

(*Bernard*)



**BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551**

June 17, 1986

TO: Federal Open Market Committee

**FROM: FOMC Secretariat
(Nancy M. Steele) *NMS***

Attached for your information is a memorandum dated June 16, 1986, from Messrs. Bradfield and Oltman on recent developments with respect to the Melcher FOMC litigation.

Attachment

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schedule, the FOMC's brief and Senator Melcher's supplemental brief are due on July 3, reply briefs from both sides are due on July 11, and argument on the motion is scheduled for July 16.

In conjunction with the Justice Department we are considering the possibility of making an immediate, direct request to the Court of Appeals to hear the jurisdictional issue and to stay the proceedings. This request would be based on the supervisory authority of the Court of Appeals over Judge Greene and the admittedly unclear law in the D.C. Circuit governing the standing of congressmen to bring suits in the federal courts challenging the validity of statutes. If the request is granted, it would at a minimum delay consideration of the constitutional issue, while providing an excellent opportunity of resolving the standing issues. However, it is unusual for the Court to grant such requests and there is some risk of antagonizing Judge Greene. The decision of whether to proceed should be made on Monday or Tuesday.

Regarding the constitutional issue, our preliminary analysis indicates that there are two major arguments. The first, which has been briefed in the prior cases, is that the Reserve Bank members of the FOMC are validly appointed by virtue of the Board's approval of their election. The second argument, which is being developed now, is that the Presidents' participation in the FOMC constitutes acceptable participation

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in an instrumentality carrying out a carefully crafted balancing of a public/private functional role that historically has not been subject to the Appointments Clause. We have retained Wilmer, Cutler & Pickering, which is counsel to the Comptroller General in the Gramm-Rudman litigation, to advise us on the "instrumentality" argument. Mayer, Brown & Platt, which has among its partners several former Deputy Solicitor Generals who have dealt with Appointments Clause issues, has been retained to advise us on the first argument.

We anticipate that a significant part of a draft brief prepared by next Thursday, June 19. We would like to have a conference call with all Reserve Bank General Counsels at 12 noon, eastern time on June 19 to bring everyone up to date on current developments. We intended to report to the Presidents on current developments on a weekly basis.