

MEMORANDUM

TO: Council, AP and SSC Members

FROM: Clarence G. Pautzke
Executive Director



DATE: June 18, 1991

SUBJECT: Anti-Reflagging Act of 1987

ACTION REQUIRED

Review recent court decision.

BACKGROUND

A GAO report dated October 15, 1990 evaluated the effects of the Anti-Reflagging Act of 1987, which had three main provisions:

1. American control requirements were increased for ownership of U.S. vessels,
2. Processing vessels that enter the fisheries after the Act must be U.S. built, and
3. Owners are prohibited from using vessels rebuilt abroad in U.S. fisheries.

GAO concluded that the Act's greatest impact was on stopping the foreign rebuilding of U.S. vessels. The Act grandfathered vessels that already had been contracted for rebuilds in foreign yards. About 15 factory trawlers were rebuilt in foreign yards after the Act because of these grandfather exemptions, but all had to be delivered by July 28, 1990. With the possible exception of one additional vessel seeking an exemption, the GAO concluded that further rebuilding in foreign yards would cease.

American control is another matter. Before the Act, there were about 29,000 vessels licensed or being purchased to operate in the fisheries. All are subject to the following, less stringent, pre-Act American control provisions:

1. Company's stock could be totally owned by foreigners.
2. CEO and Chairman of the Board had to be U.S. citizens.
3. Number of foreigners on Board of Directors could be no larger than a minority of the number of directors necessary for a quorum.

Only about 2,000 vessels, new since the Act, are subject to the following, more stringent control provisions:

1. Majority of voting stock has to be owned by U.S. citizens.
2. U.S. citizens have to have majority of voting power.
3. No contract or understanding or other means could allow voting power to be exercised in favor of a foreigner.

All vessels in the fisheries before the Act were exempted from the new control provisions, and could remain so because the Coast Guard has interpreted the grandfather rights to run with the vessel, not the owner. Therefore, a vessel can be bought and sold many times, and through periodic rebuilding in the U.S., remain in the fisheries almost indefinitely under the less stringent, pre-Act American control requirements.

The Coast Guard was questioned on its interpretation of the legislation, but remained resolved to continue it as shown in the final rule, published December 12, 1990, on documentation of vessels and controlling interest (item C-6(a)). The Coast Guard contended that the Anti-Reflagging Act and its intent were very clear in allowing the grandfather rights to run with the vessel. The Coast Guard did not intend to change its position until Congress changed the legislation.

Southeast Shipyard Association challenged the Coast Guard and the U.S. District Court in the District of Columbia came out in the shipyard's favor (C-6(b)). Apparently the statute is not clear on whether the grandfather clauses attached to the vessels or owners, but the Coast Guard held it went with the vessel. The Court found that contrary to the intent of Congress. To the Coast Guard's argument that there would be a "gradual phaseout" of the grandfathered vessels, the Court responded that, with 30,000 qualified vessels, the phaseout would have to be measured in geological time.

CDR Kyle will be available to deftly answer questions on this issue, considering it is still undergoing formal review by the Coast Guard.

standard of 46 U.S.C. app. 802(b). Proposed § 67.03-9(d) reflects this termination and no change is made in the final rule.

g. Sections 67.03-9(e) and (f). A comment from a law firm stated that the exceptions in § 67.03-9(f) to the requirement for evidence of MARAD approval in § 67.03-9(e) give little guidance and leave many issues unresolved. The intent, of § 67.03-9(e) and (f), is to ensure that statutory requirements for MARAD approval of certain vessel transactions are being complied with. MARAD has regulations in 46 CFR part 221 which fully explain these requirements. Therefore, the Coast Guard has determined that it is more appropriate to reference the MARAD regulations than to try to restate them. Moreover, the requirements for MARAD approval are not limited to transactions involving corporations. The Coast Guard's policy of obtaining evidence of MARAD approval, whenever required, is better served by a rule applicable to all types of vessel ownership. Accordingly, in the final rule § 67.03-9(e) and (f) have been combined, revised, and moved to a new § 67.03-17.

h. Section 67.03-15. Comments from two law firms agreed with the Coast Guard's position that the citizenship savings provision for fishing vessels in 67.03-15 should run with the vessel. Comments from another law firm disagreed with that position. The comments are similar to those received on this subject in response to the NPRM published October 20, 1988 (53 FR 41211). The Coast Guard's reasons for adhering to its position were explained at length in the SNPRM published October 13, 1989 (54 FR 41992, 41993-94), and are still valid. The Coast Guard is continuing to adhere to its position, because it remains convinced that the straightforward language of the Anti-Reflagging Act's citizenship savings clause correctly reflects Congress' intent and is determinative of the issue. In addition to being disputed in the rulemaking process, the Coast Guard's position has been challenged in court and is the subject of on-going litigation.

