07/27/93 16:49

U.S. Department of Justice

John Podesta

Washington, D.C. 20530

CIVIL DIVISION/APPELLATE STAFF

FAX TRANSMITTAL COVER SHEET

NOTICE: OFFICIAL GOVERNMENT BUSINESS

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DATE: 7-27-93 TIME: 4:45

TO: Steve Neuwirth

FAX NO.: 456-1647

FROM: Jon Siegel
Civil Division, Appellate Staff
Room 3617
United States Department of Justice
Washington, D.C. 20530

PHONE NO.: (202) 514-4821 /(FTS) 368-

FAX NOS.: (202) 514-8151/FTS 368-8151 (Room 3631)
(202) 514-7964/FTS 368-7964 (7400 Corridor)

THERE ARE A TOTAL OF 13 PAGES, INCLUDING THIS COVER PAGE, IN THIS TRANSMISSION.

Attached, the Attorney General's April 26 letter to Mr. Nussbaum

Office of the Attorney General
Washington, D.C. 20530

April 26, 1993

Honorable Bernard W. Nussbaum
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Nussbaum:

As you may know, we have reached a conditional settlement of the case entitled Mackie v. Bush, No. 93-5001 (D.C. Cir.), which involves several important issues of presidential power. The settlement is conditioned on the execution of two documents by the President, and we have enclosed draft copies of these documents for his signature and for transmittal to the Governors of the Postal Service. Once those documents have been executed, we plan to move to dismiss the appeal and vacate the adverse district court judgment in the case, and to dismiss count one of the complaint. Copies of the motion and stipulation are also enclosed for your information. (These two documents do not require any action on your part.) Mr. Klain previously reviewed all of these documents.

This litigation arose when the Postal Service, without the Attorney General's consent, attempted to appear by its own counsel in a suit concerning postal rates. President Bush ordered the Governors of the Postal Service to withdraw its filings and threatened to remove the Governors when they declined to do so. The Governors who were under threat of removal brought this suit, seeking an injunction against their removal. The district court granted a preliminary injunction to that effect, and we appealed to the D.C. Circuit. Later, the plaintiffs amended their complaint to add a count challenging the validity of the recess appointment of Governor Thomas Ashley to replace Governor Crocker Nevin.

The court of appeals then decided the question of litigation authority in the underlying postal rate case. The court held that the Postal Service does have authority to appear by its own counsel in postal rate litigation conducted under 39 U.S.C. § 3628. The basis for President Bush's decision to remove the Governors--that they were illegally violating the Attorney General's litigation authority--was thus held to be incorrect. The Acting Solicitor General has determined not to seek further review of this decision.

Accordingly, after consultation with your office, we have arranged a settlement of the case concerning the removal of the Governors. As drafted, the documents contemplate that President Clinton would first rescind President Bush's directive and inform the Governors that they are no longer under threat of removal. On the basis of those actions, we would then file simultaneously the stipulation dismissing count one of the complaint and the motion to dismiss the appeal and for vacatur.

Please note that the joint stipulation does not contemplate that the recess appointment count of the amended complaint would be dismissed at this time. Currently, the recess appointment issue is being handled by an informal agreement that neither Governor Ashley nor his predecessor will attend meetings of the Board of Governors until President Clinton nominates a successor to Governor Ashley, at which time both will resign. A status conference has been scheduled for May 19, 1993, and we anticipate that plaintiffs might be reluctant to agree publicly to continue this arrangement. Once President Clinton nominates a successor Governor, we expect that we will be able to settle all remaining issues in the case.

If you have any questions regarding this matter, your staff can contact officials of our Civil Division. The staff attorney handling this matter is Jonathan R. Siegel, who can be reached at 514-4821. I would also appreciate it if you could return copies of the first two documents to Mr. Siegel once they are signed and sent. His address is Room 3343, Civil Division, Department of Justice, Washington, DC 20530.

Sincerely,

Janet Reno

Janet Reno

Enclosures

THE WHITE HOUSE
WASHINGTON

April _, 1993

MEMORANDUM FOR THE POSTMASTER GENERAL

On December 11, 1992, President Bush directed you to cooperate with the Attorney General in arranging for the withdrawal of certain filings made by the United States Postal Service in the United States Court of Appeals for the District of Columbia Circuit. Thereafter, on January 15, 1993, that court granted in part the motion of the Postal Service for leave to appear as a party on its own behalf. While that order and the court's subsequent explanatory opinion do not resolve all issues regarding the scope of the Postal Service's authority under 39 U.S.C. 409(d) to file documents in court without the authorization of the Attorney General, I have determined that the order constitutes a sufficient change in circumstances to warrant rescission of the December 11th memorandum to you, and I hereby rescind it.

cc: Chairman Bert H. Mackie
Attorney General Janet Reno

THE WHITE HOUSE
WASHINGTON

April __, 1993

The Honorable Bert H. Mackie
Chairman of the Board of Governors
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1000

Dear Chairman Mackie:

Enclosed is my memorandum rescinding the memorandum of December 11, 1992, that directed the Postmaster General to cooperate with the Attorney General in arranging for the withdrawal of certain filings made by the United States Postal Service in the United States Court of Appeals for the District of Columbia Circuit. In light of that action, neither you nor any other Governor of the United States Postal Service is now under a threat of removal from office or any other adverse action for refusing to comply with the former directive.

