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Office of the General Counsel

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Philip J. Loree, Chairman
Federation of American Controlled Shipping
50 Broadway
New York, New York 10004

Dear Mr. Loree:

This is in response to your letter of May 2, 1988, in which you expressed concerns about our April 14, 1988 legal opinion to Senator Ernest A. Hollings, Chairman of the Senate Committee on Commerce, Science, and Transportation. Our opinion involved the scope of section 902(a) of the Merchant Marine Act of 1936, as amended. 46 U.S.C. § 1242(a). Section 902(a) provides the Secretary of Transportation with the authority under specified conditions to requisition vessels "owned by citizens of the United States."

One of the issues Senator Hollings asked us to address was whether a vessel owned or controlled by an American corporation's foreign subsidiary would be within the reach of the requisitioning provision. We recognized that the Maritime Administration disregards the corporate form and considers the American parent corporation the "ultimate owner" of the vessel. However, this view may be subject to challenge on the basis of general corporate law. Therefore, we suggested that to avoid this uncertainty, the requisitioning authority could be specifically amended to include foreign subsidiaries owned by American concerns or that the Maritime Administration could enter into agreements providing for requisitioning with the owners of the vessels not specifically covered by the requisitioning provision.

It is your view that our decision was not rendered in an "even-handed and open-minded fashion." Moreover, you contend that we misconstrued the intent of the requisitioning authority. It is your position that the term "owned" was intended to mean "beneficially owned" and that vessels owned by foreign subsidiaries that are in turn owned or controlled by American companies are within the scope of the requisitioning authority. In support of your position

you have provided me with your legal analysis of the question and asked that we reconsider our opinion.

We regret any appearance of unfairness on the part of this Office. When Mr. Yourch of your staff made his offer of assistance, we thought our decision was almost ready for release and that we would not have time to consider your comments in our decision. Unfortunately, the release of the opinion was delayed, leaving the impression that we unfairly refused to listen to your concerns. You should know that in preparing our opinion, we received comments only from the Maritime Administration, which were solicited immediately after we received the request for our opinion, in accordance with GAO policies. We did not solicit nor did the National Maritime Union submit independent comments on the issues raised by the Senator's request. However, we did consider the Union's position as expressed in litigation materials submitted with the request and by the Maritime Administration. In the same manner, we also considered previously expressed written views of your organization as part of our review of the legislative history. See, e.g., Defense Sealift Capability: Hearings Before the House Committee on Merchant Marine and Fisheries, 97th Cong., 1st Sess. 41-76 (1981) (statement of Eugene A. Yourch, Executive Secretary and Treasurer, Federation of American Controlled Shipping).

After carefully considering your views, we continue to believe our analysis of section 902(a) is correct. You rely on statements made in 1939 by Rear Admiral Emory S. Land, Chairman of the United States Maritime Commission, to support your position that the term "owned" was intended to mean "beneficially owned." See Hearings on H.R. 4983 Before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess. 9 (1939). Admiral Land had requested that the requisitioning authority be amended, in part, because "many vessels owned by our citizens are now under foreign registry." Id., see also S. Rept. 678, 76th Cong., 1st Sess. 6 (1939) (emphasis added). You indicate that Admiral Land was referring to the Panamanian and Honduran flag ships beneficially owned by American companies as well as similarly owned vessels in some other registries when he made this statement. This conclusion apparently is based on a statement written by Admiral Land in a July 1954 issue of United States Naval Institute PROCEEDINGS (reprinted in Hearing on S. 1488 before the Merchant Marine and Fisheries Subcommittee of the Committee on Interstate and Foreign Commerce, U.S. Senate, 85th Cong., 1st Sess. 100 (1957)).

As we explained in our opinion, we do not think that the legislative history of the requisitioning provision supports

this view. We agree that the purpose of the 1939 amendment was to broaden the scope of the requisitioning authority. However, this does not suggest to us that the Congress intended the new authority to include foreign owned vessels which are beneficially owned by United States citizens.

In 1943 a bill was introduced in the Congress that would have expressly extended the requisitioning authority to cover vessels owned by foreign subsidiaries of American corporations. H.R. 3260, 78th Cong., 1st Sess. (1943). It was not enacted and therefore cannot be relied on as persuasive evidence of congressional intent concerning existing legislation. However, it did provide a vehicle for Admiral Land to express his views on the subject. In support of the bill, Admiral Land wrote:

> "There are certain other vessels which cannot under existing law be requisitioned for while in effect owned by American concerns (citizens of the United States) they are owned through foreign subsidiaries, and are therefore not American owned within the terms of section 902. . . .
>
> "This situation results from the fact that several American shipping concerns have, for various reasons, organized subsidiaries under the laws of other countries, and placed the title to many of their vessels in the names of such subsidiaries." Hearings on Miscellaneous Maritime Bills including H.R. 3260, House Committee on the Merchant Marine and Fisheries, 78th Cong., 1st Sess. 36 (1943) (letter of Admiral Land, Administrator of the War Shipping Administration, Oct. 9, 1943).

It is clear from this statement that Admiral Land in 1943 did not believe that the requisitioning authority extended to vessels owned by the foreign subsidiaries of American companies, nor does it appear that he thought the word "owned" in the statute means "beneficially owned."

Enclosed, for your information, is a copy of a letter we received from Professor Rodney Carlisle of Rutgers University, whose book, Sovereignty for Sale, was cited in your letter to us as arguing against our decision.

In summary, we do not think the legislative history of section 902(a) supports your position and see no basis for modifying our opinion.

Sincerely yours,

James F. Hinchman
General Counsel

Enclosure