The plain language of the American control savings provision provides no basis for concluding that its protection should terminate because of a change of ownership or control, but the comment which disagrees with the Coast Guard's position asserts that the Coast Guard should not be guided by the provision's plain meaning. Instead, the Coast Guard is urged to read between the lines and administratively adopt a rule that the savings provision's protection terminates when there is a change of

ownership or control. The comment states that the Coast Guard's interpretation of the American control savings provision is not a permissible construction because it makes no sense in light of the legislative purpose; that being to increase domestic control over U.S. fisheries resources and encourage displacement of foreign fishing activity. The comment also suggests that the legislative history does not permit the Coast Guard's position.

There are several reasons why the Coast Guard is unpersuaded by these arguments. In the first place, it is not proper to invoke the broad purposes of a statute to overrule a specific provision of that statute. This should be particularly true in the case of a grandfather provision. Grandfather provisions are intended to mitigate new statutory requirements and, by their nature, typically conflict with the broad purposes of the statutes they affect. Moreover, even if the Coast Guard had determined that it could not accurately discern the intent of Congress from the plain language of the American control savings provision, but needed to consider the legislative history as well, its position would still be reasonable. The legislative history does not compel the conclusion that Congress intended the protection of the savings provision to terminate when there is a change of ownership or control. The Coast Guard could also reasonably conclude from the legislative history that the protection should run with the vessel, in keeping with the plain language of the American control savings provision.

Although the Coast Guard has based its position on the plain language of the American control savings provision, it is very familiar with the legislative history of the Anti-Reflagging Act. The Coast Guard responded to questions at Senate Hearings on April 28, 1987, testified at House Hearings on April 29, 1987, and followed the progress of this legislation through to final enactment. The purpose of the Anti-Reflagging Act is not as clear cut as the comment which disagrees with the Coast Guard's position would make it seem. As Congressman Young of Alaska, one of the sponsors of the Anti-Reflagging Act stated, "this bill is a carefully crafted compromise between diverse interests in the fishing and maritime industries." 133 Cong. Rec. H9811 (daily ed. Nov. 9, 1987). There certainly were differences of opinion about what "Americanization" of the fishing industry meant and how it could best be achieved.

The need for an American control provision for fishing vessels was one of the most controversial issues. The bill

considered in the Senate Hearing contained no American control provision. At the House Hearing, on a bill that included an American control provision which did not apply to vessels documented before November 1, 1986, the testimony included strong reservations about the need for an American control provision. Since the legislative history shows that the Anti-Reflagging Act was a carefully crafted compromise, the Coast Guard does not agree with the assertion that the plain language of the American control savings provision is necessarily inconsistent with the broad purposes of the statute, even though it would permanently exempt many existing U.S. fishing vessels from the new American control requirement.

The legislative history of the Anti-Reflagging Act does not require the Coast Guard to change its position. While it is true that the House Report states in one place that exemption from the American control requirements should terminate on a change of ownership or control, H.R. Rep. 423, 100th Cong., 1st Sess. 17 (1987), the legislative history also contains material which supports the plain language of the American control savings provision. For instance, the House Report states that a "Date Certain" Amendment was adopted which essentially established the effective date of the Anti-Reflagging Act as July 28, 1987. All of the savings provisions in the Anti-Reflagging Act reflect the choice of that date as the date from which the new law would take effect. Congressman Young described the purpose of the "Date Certain" Amendment as follows: "The Committee on Merchant Marine and Fisheries chose the date of July 28, 1987, as a cutoff in order to avoid any semblance of a taking of a vessel-owner's privileges under the law." 133 Cong. Rec. H9812 (daily ed. Nov. 9, 1987).

