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To: Mike Davidson	From: K. Berkowitz	
Co. Gen. Legal Counsel	Co. MWAA	
Dept.	Phone: 703/739-8770	
502/228-3391	Fax: 703/706-9596	

U.S. Department of Justice
 Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

July 13, 1992

Honorable Robert C. Byrd
 President Pro Tempore
 United States Senate
 Washington, D.C. 20510

Dear Senator Byrd:

I wish to advise you of the decision of the Department of Justice not to defend the constitutionality of certain provisions of the Metropolitan Washington Airports Act Amendments of 1991, Pub. L. No. 102-240, Title VII, 103 Stat. 2197 (Dec. 18, 1991). This position is consistent with that taken by the Department of Justice prior to the enactment of this legislation as well as that expressed in the President's signing statement. See 27 Weekly Comp. Pres. Doc. 1862 (Dec. 18, 1991).

These amendments were enacted in response to the United States Supreme Court's decision in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise ("MWAAN"), 111 S. Ct. 2298 (1991), which struck down, on separation of powers grounds, provisions regarding the Board of Review in the Metropolitan Washington Airports Act of 1986, 49 U.S.C. App. § 2451 et seq. ("1986 Act").¹ In Reckinger v. Metropolitan Washington Airports Authority, C.A. No. 92-556-JHG (D.D.C.); plaintiffs have alleged that the provisions regarding the Board of Review in the Metropolitan Washington Airports Act Amendments of 1991 continue to violate separation of powers principles, as well as the Appointments Clause and the Ineligibility and Incompatibility Clauses. We have reviewed this matter and determined that the provisions regarding the Board of

¹ The United States intervened in the D.C. Circuit to defend the constitutionality of the 1986 Act and participated before the Supreme Court. In defense of the 1986 Act, we argued that the Board of Review exercised state power derived from the Virginia and District of Columbia statutes which created the Airport Authority, not federal power. Thus, the United States contended that separation of powers principles were not implicated. This position was expressly rejected by the Supreme Court. 111 S. Ct. at 2307-08.

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Review are unconstitutional. Because these provisions raise significant separation of powers concerns, the Department of Justice intends to file a Statement of Interest pursuant to 28 U.S.C. § 517 in this case setting forth its views.

In *MMAA*, the Supreme Court determined that the composition and operation of the Board of Review implicated separation of powers principles because the Board of Review exercised federal power as an agent of Congress. 111 S. Ct. at 2307-08. Under the 1991 Amendments, the Board of Review continues to exercise federal power delegated by Congress. In *MMAA*, the Supreme Court observed that the Board of Review was "created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials." 111 S.Ct. at 2308. The first three of these four features remain. And, while membership is no longer expressly restricted to congressional officials, it remains restricted to those of whom congressional officials approve.

Nor can there be any doubt that the Board of Review continues to wield significant and substantial authority. While the Board of Review no longer has veto power over certain actions proposed by the Airport Authority board of directors, it may make "recommendations" to the board of directors in response to such proposals. The result of such "recommendations" is either acquiescence by the Airport Authority; delay in implementing the proposed action; or Congress' disapproval of the proposed action through a joint resolution. Thus, Board of Review "recommendations" constitute the exercise of significant executive authority.

That the Board of Review exercises executive power yields three conclusions. First, the Board of Review, appointed by the MMAA, violates the Appointments Clause, Art. II, § 2, cl. 2. "Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

Second, the existence of Members of Congress on the Board of Review violates the Incompatibility and Ineligibility Clauses of Art. I, § 6, cl. 2. These clauses bar Members of Congress from simultaneously holding office in the legislative and executive branches of government. See *Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833, 835-37 (D.D.C. 1971), *aff'd mem.*, 495 F.2d 1079 (D.C. Cir. 1972), *rev'd on other grounds sub nom. Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

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Third, the Board of Review as reconstituted under the 1991 Amendments continues to violate separation of powers principles. The Supreme Court in MHA held that the Board of Review created in 1988 violated these principles. The new Board of Review is not sufficiently different from the one invalidated in MHA to warrant a different outcome.

In conclusion, it is our view that the Board of Review provisions of the 1991 Amendments are unconstitutional, and we will so advise the district court.

Sincerely,



Stuart M. Garson
Assistant Attorney General