

June 24, 1986

TO: Members, Federal Open Market Committee SUBJECT: Status Report #2 on
Melcher FOMC Case

FROM: Michael Bradfield, General Counsel
James Oltman, Deputy General Counsel

This is the second report on developments in the Melcher FOMC litigation. In our first report, we indicated that we were considering filing a special petition with the Court of Appeals on the issue of whether Judge Greene has jurisdiction to hear Senator Melcher's lawsuit. On Wednesday, June 18, we filed such a petition, which asks the Court of Appeals to issue an order, technically referred to as a writ of mandamus, requiring Judge Greene to dismiss the case on jurisdictional grounds. Although it is unusual for such petitions to be granted, we believed that the petition was advisable because, if granted, the necessity of addressing the complicated constitutional issues would be avoided. We concluded that while Judge Greene might not view filing of such a petition with favor, it would not cause him to change his views on the constitutional issue. As you may be aware, the filing of the petition was reported in the Wall Street Journal on Thursday.

Also on Wednesday, we requested Judge Greene to stay his consideration of the constitutional issue pending the court of appeals' decision. On Thursday, Judge Greene denied the stay request and we expect to request the Court of Appeals to stay further proceedings by Judge Greene.

-2-

We are proceeding, as we must, on the assumption that Judge Greene's consideration of the constitutional issue will not be delayed and are reviewing material prepared by outside counsel and by staff. We anticipate having a complete draft of the brief by the middle of this week. Unless a stay is granted, our papers must be filed by July 3.

As we have indicated, there are two major arguments on the constitutional issue: (i) the Appointments Clause does not prohibit a central banking function from being carried on by a public/private instrumentality like the FOMC and (ii) the Reserve Bank members of the FOMC are validly appointed by virtue of the Board's approval of their election as Reserve Bank Presidents. A draft of the Appointments Clause argument and a draft and an outline of the instrumentality argument have been provided to the General Counsels of the Reserve Banks and other draft material will be circulated to the General Counsels as it becomes available.