The original purpose of the Anti-Reflagging Act was to prevent foreign-built fish processing vessels from changing from foreign flag to U.S. flag, but the "Date Certain" Amendment makes it clear that the prohibition against documentation of foreign-built fish processing vessels only applies to vessels newly documented after July 27, 1987. Foreign-built processing vessels which were documented prior to July 28, 1987 are exempt from the new U.S.-built requirement, and that exemption does not terminate on a change of ownership or control. In this instance it is clear that when Congress limited the application of the new U.S.-built requirement to "newly documented" vessels it intended to include only vessels documented

under U.S. law for the first time after July 27, 1987. Vessels which had previously been documented under U.S. law, even if they were redocumented later—because of a change of ownership for example—are not subject to the new U.S.-built requirement. Similarly, the new American control requirements should be understood as applying only to "newly documented" vessels, and not to vessels that have qualified for grandfathering but later change ownership.

Statements made on the House floor, after the House Report was issued, indicate that, despite the contrary language in the House Report, the American control requirement would only apply to vessels that were newly documented after July 27, 1987. Congressman Young stated that the American control provision "requires as a condition of new documentation that a fishing industry vessel be owned in the majority by individuals who are citizens of the United States." 133 Cong. Rec. H9812 (daily ed. Nov. 9, 1987). Congressman Jones stated that "as a condition of new documentation [H.R. 2598] requires majority ownership of fishing industry vessels by individuals who are citizens of the United States." *Id.* at H9813.

The clearest exception to the "Date Certain" Amendment's rule that vessels documented before July 28, 1987 are exempt from the provisions of the Anti-Reflagging Act is the provision penalizing foreign rebuilding. In that case, there is support, both in the text of the rebuilding savings provision and in the legislative history, for the position that the new rebuilding requirements apply to all fishing vessels regardless of when they were first documented under U.S. flag, and only grandfathered rebuilding projects are exempt. The suggestion that there is an unexplained disparity between the Coast Guard's position on the rebuilding savings provision and the American control savings provision is answered by the fact that, in the case of the rebuilding savings provision, there is clear support in both the plain language of the provision and its legislative history for the limited scope of the exemption. That is not the case with the American control savings provision, and the difference in interpretation is, therefore, justified.

The explicit and detailed limitations on grandfathered rebuilding projects contained in the text of the rebuilding savings provision contrasts starkly with the lack of explicit language in the American control savings provision indicating that its protection is limited.

Moreover, the legislative history for the rebuilding savings provision clearly limits its protection to "those who have relied on current laws and who have made certain identifiable commitments toward rebuilding fishing, fish processing, and fish tender vessels in foreign yards." H.R. Rep. 423, 100th Cong., 1st Sess. 12 (1987). This limiting language does not apply to the American control savings provision, although the comment disputing the Coast Guard's position seems to imply that it does.

Based on the plain language of the American control savings provision the Coast Guard's position that the exemption from the new American control requirement runs with the vessel is reasonable. It would be reasonable, even if the intent of Congress could not be accurately discerned from the plain language of the American control savings provision. Neither the broad purpose of the legislation, nor the legislative history, compels a different position. Therefore, it remains the Coast Guard's position that the citizenship savings provision for fishing vessels in § 67.03-15 runs with the vessel, and does not terminate because of a change in ownership or control.

1. *Section 67.03-15.* A comment from a law firm suggested that the criteria for eligibility for the savings provision in § 67.03-15 should be modified for vessels owned by partnerships, to reflect the date of publication of the final rule. If the suggestion were adopted, a vessel owned by a partnership would qualify for grandfathering under the regulation if it was documented and engaged in the U.S. fishery, or under contract for purchase for that use, when the final rule was published rather than as of July 28, 1987.

The Coast Guard does not agree that the regulation should be modified. Unlike corporations, partnerships seeking to document vessels for any purpose are required to meet a controlling interest test. This controlling interest requirement for partnerships pre-dates the Anti-Reflagging Act. Therefore, the controlling interest requirement for partnerships seeking to document vessels with a fisheries endorsement is not something newly imposed by the Anti-Reflagging Act. It is true, however, that with the Anti-Reflagging Act in mind the Coast Guard is changing the required citizen ownership of equity in a partnership for purposes of eligibility for fisheries endorsements from 50 percent to more than 50 percent. The Coast Guard has also proposed to exempt partnerships

which own grandfathered vessels from the new requirement in the same manner that the Anti-Reflagging Act provides an exemption for corporations.

