# The Federal Reserve is not a fourth branch of government

by Edward Spannaus

In his economic address to the Congress Feb. 18, President Reagan once again cited the "independence" of the Federal Reserve as his justification for noninterference with Paul Volcker's wrecking of the U.S. economy.

The President has, in fact, the constitutional obligation to fire Volcker and to prevent the Fed from destroying the economy. Likewise, the Congress, which created the Fed pursuant to its designated powers under the Constitution, can amend the Federal Reserve Act to bring the Fed into line, or it can abolish it altogether if it so chooses.

## The powers of Congress

The authority for the creation of the Federal Reserve System is Article I, Section 8 of the Constitution which defines the power of Congress. These include the following powers:

> To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States;
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> To borrow money on the credit of the United States;
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> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
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> To coin money, regulate the value thereof, and of foreign coin;
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> To promote the progress of science and the useful arts. . . .
>
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . .

This defines a very specific direction of Congress's power of economic legislation: that Congress is to pass laws for the advancement of the economy and the "general welfare." Contrary to current narrow interpretations, the Commerce Clause, for example, was intended as a general grant of power to Congress to "regulate" and *encourage* all gainful economic activity—trade, agriculture, and manufacture. There was no intent to restrict the economic powers of Congress to something called "interstate commerce"; Congress had the responsibility to regulate all economic activity *among* the states (not "between" the states) to ensure the economic well-being of the nation.

*In the plan of government created by the Constitutional Convention, there is no room for "independent" bodies that exercise major substantive powers over the nation's economy but operate outside the three designated branches of government. Both Congress and the President have the duty to exert their authority over the Federal Reserve.*

The Fed's current wrecking operations are clearly *not* within the ambit of congressional or constitutional authority. Even the language of the Federal Reserve Act does not justify destroying the economy. For example, the Fed's ability to discount paper is to be done "with a view of accommodating commerce and business," and elsewhere congressional intent is explicitly established to prevent "injurious" expansion or contraction of credit.

Having once created the Federal Reserve System, Congress is not obliged to sit on its hands and watch the Fed go on its merry "independent" way sabotaging the U.S. economy and the welfare of its citizens. The

*The Second National Bank of the United States. In 1832, Congress exerted its power to recharter the bank, and (in this case unfortunately) Andrew Jackson vetoed it.*

Fed is not a fourth branch of government; like every other part of the government it must fit within the tripartite plan of our government or else it should not exist at all.

## The President's power

Nor is President Reagan obligated to observe some mythical "independence" of the Federal Reserve. Constitutionally, the Fed *cannot* be independent of the executive branch. The seven governors of the Federal Reserve Board, including Chairman Paul Volcker, are appointed by the President with the advice and consent of the Senate. As such, they fall into the category of "officers of the United States" and are subject to removal by the executive.

The Appointments Clause, Article II, Section 2, Clause 2 of the U.S. Constitution states:

> [The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present shall concur; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and *all other officers of the United States,* whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments [emphasis added].

Two methods of appointment for primary and inferior government officials, and no more, are created by the Constitution. The definitive interpretation of the Appointments Clause was set forth in an 1878 Supreme Court ruling by Justice Samuel Miller:

> The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class reqires a nomination by the President and confirmation by the Senate. . . . That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be little doubt. This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by this instrument.[1]

All major government officials outside of the legislature and the judiciary are therefore the subjects of executive power. This view was upheld as recently as 1976 in the Supreme Court's ruling in *Buckley v. Valeo,* which said that the Federal Election Commission as then constituted was a violation of the Constitution's separation of powers doctrine. (Some of the FEC Commissioners were appointed by Congress and some by the President.) It is Congress's duty to legislate, and it is the President's duty to ensure "that the laws be faithfully executed."

## Promoting the Fed independence hoax

Senators William Proxmire and Jake Garn have introduced Senate Concurrent Resolution 8 to try to rally Congressional support for Volcker's high interest-rate policies. The argument used by supporters of this resolution is that Congress has *delegated* its powers over the economy to the Fed. According to a staff member of Proxmire's Senate Banking Committee: "We are not saying the Fed is an independent institution. It is independent of the *executive*, but not of the Congress. Resolution 8 is the Congress exercising its power to advise the Fed on policy."

As the accompanying article shows, Congress can only make laws; it does not administer them. Furthermore, the method of appointment of the Governors of the Federal Reserve suffices to demoperate independently of the executive—unless operate independently of the executived—unless the Fed is "independent" of the Constitution itself.

The President's power to appoint is also the power to remove. The most exhaustive treatment of this question was in a 1926 Supreme Court decision in the case *Myers v. U.S.*, written by then Chief Justice Taft. This case involved a postmaster in Portland, Oregon. Taft reviewed the entire history of the Appointments Clause from the debates in the Constitutional Convention onward, and concluded that Congress could not, even by statute, take away the President's power to remove an officer whom he was authorized to appoint in the first place.

> Our conclusion on the merits . . . is that Article II grants to the President the executive power of the government, *i.e.*, the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed.[2]

In later cases, the Supreme Court has held that Congress can circumscribe the President's ability to remove officers of so-called independent regulatory agencies. This is unquestionably an extremely murky constitutional area, but in the situation of the Federal Reserve it is not even necessary to be concerned with it, for the Federal Reserve Act places *no* prohibition on the President's ability to remove officers whom he has the authority to appoint. Governors of the Federal Reserve are appointed for terms of 14 years; nothing is said about any special procedure or prohibitions on their removal.

The separation of powers and the appointive power of the executive were questions that were thoroughly debated and well thought-out in the Constitutional Convention. The framers of the Constitution had just been through the experience of fighting a war and trying to establish a peace under the Articles of Confederation in which there was only one branch of government. The central government had no judicial power, and executive and legislative power were both combined in the Continental Congress. The result was a miserably weak government, incapable of effectively waging war or keeping the peace, much less providing for the economic growth and well-being of the new nation.

In the plan of government created by the Constitutional Convention, there is no room for "independent" bodies that exercise major substantive powers outside the three designated branches of government. Under their oaths of office to protect the Constitution, both Congress and the President have the obligation and duty to exert their authority over the Federal Reserve before it totally destroys the U.S. economy.

1. *United States v. Germaine*, 99 U.S. 508, 509-510 (1878).
2. *Meyers v. U.S.*, 272 U.S. 52, 163-164 (1926).

# 'No one has really challenged the basis'

*The following is an interview with the Federal Reserve's Mr. Mattingly of the Fed Legal Division.* EIR*'s reporter was Legal Editor Edward Spannaus.*

**EIR:** I am very intrigued with the question of the so-called independence of the Fed. For example, the governors are appointed by the President with the advice and consent of the Senate. Is there any provision for their removal? Say by the President?
**Mattingly:** There isn't any provision for it. I suppose one could bring an impeachment action.

Officers of the Fed do not serve at the pleasure of the President, like many other government officials. I don't think they can be removed this way.

**EIR:** Where does this notion of the "independence of the Fed" come from anyway?
**Mattingly:** Well, I think it derives from history as much as anything else. It's always been accepted. For example, the Fed can hire its own attorneys, its employees are not subject to civil service, it does not use any government funds, its stock is privately owned by member banks. . . .

**EIR:** What if I were to say to you that since its officers are appointed by the President under the Appointments Clause, that, therefore, it is an executive branch agency? Its powers seem to be similar to those of the Treasury.
**Mattingly:** I'd say that's an interesting legal position.

**EIR:** How would you compare or distinguish the Fed from a regulatory agency?
**Mattingly:** It's different from the regulatory agencies. Everybody accepts the fact that the Federal Open Markets Committee is not open to direction by the President. There is no provision that gives anyone supervision over the Fed's operations with respect to monetary policy.

Some senators have taken the position that it is a legislative agency. There was once an attorney general's opinion that said it was an independent agency of the federal government. He didn't say it was either executive or legislative.

**EIR:** Where do you find any support in the Constitution for this to back up the idea of an independent agency?
**Mattingly:** I don't know. It *is* generally thought that there are only three branches of government, not four, with the Fed being the fourth.