Sincerely,

William J. Clinton
President

cc: Attorney General Janet Reno

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BERT H. MACKIE, et al., Plaintiffs-Appellees v. WILLIAM J. CLINTON, in his official capacity as President of the United States of America, Defendant-Appellant.	No. 93-5001

JOINT MOTION TO DISMISS APPEAL AND FOR VACATUR ON GROUNDS OF MOOTNESS

Defendant-appellant William J. Clinton,[1] President of the United States, joined by plaintiffs-appellees Bert H. Mackie, Norma Pace, John H. Griesemer, Crocker Nevin, Marvin T. Runyon and Michael S. Coughlin, hereby move this Court to vacate the preliminary injunction issued on January 7, 1993 which enjoined the removal of certain Governors of the United States Postal Service and to dismiss this appeal.

As explained below, President Clinton has informed the Chairman of the Board of Governors of the Postal Service that he has rescinded President Bush's December 11, 1992 directive ordering the Postal Service to cooperate with the Attorney General in withdrawing filings made in Mail Order Association of America v. United States, No. 91-1058 (Complex), and that the Governors are no longer under any threat of removal for their refusal to obey that directive. The parties have now filed a

[1]President Clinton has been substituted for President Bush pursuant to Fed. R. App. P. 43(c)(1).

joint stipulation in the district court dismissing Count 1 of Plaintiffs' First Amended Complaint without prejudice. As a result, this appeal has become moot and review of the district court's order has been foreclosed. Accordingly, this Court should dismiss the appeal and vacate the district court's preliminary injunction as moot.

FACTUAL BACKGROUND

This suit arises from a dispute between President Bush and certain Postal Service Governors over the authority of the Postal Service to make filings on its behalf in a case before this Court, Mail Order Association of America v. United States Postal Service, No 91-1058 (Complex).

On December 11, 1992, President Bush issued a directive to the Postmaster General and the Governors of the Postal Service to cooperate with the Attorney General to withdraw these filings. See Exhibit ("Exh.") 1. Subsequently, by letter dated January 4, 1993 to each of the Governors, President Bush advised the Governors that he would remove them if necessary to ensure compliance with the December 11 directive. Exh. 2.[2]

Four of the Governors, joined by the Postmaster General and the Deputy Postmaster General, filed the present suit seeking an injunction against their removal. On January 7, 1993 the district court (Oberdorfer, J.) issued a preliminary injunction prohibiting President Bush from removing the named plaintiffs

[2]By letter to the Governors dated January 6, 1993, the Counsel to the President reaffirmed the President's directives.

from their positions as members of the Board of Governors of the Postal Service.[3] The government thereupon noticed this appeal, and filed an emergency motion to stay or reverse the preliminary injunction.

2. On January 15, 1993, this Court issued an order in the Mail Order Association case permitting the Postal Service to appear on its own. The Postal Service's brief as petitioner in No. 91-1073 was accepted for filing; in addition, the Postal Service's brief as respondent was returned, and the Postal Service was instructed to file a supplemental brief setting forth the Postal Service's position "only to the extent that its position is fundamentally different from that taken by DOJ in the latter's respondent's brief."

Subsequently, this Court explained that it was "not deciding that, as a general matter, the Postal Service can initiate litigation without the participation or consent of the Attorney General." Mail Order Association of America v. United States Postal Service, No. 91-1058 (D.C. Cir. Feb. 23, 1993), slip op. at 12. Rather, the Court concluded that when the Postal Service seeks judicial review of a Postal Rate Commission decision pursuant to 39 U.S.C. 3625(c), "it may do so on its own if the Department of Justice has declined to represent its fundamental positions or to consent to its self-representation," and that when private suits are filed against the Service under 39 U.S.C.

[3]On January 15, 1993, the district court extended its preliminary injunction against removal to a fifth Governor, Tirso del Junco.

3628, "the Postal Service is entitled to appear and to be represented by its own counsel when its position is inconsistent with that of the Department of Justice." Ibid.

3. On January 20, 1993, William J. Clinton was sworn in as the 42d President of the United States.

4. On April __, 1993, President Clinton, by memorandum to the Postmaster General, rescinded President Bush's December 11 directive in light of this Court's January 15 order. Exhibit 3. On April __, President Clinton informed the Chairman of the Board of Governors by letter that he had rescinded the December 11 directive and that the Governors were no longer under any threat of removal or any other adverse action by reason of their noncompliance with the December 11 directive. The parties thereupon filed a motion to dismiss Count 1 of Plaintiffs' First Amended Complaint in the district court.

DISCUSSION

1. By virtue of its January 15 order, this Court has determined that the Postal Service has authority to appear on its own behalf in the Mail Order Association case without the consent of the Attorney General. It was the dispute over that authority which gave rise to the President Bush's December 11 directive. In light of this Court's order, President Clinton has now rescinded the December 11 directive and determined that he will not continue President Bush's threat to remove the Governors for noncompliance with that directive. In short, as the parties have recognized by stipulating in district court to dismiss Count 1 of

Plaintiffs' First Amended Complaint, subsequent events have eliminated the possibility that the Governors might be removed by virtue of their noncompliance with President Bush's December 11 directive. This appeal has therefore been rendered moot.