Since the controlling interest requirement for partnerships is not new, and the Coast Guard is merely reinterpreting a requirement that has been imposed on partnerships since 1982, there is no requirement for grandfather protection. The agency decision to reinterpret this statutory requirement in light of subsequent legislative developments is nothing so extraordinary that the new interpretation should not be applied to partnerships generally. The new regulatory requirement properly can, and will, apply from the effective date of this final rule. However, because the new requirement involves a change of less than one percent, the Coast Guard expects very few partnerships to have to restructure or surrender vessel documents as a result of the change. Partnerships, generally, will have to meet the requirements of the new controlling interest regulations. Only partnerships owning a vessel that qualifies for grandfathering under § 67.03-15 will be exempt from the new requirement.

Another law firm commented that a partnership owning a vessel that qualifies for grandfathering under § 67.03-15 should be able to document that vessel for the fisheries, even if one of the entities contributing to the equity interest requirements is a corporation whose stock is 100 percent foreign owned. The comment suggests that § 67.03-2(b) be changed to explicitly address this situation. The Coast Guard does not agree that this change is needed. Section 67.03-2(b) already states that an entity which is a citizen eligible to document a vessel in its own right with the endorsement sought can contribute to meeting equity interest requirements. In the case of a vessel grandfathered under § 67.03-15, the corporation certainly could be a citizen eligible to document the vessel with a fisheries endorsement. If it is, the corporation can contribute to meeting the partnership's equity interest requirements.

The final rule includes a minor change to § 67.03-05. This regulation was never intended to permit vessels to be documented without establishing that the vessel qualifies for the exemption. The change makes it clear that the section only applies if the Secretary of Transportation or the Secretary's delegate has determined that the vessel meets the specified requirements.

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JUNE 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

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SOUTHEAST SHIPYARD ASSOCIATION, et al.,
Plaintiffs,

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

v.

Civil Action No. 90-1142

UNITED STATES OF AMERICA, et al.,
Defendants.

MEMORANDUM

This matter is before the Court on Cross-Motions for Summary Judgment. The Court heard oral arguments on the motions on February 19, 1991. For the following reasons, the Court concludes that plaintiff's motion for summary judgment must be granted. The Court further concludes that defendant's motion for summary judgment must be denied.

I

In the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987 ("Anti-Reflagging Act"), Pub. L. No. 100-239, 101 Stat. 1778, Congress enacted certain citizen-control and domestic-rebuilding requirements in order to complete the "Americanization" of fishery resources off the coasts of the United States. This "Americanization" process was initiated in 1976 when Congress enacted the Fishery Conservation and Management Act (later renamed the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1811 et seq., ("Magnuson Act") to promote the growth of the domestic commercial fishing industry. The Anti-Reflagging Act was

enacted to "increase domestic control over the fisheries resources within the United States Exclusive Economic Zone [and] encourage the already ongoing process of displacing foreign fishing activity" See H.Rep. No. 100-423, 100th Cong. 1st Sess. reprinted in 1987 U.S.Code Cong. & Ad.News 3245 [hereinafter House Report]. To achieve this goal the Anti-Reflagging Act prevented the reflagging of foreign-controlled vessels after July 28, 1987, and required any rebuilding of vessels after July 28, 1987, be done in American shipyards. Generally, a fishing license cannot be issued to a vessel that does not meet the requirements of the Citizen-Control Clause¹ or the Domestic-Rebuild Clause.² Each of these

¹ Section 7 of the Anti-Reflagging Act contains the American Control of Vessels provision. Section 7(a) provides:

A vessel owned by a corporation is not eligible for a fishery license under section 12108 . . . unless the controlling interest (as measured by a majority of voting shares in that corporation) is owned by individuals who are citizens of the United State. . . .

See 46 U.S.C. § 12102.

