\(^{232}\) DUVALL ET AL., supra note 168, § 2:2.
the “bankruptcy equivalent of a cease and desist order; it prohibits creditors from grabbing collateral, pursuing legal actions, or pester the debtor for what they are owed.”

233 Stays allow the bankruptcy court to “call time-out,” which gives the court time “to collect and validate claims, to determine the best way to dispose of assets in an orderly, value-maximizing manner, and to treat all like-priority creditors equally.”

234 Even though this remedy may seem counterintuitive because bankruptcy usually creates an automatic stay against *nonderivatives* creditors, bankruptcy does not prevent *derivatives* creditors from seizing collateral from a financial institution that is close to bankruptcy.

235 In the case of AIG, for example, even if AIG declared bankruptcy, AIG would not be able to prevent its derivatives counterparties from selling AIG’s assets because those derivatives counterparties were not required to comply with bankruptcy’s automatic stay.

236 In fact, banks and general corporations are actually “subject to different bankruptcy codes because the goals of resolving insolvencies differ.”

237 In bankruptcies of general corporations, the bankruptcy court must ensure that senior creditors are paid in full before junior creditors, and that creditors of equal priority get paid proportionally.

238 In bank insolvencies, the FDIC has complete control as receiver because it must minimize losses to the insurance fund.

239 Through the Orderly Liquidation Authority, Dodd-Frank formally establishes similar FDIC control over SIFI takeovers, unless the district court decides within twenty-four hours that the proposed

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235 *E.g.* SKEEL, *supra* note 4, at 158.

236 *See* SKEEL, *supra* note 4, at 158.


239 *See* Hynes & Walt, *supra* note 270, at 1003.
takeover is arbitrary and capricious.\textsuperscript{240} Thus, bankruptcy is available for general corporations, but not for SIFIs.

Another remedy for a SIFI could be a restoration of the normal preference rules under bankruptcy for derivatives creditors.\textsuperscript{241} Under normal bankruptcy preference rules, creditors must return payments and property they receive shortly before bankruptcy if they received more than market value.\textsuperscript{242} As with the bankruptcy stay, derivatives creditors are not subject to the preference rules.\textsuperscript{243} By reestablishing the normal bankruptcy rules for SIFIs at risk of default, the expedited finance trial could give SIFIs the time and space to conduct orderly resolutions.\textsuperscript{244} The expedited finance trial would also give derivatives creditors an incentive to settle their claims against a SIFI because they would no longer receive preferential treatment in bankruptcy. Derivatives creditors could also agree to a modification, which could give the SIFI enough time to secure the necessary funds to remain solvent.

4. Proposed Expedited Finance Trials in Practice: Bear Stearns, Lehman, and AIG

Under the expedited finance trials, the Treasury Secretary would not be the only person who could propose a SIFI takeover. Although the FSOC would still approve formal investigations through a majority or tie vote, any third party complainant could also file a complaint with the FSOC. Allowing third party complainants may not solve the lack of political will to propose a SIFI takeover, but private parties would have an incentive to seek an early

\textsuperscript{240} See \textit{supra} Part I.B.
\textsuperscript{241} See \textit{SKEEL, supra} note 4, at 159.
\textsuperscript{242} \textit{SKEEL, supra} note 4, at 159.
\textsuperscript{243} \textit{SKEEL, supra} note 4, at 159.
\textsuperscript{244} See \textit{SKEEL, supra} note 4, at 162.
liquidation of the SIFI before its liabilities exceed its assets, because derivatives counterparties, for example, would not be guaranteed preferential treatment. 245

Once the investigation begins, the investigation should place the SIFI on notice that a takeover of that SIFI could be imminent. The FSOC staff attorney would also add value to the investigation because staff would advocate for a takeover only if a takeover is in the public interest. Bear Stearns and Lehman, for example, could then be given time to locate a buyer for viable assets. 246 AIG could be given a stay against its derivatives creditors. 247 At the same time, the parties could expect a rapid and accurate final determination. 248

Thus, this Note proposes that SIFIs be given a right to an expedited, quasi-bankruptcy, finance trial before an ALJ with a technical background in finance. The expedited trial would cure due process problems with the Orderly Liquidation Authority by providing a fair hearing and reestablishing access to the stay and the preference rules available in corporate bankruptcy.

