July 8, 1986

Federal Open Market Committee

FOMC v. Melcher

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and Siciliano

FOR INFORMATION ONLY

This memorandum summarizes arguments made on behalf of the FOMC and Senator Melcher in written briefs that were simultaneously filed on July 3, 1986.[1/] As the Committee is aware, the decision was made to allow the Justice Department to submit a brief on behalf of the FOMC in this case and not to file a separate FOMC or Reserve Bank brief at this time.

A. Justice Department Brief. The Justice Department brief first extensively summarizes the history of central banking in the United States.

Based on this background, the Department then argues that Buckley v. Valeo, 424 U.S. 1 (1976), requires only that persons exercising enforcement, rulemaking or adjudicatory powers on behalf of the United States must be appointed in accordance with the Appointments Clause and that the FOMC exercises no such powers. In contrast to Buckley, the FOMC does not issue rules or opinions that are binding on the general public; its regulations are binding only on the Reserve Banks. Thus, it is more like a self-regulatory body. It clearly does not adjudicate rights or

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1/ Responsive pleadings are due Friday, July 11, 1986. Oral argument is scheduled for July 16, 1986.

enforce laws. The Department cites language from F.O.M.C. v. Merrill, 443 U.S. 340 (1979) and Committee for Monetary Reform v. Board of Governors, 766 F.2d 538 (D.C. Cir. 1985) to support the view that the FOMC's functions are therefore as in Buckley. The Department also points out that open market transactions do not use government funds.

In addition, the FOMC's functions are contrasted with the Board's functions to show that Congress was careful to vest the crucial Buckley-type functions in officials who are properly appointed under the Appointments Clause, i.e. in the Board. Because the FOMC does not perform any of the functions required by the Constitution to be exercised exclusively by officers of the United States, the Department argues, the Appointments Clause does not apply here.

The brief also points out that McCulloch v. Maryland, 17 U.S.(4 Wheat.) 316 (1819) and Osborn v. Bank of the United States, 22 U.S.(9 Wheat.) 738 (1824), ruled that the Second Bank of the United States, which exercised central banking powers and which was managed at least in part by representatives of the private sector, was constitutional.[2/] History shows that the Second Bank carried out, at least in part, the same monetary control functions as the FOMC, and its board of directors was not

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2/ Neither McCulloch nor Osborn expressly addressed the Appointments Clause issue raised in Melcher.

controlled by public officers. Only one-fifth of its board was appointed by the President with the advice and consent of the Senate.

The Department also argues that if the Reserve Bank representatives on the FOMC are deemed "officers of the United States," they are at most "inferior officers" under the second prong of the Appointments Clause. The Department argues that, although the Supreme Court has not clearly defined the term "inferior officers," the text and history of the Appointments Clause show that it was intended to include subordinate officers in the governmental hierarchy. Because the Reserve Bank members of the FOMC are subordinate to the Board, in the sense that they may be suspended or removed by the Board, they could be included within the term. The brief argues against plaintiff's suggested meaning of "inferior" as insignificant by saying that it is more properly interpreted as subordinate.

The brief then argues that since the inferior officer prong appointment authority contained in the Appointments Clause does not require Senate confirmation of "inferior officers," Senator Melcher may not challenge whether the Reserve Bank members have been validly selected under the procedures governing the appointment of inferior officers. Melcher is injured only if he is being deprived of a right to participate in the Senate's right to advise and consent to the appointment of "superior officers."

B. Senator Melcher's Brief. Since the briefs were simultaneously filed, counsel for Senator Melcher does not address the Justice Department arguments. Instead counsel challenges principally the "inferior officer" argument as it was briefed on the FOMC's behalf in Riegle v. FOMC, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). That argument holds that the Reserve Bank members of the FOMC are inferior officers who have been validly appointed by the Board, which approves the appointments of Reserve Bank presidents and first vice presidents.

Senator Melcher argues that the FOMC exercises governmental powers and that its members must, therefore, be appointed in accordance with the Appointments Clause. He attacks the "inferior officer" argument on several grounds. First, he argues that the Board is not the head of a department that includes the FOMC because the Board is equal with the FOMC and thus the Board may not appoint members of the FOMC. Second, he claims that the Reserve Bank FOMC members are appointed by Reserve Bank boards of directors rather than by the Board. Third, he argues that the Reserve Bank members are not "inferior officers" because their votes are not controlled by the Board and because the powers of the FOMC are so important that only persons appointed by the President with the advice and consent of the Senate may constitutionally exercise such powers.