2. It is the "established practice" of the federal courts to vacate judgments that have become moot pending review. United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950). See Lewis v. Continental Bank Corp., 494 U.S. 472, 482 (1990); Matter of City of El Paso, Texas, 887 F.2d 1103, 1106 (D.C. Cir. 1989) (per curiam); Matson Navigation Co. v. United States, 825 F.2d 502, 504 (D.C. Cir. 1987); Monzillo v. Biller, 735 F.2d 1456, 1464 (D.C. Cir. 1984).

In this case, the appeal has been rendered moot and the parties are foreclosed from litigating the issues presented by the district court's interlocutory order. Besides the merits, these include the important threshold question of whether the district court had jurisdiction to enjoin the President in the first place. To prevent the district court's order from having any future collateral effects, the order should be vacated. See University of Texas v. Camenisch, 451 U.S. 390, 398 (1981); Fauconniere Manufacturing Corp. v. Secretary of Defense, 794 F.2d 350, 352 (8th Cir. 1986); Nilson Van & Storage v. Marsh, 755 F.2d 362, 363 & n.2 (4th Cir. 1985) (all vacating preliminary injunctions rendered moot on appeal).

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal and vacate as moot the district court's January 7, 1993 preliminary injunction enjoining the removal of the Governors of the Postal Service.

Respectfully submitted,

KENNETH S. GELLER
DAN M. KAHAN
(202) 778-0613
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

ANTHONY J. STEINMEYER
(202) 514-3388

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Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
9th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of April 1993, I caused two copies of the foregoing Joint Motion To Dismiss Appeal And For Vacatur to be served by hand-delivery upon:

Kenneth S. Geller
Dan M. Kahan
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JACOB M. LEWIS, Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERT H. MACKIE, et al., Plaintiffs, v. WILLIAM J. CLINTON,[1] in his official capacity as President of the United States of America, Defendant.	Civil Action No. 93-0032-LFO

STIPULATED DISMISSAL

The parties, desiring to terminate certain aspects of this action without further litigation on behalf of the plaintiffs or defendants, by their undersigned counsel, hereby stipulate, pursuant to Fed. R. Civ. P. 41(a)(1)(ii), that Count 1 of Plaintiffs' First Amended Complaint is dismissed without prejudice.

FOR PLAINTIFFS:

DATED: ____________, 1993

KENNETH S. GELLER, No. 401130
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Telephone: (202) 778-0613

FOR DEFENDANT:

DATED: ___________, 1993

STUART E. SCHIFFER
Acting Assistant Attorney General

KAREN STEWART, No. 367290
Attorneys
U.S. Department of Justice
901 E Street, N.W., Room 820
Washington, D.C. 20530
Telephone: (202) 514-2849

[1] President Clinton is automatically substituted as a defendant for President Bush pursuant to Fed. R. Civ. P. 25(d).

W. Post — 1/7/93

edical panel study expressed shock
ne government treated the young
ost appalling was the fact that no
medical care or monitoring was
for any of the WWII human sub-
. despite knowledge available by
at mustard agents and Lewisite
oduce long-term debilitating health
s, particularly in those people suf-
evere burns and inhalation injuries,"
There was not even adequate short-
low-up of the human subjects by the
nent of Defense."

420-page report, the panel also
ned that some Defense agencies
ed to cloud the testing in "an atmos-
of secrecy" and had frustrated the
hers' efforts to learn details of the
. The Naval Research Laboratory in
ast Washington was the only one of
major facilities involved in gas-cham-
sts that "freely shared technical and
d summaries" of its work, the panel

reports from Army research facil-
emain classified or restricted, the
ittee said; often the military agencies
d the researchers file Freedom of
nation Act requests to obtain docu-
needed for the survey, it said.

panel urged the VA to continue to
rch the issue and to expand its efforts
ntact veterans who were part of the
In addition to the Naval Research
atory in Washington, the VA said that
y exposed veterans may have partic-
l in tests run by the Army at the Edge-
Arsenal, Md.; Camp Sibert, Ala.;
nell, Fla.; Dugway Proving Ground,
and San Jose Island, Panama Canal
It said, however, there is no central
of personnel who were exposed to
boratory or field tests.

August of last year, the VA published
regulations citing seven ailments el-
for benefits. Since the VA first an-
ed it would award compensation to
rd gas victims, 187 veterans have
d for benefits but only 24 of those
ed. A VA spokesman said the depart-
would be reexamining the claims on
sis of the new medical report.

Court Is Asked to Block Bush

Postal Service Board Seeks to Continue With Lawsuit

By Bill McAllister
Washington Post Staff Writer

Lawyers for the Postal Service went into federal court last night in an attempt to secure a court order blocking President Bush from forcing them to withdraw a lawsuit.

The action was the latest round in a dispute over Bush's threat to fire the nine presidential appointees who oversee the agency and had filed a lawsuit without Justice Department approval.

U.S. District Judge Stanley S. Harris rejected a proposal to hold an emergency hearing in the matter last night but told the postal lawyers that the request would be heard this morning, a postal official said.

The high-stakes legal maneuvering began shortly after a senior administration official said Bush had waived his Wednesday deadline for the Postal Service Board of Governors to withdraw its lawsuit. The official said he had "some reason to believe" that the governors may back down from the dispute and save the issue for the incoming Clinton administration.