The grandfather clause of the Citizen-Control provision which was applicable as of July 28, 1987 is contained in Section 7(b) and provides:

[This section] applies to vessels issued a fishery license after July 28, 1987. However, [section 12102(a)] does not apply if before that date the vessel -

(1) was documented under chapter 121 of title 46 and operating as a fishing, fish processing, or fish tender vessel in the navigable waters of the United States or the Exclusive Economic Zone; or

(2) was contracted for purchase for . . . in the navigable waters of the United States or the Exclusive Economic Zone, if the purchase is shown by the contract or similarly reliable

provisions contain a grandfather clause which exempts certain vessels from their applicability. The United States Coast Guard ("Coast Guard") regulations promulgated to implement the Citizen-Control Grandfather Clause and the Domestic-Rebuild Grandfather Clause concluded that the grandfather clauses permanently attach to the vessel no matter who is the owner of the vessel or where the vessel is rebuilt if the vessel meets the requirements of the grandfather clauses as of July 28, 1987.³ The Coast Guard

evidence . . . to have been made for the purpose of using the vessel in the fisheries.

See 46 U.S.C. §12102 (note).

² Section 4 of the Anti-Reflagging Act contains the Savings Clause which is applicable to Domestic-Rebuilding. Section 4(a) provides:

(a) . . . a fishery license may be issued to a vessel that before July 28, 1987 - . . .

(3) was documented under chapter 121 . . . and
 (A) is rebuilt in a foreign country; or
 (B) is subsequently rebuilt in the United States for use as a fish processing vessel; or

(4) was built in the United States and -
 (A) is rebuilt in a foreign country under a contract entered into before 6 months after the date of enactment of this Act, and was purchased or contracted to be purchased before July 28, 1987. . . .

See 46 U.S.C. § 12108 (note).

³ Defendants state that Congress has expressed clearly that the grandfather clause in the controlling interest savings clauses attaches to the vessels and not the vessels' owners. See Defendants' cross-Motion for Summary Judgment at 7. Further, defendants state the Coast Guard properly interpreted and applied the rebuilding grandfather clause. *Id.* at 22. While defendants make these bold statements, the Court cannot locate anywhere in the

regulations implementing the Citizen-Control clause were promulgated on December 12, 1990. 55 Fed. Reg. 51244.⁴ The Coast Guard regulations implementing the Domestic-Rebuild clause were promulgated on October 10, 1988. 53 Fed. Reg. 41166-02. The question presented in this case is whether the Coast Guard's decision to attach the grandfather clauses to the vessel themselves is based on a reasonable construction of the Anti-Reflagging Act.

II

A. Standard of Review

Actions by the Coast Guard are subject to judicial review pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, which provides that "a reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. . . ." The question before this Court is solely one of statutory construction: Did congress intend when it enacted the Citizen-Control and Domestic-Rebuild clauses that the exemptions would attach to the vessels themselves and thus be freely transferable? Stated differently, in issuing the final rulemaking, has the Coast Guard acted in

legislative history a single hint that the grandfather clauses attach to the vessels, and thus can be sold with the vessel without regard to the new owner's identity.

⁴ This Court dismissed an earlier action by plaintiffs because the Coast Guard had not issued its final rulemaking. See Southeast Shipyard Ass'n v. United States, No. 89-2328, slip op. (D.D.C. Apr. 30, 1990).

accordance with congressional intent, as manifested in the text of the statute and its legislative history?

Although the Coast Guard has concluded that the exemptions attach to the vessels and thus have an indefinite lifespan, the Supreme Court has made it clear that:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 2718 n. 9 (1984).

Thus, it is apparent that a court need not defer to an agency's reading of a congressional enactment when, as here, that interpretation raises "a pure question of statutory construction for the courts to decide, rather than a question of interpretation that arises in each case in which the agency is required to apply [a legal standard] to a particular set of facts." INS v. Cardona-Fonseca, 480 U.S. 421, 107 S. Ct. 1207, 1221 (1987). See also N.L.R.B. Union v. Federal Labor Relations Authority, 266 U.S. App. D.C. 165, 834 F.2d 191 (1987); International Union, U.A.W. v. Brock, 259 U.S. App. D.C. 457, 816 F.2d 761 (1987); Union of Concerned Scientists v. United States Nuclear Regulatory Commission, 262 U.S. App. D.C. 381, 824 F.2d 108, 113 (1987) ("When the court faces a 'pure question of statutory interpretation,' the court need not defer to agency opinion, even if the statutory provision at issue admits of some ambiguity."); and Waterman Steamship Corp. v. Burnley, 691 F. Supp. 1524 (D.D.C. 1988).