B. Appellate Review of Expedited Finance Trials

Appellate review of the expedited finance trial should be a two-step process: after the ALJ issues an initial determination, the FSOC should have the ability to review the determination either sua sponte or after a petition by any party who had an issue adversely decided against them. 249 The FSOC’s decision should then be subject to appeal before the Federal Circuit. 250

1. The FSOC and the U.S. President Should Have Authority to Review Administrative Law Judge Decisions

245 See supra notes 1–7, 71–75 and accompanying text.
246 See supra note 236 and accompanying text.
247 See supra note 236 and accompanying text.
248 See supra note 186 and accompanying text (discussing appropriate balance between speed and accuracy in ITC trials).
249 See Diehl, supra note 186, at 120.
250 See infra Part IV.B.2.
Attorney-advisors at the FSOC’s Office of General Counsel should review the initial determinations by the ALJs and provide recommendations to the FSOC.\(^{251}\) If the FSOC disagrees with the ALJ’s initial determination, the FSOC should issue a final determination within sixty days of the initial one.\(^{252}\) The standard of review should mirror that of the ITC. The finding required to trigger review is: “(i) [t]hat a finding or conclusion of material fact is clearly erroneous; (ii) [t]hat a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or (iii) [t]hat the determination is one affecting Commission policy.”\(^{253}\)

ITC trials also allow for the benefit of U.S. Presidential power to accept or reject the ITC’s decision based on policy reasons.\(^{254}\) Here, instead of bailing out SIFIs without any formal hearing, the U.S. President can still achieve a bailout, but only after a formal hearing before an ALJ with a public record.\(^{255}\) Approval by Congress would still be necessary to provide the funds needed for any bailouts.\(^{256}\)

In ITC trials, the President’s power to reject an ITC determination is not appealable, but the U.S. President can only cancel an ITC action—i.e., the President has no power to initiate an action if the ITC did not find a violation.\(^{257}\) Here, the President would have same power—i.e., the President would have no power to initiate an action to unwind a SIFI, but only the power to reject that action.

2. The Federal Circuit Should Have Authority to Review FSOC Decisions

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\(^{251}\) See DUVALL ET AL., supra note 168, § 2:2.
\(^{252}\) See DUVALL ET AL., supra note 168, § 2:2.
\(^{253}\) See Diehl, supra note 186, at 120 (quoting 19 C.F.R. § 210.43(b)(1)).
\(^{254}\) See DUVALL ET AL., supra note 168, § 2:15.
\(^{255}\) See supra Part IV.A.
\(^{256}\) See U.S. CONST. art. I, § 8, cl. 1.
\(^{257}\) See DUVALL ET AL., supra note 168, § 2:15.
When the U.S. President does not exercise his power to reject the FSOC’s final determination, the determination should be subject to appeal to the Federal Circuit. As in ITC trials, attorney-advisors in the FSOC’s Office of General Counsel should assist and represent the FSOC throughout the appeal.\textsuperscript{258} The Federal Circuit, moreover, is well equipped to understand finance issues because it already has nationwide subject matter jurisdiction over the highly technical issues involved in patent disputes.\textsuperscript{259} The Federal Circuit could also decide appeals on an expedited basis if necessary.\textsuperscript{260} Prior to her appointment to the Federal Circuit, for example, Judge Kimberly Moore argued for expedited appeals to decide issues of claim construction.\textsuperscript{261} Claim construction is the process in which the court determines the boundaries of the actual invention covered by the patent.\textsuperscript{262}

In sum, this Note argues that banks should be brought to court. SIFIs should be subject to expedited finance trials before ALJs with appellate review by the FSOC and the Federal Circuit. Unlike the Orderly Liquidation Authority, which could violate a SIFI’s right to due process and a fair trial, a finance trial provides SIFIs with the time and space to conduct an orderly liquidation. The finance trial could also provide a SIFI with remedies such as a stay against derivatives creditors and a restoring of the normal preference rules of bankruptcy.