But a postal spokesman said late last night that the postal governors voted 6 to 5 to seek a court order that would block Bush from firing any of the board members. Frank Brennan, a postal spokesman, said the board majority believed that the president's directive to drop the lawsuit was not consistent with terms of the Postal Reorganization Act, which removed the Post Office Department from the Cabinet and established the Postal Service as a semi-independent agency.

In addition to the nine governors appointed by the president, Postmaster General Marvin T. Runyon and his deputy, Michael S. Coughlin, make up the board.

"A majority of the board of governors believe recent actions sought by the White House are not in accord with the Postal Reorganization Act and ultimately in the best interests of the American public," said Deborah K. Bowker, vice president of communications for the Postal Service.

"The majority of the board . . . regret the necessity of taking this action but are left with no alternative," Bowker said. "They respect the office of the president, believing that the issue is one of constitutional and statutory interpretation that should have been worked out in the appropriate federal courts."

Earlier yesterday, the White House had sent the governors another letter rejecting their argument that the board should be allowed to legally challenge postal rate actions. In the letter, Bush again insisted that the board withdraw a lawsuit. In an unprecedented move, Bush last week threatened to fire the presidential appointees if they did not comply.

A senior administration official said the Bush letter, responding to one from the governors, rejected arguments that the board would be seriously weakened and financially threatened if it could not independently challenge postal rate actions.

The senior official said the board "made no legal arguments that undermine . . . the clarity of the statute" governing the board, which states it must obtain "prior consent" from the Justice Department before engaging in litigation. "In government, there can only be one arbiter, and in this case, it is the attorney general," the official said.

The dispute involves the governors' challenge in a rate case that, among other things, kept the price of a first-class stamp at 29 cents. The Postal Service sued without the attorney general's approval, arguing that it has legal authority to see that postage rates are properly and fairly established by the independent rate commission.

Staff writers Stephen Barr, Ann Devroy and Michael York contributed to this report.

Gideon
copy to B. Lindsey

BOARD OF GOVERNORS
Washington, DC 20260-1000

January 6, 1993

The President
The White House
Washington, D.C. 20500-0001

Dear Mr. President:

This is in response to your letter of January 4, 1993, regarding the steps I have taken to ensure compliance with the Presidential Directive.

I have struggled at great length to make the right choice in this very difficult decision. As your most recent appointee on the Postal Service Board of Governors, I have a high degree of respect and loyalty in representing you in that position. I also have great respect for you as President and the importance of your Directive.

By the same token, I have a major responsibility to ensure that my obligations as a Governor under the Postal Reorganization Act be properly carried out. I very much respect the independent nature of the Postal Service legislated by Congress and the need to manage in a business-like fashion to meet difficult financial and service objectives. The rate making process is a key aspect of that design. To that end, I respect the position espoused by the majority of the Board, and understand that the Board of Governors must maintain its independency.

However, I yield to a deep-seated moral obligation to comply with a Presidential Directive, and am thus placing my support with immediate compliance. I hope never to face such a difficult choice again, and greatly desire that these matters can still be resolved amicably.

Sincerely,

Tirso del Junco, M.D.

Tirso del Junco, M.D. /mse

cc: Members of the Board of Governors

Hand-carried by LeGree Daniels, Bd of Govs at 9:36 am 1/5/93

UNITED STATES POSTAL SERVICE
U.S. MAIL

BOARD OF GOVERNORS
Washington, DC 20260-1000

January 5, 1993

The President
The White House
Washington, DC 20500-0001

Dear Mr. President:

At its meeting on January 4, 1993, a majority of the Board of Governors voted in favor of a motion to write a letter to you stating reasons for not withdrawing, at that time, filings made by the United States Postal Service in the Court of Appeals in certain rate cases. This letter is to advise you that the undersigned voted against that motion. It is our opinion that the Governors should have taken appropriate action to comply with your directive and we would have voted in favor of a motion to comply with your directive and to withdraw such filings. An appropriate motion was made to comply with your directive. Instead a substitute motion was made and adopted to send you a letter setting forth reasons that the filings should not be withdrawn, which was opposed by the undersigned. Thus, the undersigned have complied with your directive.

We believe that a substantial legal question exists as to whether the Attorney General can or should prevent an appeal by the United States Postal Service from a decision of the Postal Rate Commission as is provided by statute and we further believe that this matter should be clarified in an appropriate forum.

Respectfully submitted,

Robert Setrakian

Susan E. Alvarado

Susan E. Alvarado

LeGree S. Daniels

LeGree S. Daniels

Sam Winters

Sam Winters

Hand-carried by
Jim Adams, USPS at
857 am on 1/5/93

BOARD OF GOVERNORS
Washington, DC 20260-1000

January 4, 1993

Norma Pace
Chairman

President George Bush
The White House
Washington, D.C.

Dear Mr. President:

The Governors of the United States Postal Service greatly appreciate the confidence shown in them by President Reagan and yourself by appointing them as Governors. Three were appointed by you and the other six by President Reagan. The Governors have done their very best to be worthy of the trust shown in them. They have taken their responsibility very seriously and are bringing economic stability back to the Postal Service.