The Court of Appeals for the District of Columbia has recently

interpreted the mandates of Chevron and Cardoza-Fonseca. The Court of Appeals stated that "[t]he principal charge of a court in statutory construction is to ascertain congressional intent." N.L.R.B. Union, 834 F.2d at 198. Further, "if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Id citing Chevron, 467 U.S. at 843 n. 9, 104 S. Ct. at 2781 n.9.

Thus, the court need not defer to agency opinion on pure questions of interpretations. As the Court of Appeals concluded in International Union, U.A.W. v. Brock, 259 U.S. App. D.C. 459, 816 F.2d 761 (1987), "[i]n those circumstances, however, in which an agency is required to apply a legal standard to a particular set of facts, 'courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program' INS at 1221-22." UAW, 816 F.2d at 764.

In these situations, because the court is not faced with a pure question of statutory construction, some deference is due the agency and the two-prong test of Chevron applies:

First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 at 842-43, 104 S. Ct. at 281-82 (footnotes omitted), cited in NLRB, 834 F.2d at 198, citing UAW, 816 F.2d at 764-65 & n. 5.

Despite the Coast Guard and amici's contentions, the question presented here is an unadulterated question of statutory interpretation, and the Court is required to turn to "traditional tools" of interpretation to discover Congress' intent as to its meaning. Cardozo-Fonseca, 107 S. Ct. at 1220-21, see also UAW, 816 F.2d at 765. Therefore, the Court must review the language of the statute and legislative history to determine whether the challenged regulations contravene congressional intent. The Court can ascertain congressional intent. Therefore, the Court need not defer to the Coast Guard's interpretation of the grandfather clauses.⁵

B. Discussion

The starting point in construing any statutory provision is the language itself. American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S. Ct. 1534, 1537 (1982). The Court may assume "that the legislative purpose is expressed by the ordinary meaning of the words used." Id. quoting Richards v. United States, 369 U.S. 1, 9, 82 S. Ct. 585, 591 (1962). The Anti-Relagging Act does not disclose whether the savings provision attaches to the owner of the vessel or to the vessel itself. However, the Coast Guard

⁵ Even undertaking a straight Chevron analysis, the Court would reach the same conclusion.

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promulgated regulations for the Anti-Reflagging Act which attaches the savings provision to the vessel. 55 Fed. Reg. 51244.

This construction of the Anti-Reflagging Act need not be accorded any special deference if it indeed contravenes the intent of Congress. See Norton v. Ruiz, 415 U.S. 199, 237, 94 S. Ct. 1055 (1974). The Court is obliged to "honor the clear meaning of [the] statute as revealed by its language, purpose and history." Southeastern Community College v. Davis, 442 U.S. 397, 411, 99 S. Ct. 2361, 2369. (1979) quoting Teamsters v. Daniel, 439 U.S. 551, 566 n. 20, 99 S. Ct. 790, 800 n. 20 (1979):

Congress approved the Anti-Reflagging Act to remedy the widely perceived threat to the continued orderly growth, development, and competitiveness of the U.S. fishing and fish processing industry, and circumvent the fundamental intent of the Magnuson Act. Congress specifically stated that:

The primary purpose of [the Anti-Reflagging Act] is to prohibit the reflagging of foreign-built processing vessels and "vessels of the United States" for operation in domestic fisheries under the Magnuson Act. Specifically, the [Anti-Reflagging] Act increases domestic control over the fisheries resources. . . . By prohibiting the documentation of foreign-built processing vessels as a "vessel of the United States" . . . [the Anti-Reflagging Act] furthers the fundamental purposes of the [Magnuson] Act by displacing foreign-built with domestically built fishing industry vessels in U.S. fisheries.

House Report at 3245.