\section*{V. Alternative Proposals to Address Systemic Risk Posed by SIFIs}

The main counterarguments to this Note’s proposal discuss the effectiveness of the ITC and the Federal Circuit, or propose alternative nonjudicial remedies. None of these alternatives,
however, effectively resolve certain significant issues of moral hazard, regulatory capture, and the global nature of finance.

A. Expedited Trials Would Not Be Too Slow or Ineffective to Address Systemic Risk Because They Provide an Appropriate Balance of Speed and Accuracy

One counterargument is that an expedited trial would still not be sufficiently fast to prevent systemic failure. Nothing, however, precludes issues in complex finance from being resolved through an expedited trial hearing. The Lehman bankruptcy\textsuperscript{263} illustrated that the extreme time pressure of financial markets could facilitate the rapid sale of viable assets to other financial institutions within a matter of days.\textsuperscript{264} Moreover, even if a bailout can be achieved in one day,\textsuperscript{265} that bailout may not be the correct decision. Expedited trials, by contrast, provide for an appropriate balance between speed and accuracy.\textsuperscript{266}

Another counterargument is that SIFIs should file for chapter 11 bankruptcy\textsuperscript{267} as Lehman did.\textsuperscript{268} However, there are two problems with this argument. First, banks cannot file for bankruptcy\textsuperscript{269} because the FDIC is the receiver for insolvent banks.\textsuperscript{270} Second, even though bank holding companies can file for chapter 11—as Lehman and Washington Mutual\textsuperscript{271} did—the

\textsuperscript{264} See Estrada, supra note 2, at 1119–20 (although section 363 of the bankruptcy code required twenty-one days before assets could be sold, the court held that proper, timely, and adequate notice existed, and good cause existed to shorten the notice period to two days, allowing Barclays to purchase Lehman’s investment banking business).
\textsuperscript{265} See supra Part I.A.4.
\textsuperscript{266} See supra note 189 and accompanying text.
\textsuperscript{267} See 11 U.S.C. § 301 (2006) (“A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.”).
\textsuperscript{269} See 11 U.S.C. § 109(b), (d) (2006) (providing that national banks and FDIC insured state banks do not qualify for bankruptcy under chapter 7 or chapter 11); 12 U.S.C. § 1821(d)(13)(D)(i) (2006) (“[N]o court shall have jurisdiction over any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver.”).
\textsuperscript{271} In re Washington Mut., Inc., 408 B.R. 45, 47 (Bankr. D. Del. 2009) (“WMB’s takeover by the FDIC was the largest bank failure in the nation’s history.”).
availability of chapter 11 did not dissuade the government from retroactively extending FDIC-like insurance to SIFIs through bailouts. 272 Thus, bankruptcy is not an option for SIFIs.

Other commentators argue that the ITC is no more effective than district courts in claim construction. 273 The ITC, however, achieves its results within a much faster time frame than the district courts. 274 The ITC also provides for the flexibility of a two-step process, where commissioner review of ALJ decisions increases accuracy and reduces reversal rates from 40% to 27%. 275

Thus, expedited trials at the ITC are an effective model for resolving issues for SIFIs at risk of default because they provide an appropriate balance between speed and accuracy. They also provide for the flexibility of allowing FSOC review of initial determinations by ALJs and U.S. Presidential power to cancel FSOC decisions for policy reasons.