In reference to your directive, the Board of Governors believes that it is important for you to know that it is acting responsibly, and it is not intentionally acting arbitrarily or contrary to law. To the contrary, there is substantial reason for the careful deliberation taken by the Board on this very complex matter.

Your directive states that the Postal Service has made filings in the United States Court of Appeals for the District of Columbia Circuit without authorization of the Attorney General, contrary to 39 U.S.C. § 409(d). That statute provides that "[t]he Department of Justice shall furnish ... the Postal Service such legal representation as it may require, but with the prior consent of the Attorney General the Postal Service may employ attorneys ... to conduct litigation brought by or against the Postal Service ...." A federal appeals court, pointing to this "shall furnish" language, concluded that "§ 409(d) does not give the Attorney General [a] veto power over the Service" by refusing to defend the Service.[1]

On January 23, 1991, the General Counsel of the Postal Service wrote the Department of Justice advising it of the action of the Governors with regard to rate recommendations of the Postal Rate Commission and requested authority for the Postal Service to represent itself in the rate matters, particularly with regard to

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1/ Leonard v. U.S. Postal Service, 489 F.2d 814 (1st Cir. 1974).

judicial review of the Public's Automation Rate (PAR) wherein the Postal Service Governors would be petitioners and the Postal Rate Commission the respondent. This has been the consistent practice followed by the Postal Service, with the approval of the Department of Justice, over the past 15 years. On October 27, 1992, more than 21 months later, the Postal Service was informed that the Department of Justice would neither represent the Service in the PAR case nor would it "allow the case to continue to be litigated."

The current disagreement between the Postal Service and the Department of Justice is about more than section 409(d). Because the PAR case involves ratemaking, the principle sources of statutory authority that the Service relies on are 39 U.S.C. § 3625 and 39 U.S.C. § 3628. Section 3625 allows the Governors to "seek judicial review under § 3628" of Postal Rate Commission recommendations with which they disagree. Indeed, in 1981 the D.C. Circuit Court of Appeals decided a case brought by the Governors against the Commission under the same § 3625 authority at issue here. In that case, the Department of Justice authorized both the appeal and the use of outside counsel by the Postal Service.[2] For § 3625 to have meaning, the Postal Service must have a statutory right to initiate litigation against the Commission. Moreover, 39 U.S.C. § 3628 (by reference to the Hobbs Act, 28 U.S.C. § 2348) empowers the Service to speak with its own voice on ratemaking disputes. The legislative history of the Hobbs Act discloses that Congress' concern here was to "best serve" the public interest in those "troublesome" cases where the Justice Department declines to defend an agency order "where there are differences of opinion on questions of policy and statutory construction."

Heretofore there has been a consistent cooperative relationship between the Postal Service and the Department of Justice. The right of the Postal Service to appeal a recommendation of the Postal Rate Commission to determine the legality of the action of the Postal Rate Commission is a fundamental element of the ratemaking scheme devised in the Postal Reorganization Act. It is similar to an appeal by private industry from a ruling by a regulatory body. No court has ever held it improper. Without such authority the operation of the Postal Service is severely weakened. Its continued financial viability would be seriously affected.

The statutory authority granted to the Board in §§ 3625 and 3628 has not been addressed in the President's directive to the Board. Consequently, the Board of Governors feels that these issues must

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[2] Governors of U.S. Postal Service v. U.S. Postal Rate Commission, 654 F.2d 108 (D.C. Cir. 1981).

be addressed because they go to the main question, which is the legal responsibility of the Board.

If the Postal Service withdraws its appeal it will face a potential net revenue loss of approximately $100 million, relative to the status quo. Further, a precedent will be set that the Department of Justice, not the United States Postal Service, will determine when an appeal can be taken or when a defense can be urged, and that the Postal Rate Commission will have authority to establish rates on bases not presented at a hearing before it and not addressed by the Postal Service at a hearing before the Commission.

In view of the above, it is earnestly and respectfully requested, and strongly urged, that you suspend your directive for further review and, if necessary, allow the court to determine whether the action of the Department of Justice or of the Postal Service is appropriate.

The following members of the Board of Governors agreed to send this letter: Norma Pace, Chairman, John N. Griesemer, Vice Chairman, Michael S. Coughlin, Tirso del Junco, Bert H. Mackie, Crocker Nevin, Marvin Runyon. The following members did not agree to send this letter: Susan E. Alvarado, LeGree S. Daniels, Robert Setrakian, and Sam Winters.

Respectfully submitted,

Norma Pace

Norma Pace
Chairman, Board of Governors

THE WHITE HOUSE

WASHINGTON

January 4, 1993

Dear Chairman Pace:

On December 11, 1992, I directed the Postmaster General to cooperate fully with the Attorney General in arranging for the withdrawal of certain filings that had been made purportedly on behalf of the United States Postal Service in the United States Court of Appeals for the District of Columbia Circuit. That directive extended to the Governors of the Postal Service to the extent that any action on their part was required to implement it. A copy of that directive is attached.