In this case, using "traditional tools of statutory construction," it is clear Congress never intended to permit the grandfather clauses to attach to the vessels themselves because it would permit the transfer of the grandfathered vessels to

noncitizen-controlled owners. Permitting such a result effectively obliterates the primary purpose of the Anti-Reflagging Act, circumvents the plain meaning of the statute and thwarts Congress' intent.⁶

Defendants argue that the Coast Guard's interpretation does not obliterate the purpose of the Anti-Reflagging Act because there will be a "gradual phaseout" of the number of vessels that would qualify under the grandfather clauses as interpreted by the Coast Guard. However, when questioned by the Court how long the "gradual phaseout" would take, defendants could not answer. Nor could defendants answer what is the average life of a vessel. Defendants merely stated "some last longer -- some live longer, some do not." Transcript at 22. Meanwhile, plaintiffs noted that "average life of a vessel [does not reflect] rebuilding . . . and that these vessels can be preserved forever and rebuilt time and time again. There simply will be no phaseout." Transcript at 23. The Court has been informed that approximately 30,000 vessels would qualify under the Coast Guard's interpretation. Transcript at 7 and 16. Thus, the Court must conclude that under the Coast Guard's interpretation up to 30,000 vessels could qualify under the grandfather clauses as interpreted by the Coast Guard, and that

⁶ The Court notes that on October 25, 1990, the General Accounting Office ("GAO") released a report titled COAST GUARD: Anti-Reflagging Act Has Mixed Impact on U.S. Fishing and Ship Rebuilding [hereinafter GAO Report] which evaluated the effect of certain provisions of the Anti-Reflagging Act. The GAO concluded that "the [Act's] American control provisions have had little impact on ensuring increased American control of the U.S. fishing industry. This results from the Coast Guard's interpretation of the [Act's] grandfather clauses." GAO Report, at 1.

the "gradual phaseout" would have to be measured in geological time.

The Court, therefore, concludes that the Coast Guard's interpretation is contrary to the intent of Congress. Further, the Anti-Reflagging Act is the latest in a series of steps taken to Americanize the fishery resources off the coasts of the United States, a process that has been ongoing since 1976, and the Coast Guard's interpretation would defeat that process.

An appropriate Order accompanies this Memorandum.

Date: APR 30 1991



JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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APR 30 1991

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SOUTHEAST SHIPYARD ASSOCIATION, et al.,
Plaintiffs,

Civil Action No. 90-1142

v.
UNITED STATES OF AMERICA, et al.,
Defendants.

ORDER

For the reasons discussed in accompanying Memorandum, the Court concludes that plaintiffs' motion for summary judgment should be granted, and that defendants' cross-motion for summary judgment should be denied.


It is hereby

ORDERED that plaintiffs' motion for summary judgment is granted; it is further

ORDERED that defendants' cross-motion for summary judgment is denied; it is further

ORDERED that this case is dismissed.

Date: APR 30 1991


JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 10 1991

Mr. Douglas B. Gordon
American High Seas Fisheries Association
3040 West Commodore Way
Seattle, WA 98199

Dear Mr. Gordon:

I am writing in response to your recent inquiries concerning Southeast Shipyard Association v. United States, No. 90-1142 (D.D.C. May 1, 1991), a recent United States District Court decision construing the so-called "grandfather" provisions of the Commercial Fishing Industry Vessel Anti-Reflagging Act, Pub. L. No. 100-239. You have requested that the United States support Judge Penn's decision in the matter, and have accordingly urged the government to refrain from appealing the decision.

At this juncture, however, consideration of whether to appeal or refrain from appealing the district court's judgment would be premature. On May 15, 1991, the United States filed in district court a motion under Rule 59 of the Federal Rules of Civil Procedure which asks the court to clarify and amend certain aspects of the judgment referenced in your letter. The court's decision will not become final until the court disposes of our motion, and we accordingly cannot begin to evaluate the merits or demerits of appeal until the district court issues an additional order.

I nonetheless appreciate receiving your views on the appropriate interpretation of the Anti-Reflagging Act and assure you that any decision on appeal will be made only after a thorough analysis of the issues presented by the Southeast Shipyard litigation. As you may know, the authority to determine whether, and to what extent, appeals will be taken by the government to the appellate courts is assigned to the Solicitor General. The Solicitor General makes his determination based upon the views of affected government agencies and components and upon a rigorous, independent assessment of the pertinent facts and law. This review process will begin shortly after Judge Penn issues a final decision in the case. I am confident that whatever determination the Solicitor General reaches will be informed by a sound view of the law and guided by the best interests of the United States.

Thank you for your interest in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Stuart M. Gerson".

Stuart M. Gerson
Assistant Attorney General