B. The Federal Circuit Would Not Be Ineffective in Deciding Finance Issues Because It Successfully Brought Uniformity and Predictability to Patents

The main counterargument against the Federal Circuit is that it has not successfully solved the problem of achieving uniformity and predictability in patent litigation. 276 Some scholars question whether specialization solves the problems identified by Judge Hand, arguing that specialization leads to tunnel vision, making judges susceptible to capture by the bar that practices before them. 277 Doctrinal isolation could lead to a body of law inconsistent with other

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272 See Andrea J. Boyack, supra note 54, 1520.
273 Schwartz, supra note 183, at 1699 (failing to “find any evidence that the patent-experienced ALJs of the ITC are more accurate at claim construction than district court judges”).
274 See Schwartz, supra note 183, at 1731 n.158 (“The ITC, on the other hand, may be adjudicating patent cases more quickly than district courts with no decrease in accuracy.”).
275 See Diehl, supra note 186, at 162.
parts of the law, and the repetitive nature of specialized practice could attract less qualified judges.\footnote{See, e.g., id. at 150, 156–57; see also Kimberly A. Moore, \textit{Markman Eight Years Later: Is Claim Construction More Predictable?}, 9 \textit{LEWIS & CLARK L. REV.} 231, 247 (2005) (assigning fault to the Federal Circuit for the increase in reversal rates in claim construction cases).}

Congress, however, recognized the possible dangers of lack of exposure to broad legal issues and capture by specialized interests.\footnote{See \textit{S. REP. No. 97-275}, Nov. 18, 1981 (“This rich docket assures that the work of the [Federal Circuit] will be broad and diverse and not narrowly specialized. The judges will have no lack of exposure to a broad variety of legal problems. Moreover, the subject matter of the new court will be sufficiently mixed to prevent any special interest from dominating it.”).} To address these concerns, Congress provided the Federal Circuit with jurisdiction to decide trademark law, tariff and customs law, technology transfer regulations, government contracts, and labor disputes.\footnote{See Rochelle Cooper Dreyfuss, \textit{The Federal Circuit: A Case Study in Specialized Courts}, 64 \textit{NYU L. REV.} 1, 3 (1989).} This Note proposes even broader jurisdiction for the Federal Circuit, thereby lowering the risk of capture and tunnel vision even further.

At the same time, other commentators have argued that the Federal Circuit has achieved consistency and uniformity in legal precedent for patent litigation.\footnote{See, e.g., Jeff Becker, \textit{On Creating Specialized Patent District Courts: Why H.R. 34 Does Not Go Far Enough to Address Reversal Rates in District Courts}, 61 \textit{SMU L. REV.} 1607, 1632 (2008) (“[T]here is no disadvantage to having a judiciary that is more likely to correctly interpret the law—especially when the sole purpose of keeping the status quo is to preserve the archaic notion that federal judges should be generalist experts.”); R. Polk Wagner & Lee Petherbridge, \textit{Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance}, 152 \textit{U. PA. L. REV.} 1105, 1113 (2004) (the Federal Circuit met its mandate and is “moving in the right direction”).} One historical study by Former Chief Judge Paul R. Michel provides a detailed analysis of the outcomes of different cases and the panel selection process at the Federal Circuit and argues that the Federal Circuit successfully achieved uniformity and consistency in patent litigation.\footnote{See Paul R. Michel, \textit{A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Foreward: Assuring Consistency and Uniformity of Precedent and Legal Doctrine in the Areas of Subject Matter Jurisdiction Entrusted Exclusively to the U.S. Court of Appeals for the Federal Circuit}, 58 \textit{AM. U. L. REV.} 699 (2009).} Another commentator agrees, arguing that the Federal Circuit met its statutory goals of achieving uniformity and
predictability, based on a thorough assessment of the problems in patent law, previous reform proposals, the congressional debate, and congressional expectations.\textsuperscript{283}

Professor John M. Golden, Professor of Patent Law at The University of Texas Law School, also argues that the “Supreme Court's current critical scrutiny of the Federal Circuit's patent jurisprudence is not unprecedented for a semi-specialized circuit.”\textsuperscript{284} The D.C. Circuit, for example, is technically a “regional circuit,” but has “exclusive jurisdiction over a variety of challenges to administrative action.”\textsuperscript{285} Yet despite being “the most frequently reversed” Court of Appeals throughout the 1970s and 1980s, the D.C. Circuit now “enjoys unmatched prestige.”\textsuperscript{286} Thus, a high Supreme Court reversal rate does not necessarily prove that the Federal Circuit is ineffective.

C. NonJudicial Alternatives to Solve Systemic Risk Are Not Effective Because They Fail To Address Moral Hazard, Regulatory Capture, and Global Finance

Another counterargument is that a judicial solution is not appropriate. Nonjudicial solutions, however, do not address the problems of moral hazard\textsuperscript{287} and regulatory discretion.\textsuperscript{288} Even if regulators refuse to “orchestrate bailouts in times of crisis,” they “will inevitably be replaced by others who will.”\textsuperscript{289} In fact, bailouts may even become more likely under Dodd-Frank and may even occur in private with the support of the Fed.\textsuperscript{290}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{284} See \textit{Comparative Trials, supra} note 154, at 573 (arguing that “recent Supreme Court setbacks for the Federal Circuit pale in comparison to past setbacks for the D.C. Circuit.”).
\item \textsuperscript{285} See \textit{Comparative Trials, supra} note 154, at 554.
\item \textsuperscript{286} See \textit{Comparative Trials, supra} note 154, at 556, 560.
\item \textsuperscript{287} See \textit{supra} Part I.A.3.
\item \textsuperscript{288} See \textit{supra} Part II.A.
\item \textsuperscript{289} See Macey & Holdcroft, \textit{supra} note 8, at 1376.
\item \textsuperscript{290} See Mehrsa Baradaran, \textit{Reconsidering the Separation of Banking and Commerce}, 80 GEO. WASH. L. REV. 385, 408 (2012).
\end{itemize}
\end{footnotesize}
One nonjudicial solution without moral hazard is simply to break up TBTF financial institutions. This solution, however, fails to accommodate the increasingly global nature of finance. Even if regulators limit SIFI size, SIFIs can respond by simply moving their trading desks or other investment operations to overseas offices such as London or Hong Kong. SIFIs would still contribute to systemic risk by acting as counterparties to bets on risky loans. Bank holding companies, moreover, may have thousands of wholly-owned and partially-owned subsidiary banks, each of which could act as counterparties with other SIFIs.

Another nonjudicial solution proposes a tax on bank size using a combined public and private market-based tax or quasi-insurance-based assessment. The tax-based solution proposes charging each SIFI with a tax based on the SIFI’s “contribution to systemic risk,” or expected losses in case of a systemic crisis. This tax would provide an incentive for SIFIs to internalize the cost of systemic risk and encourage SIFIs to create less systemic risk. Regulators would require firms to purchase contingent capital insurance against potential losses during a systemic crisis, where the cost of the insurance would determine the amount of the systemic risk tax. A systemic risk tax, however, could create a snowball effect during a systemic crisis. As a SIFI nears default, its contribution to systemic risk increases, which could raise its tax assessment and make it even more likely to default.

VI. Conclusion

This Note argues that the Dodd-Frank Act will not prevent future government bailouts of failing banks, because Congress already promised and failed to end bank bailouts only twenty

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293 See id.
294 See id.
295 See id.
years earlier in response to the Savings and Loans Crisis. Rather than rely on extra-judicial remedies like the Orderly Liquidation Authority, banks should be brought to court in expedited finance trials subject to appeal to the Federal Circuit. One possible model could be expedited patent trials at the U.S. International Trade Commission. In fact, many previously unrealized parallels exist between finance and patents. Both require high technical expertise, benefit from nationwide jurisdiction, and depend on speedy trial and appellate resolutions. Even if this proposed solution does not guarantee the end of bailouts, it does compel regulators to argue for each bailout in a formal hearing with a public record before an impartial decision-maker. Alternative strategies to end bailouts, by contrast, do not address moral hazard, regulatory discretion, and the global nature of finance.