This issue arises because the General Counsel of the Postal Service made filings in the court of appeals without the approval of the Attorney General, despite the express requirement of 39 U.S.C. 409(d) that the Postal Service obtain the Attorney General's authorization before appearing in court through attorneys other than those of the Department of Justice. The decision not to authorize these filings was reiterated in a letter of October 27, 1992, from Assistant Attorney General Stuart M. Gerson to Mary Elcano, General Counsel of the Postal Service. A copy of Assistant Attorney General Gerson's letter is attached.

The purpose of my December 11 directive was to take care that the Postal Service comply with the statutes regarding litigating authority. The Postmaster General has not cooperated with the Attorney General in withdrawing the filings to which the directive referred. The Postal Service is thus now in violation of both the statutes regarding litigating authority and my directive that those statutes be complied with.

I feel it is incumbent on me to inform you that in order to obtain compliance with the statutes and my directive enforcing them, I will if necessary exercise my authority to remove Governors of the Postal Service. I have been advised by the Department of Justice that such a course of action is consistent

1/4/93: No announcement. Originals delivered by Clerk's office -- receipts attached. Copies of the original to Chm. Pace were hand-delivered to Postmaster General Runyon + Dep. Postmaster General Coughlin. All originals had the two attachments as on Chm. Pace's ltr. attached to them. Lee Liberman, Counsel's office, provided copies of all for forwarding to the Dept of Justice. Besides Chm. Pace, identical ltrs. hand-delivered to Governors Alvarado, Daniels, del Junco, Griesemer, Mackie, Nevin, Setrakian + Winters.

MB

with constitutional and statutory requirements. Accordingly, please inform me, by January 6, of the steps you have taken to ensure compliance with my directive. If you have not taken such steps, please inform me by that date of any reason why I should not remove you as a Governor of the United States Postal Service.

Sincerely

The Honorable Norma Pace
Chairman of the Board of Governors
United States Postal Service

cc: The Postmaster General
The Deputy Postmaster General

THE WHITE HOUSE

WASHINGTON

December 11, 1992

MEMORANDUM FOR THE POSTMASTER GENERAL

I am informed by the Department of Justice that filings have been made in the United States Court of Appeals for the District of Columbia Circuit purportedly on behalf of the United States Postal Service without the authorization of the Attorney General, contrary to 39 U.S.C. 409(d). Accordingly, pursuant to my authority as Chief Executive and my obligation to take care that the laws are faithfully executed, I direct you to cooperate fully with the Attorney General in arranging for the withdrawal of those filings. This directive also extends to the Governors and the Board of Governors of the United States Postal Service, if any action on their part is necessary in order to implement it.

cc: Chairman Norma Pace
The Honorable Susan E. Alvarado
The Honorable LeGree Sylvia Daniels
The Honorable Tirso del Junco
The Honorable John N. Griesemer
The Honorable Bert H. Mackie
The Honorable Crocker Nevin
The Honorable Robert Setrakian
The Honorable J. Sam Winters
The Honorable Michael S. Coughlin
Acting Attorney General George Terwilliger

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

October 27, 1992

Honorable Mary S. Elcano
General Counsel
United States Postal Service
475 L'Enfant Plaza
Room 6006
Washington, D.C. 20260-1100

Re: Governors of the United States Postal Service v. Postal Rate Commission, No. 91-1073 (D.C. Cir.)

Dear Ms. Elcano:

I am writing to you with respect to a serious problem of which you may not be aware. It concerns the above-captioned petition for review of a decision by the Postal Rate Commission. That petition, which was filed by attorneys in your office prior to the time you became the General Counsel, was filed without the authorization of the Attorney General.

Because the United States Postal Service and its Governors lack independent litigating authority, see 28 U.S.C. § 516, 39 U.S.C. § 409(d), the Attorney General's authorization is a necessary precondition to the filing of such a petition for review by Postal Service attorneys. In this case, authorization was not provided because a lawsuit between the Postal Service and the Postal Rate Commission raises serious justiciability problems under Article III of the United States Constitution. As we discussed with your predecessor, Mr. Hughes, we have grave doubts that the Attorney General could authorize the filing of a lawsuit that he believes is not within the judicial power of the United States courts.

Given the above and after careful consideration, we feel strongly that we cannot allow this case to continue to be litigated. In our view, the best course of action would be for your office to withdraw the petition for review. Much less desirable would be for the Department of Justice to move to strike the petition on the ground it was filed by attorneys who lacked the requisite authority to file it -- an option we may be forced to consider seriously if we have not reached a consensus by Monday, November 2, 1992.

We recognize that any decision not to continue this case, regardless of how it is implemented, presents serious practical problems for the Postal Service -- a fact we consider to be most unfortunate. On the other hand, however, we hope you recognize the serious nature of our concerns.

Perhaps it would be in the best interests of both the Postal Service and the Department of Justice if we met to discuss this matter more fully. If you concur, please let me know as soon as possible. In any event, please feel free to call me if you wish to discuss this matter further.

Sincerely yours,

Stuart M Gerson

Stuart M. Gerson
Assistant Attorney General
Civil Division

Bush's Recess Appointment Voided

Position on Postal Service Board Was Not Vacant, Judge Rules

By Bill McAllister
Washington Post Staff Writer

A federal judge has declared one of President George Bush's final appointments invalid, holding that there was no vacancy on the Postal Service Board of Governors for a longtime Bush friend to fill.

