

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



HAROLD WEISBERG,  
Appellant/Cross-Appellee  
v.  
U.S. DEPARTMENT OF JUSTICE,  
Appellee/Cross-Appellant

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Case No. 82-1229  
(and consolidated Nos.  
82-1274, 82-1722, and  
83-1764)

MOTION TO RECALL MANDATE

Comes now the appellant/cross-appellee, Harold Weisberg ("Weisberg"), and moves this Court to recall the mandate in this case.

The initial panel decision in this case issued on October 5, 1982. Thereafter, Weisberg moved for a rehearing and suggested a rehearing en banc. Weisberg's petition was denied on June 4, 1985. However, while considering Weisberg's petition the panel issued a sua sponte order directing the parties to brief jurisdictional issues which had not been previously raised. At the same time Weisberg's petition for rehearing was denied, the panel issued a new opinion in which it ruled on the jurisdictional issues in a split vote.

By operation of Rule 14(b) of the rules of this Court, the mandate issued 7 days after the panel's June 4, 1985 denial of Weisberg's petition for rehearing. However, Weisberg is moving this

date for a rehearing of the panel's June 4, 1985 decision, and he is also suggesting the appropriateness of a rehearing en banc.

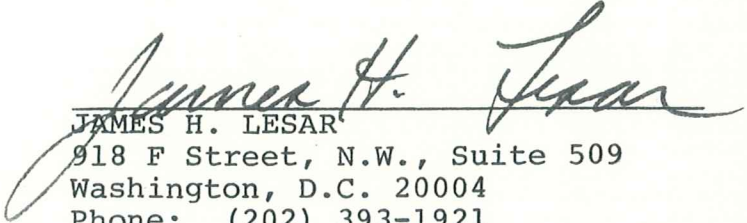
The power of a Court of Appeals to recall its mandate for good cause is well established. Greater Boston TV Corp. v. FCC, 463 F.2d 268 (D.C.Cir. 1971); Sparks v. Duval County Ranch Co., Inc., 694 F.2d 976 (5th Cir. 1979); Nat. Sur. Corp. v. Charles Carter & Co., Inc., 621 F.2d 739 (5th Cir. 1980). In this case the mandate issued before the time to petition for rehearing of the June 4, 1985 decision had run and before the time for petitioning the Supreme Court for certiorari had elapsed.

The present petition for rehearing and suggestion for rehearing en banc involves the fundamental issue of whether this Court properly had jurisdiction over this case. A court's competency to render judgment is basic to our jurisprudence. Federal Rule of Civil Procedure 12(h)(3) provides that "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (Emphasis added.) Federal appeals courts have the same obligation to carefully and affirmatively establish their jurisdiction, and to restrively interpret it. This obligation exists regardless of what the parties themselves say. Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379 (1884). The United States Supreme Court will dismiss a case on jurisdictional grounds even when the parties themselves have not questioned it. Louisville

& Nashville R.R. v. Mottly, 211 U.S. 149 (1908) ("Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not extended.")

Judge Bork stated in his dissent that "it appears that the Federal Circuit may have exclusive jurisdiction over this entire appeal and that we may have decided a case which we had no power to decide." Dis. Op. at 5. (Footnote omitted.) Because jurisdiction is fundamental to the exercise of federal judicial power, and because there is division of opinion among the panel as to whether this Court does have jurisdiction, good cause exists to recall the mandate and retain it until such time as this Court has acted upon Weisberg's petition for rehearing of the panel's June 4, 1985 opinion.

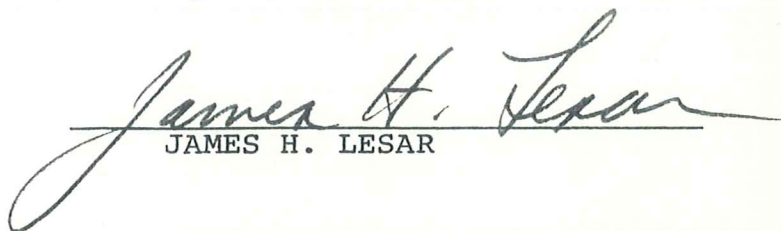
Respectfully submitted,

  
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Counsel for Weisberg

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of July, 1985, mailed a copy of the foregoing Motion to Recall Mandate to John S. Koppel, Attorney, Appellate Staff, Civil Division, Room 3617, U.S. Department of Justice, Washington, D.C. 20530.

  
JAMES H. LESAR