

## BOARO OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

WASHINGTON, D.C. 20551

TO: Federal Open Market Committee DATE: July 5, 1983

FROM: Normand Bernard

Attached for your information is a memorandum from Messrs. Bradfield, Ashton, and Siciliano regarding a lawsuit against the Board and its members, the FOMC, and the five presidents currently serving as FOMC members.

Attachment

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## FEDERAL RESERVE SYSTEM

## Office Correspondence

Date	յսլ 5	1983	
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To Federal Open Market Committee

From Legal Division (Messrs. Bradfield Ashbon & Sicillano)

Subject: Lawsuit challenging the constitutionality of the laws governing the conduct of monetary policy.

## FOR INFORMATION ONLY

On June 16, 1983, the Committee for Monetary Reform and approximately 900 other named businesses, associations, and individuals filed a lawsuit in the Federal district court in the District of Columbia against the Board and its members, the FOMC, and the five individual Reserve Bank presidents currently serving as FOMC members. This lawsuit makes the same allegation involved in the two previous lawsuits against the FOMC brought by Congressman Reuss and by Senator Riegle; namely, that the Reserve Bank members were not appointed by the President and confirmed by the Senate in conformance with the Appointments Clause of the Constitution. It also makes a new allegation, asserting that the statutes under which the Board and the FOMC conduct monetary policy (relating to open market operations, reserves, and the discount rate) represent an unconstitutional delegation of congressional authority, since the statutes "lack adequate standards" to govern the actions of the Board and the FOMC.

The plaintiffs, who are represented by the same attorney who represented Congressman Reuss and Senator Riegle, consist of various groups of builders/general contractors, building subcontractors and suppliers, building industry trade associations, other businesses, and farmers, as well as one labor union local, approximately 800 individuals, and the Committee for Monetary Reform itself. According to the complaint, the plaintiffs have been injured economically in various ways by alleged "instability in the nation's money supply" and high interest rates, which plaintiffs contend are the "direct result" of the Reserve Bank representatives' participation in FOMC actions and of the allegedly unconstitutional delegation of legislative power to the Board and the FOMC.

The previous cases raising the question of whether the Reserve Bank representatives may constitutionally sit as members of the FOMC were brought against the FOMC and its individual members only. In both previous cases, the FOMC moved to dismiss on the grounds that: (1) the Congressman and Senator lacked standing to sue, and (2) the manner of selection of Reserve Bank representatives to the FOMC satisfies the Appointments Clause of the Constitution. In neither case did the court reach the Constitutional question. Congressman Reuss's lawsuit was dismissed because he failed to allege a sufficiently specific and individualized injury either as a

member of Congress or as an owner of bonds to have standing to challenge the constitutionality of the FOMC.  $\stackrel{*}{-}$ 

With respect to the second lawsuit, the court held that Senator Riegle alleged sufficient individualized injury to sue the FOMC because, unlike Congressman Reuss, he shares in the Senate's power to confirm presidential appointees. The court nevertheless upheld the district court's dismissal of the lawsuit based on prudential considerations because, in its view, to hear the suit would unduly interfere with constitutionally mandated separation of powers between the judicial and legislative branches of the Government. The court found dismissal of the legislator's lawsuit appropriate in part because it believed that a private plaintiff, such as a "major corporation, pension fund, or other major investor," who sued the FOMC would not be burdened by separation of powers concerns and might be able to acquire standing to sue.\*\*/

<sup>\*/</sup> Reuss v. Balles, 584 F.2d 461 (D.C. Cir.), cert. denied, 439 U.S. 997 (1978). "Standing" connotes a right to sue. In the present context, it means that plaintiffs have suffered a real injury in fact which is not shared with persons generally, and that the statute or constitutional provision in question should protect plaintiffs' interest. If there is no standing, the lawsuit must be dismissed.

 $<sup>\</sup>frac{**/}{454}$  Riegle v. FOMC, 656 F.2d 873 (D.C. Cir.), cert. denied,  $\frac{454}{454}$  U.S. 1082 (1981). In both previous cases the Supreme Court declined to review the court of appeals' decision.

We suspect that the <u>Riegle</u> court's suggestion that a private plaintiff may have standing may be one of the reasons why the present suit was brought. This suggestion by the court may make it more difficult to persuade the district court here to dismiss the action for lack of standing. Based on our initial analysis of the issues, however, it does not appear that the court's remarks in <u>Riegle</u> preclude an argument that the plaintiffs in this case lack standing.

Under the established criteria for showing standing, a prospective litigant must allege that (1) he has suffered some concrete injury; (2) this injury can be fairly traced to the actions being challenged; and (3) the injury will be redressed by the relief the litigant seeks. Moreover, the litigant's action must be dismissed if he alleges only a generalized grievance that affects virtually all members of the public. In the Reuss case, the court ruled that all four of these factors demonstrated that an investor in government bonds lacked standing to sue the FOMC.

A preliminary review of the complaint in this case indicates that under these established standards, all categories of plaintiffs would very likely to be found to lack standing. For example, in a prior case very similar to this one, Bryan v. FOMC, 235 F.Supp. 877 (D. Mont. 1964), the plaintiff sought to have the authority of the FOMC declared an unwarranted delegation by Congress and to restrain the conduct

of open market operations by the FOMC. The court held that plaintiff's ownership of treasury bills was insufficient to establish his standing to sue.

The court's statement in Riegle concerning the likelihood of standing for private plaintiffs did not apply the criteria for standing to such plaintiffs or rule that any private individuals have standing. Nor did the court enunciate new standards to determine standing. The Riegle court merely stated, without any analysis, that it was conceivable that some persons might qualify to bring a legal challenge against the FOMC. Moreover, the court's speculation expressly referred to major businesses and investors that have a significant economic interest in the "open securities markets and prime lending rates." It could be argued that the court had in mind only those who deal in securities or borrow money on a massive scale, for example, a money fund or major industrial corporations, rather than ordinary investors (like Congressman Reuss) or businesses on whose economic condition the monetary policy actions of the Board and FOMC might have a less perceptible effect. None of the plaintiffs in this case have made allegations that they are such "major" investors or businesses.

It is possible that there may be other principles limiting judicial intervention in disputes between citizens and the government that would warrant dismissal of this case. For example, it could be argued that this action in reality is an

attack on particular policy decisions taken by the Board and the FOMC and, even if standing were found, such policy decisions are not judicially reviewable because they are committed to agency discretion by law.\*

Aside from the standing issue, we expect the response of the Board and the FOMC to address the merits of the constitutional allegations, demonstrating that they are not correct. As was argued in both the Reuss and Riegle cases, the appointment of the Reserve Bank presidents who serve as members of the FOMC complies with the Appointments Clause because the presidents are appointed with the approval of the Board.

Similarly, plaintiff's claim that the provisions of the Federal Reserve Act authorizing the FOMC to engage in open market transactions and the Board to establish reserve requirements and set the discount rate--the principal tools of monetary policy--are invalid for lack of adequate standards also appears to be of dubious validity. As the plaintiffs are forced to concede, the Federal Reserve Act, as amended, and the Employment Act provide appropriate standards to govern the Board's and the FOMC's control of the monetary and credit

<sup>\*/</sup> See Raichle v. Federal Reserve Bank of New York, 34 F.2d 910, 915 (2d Cir. 1929) ("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."); Merrill v. FOMC, 516 F.Supp. 1028, 1032 (D.D.C. 1981) ("While Congress has entrusted the FOMC with making such [monetary policy] determinations, it is at once apparent that this Court is an inappropriate forum for weighing the wisdom of the FOMC's choice.").

aggregates. 12 U.S.C. 225a; 15 U.S.C. 1021. The doctrine that the Constitution precludes Congress from delegating its power to an agency without establishing standards to circumscribe the agency's exercise of that power originated in two 1935 Supreme Court decisions striking down portions of the National Industrial Recovery Act.\*/ Although the Court continues to recognize the validity of this doctrine, since 1935 no statute has been invalidated by the Court because of delegation without adequate standards and statutes delegating power to agencies under the most general of guidelines have been upheld.\*\*/

It will be necessary to contact the Department of Justice and to request either that it enter an appearance on behalf of the Board and the FOMC or that it authorize the Board and the FOMC to represent themselves in the case. The Department appeared on our behalf in the previous two cases, but most of the papers actually filed in those cases were drafted by members of the Board's staff, with input from

<sup>\*/</sup> Panama Refining Co. v. Ryan, 293 U.S. 388, A.L.A Schechter Poultry Corp. v. United States, 295 U.S. 495.

<sup>\*\*/</sup> For example, the Court has upheld Congressional delegations to agencies where the only standard guiding the agency's action is that it be "fair and equitable" or "in the public interest." See Yakus v. United States, 321 U.S. 414, 427 (1944).

various Reserve Bank general counsel. Our deadline for filing an answer or motion to dismiss is sixty days from the date of service, which was June 21, 1983. Accordingly, our response will be due no later than August 22, 1983.

<sup>\*/</sup> This deadline may be changed by one or two days if we discover that the U.S. Attorney was served on a date other than June 21. Since the suit was filed June 16, the earliest date on which our response could be due is August 15, 1983.