U.S. District Judge Louis F. Oberdorfer's ruling last Friday was a defeat for the Clinton administration, which had sent Justice Department lawyers to defend the recess appointment of former Democratic representative Thomas "Lud" Ashley of Ohio.

The administration's position had upset the Senate Democratic leadership, which claimed that the Bush appointment was an abuse of the president's power to make appointments that do not require Senate confirmation while Congress is in brief recesses. Much of the debate in the court case focused on whether the Senate had a sufficiently long recess on Jan. 8 to allow Bush to invoke his recess appointment powers.

At the time Bush had 12 days left in his presidency, and Senate committees were considering Clinton's Cabinet choices.

Oberdorfer skirted the recess question in his six-page ruling. What the judge described as "the unusual constitutional case . . . turns on plain language—indeed one word—of the Constitution: 'vacancies.' "

Under the law that established the postal board, its nine presidentially appointed governors each serve nine-year terms, but may continue to serve "for up to one year" or "until his successor has qualified," Oberdorfer noted. That means California business executive Crocker Nevin, the governor whom Ashley was supposed to succeed, could serve for up to a year after Dec. 8, 1992, when his term expired. Therefore, Oberdorfer held: "There was no vacancy to be filled by the recess appointment of Ashley and his purported appointment and commission were and are null and void."

Postal Board Chairman Bert H. Mackie said in a statement he was "gratified" by the ruling, saying it would allow Nevin to return to the board at its August meeting. Neither Nevin nor Ashley has sat on the board since the dispute began.

Ashley said yesterday he had not studied the decision and will meet with his lawyers today to decide whether to appeal. His attorney, John Vargo, said he will urge they appeal. The ruling "confused the issues of whether there is a vacancy with how you fill that vacancy," Vargo said.

A Justice Department spokeswoman had no comment. Vargo said he doubts the department would appeal the ruling because it supported administration arguments of broad presidential appointment powers.

In her arguments to Oberdorfer, Karen Stewart, a Justice lawyer, had urged him to delay his ruling, assuming that the Senate could then confirm a Clinton nominee, Einar Dyhrkopp of Illinois, to fill out the remainder of Nevin's term.

Lawyers for Ashley and the Postal Service said that because Ashley was ~~nominated~~ during the start of the first session of the 103rd Congress, he would be eligible to serve until the next session of Congress.

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W. Post, 7/26/93

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERT H. MACKIE, et al.,
Plaintiffs,
v.
WILLIAM J. CLINTON, et al.,
Defendants.

Civil Action No. 93-0032-LFO

FILED
JUL 23 1993
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM

The dispositive issue remaining in this case is the legality of the January 8, 1993 recess appointment of Thomas Ludlow Ashley to the Board of Governors of the United States Postal Service. On that date, Crocker Nevin occupied that position as a holdover following the December 8, 1992 expiration of the 9-year term to which he had been nominated by President Reagan and confirmed by the Senate on the authority of 39 U.S.C. § 202(b), which continued him in office (for up to one year) "until his successor has qualified."[1] A preliminary injunction entered January 7, 1993 enjoined President Bush from carrying out a threat to remove Postal Service Governors, including Nevin, from office pending resolution by the Court of Appeals of the issue that prompted the President to threaten their removal. Mackie v. Bush, 809 F. Supp. 144 (D.D.C.

[1]Section 202(b) provides in relevant part: "The terms of the 9 Governors shall be 9 years . . . . A Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year."

1993).[2]

On January 8, 1993, the day after the President was enjoined from removing plaintiffs, he purported to appoint Ashley without the advice and consent of the Senate on the authority of the Recess Appointments Clause of the Constitution.[3] That clause created an exception to the requirement of the Appointments Clause[4] that a Presidential nomination be confirmed by the Senate as a precondition to the appointment and commission of the nominee.

The voluminous briefs and extensive oral argument filed and presented in this final phase of this matter establish that this is the unusual constitutional case which turns on the plain language[5]

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[2]That issue -- the independent litigating authority of the Postal Service -- has been resolved in plaintiffs' favor. See Mail Order Ass'n v. U.S. Postal Service, 986 F.2d 509 (D.C. Cir. 1993).

[3]The Recess Appointments Clause provides:

> The President shall have power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. Const. art. II, § 2, cl. 3.

[4]The Appointments Clause provides:

> [The President] 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.

U.S. Const. art II, § 2, cl. 2.

[5]E.g., Perpich v. Department of Defense, 110 S. Ct. 2418, 2422 (1990); see also Coleman v. Alabama, 399 U.S. 1, 12-13 (1970) (Black, J., concurring).

-- indeed one word -- of the Constitution: "Vacancies." The President's constitutional power to make a recess appointment depends literally and absolutely upon the existence of a vacancy while the Senate is in recess.

Here, the Senate had adjourned on January 7, 1993, to reconvene on January 20, unless recalled earlier, leaving committees in session to consider nominations submitted by a President during that period. In the circumstances here, it is unnecessary to address the elusive issue of when the Senate is in recess within the meaning of the Recess Appointments Clause.

In an apparent effort to avoid the potentially paralyzing effect of a vacancy among the Postal Service Board of Governors that could be created by the expiration of a Governor's term of office and delay in his or her replacement,[6] Congress has expressly provided for the temporary continuation in office of an incumbent whose term has expired, with the powers, duties and privileges of the office of Governor undiminished. It seems plain from the express language of the statute that Governor Nevin holds and occupies the office of Governor through December 8, 1993, unless he dies, resigns, is lawfully removed[7] or some "successor has qualified," i.e., has been nominated by the President and confirmed by the Senate. Section 202(b) creates not a present vacancy but a

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[6]*See* 129 Cong. Rec. 23,199 (1983) (statement of Rep. Ford) (purpose of § 202(b) is to avoid "vacancies on the Board . . . [which] can greatly inhibit the ability of the Board of Governors to perform its functions").

[7]*But see* *Mackie v. Bush*, 809 F. Supp. at 147.

"prospective vacancy," which can only be filled in the manner set forth in the Appointments Clause.[8]

Defendants rely on the decision in Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979), which upheld a recess appointment to a position occupied by a holdover Federal Election Commissioner on the theory that the expiration of the predecessor's term created an immediate vacancy. However, that decision was tied to the specific language of the Federal Election Campaign Act (FECA). FECA's holdover provision states that a Commissioner whose term has expired may serve until his or her "successor has taken office as a member of the Commission." 2 U.S.C. § 437c(a)(2)(B). The absence of the "successor has qualified" language in that context evidences an intent not to create the sort of prospective vacancy that appears to have been contemplated with § 202(b). FECA provides that an "individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds." 2 U.S.C. § 437c(a)(2)(C) (emphasis added). The Staebler court relied on this language in concluding that the "expiration of a term of office" must be treated as a "vacancy." 464 F. Supp. at 589-90. In contrast, the analogous provision of § 202(b) compels no such inference. Finally, unlike § 202(b)'s one-year holdover period, FECA establishes an indefinite holdover period. Section 202(b) is

[8] See Nominations for Prospective Vacancies on the Supreme Court, 10 Op. Off. Legal Counsel 143 (1986); Presidential Appointees -- Resignation Subject to the Appointment and Qualification of a Successor, 3 Op. Off. Legal Counsel 152 (1979).

therefore not susceptible to many of the concerns expressed by the court in Staebler. See id. at 599-601.[9]

Viewing the Appointments Clause and the Recess Appointments Clause together and in context, the opinions in Staebler and McCalpin are not controlling, and, with due respect, are not persuasive. It is apparent that the purpose of the Recess Appointments Clause was to prevent disruptions in the functioning of the government occasioned by periods in which the Senate is unable to perform its role of advice and consent.[10] Congress has filled that gap in 39 U.S.C. § 202(b) by permitting a Governor to remain in office for up to one year while a successor can be nominated and confirmed.

Thus, irrespective of whether the Senate was in a "recess" within the meaning of the Recess Appointments Clause on January 8, 1993, there was no vacancy to be filled by the recess appointment of Ashley and his purported appointment and commission were and are null and void.

It may be that before there can be a final judgment in this case, the incumbent President and the Senate, exercising their authority under the primary (as distinguished from the Recess) Appointments Clause will have qualified, i.e., appointed and

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[9]In McCalpin v. Dana, No. 82-0582 (D.D.C. Oct. 5, 1982), vacated as moot, 766 F.2d 535 (D.C. Cir. 1985), the court concluded that holdover members of the Board of the Legal Services Corporation could be replaced by recess appointees. In that case, however, the court simply adopted the reasoning of Staebler.

[10]See, e.g., 41 Op. Atty. Gen. 463, 467 (1960); 33 Op. Atty. Gen. 20, 21-23 (1921).

confirmed, a successor to Governor Nevin. But, should the appellate courts have a different view of this matter, the intervening appointment of a Senate-confirmed successor to Nevin would not preempt any claim that Ashley may have for compensation for the period from January 8, 1993 until a qualified successor is sworn in. See Powell v. McCormack, 395 U.S. 486, 498-500 (1969). Therefore, a viable case or controversy could survive the imminent accession to the office by a "qualified" successor.

In light of all the circumstances and the deference owed by one branch of the government to another, an injunction is inappropriate and unnecessary.

In view of the fact that President Bush is no longer in office and the issue which prompted his threat to remove the Governors, including Nevin, has been resolved by the Court of Appeals, Count I of the Amended Complaint is moot.

Accordingly, an accompanying Order grants plaintiffs' motion for summary judgment on Count II, denies defendants' motions for summary judgment on Count II, and dismisses Count I as moot.

Dated: July 23, 1993

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERT H. MACKIE, et al., Plaintiffs, v. WILLIAM J. CLINTON, et al., Defendants.	Civil Action No. 93-0032-LFO

FILED
JUL 23 1993
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

For the reasons stated in the accompanying Memorandum, it is this 23d day of July, 1993, hereby

ORDERED: that plaintiffs' motion for summary judgment on Count II should be, and is hereby, GRANTED; and it is further

ORDERED: that defendants' motions for summary judgment on Count II should be, and are hereby, DENIED; and it is further

DECLARED: that the purported recess appointment and commission of Thomas Ludlow Ashley as a Governor of the United States Postal Service are, and were, null and void *ab initio*; and it is further

ORDERED: that plaintiffs' application for injunctive relief is DENIED without prejudice; and it is further

ORDERED: that Count I should be, and is hereby, DISMISSED as moot.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE