ORIGINAL

In the

Supreme Court of the United States

SEATRAIN SHIPBUILDING CORPORATION, et al.,

Petitioners,

--vs--

SHELL OIL COMPANY, et al.,

Respondents.

Number: 78-1651

Washington, D. C.
November 28, 1979

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Washington, D.C.
Wednesday, November 28, 1979

The above-entitled matter came on for argument at 11:41 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM E. McDANIELS, Esq., Williams & Connolly, Hill Building, Washington, D.C. 20006; for petitioners.

ANDREW J. LEVANDER, Esq., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; pro hac vice, federal respondents supporting petitioners.

MRS. AMY LOESERMAN KLEIN, Galland, Kharash, Calkins & Short, 1054 31st Street, N.W., Washington, D.C. 20007; for respondents Alaska Bulk Carriers, Inc. and Trinidad Corporation.

STEPHEN N. SHULMAN, Esq., Cadwalader, Wickersham & Taft, 11 Dupont Circle, Suite 450, Washington, D.C. 20036; for respondent Shell Oil Company.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 78-1651, Seatrain Shipbuilding Corporation against Shell Oil Company.

Mr. McDaniels, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM E. McDANIELS, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. McDANIELS: Mr. Chief Justice, and may it please the Court:

This case comes before the Court on writ of certiorari of the United States Court of Appeals from the District of Columbia Circuit. The petitioners, Polk and Seatrain, were signatories to a contract entered into in June of 1972 with the secretary of commerce whereby $27.2 million in subsidy was provided towards the construction of the super-tanker STUYVESANT. The issue that this case presents involves whether the secretary of commerce has the power under the Merchant Marine Act, 1936 to amend that contract to delete therefrom certain terms restricting the domestic trade by the STUYVESANT in exchange for a repayment of the subsidy award. The district court held that power existed.

Q Does it not also present a jurisdictional issue of how the case ever got from the district court to the court of appeals?

MR. McDANIELS: Yes, Your Honor, it does. The district court had--

Q Are you very enthusiastic about that issue?

MR. McDANIELS: Your Honor, Mr. Levander has briefed that issue and would be arguing it. We support his brief. We have not addressed it in our particular briefs.

Q You certainly did not touch upon it in your initial brief.

MR. McDANIELS: We did not, Your Honor. The time of argument has been divided and, with the permission of the Court, I would address the merits, and Mr. Levander would address the issue of appealability. We support the Solicitor General's position in that regard. What happened was there was a remand of the particular exercise of this authority in the case of the STUYVESANT for further consideration by the secretary. And prior to the decision on remand, the plaintiffs here, Shell and Alaska Bulk, took appeal of the issue of authority to the court of appeals. And the court of appeals in a split decision decided that the secretary did not enjoy the authority under the act.

The Stuyvesant, Your Honor, may it please the Court, had the benefit of and the participation by the secretary of commerce directly and indirectly in its construction financing. The secretary had loaned outright under the Economic Development Administration Act $5 million and

guaranteed 90 percent of eighty million other dollars in loans which were used to refurbish the shipyard, Brooklyn Navy Yard, where the vessels were built. This was part of a program to both establish a shipyard for use in national purposes and also to employ the hardcore unemployed in that area, provide them job training.

Q Mr. McDaniels, let me ask, is the Solicitor General going to confine his argument to the jurisdictional issue?

MR. McDANIELS: No, I believe he will address the merits as well, Your Honor.

Q Because it is hard for us to get to the merits if we do not have jurisdiction.

MR. McDANIELS: I certainly would, if you had some questions of Mr. Levander on the question of appealability, sit down and have him argue now and argue later on the merits.

Q Is it not a rather odd distribution of time to first argue the merits when there is a question of jurisdiction?

MR. McDANIELS: I agree, Your Honor, but it was suggested that as petitioner I was required to go first; and Mr. Levander and I had discussed it. I would prefer if he goes first, but it is up to the Court. He is certainly prepared to address that issue within the time that he has.

MR. CHIEF JUSTICE BURGER: It is your case. We

will allow you to make the decision. But, as my colleagues have suggested, it is putting the cart before the horse a little.

MR. McDANIELS: I agree.

Q Who suggested you had to go first?

MR. McDANIELS: It was suggested that as petitioner--

Q Who suggested it?

MR. McDANIELS: The discussions with the Solicitor General's office suggested that it was appropriate that I go first as the petitioner. I would be happy to have Mr. Levander take the podium at this time.

MR. CHIEF JUSTICE BURGER: Mr. Levander.

ORAL ARGUMENT OF ANDREW J. LEVANDER, ESQ.,

PRO HAC VICE, FEDERAL RESPONDENTS SUPPORTING PETITIONERS

MR. LEVANDER: Thank you, Mr. Chief Justice, and may it please the Court:

Although I am also prepared to discuss the merits of this case, I will address myself primarily to the jurisdiction represented here. Plaintiffs' complaint asserted that the STUYVESANT transaction, which is at issue here, was unlawful for essentially three reasons. First is that the secretary lacked power to enter into such a transaction. The second is that, given the circumstances of this case, the secretary had abused her discretion by entering into the transaction for failing to consider the economic impact on

the existing domestic traders in the Alaskan trade.

Third, they challenged the nature of the proceedings before the secretary under the Administrative Procedure Act. On November 22, 1977 the district court concluded that the secretary had power to enter into a STUYVESANT type of transaction. He concluded, however, that the secretary had abused her discretion by failing to consider the economic impact issue. The district court therefore granted partial summary judgment to both sides and remanded the case to the secretary for determination within 45 days of the economic impact issue.

Q Was the jurisdictional argument made in the court of appeals?

MR. LEVANDER: It was first mentioned to the district court by Mr. McDaniels at the time of the entry of order. And in the court of appeals, in the petition for rehearing, a footnote addressed this issue.

Q Any federal court has to take note of it on its own motion, does it not?

MR. LEVANDER: That is made quite clear by this Court's decision in Wetzel, Your Honor.

The court also concluded on November 22nd--the district court--that the third issue, the procedural claim, would require a trial, and therefore did not grant summary judgment either way on that issue. On November 30th

plaintiffs--the respondents here whom I will refer to as plaintiffs since we are also technically respondents--went before the court and asked them to modify the judgment. First, they voluntarily dismissed their procedural claim. Second, they first asked the court to enter a certification under 28 USC 1292(b). That provision, in our view, is the only provision which would have allowed an interlocutory appeal on the statutory power question. The district court, however, intimated that it did not think that was appropriate or it did not think it was necessary, and it agreed to accept the plaintiffs' second suggestion, which was that it enter a certification under Rule 54(b) to allow an immediate appeal of the statutory question. At that point the plaintiffs appealed although the secretary had never had a chance to render its decision on remand at that point and although the district court has never had a chance to address the remand decision which came down while the appeal was pending. We submit that that appeal was premature and that the court of appeals lacked power to hear this case.

The primary submission of plaintiffs as to why jurisdiction existed in the court of appeals is that the November 30th order constituted a valid Rule 54(b) certification. That is the question of the secretary's power. Rule 54(b) permits the district court to enter a final judgment as to any separate claim for relief even though the litigation

as a whole is not terminated. For example, in this case suppose that plaintiffs had sued the secretary regarding the STUYVESANT transaction and in addition had sued the secretary for a subsidy that they claim was due them on some other unrelated transaction. If the district court during the course of that litigation had concluded that the secretary did not owe them the subsidy and finally determined that separate claim but then there were further proceedings to be had on the STUYVESANT claim, then the district court, in our view, would have had power to enter a Rule 54(b) certification because then a separate claim would have been finally determined, and that is what Rule 54(b) exists to do. That, however, in our view, is not what happened here.

Before I turn to that, I would like to say at the outset that the standard of review of the 54(b) question depends on what is being challenged. If the question involves whether or not the district court should have exercised its discretion as to a clearly separate claim, then this Court's decision in Sears Roebuck against Mackey and other decisions made clear that there is an abuse-of-discretion standard. However, the Court's subsequent decision in Liberty Mutual Insurance Company against Wetzel makes clear that where the question is simply whether or not there are separate claims that can be certified under Rule 54(b) that is purely a legal question and there is no

deference due.

In our view, what happened here is that the plaintiff had two interrelated legal theories supporting a legal right. And such interrelated legal theories do not constitute separate claims within the purview of Rule 54(b).

Q Do you think claims for relief as used in Rule 54(b) is synonymous with causes of action?

MR. LEVANDER: I think it is a very similar concept if not identical, Your Honor.

Q How is it different?

MR. LEVANDER: This Court in Mackey and in Wetzel never precisely said what a claim for relief was.

Q You are arguing this case. What do you submit?

MR. LEVANDER: I submit that the Court indicated in Wetzel-Mackey that a separate claim is an independent cause of action separately enforceable on a mutually exclusive basis. And by that I mean if the awarding of relief on one of the alleged claims precludes or obviates the need for relief on the other alleged claim, then in fact you do not have separate claims, and you just have interrelated theories. In Mackey--

Q It says claims for relief. I understood your answer to be yes, it is tantamount to a claim for relief means for cause of action.

MR. LEVANDER: Right. And in Wetzel the fact that there were different--there was a damage claim and an injunctive claim and a declatory relief claim all rising out of one single legal right, the Court said that is not separate claim for the purposes of Rule 54(b). Similarly here and in Mackey where they did hold that 54(b) was properly used the plaintiff in that case could have recovered on its anti-trust claims and its common law tort claims and business claims and unfair competition claims regardless of what happened as to the antitrust claim. And so therefore there were separate claims. The rights are separate and the recoveries are separate, and one does not preclude or obviate the need for the other.

Here, however, if the district court had granted conclusively either one of plaintiffs' legal theories, there would have been no need to address the other legal theory, and also if the secretary--

Q Mr. Levander, is that true as to the Alaska Bulk claim?

MR. LEVANDER: That is my next point. Their major submission, as I see it, is that they have two separate claims. The first claim is that they are complaining about the STUYVESANT itself and its operation. And the second claim is that they have a right to know about the broader picture, the statutory question. And their theory is that even if the

secretary on remand had concluded that the economic impact was sufficiently adverse as to not go forward with the STUYVESANT transaction, that they nonetheless could have appealed the district court's determination of the statutory power question with the court of appeals. In our view that ignores the controversy requirement of Article III. Certainly if the secretary had never authorized the STUYVESANT to operate in the first place, you would have had an unripe claim. They could not have entered court and asked for a declaration as to the secretary's power when there was no impending use of that power and there was no decision to use it. Similarly, if the secretary decided to withdraw from the STUYVESANT transaction and not go forth with it, then you would have a situation which was moot. There would be no more case or controversy, and they could not go forth and litigate the issue in the court of appeals as to the claim of the statutory power.

Q She in fact decided to the contrary. I mean, the court in fact decided to the contrary.

MR. LEVANDER: Yes, but I do not think you can judge--first of all, I do not think you can judge--

Q Do you not have to judge appealability at the time the appeal is attempted to be prosecuted?

MR. LEVANDER: That is right. And at that time--

Q At that time both claims were still being made,

and neither of them could be said there was no case or controversy.

MR. LEVANDER: The two legal theories. One of them had been conclusively determined by the district court, but the other one had not. And the purpose of Rule 54(b) is to not increase interlocutory appeals of interrelated litigation; it is to alleviate--

Q But your mootness arguments--I am just addressing your mootness now. At the time of the remand for the competitive inquiry neither theory could be disposed of on the ground that it was moot.

MR. LEVANDER: That is correct. But what I am suggesting is that the test to determine whether we have truly separate claims or, as the courts of appeal have realized in other circumstances, interrelated legal theories is whether or not the granting of one of the theories would obviate the need to get relief on the other theory because the relief would be the same or would end the case, then in our view there is no such thing as a separate claim. It is not separate; it is a related, closely intertwined legal theories. And that kind of single claim multiple theory kind of litigation is not subject to a Rule 54(b) certification.

Q Would your argument fail if there had been 15 or 16 similar transactions on the horizon?

MR. LEVANDER: That might indicate that mootness was not appropriate in this particular case. But here mootness is clearly inappropriate doctrine.

Q The argument would fail on the hypothetical I have given.

MR. LEVANDER: That is right--well, possibly. But here the secretary has--

Q Why did you just say possibly?--because is not your whole argument that that claim is moot on these facts, and I posit facts where it would not be moot.

MR. LEVANDER: Yes, if there were other transactions already approved, yes, that would be ongoing. But here the secretary has used her power something like five times since 1936. Moreover, on the remand, if it had determined not to go forward with the claim, it would have determined--she would have determined that the economic impact was sufficiently adverse on the existing Alaskan traders that the STUYVESANT should not enter, and that finding--

Q Mr. Levander, on my Colleague Stevens' hypothesis there were 15 or 16 foreseeable claims in the future; to avoid mootness you would not only have to have that, but you would have to have them by the same plaintiff, would you not?

MR. LEVANDER: No. I understood Mr. Justice

Stevens' hypothetical to be that there were 15 other applications granted or in process of being granted as to the Alaskan trade. And--

Q Which might have the same impact on the plaintiff.

MR. LEVANDER: On the plaintiffs.

Q Same impact on the plaintiff.

MR. LEVANDER: There would have to be--I mean, I take it even plaintiffs would not claim that they have any right to complain about the secretary's exercise of power in a situation or in an area of trade which they do not operate, although they may say otherwise.

As I started to say, that mootness is particularly appropriate in this case not only because the secretary has so seldomly exercised her power, which is the appropriate way that it should be exercised, but also the finding that she would have had to make on remand would have militated against her ever, or in the reasonable future, authorizing any other ship to enter the Alaskan trade, any other ship that was willing to repay a subsidy and become unsubsidized.

I want to address one point on the merits, if I might, unless--

Q May I ask just one other question?

MR. LEVANDER: Yes.

Q What is the practical consequence if you

prevail on the jurisdictional issue and we dismiss the appeal, will not the case be right back here almost immediately?

MR. LEVANDER: Not necessarily. First of all, it would be vacated. It would go back down to the district court. The district court would have to consider the findings on remand, and it might actually conclude that the secretary had abused her discretion and enter the injunction; and the case would be over. Otherwise it is possible--the first time around the district court and implicitly the court of appeals rejected our standing claim that plaintiffs do not have standing. But I think that Simon v. Eastern Kentucky Welfare Rights Organization makes it clear that you can judge standing from two positions; one at the pleading stage and, secondly, at the proof stage. And here the remand proceedings demonstrate that at least some, if not all, of Trinidad and Alaska Bulk Ships, which are of the smaller variety, do not compete against the bigger STUYVESANT vessel. And, therefore, it is possible that at least some of the plaintiffs do not have standing.

Moreover, Shell points out in its brief and footnote six, I believe, that it has gotten Alaskan oil charters. And so, therefore, I am not quite sure what its potential injury would be either.

Q Would not another practical consequence of

your prevailing in your jurisdictional claim be that district courts and courts of appeal and litigants would be much more careful of the rules that this Court has promulgated as to when a court case can be appealed and when it cannot?

MR. LEVANDER: That is absolutely correct, Mr. Justice Rehnquist. And as an institutional litigant the United States has a very great interest in making sure that the final judgment rule is adhered to, if at all possible. The United States has been involved in many remand decisions, and as a general rule the courts of appeal have recognized, including an opinion by Mr. Justice Blackmun when he was on the Eighth Circuit, that a remand decision is not a final judgment for purposes of 1291. And we do not think there is any reason to distinguish from that rule in this case.

Q As a practical matter, is not my Brother Stevens correct that this would be remanded to the district court? And even though the district court then agreed that the secretary, on remand to her, now him, I guess, was quite right in the finding as to the competitive situation, but nonetheless under the compulsion of the law of the circuit would enjoin the secretary, would have to?

MR. LEVANDER: No, I think it would vacate the court of appeals decision. And, therefore, that decision would not be law of the circuit any longer. And then you would have to go through the litigation on the remand, and it

might be determined there was no standing of plaintiffs.

Q It would be an educated guess by any district judge as to what the law of the circuit was, would it not? [Laughter]

MR. LEVANDER: That--that--

Q And then Seatrain would be right back up here, first of all in the court of appeals and then here.

MR. LEVANDER: That was also the case in Wetzel, Your Honor, where everything had been litigated but the entry of the relief. And there this Court sua sponte vacated the court of appeals decision.

Q There is this difference though, if I understand your position correctly: There there was precedent rather clearly establishing that that was not final under the statute. Here I think the government agrees the question is open. You may well be right. But you do not have direct precedent for this.

MR. LEVANDER: No direct precedent in this Court, although I think that the Boston & Maine Railroad case is very close in many aspects. And I think that the court of appeals decisions are uniformly in our favor. This is not a collateral decision of any sort. This goes right to the heart of the merits. They will be easily reviewed on appeal, and there is no reason to divert from the generally accepted rule that a remand decision is not a final order and is not

subject to 54(b) unless there are separate claims.

MR. CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock, counsel.

[A luncheon recess was taken at 12:01 o'clock p.m.]

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AFTERNOON SESSION - 1:01 o'clock

MR. CHIEF JUSTICE BURGER: Now we will return to you, Mr. McDaniels.

ORAL ARGUMENT OF WILLIAM E. McDANIELS, ESQ.,

ON BEHALF OF THE PETITIONERS, RESUMING

MR. McDANIELS: Thank you, Mr. Chief Justice, and may it please the Court:

The STUYVESANT was the recipient under the Merchant Marine Act of 1936 of two kinds of financial assistance in its construction. One was a guaranteed loan in the amount of $30 million, and the subsidy of $27.2 million which is designed to equalize the cost between building that vessel in a domestic shipyard and what it would have cost to build that vessel in a foreign shipyard. And as a result, the contract of CDS contained a provision required by Section 506 of the statute that the owner of the vessel shall agree to operate that vessel in the foreign trade, except incidentally on foreign travel and except temporarily upon the consent of the commission and with a limit of six months out of every year of its economic life. In each instance a pro rata repayment of the subsidy would be required.

Between the time that that contract was entered into in 1972 and 1977 all foreign trade opportunities for the vessel were non-existent. The Arab oil embargo and the subsequent downswing in the international market had rendered

no need for this vessel in the foreign trade. At the same time, however, there was a domestic market that had developed, the carriage of oil from Valdez, Alaska, the end of the Alaska pipeline, around to the west side of the Panama Canal for throughput to the East Coast.

Q This was obviously a tanker.

MR. McDANIELS: This is a tanker; this is a 225,000 deadweight ton tanker.

Q What does TT mean? I know what SS means and MV, but...

MR. McDANIELS: Tanker--it is a--VLCC is what in the trade is called a very large crude carrier. And of course steamship tanker is the--

Q And what was its power?

MR. McDANIELS: The speed, I am not sure exactly of the speed, Your Honor.

Q Was it a diesel or a--

MR. McDANIELS: Yes.

Q --steamship or what?

MR. McDANIELS: No, it is a diesel. It has the capacity of sufficiently carrying the long haul that is required here from Valdez all the way down to the West Coast of Panama because of its size and its--

Q Are there many larger than that?

MR. McDANIELS: No, there are not many larger.

There are some in other registry, foreign vessels, that are larger. But in terms of our vessels there are not.

The charter that the STUYVESANT was able to obtain from Sohio was in the domestic trade. And in order to meet that charter, the vessel would have to be freed of the restrictions in its contract, which limited it to six months out of every year and then with the consent of the commission. So that in August of 1977 the petitioners applied to the secretary for permission to amend the contract, to delete the provisions, and to repay the subsidy which had been provided. And that was approved on August 30, 1977. And the closing of the transaction which the approval formed the basis of a rather complicated sale transaction--

Q When, Mr. McDaniels, did the question of paying interest on the rebate arise?

MR. McDANIELS: The question of the interest in terms of the interest between the time the subsidy was originally granted and the time it was paid back, it was deemed by the secretary in her initial decision not to be necessary.

Q Then next how did that get into the case?

MR. McDANIELS: It next got into the case I guess by the Court of Appeals. I think Judge Bazelon indicated that he would require that to be paid back. Actually the-- and the Solicitor General has said in his papers here that

the secretary would now require that interest in addition to be paid back, the interest for that time period. But in terms of in the case, the original decision by the secretary was not required at interest, and that decision was reaffirmed on the remand. So, at the moment the interest has not been paid back. The subsidy is being paid back in equal semiannual installments over the 20-year economic life of the vessel. And the vessel has been in the trade since September 30, 1977, has been working the trade since that time when the preliminary injunction sought here was denied.

The authority that we rely upon, the secretary relies upon--

Q I suppose you would not challenge the idea that payment of interest might be a reasonable or a sensible administrative decision.

MR. McDANIELS: I suspect, Your Honor, that is a request that we would not refuse, if that was to be the position of the secretary that now that would be required, our clients would acknowledge that. The secretary did analyze the financial aspects of it on remand to show that it did not result in any competitive disadvantage to the plaintiffs. But we would not quarrel with that requirement.

The question of statutory interpretation for power to make this amendment and to accept subsidy repayment involves, in the first instance, the language of the statute

itself. That is, Section 504 gives the power to contract in this EDS area and gives with it necessarily the power to amend and terminate.

In addition, Section 207 of the act specifically gives the secretary powers to contract the system with the purposes of the Merchant Marine Act, 1936 and specifically further to protect and to preserve or to improve the collateral position. We submit the exercise of the power, if you look to the circumstances of this case, fully met each and every one of the purposes of the act set forth in Section 101 as well as holding that a desire to preserve and protect and improve the secretary's collateral position. It met the purposes of the act because the shipyard was benefited by the ability to sell the vessel and to have financial commitments recognized.

The vessel itself is a viable vessel. Instead of going into layup, it is a viable vessel with American built, American owned, and operated by American crew, available for any national need.

The trade area itself was in need of further tonnage and still is. There was an undersupply of this type of shipyard tonnage to carry the Alaskan oil. Therefore, the secretary was able to address the need in the trade by permitting the domestic use of this tanker. Furthermore, her collateral position was protected. First of all, the

secretary will receive back $27.2 million that obviously would not otherwise have to be repaid since at the outset it was a direct subsidy grant. In addition, there are $28.6 million of the proceeds of the sale that went immediately to discharge loans which the secretary guaranteed under EDA. The $28.6 million went directly to discharge those guaranteed loans.

In addition, the $30 million of Title XI assistance, which was guaranteed loans, which was increased to an additional $30 million at the closing, received an improved collateral position because the vessel was a viable vessel in a trade earning charter rate.

We submit, Your Honor, the statutory construction question is aided by the principle that the secretary's interpretation will be given great weight if it is consistent with the purposes of the act and should be accorded unless there are compelling indications that it is wrong, particularly whereas here the secretary's interpretation has been long-standing. It was first done in 1964 in the Grace Line decision. It has been consistently spoken about by the secretary ever since both in terms of other, although infrequent, application for this relief and in its messages to Congress.

Q You say infrequent. It is alleged somewhere in here that it has only been done twice, the Grace Line case

and this case.

MR. McDANIELS: Yes. There have been applications that have been--three other applications, Your Honor, that have also received approval for this to be done but are contingent upon in two of them--

Q This litigation?

MR. McDANIELS: No, they are contingent upon the Virgin Islands if that were to become part of the domestic trade, which it is not now; then the particular vessels involved would be freed of their restrictions. So, it is contingent upon certain events happening in the future. But the principle has been recognized and accorded full value.

Q So, it has actually been done only twice, in the Grace Line situation and in this case; is that right?

MR. McDANIELS: Yes. And the three other times it has been approved, but future events--

Q It is additionally approved.

MR. McDANIELS: Yes. And the power is well known in the industry. It has been spoken of before Congress by industry spokesmen as well as the legislators themselves. And this particular power has survived the amendment of the statute in 1970 and has been specifically called to the attention of Congress twice, in 1972 and again in 1978. And I think the 1972 history is most important because in 1972 Congress specifically enacted positive legislation to

facilitate the secretary in grant-in-trade release restrictions, release the trade restrictions, and repayment of the subsidy because it amended Title XI to provide guaranteed financing in the cases of an applicant who seeks to repay like $27.2 million to gain trade restriction relief. As ultimately enacted the bill was broadened to include financing of any repayment of subsidy, including the more common repayment pursuant to the temporary relief authorized by Section 506. But it is clear that the Grace Line precedent was called to the attention of Congress. Congress not only did not disapprove of it but specifically granted positive legislation facilitating its exercise.

In light of these aspects and canons of statutory construction, there is not in this case any compelling indication, either in the language of the act or its history or its purposes, that the secretary's interpretation is wrong. The language which the plaintiffs rely upon is Section 506 of the act, which provides for when a vessel can enter the domestic trade while it retains its subsidy. We submit that that section, by its very language, has no application to a vessel such as the STUYVESANT, which has repaid its subsidy. There is nothing in that section that precludes the secretary from exercising the power here, nor is there anything in the legislative history that suggests this action is contrary to the intent of the act.

In 1936 Senator Hugo Black at that time issued the report which formed the basis for the act. His report to Congress indicated that the secretary should have this power. Each of the framers of the statute indicated that the secretary should have this power. And the 1936 act itself contained language which described this power in Section 506 wherein it indicated that the secretary could do this upon her consent.

The plaintiffs and the court of appeals rely heavily on 1938 legislative history wherein that descriptive language, which I have described, was removed from the statute. It was deleted. This, however, was done--and the legislative history speaks only to it being done--in the context of addressing a totally separate problem, whether or not there would be required for any and all partial returns, and any and all temporary returns, the repayment of subsidy.

Chairman Kennedy, who presented the amendment, said that there was an ambiguity in the 1936 statute. The only ambiguity in that statute, upon analysis, is that it appears to permit the subsidized vessel to return to the trade for a period of three months and not have to remit any pro rata share of the previous subsidy. This section was entirely rewritten in 1938. And as rewritten it makes the matter of trade restrictions a contractual term to which the owner shall agree. We submit to the Court there is nothing in the

legislative history that suggests that that omission of the language was done with the intention of depriving the secretary of the power she has exercised here. One word of such intent is in the legislative history, and indeed the people from the industry who spoke about the amendment at the time considered the amendment to increase the opportunity for competition between subsidized vessels and non-subsidized vessels rather than decreasing it.

Q Mr. McDaniels--

MR. McDANIELS: Yes, sir.

Q --is the Merchant Marine Act of 1936 the original act here?

MR. McDANIELS: Yes. Prior to the Merchant Marine Act of 1936, subsidies for the foreign trade had been done indirectly by virtue of the mail subsidy route, that the government would subsidize the carriage of mail. And that was a problem because a carrier who could be carrying the mail with subsidy would also be involved in the domestic trade. That was found to be an inadequate and improper way of subsidizing vessels for the foreign trade. So, the concept of subsidy had existed before. But the particular construction differential subsidy program, the direct outright grant, began in 1936. And I submit that this is actually the main focus of Congress throughout, was to prevent there being simultaneously a vessel that has a subsidy competing with

vessels that do not have subsidies, that the only competition that was a concern to Congress was competition by a vessel which still retained its subsidy with other vessels, which had not been built with subsidy.

Q Of course this vessel would not exist without the subsidy, would it?

MR. McDANIELS: Your Honor, that is not necessarily so. The vessel could have been built without the subsidy. In fact, it was built with the subsidy. It may well be that it contains certain features that it would not have had other than the subsidy. But you could in theory build this vessel without subsidies.

Q In theory but not economically.

MR. McDANIELS: There are vessels bigger than this that are built certainly in other countries.

Q Not in American shipyards.

MR. McDANIELS: No.

Q That is the whole point.

MR. McDANIELS: The vessel, in terms of its economic burden, however, bears it now. And that is to say by virtue of requiring the repayment of subsidy, it stands in the same position as it would if it had made the decision to build the vessel, including the $2,700.

Q Something like paying off the mortgage on a house. You could not own the house had you not had the

mortgage.

MR. McDANIELS: No, but the difference, Your Honor, in terms of the problem of competition is just as if the vessel had been financed by a loan and that that loan is being paid off. As far as its competitive impact, it is as if this vessel--the original decision was to make a domestic vessel this size at this cost because that is the economic burden that the vessel carries at this time.

Q As a matter of economics, business economics, is this situation, in your view, essentially the same as though the Chase Manhattan had financed by a lien on the ship the precise amount that was given by way of a subsidy here, with conditions imposed by Chase Manhattan as it would be in the lien, and now they have exercised the right for an accelerated payoff? Just economically the situation is the same?

MR. McDANIELS: I would agree that the burden on the vessel is the same.

Q I am not asserting it. I am asking your view of it on that.

MR. McDANIELS: I do feel it is the same. It is as if the vessel had been constructed with the aid of financing in the amount of $27.2 million instead of a subsidy because in planning a charter rate for the vessel it now must contemplate servicing that debt. So, it is the same as if instead

of having a subsidy in the first instance there had been a loan in that amount which it now must consider when it services its debt.

Q The quid pro quo for the subsidy are the conditions which the federal government attaches on it, going back into the history of our Merchant Marine, is that not so?

MR. McDANIELS: That is correct, its service in the foreign trade. And when that quid pro quo no longer applies--that is, when the subsidy is paid back, the reason for the quid pro quo no longer exists either.

Q If you borrow from a private source, usually at least with a penalty you can pay it off if you have the right to pay it off. Are you suggesting you have the right to pay back the subsidy if the secretary does not want it?

MR. McDANIELS: No, no, no. I thought the question was in terms of the economic burden of this vessel. Certainly it would require the agreement of the secretary to pay back the subsidy.

Q It is the secretary who has to agree to accept it and also make these findings--

MR. McDANIELS: Yes, that is correct.

Q --about these competitive impacts.

MR. McDANIELS: Under the district court's opinion the secretary must consider--

Q You do not contest that, do you?

MR. McDANIELS: No, I do not. I think that one of the factors that you consider is competitive impact. That is not the only one because there are a number of others that are concerned who are protecting a collateral--

Q But the secretary just cannot say, "By the way, I'd like to have that money back" and you just pay it. He has to make some findings.

MR. McDANIELS: He does because his decision in that regard would be reviewable on whether it is arbitrary and capricious. And the findings would be related to the purposes of the act and the purposes of the reason for making the repayment--protecting collateral, servicing a trade, making a viable vessel available for national emergency, and competitive effect. That is one--

Q If it were a Chase loan, Chase could take the money and the borrower could pay it no matter what the competitive impact was.

MR. McDANIELS: Yes. I understood that--

Q No, not without a provision for granting the right of prepayment.

MR. McDANIELS: Unless there was a prepayment with or without penalty. But I understood the thrust of the Chief Justice's question to be whether or not the vessel competitively sits as if it had received on day one a $27.2 million loan from Chase Manhattan as opposed to a subsidy.

And in that respect it is the same because it is servicing the repayment of that debt at the present time.

Q My question was limited to the economic aspects. The Chase Manhattan has not any interest in preserving an independent or a viable Merchant Marine, which the government has.

MR. McDANIELS: I agree.

Q That is the difference. That is why the secretary retains that control, is it not?

MR. McDANIELS: It is, and I took the Chief Justice's question to mean that you were concerned with whether there was some benefit that the party receives that he would not have received if he had had a loan in the first instance instead of a subsidy.

Q Do you think that if the recipient of the subsidy tenders back the subsidy to the secretary and the secretary refuses the tender, that action could be reviewed under the Administrative Procedure Act as to whether it was arbitrary and capricious?

MR. McDANIELS: I think that it could. I think that it would be a difficult burden for the person who is seeking the exercise of discretionary authority to achieve the standard to reverse it, arbitrary and capricious, but I think it would be subject to review. And in particular the secretary has now indicated that it will be promulgating rules

setting out these factors for application in the future.

I would like to reserve a couple moments for rebuttal if there are any further questions--

MR. CHIEF JUSTICE BURGER: Very well.

MR. McDANIELS: --at this time. Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Klein.

ORAL ARGUMENT OF MRS. AMY LOESERMAN KLEIN

ON BEHALF OF RESPONDENTS ALASKA BULK CARRIERS, INC.

AND TRINIDAD CORPORATION

MRS. KLEIN: Mr. Chief Justice, and may it please the Court:

The government commenced its jurisdictional argument by filing briefs in this Court which almost did not address the issue of Rule 54(b); the initial government briefs on jurisdiction were all addressed to the finality issue as that concept is understood under 28 USC 1291. In our reply brief we focused the argument on Rule 54(b) because it was a Rule 54(b) order that was entered by the district court. And because our complaint so clearly asked for relief more than the mere barring of the STUYVESANT. The government initially made its final order argument purely on the supposition that the only relief that the plaintiffs below had asked for was the barring of the STUYVESANT. And the government said you had two theories for that. You had a theory that there was no power to waive the STUYVESANT into the

domestic trades. And you had a theory that if there were power, the competitive effect was such that the power should not be exercised. And we said no, that is not our complaint; you have rewritten our complaint. What our complaint said was that the STUYVESANT should not be in the domestic trades because the secretary has no power, and for other reasons there were claims of violations under the Administrative Procedure Act. But we also said that the secretary has no power to waive any vessel built with subsidy into the domestic trades, and we asked for a declaratory judgment to that effect and we asked for an injunction to that effect. And we referred in our complaint to the BAY RIDGE, which is a sister ship of the STUYVESANT built by the same interests nearing completion as to which we alleged that if the power to waive the Section 506 bar were upheld for the STUYVESANT, that there would be similar exercise for the BAY RIDGE because the BAY RIDGE was also built with subsidy. There was the same government collateral risk. There were heavy government loan guarantees from the Economic Development Administration. And we asked for an injunction barring the exercise of the waiver power for the BAY RIDGE and for any other vessel ever built with construction differential subsidy.

Q You represent Alaska Bulk Carriers, Incorporated?

MRS. KLEIN: That is correct, and Trinidad.

Q And when you talking about the complaint, you are talking about its complaint?

MRS. KLEIN: That is correct, sir.

So that not only is there a hypothetical of 15 or 16 ships in the wings, but there was an actuality one that was referred to in the complaint. And as has already been made clear, these are huge vessels. And one may be considered an equivalent perhaps of the 15 or 16 hypotheticals in a different situation.

Q But would the theory that you advanced on behalf of--is it BAY RIDGE?

MRS. KLEIN: Yes.

Q --be substantially the same as that which you advanced on behalf of the STUYVESANT?

MRS. KLEIN: As far as the waiver is concerned, yes, identical. But the secretary--

Q Then it really would not have been a necessarily different claim; would it just have been a different theory?

MRS. KLEIN: No, it would not have been a different theory. What we said was that the secretary had no power to waive the Section 506 bar, and the relief that we asked for was an injunction going against the STUYVESANT and an injunction going against the exercise of that waiver authority for any other vessel ever built with CDS.

Q Could the injunction have been granted without

the lesser included relief having been granted?

MRS. KLEIN: An injunction could have been issued against the STUYVESANT for the reason of violation of the Administrative Procedure Act, which was also alleged in our complaint and eventually sustained by the district court. That was the reason for the remand. The district court found a violation of the Administrative Procedure Act. So, the STUYVESANT could have been barred for reasons going to issues involved in the remand. But the general injunction against waiver of the power for any vessel could only be granted upon the determination as to statutory authority. And that was the determination made by the district court. So that once the district court decided the secretary had the disputed authority, the issue as to our entitlement for an injunction as to the BAY RIDGE and all other vessels in that class was finally and irrevocably decided.

Q You could have gotten the result you wanted, but you could not have gotten it by the injunctive relief in a general injunction against the secretary?

MRS. KLEIN: We could not have gotten the relief we sought, which was a declaratory judgment that the secretary lacked the disputed authority. That was finally decided against us. The only thing we could have gotten was that the exercise of that authority with respect to the STUYVESANT was invalid. I think that we finally convinced the government

that our complaint said what we said it said instead of what they said it said because on the reply brief the government moved away from the contention that we only advanced one claim for relief, which was to bar the STUYVESANT, and the government said that we had no right to ask for anything other than the barring of the STUYVESANT because we were not presenting the judiciary with a case or controversy under Article III. And the reason for that was said to be that we were asking for something that was not concrete, that we had to wait as each vessel was waived into the fleet, and we had to bring the same lawsuit; and if we did not get the waiver set aside for some other reason, then and only then could we focus on the statutory authority. And with respect we think that the issue is a question of ripeness, the case or controversy issue.

Q I do not know if you have mentioned in your argument, but in your brief you rely fairly heavily also on the appealability of this district judge's order on the ground that it was denial of an injunction.

MRS. KLEIN: Absolutely. At 1292(a)(1).

Q 1292(a)(1) which is quite a different and alternative ground to 54.

MRS. KLEIN: That is correct. We think that it was clearly appealable under either one. It was a final denial of an injunction. Nothing that happened on remand could possibly have altered the decision below that we were not

entitled to an injunction barring the waiver of any vessel built with CDS into the domestic Merchant Marine.

Q So, you say there certainly was a controversy between you and the federal parties although there may not have been a controversy between you and Seatrain.

MRS. KLEIN: That is correct.

Q Do you think there was a controversy between you and Seatrain on that second issue?

MRS. KLEIN: We posed the waiver of--

Q You really were asking for the injunction against the federal parties.

MRS. KLEIN: But the injunction was asked against the government, yes, sir.

Q And all you need is to say there was a case or controversy between you and the federal parties.

MRS. KLEIN: Unquestionably, yes.

Q Would it not have been possible under the Administrative Procedure Act, if the secretary had come back and said, "I have corrected whatever defects the district court found," for the district court to have nonetheless enjoined the secretary from doing what she proposed to do on the grounds that it would have been in violation of the Administrative Procedure Act for her to have done it?

MRS. KLEIN: Yes. We could have conceivably gotten an injunction against the STUYVESANT. But we could not have

gotten an injunction against the exercise. We could not have gotten a declaratory judgment that the secretary lacked the power.

Q Because the BAY RIDGE was still on the drawing boards.

MRS. KLEIN: That is correct, but our complaint made very clear, pointed out--it was a substantial part of our entire case--that the mere exercise of the power or, to say it, the mere affirmation of the power has an immediate impact upon us, upon our industry, upon the unsubsidized domestic Merchant Marine.

Q So that whatever happened on remand, unless the district court changed its mind, you were out of business on your injunction.

MRS. KLEIN: That is correct. That is correct, and we are in a totally different trade, as it were. That was our complaint. We are in a different trade. We have assets that are worth a different amount than they were before the secretary said that she had the power. We have a whole different growth situation before the secretary said that she had the power. And I think a fair reading of our complaint will show that we were at least as much or even more concerned about the secretarial interpretation, that at any point in time the secretary could waive into the unsubsidized Merchant Marine, into the domestic trade, vessels built with subsidy at

any time merely by consenting to the repayment of the unamortized subsidy.

Q Mrs. Klein, may I ask you two questions. Your argument does not necessarily apply to Shell, as I understand, because they have quite a different complaint.

MRS. KLEIN: That is correct.

Q Secondly, is it not correct that the appealability under 1292(a)(1), denial of an injunction theory, really boils down to the same question as appealability under 1291 because you must, even on that theory, assume that the injunction against the exercise of power is a broader form of relief than the injunction against the recision of this particular deal?

MRS. KLEIN: It can be looked at that way, but there is also an argument that there is a separate right of appeal under 1292(a)(1) irrespective of whether we were asking for more than one--we had more than one claim for relief.

Q Even if they were precisely the same claims for relief, two different alternate theories of getting the same injunction, under 1292(a)(1) you might have appealability even though you would not under 1291?

MRS. KLEIN: We think so because under 1292(a)(1) we were finally denied an injunction as to this class of vessels, and nothing could change--

Q Then that is the broader point. That is what I--

MRS. KLEIN: Yes, that is correct.

Q All right.

MRS. KLEIN: Petitioners' statutory construction rests upon the conception that this statute establishes a quid pro quo relationship, and that is the key. That is the theme that the statute carries out. If subsidy is retained, there is a restriction against trading, domestic trading. Once subsidy is returned it is said that the restriction dissolves. We think that that is not what the statute says. While there is some quid pro quo relationship, it is not an open-ended quid pro quo relationship. The statute says that subsidy is given for operation in foreign trade. The statute has two exceptions to that, incidental domestic trading and domestic trading, purely domestic trading, for no longer than six months. If the vessel engages in those two exceptions, the vessel must return subsidy pro rata. That is the extent of the quid pro quo relationship. The opportunity to engage in trading other than foreign is limited, but there is no open-ended statutory scheme whereby a vessel operator can decide to go into any trade other than the ones that subsidy was given for merely by repaying subsidy. Petitioners in effect acknowledge that. They do not say that you can go into any incidental trade, for example, other than the enumerated foreign incidental trades. They do not say you can go into domestic trade for eight months. They say there is only one

other one-third example where you can go into--where the quid pro quo relationship is carried out. And that third example is, they say, that if you return all the subsidy or the unamortized subsidy at any point during the vessel's life, then the restriction just dissolves. The first two quid pro quo relationships are found directly in the statute. The third one is not found in the statute. But the petitioners say that is okay, it should be implied into the statute. The reason it should be implied into the statute is because it carries out the quid pro quo theme. But the quid pro quo theme itself is a concoction, we submit, of petitioners. There is no general quid pro quo theme, and indeed they acknowledge that.

Moreover, the fact that there are two instances in which a vessel built with subsidy can engage in other than foreign trade upon a repayment of subsidy clearly does not imply this third quid pro quo relationship the petitioners have concocted, for the reason that it was the very category of instances that unquestionably was taken out of the act in 1938 when the statute was rewritten. All parties here agree that the 1936 act, the act that was originally enacted, had a Section 506 that might be interpreted as establishing precisely these three quid pro quo relationships. But in 1938 unquestionably that third quid pro quo came out of the statute.

Petitioners here spend a lot of time on the '36 act, but the '36 act is not the law anymore; it is the '38 amendment that is the law.

Q The government's view is, as I remember, that the deletion of that third quid pro quo was inadvertence.

MRS. KLEIN: That is what they say. We have cited the legislative history chapter and verse to show that it was not only an inadvertence, the section was rewritten at the request of the then chairman of the Maritime Commission, Chairman Kennedy, Joseph Kennedy, who said, "We find it confusing to have these two consents which we could give, one for unlimited operation for return of subsidy, and another for a temporary emergency. We find that confusing and take out this third instance." And that is exactly what the Congress did.

Q Hugo Black left the Senate between 1936 and 1938, did he not? He had been chairman of the committee or subcommittee in '36.

MRS. KLEIN: That is right.

Q Did Chairman Kennedy say in words to take out this third alternative?

MRS. KLEIN: I suppose not. He said it is ambiguous and confusing. And then he said how the section should be rewritten, and as rewritten it was taken out.

Q But he never said in words that a total recision would be a bad idea.

MRS. KLEIN: He said, "We find the two consents that we are empowered to give ambiguous and confusing, and we want the section rewritten so that the total payout is taken out." And that was the language that he proposed, and that was the language that was enacted.

Q You do not quote him as saying, "We want the total payout taken out"?

MRS. KLEIN: No. No. If I did, I overreached myself.

Q Did he submit a draft with it out?

MRS. KLEIN: Yes. He said as the section is rewritten.

Q And "I want it rewritten as attached."

MRS. KLEIN: As the section is rewritten. I cannot be sure of that, no, Your Honor. He said--

Q Did he submit a draft or did he not?

MRS. KLEIN: I believe he did, but I cannot be sure of that.

Q With the language out, or was it in?

MRS. KLEIN: When the amendment was introduced, the chairman of the committee said, "This has been rewritten wholly in the light of the suggestions of the Maritime Commission."

Q That infers that somebody besides the chairman had written it.

MRS. KLEIN: And he said, "And largely in the words

of the Maritime Commission."

Q "Largely."

MRS. KLEIN: I think we have the exact quote in our brief.

Q Two-thirds, two-thirds at least?

MRS. KLEIN: Yes.

Q Mrs. Klein, the government also argues that if you just had a transaction authorized, the subsidy with the restriction on it, and did not say anything one way or another about rescinding the transaction, that the government would nave, just pursuant to its general powers to make contracts and amend them and so forth--they would have the power to, in effect, rescind this transaction. Would you agree with that? In other words, do you have to rely on the fact that the authority for the legislative history, plus the authority for six months permission, impliedly prohibits anything else. That is your argument, as I understand it.

MRS. KLEIN: No, I do not think we have to. I think we can rely just on the statute that says that you are supposed to have subsidy for the foreign trade, and that is the only purpose for which you can give subsidy.

Q Supposing you had a statute that just contemplated one transaction like the Chrysler proposal now or this one vessel, and Congress said, "We will give you a subsidy for this transaction, and we will authorize a subsidy for this

transaction provided there is a restriction on domestic commerce put in the contract," and that was all that was done and the contract was made pursuant to the statute and nothing was said one way or another about rescinding it. Do you think the secretary would have power to rescind such a contract?

MRS. KLEIN: No. I think the carrying out of the legislative intent is that you take the subsidy and you fulfill the contract.

Q And it must be a permanent restriction.

Q In other words, it is a permanent relationship?

MRS. KLEIN: So the lower court found after very extensive analysis, yes.

Q Like the mark of Cain on this vessel.

MRS. KLEIN: That is true. That is what the vessel was built for; that is why the aids were extended.

Q With taxpayers' money.

MRS. KLEIN: With taxpayers' money.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Klein.

Mr. Shulman.

ORAL ARGUMENT OF STEPHEN N. SHULMAN, ESQ.,

ON BEHALF OF RESPONDENT SHELL OIL COMPANY

MR. SHULMAN: Mr. Chief Justice, and may it please the Court:

I would like to pick up one or two points with

regard to the jurisdictional question that strike me as still hanging a little bit. One was that Mr. Justice White asked whether or not there was still a case or controversy, there would still be a case or controversy vis-a-vis Seatrain. And previously to that there had been questions raised as to what would happen if there were 15 or 16 ships in the wings. I believe Mr. Justice Stevens raised that question. The important point to remember is that the STUYVESANT itself was standing in the wings because with the only relief that could be gotten injunctively, given the district court's order, what you would have was an injunction against the STUYVESANT then based upon the competitive conditions then. And there could have been a new attempt 30 days later to put the STUYVESANT in again. So that the STUYVESANT itself was waiting in the wings to be entered again into domestic trade when the respondents had been denied a permanent injunction.

I would like also to advert to the point that Mr. Levander made suggesting that following a remand proceeding before the Department of Commerce, it would have been possible to question the standard of what then would have been plaintiffs to bring the action. And I would say, one, it is a strange procedure indeed that if you were remanded for a determination of competitive impact and there was a finding of no competitive impact, you thereby lose your standing to attack or to review the finding of no competitive impact. And

quite apart from that, it is certainly true that a two-year charter of the Shell ship, which is what happened, does not take care of 20 years of injury when the STUYVESANT is permanently waived.

The question came up--Mr. Chief Justice Burger raised the question about the similarity between this case and the Chase Manhattan Bank financing. And then Mr. Justice White raised the point that you might be able to pay back the Chase Manhattan Bank, with Mr. Justice Rehnquist pointing out that you might need a prepayment requirement but that the secretary might not be able to be forced to take back CDS. Instead the secretary would have to make some findings before she could take back CDS. The only place where there are any findings suggested at all that the secretary might have to make is in the opinion of Judge Richey. The statute does not set forth any findings for the secretary to make. The reason why the statute does not set forth any findings for the secretary to make is because there never was a thought that there would be a permanent payback of CDS.

Q What about temporary?

MR. SHULMAN: There are findings to be made for a temporary. The finding is that it is necessary or appropriate to the purposes of the act. And that is one of the reasons why Chairman Kennedy raised the question in 1938 with regard to the ambiguity because there was absolutely no standard

suggested other than the three months standard.

Finally I would like to make a point in response to Mr. Justice Stevens' question with respect to whether or not a one-time statute with a one-time contract with restrictions would be amendable by the contracting party, to which Mrs. Klein answered no, it would not be. And I certainly want to endorse everything that Mrs. Klein says before this Court. But I would add one additional point, that the words of Title 506, Section 506, are not "the purchaser." The words are "every owner." The words are "every ownser shall agree." And the whole purpose of those words is that they go on as title goes on. And in fact the Maritime Administration referred to this as a covenant running with the ship.

Q Of course they did agree.

MR. SHULMAN: What?

Q They did agree. The owner did agree.

MR. SHULMAN: That is a very interesting point, Mr. Justice Stevens. The fact of the matter is that the current owner did not agree in the face of the language which said every owner must agree because the secretary removed it before that owner had to agree with it. This whole case has presented--

Q Does it not boil down, Mr. Shulman, to whether or not Congress intended to protect your clients and others similarly situated from competition, on the one hand, or from

subsidized competition on the other?

MR. SHULMAN: That would be an adequate way of expressing it, Mr. Justice, but I do not think that is a complete way of expressing it because the whole issue with regards to CDS is foreign commerce. CDS has no meaning except for foreign commerce. It is not CDL, construction differential loan. It is talking about paying it back. It is the worst case of the tail wagging the dog. It is a subsidy. The secretary of Commerce really does not want the subsidy back. What she wants is ships in foreign commerce.

Q Yes, but if ships are not usable in foreign commerce, there can be at least temporary use in domestic commerce.

MR. SHULMAN: That is exactly correct, Your Honor.

Q If there are some findings.

MR. SHULMAN: That is exactly correct. And that is precisely the balance that is drawn.

Q In which event there has to be some refund of the subsidy.

MR. SHULMAN: That is precisely correct. And the reason for that is that you have a ship built for foreign commerce, and there may be some incidental needs for it to participate in domestic commerce. One of those are the enumerated trades that are set forth in Title 506. And the other is a temporary transfer up to six months when the

secretary has made the necessary findings.

Q I suppose the secretary could string temporary exemptions together as long as each time he made another finding.

MR. SHULMAN: But you can only string the exemptions after a six-month hiatus.

Q Yes.

MR. SHULMAN: Right, that any time that--

Q Six months on and six months off, six months on and six months off.

MR. SHULMAN: That is correct.

Q Indefinitely?

MR. SHULMAN: On the assumption that it did in fact--was necessary or appropriate to effectuate the purposes of the act.

Q If proper findings were made.

MR. SHULMAN: Yes.

Q You could do that indefinitely if the necessary findings were made. But those findings could be challenged in a judicial proceeding?

MR. SHULMAN: I would expect so, Mr. Chief Justice. And it is also true that there is a world of difference between competing with a ship that is available in six-month units out of each year and competing with a ship that is available for the full year.

Q It would depend to some extent on which six months and what tanker market conditions were at the time, would it not?

MR. SHULMAN: That question, Mr. Chief Justice, exactly explains why you would deal in temporary transfers in this connection because six months is the kind of discrete unit as to which a rational judgment can be made.

One of the things that came out of the remand proceeding was the statement by the secretary of commerce that you could not make a projection more than three years into the future. And that is some sort of basis on which to allow a ship to engage permanently in foreign trade. It also speaks to why there really are no standards in the act because Congress never intended that there would be a transfer longer than a six-month period.

There is only one provision in Section 509 which deals with the question of loans, as this attempts to be described here, or which deals with the question of building for the domestic trade. And that is Section 509, which allows the secretary to make provision for building a ship and then sell it to the purchaser for 12-1/2 percent down or 25 percent down, depending upon what type of ship it is. And Section 509 specifically says no construction differential subsidy shall be allowed. With regard to construction differential subsidy Title V is perfectly clear that foreign commerce is the sole

purpose of it. Section 501 establishes construction differential subsidy in these words, quote, "to aid in the construction of a new vessel to be used in the foreign commerce of the United States."

The secretary of commerce must determine, before approving an application, that, quote, "The plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States." She has to determine, quote, "that the plans will aid in the promotion and development of such commerce. And Section 506, as I pointed out before, is a continuing prescription. It does not apply to the purchaser or the shipyard. It applies to every owner. It says every owner shall agree, not may agree. It applies to every vessel for which CDS has been paid, not has been and paid and has not been repaid. It allows only the two indicated domestic uses, one incidental and, two, for six-month periods. And it is the result of an amendment in 1938 at which time Chairman Kennedy did submit a draft. Chairman Kennedy's draft was enacted. And the words that Chairman Kennedy said to describe this were, quote: "If the owner desires to engage in domestic trades other than those enumerated in the section, he can do so only by receiving the consent of the commission. The consent for this service is limited to six months in any one year."

Q Was that what he was criticizing or was that

what he wanted?

MR. SHULMAN: I am not sure that I have the qualification to answer that question, Mr. Justice Rehnquist. That was both the only ambiguity in the act and the ambiguity that he said was being corrected. So, I think it was both what he was criticizing and what he wanted in the sense that he was observing the one ambiguity and he was suggesting the correction.

Q By another ambiguity.

MR. SHULMAN: I do not find the section since 1938 contains any ambiguity. The only way that the section can contain an ambiguity is the way that is classically brought out by footnote two of the government's reply brief, which says that a ship that has repaid the subsidy in full, and therefore no longer enjoys the benefits of that subsidy, is simply not a vessel for which subsidy has been paid.

If a ship which has been paid subsidy, which must have been paid subsidy, in order to repay subsidy is not a ship as to which subsidy has been paid, I do not know what ship might be. There is no warrant in the statute. The statute is clear. There is no need to go to the legislative history. And if the legislative history is gone into and considered, it is clear that the statute advertently does what it does, which is to confine any sort of domestic trade by CDS-built ships to two types--incidentally enumerated services and six-month

temporary transfer. Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. McDaniels.

REBUTTAL ARGUMENT OF WILLIAM E. McDANIELS, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. McDANIELS: Yes, may it please the Court:

I think that the statute clearly sets forth the kinds of findings that the secretary must consider when it says in 207 that she may contract consistent with the purposes of the act--those are set forth in 101--and to protect and preserve her collateral, which she did here. It would be an unreasonable interpretation of the statute to bind the secretary where, on the one hand, you give her the power to invest $70 million of the taxpayers' money to say she can never react to the volatile trading circumstances that occur in the maritime trade. She must have this flexibility.

And with respect to the 1938 history, Mr. Justice Stewart, the key there is this language that Mr. Kennedy proposed was said at the same time that he says we have no intent to change the original purpose of the section. The original purpose of the section was to remain the same. It clearly countenanced the right to have permanent payback. And the fact is that since 1936 and 1938 and clearly since 1954, the unsubsidized carriers have realized that this possibility existed. They proposed--the unsubsidized carriers--proposed legislation to permanently ban forever a subsidized vessel

from ever coming into the domestic trade. Congress has never done that. Congress has never passed that legislation. Instead the statutory scheme permits a half of the life--ten years of the vessel's life while subsidized can be spent in direct competition with a subsidized vessel.

Q Ten years in these--

MR. McDANIELS: Six-month periods. And that is more dangerous to their interest frankly because you could pick and choose as your foreign carrier the six months you want. Here--

Q If the secretary--

MR. McDANIELS: If she will let you, exactly. But in this case we are committed as a domestic--we are now a Jones Act carrier, always have been, the same as they are. We are now committed to the domestic trade to take the ups and downs. They are still in business. We are still in business. They still have a market, and we still have a market. There is no sense in any way, shape or form in the history that there was to be freedom from competition from the vessel, only freedom from unfair competition.

Q Unfair--greenhorn in this. But why do you say you are locked into the domestic trade?

MR. McDANIELS: Because the return of the subsidy makes us a vessel which--

Q It makes you free to go into the domestic trade.

MR. McDANIELS: Yes. But we can go into foreign trade as well. But we--

Q But you indicated you could not.

MR. McDANIELS: We stand at equal competitive footing with them.

Q You still have your options, and now you can say on either trade.

MR. McDANIELS: Exactly, but we cannot compete in the foreign trade with the benefit of subsidy. So, in terms of our trading options, the domestic trade has to be the first opportunity.

Q You are locked into competing without a subsidy.

MR. McDANIELS: That is correct, which is--

Q I take it you are locked in as a matter of economics. None of the domestic trade vessels are economically able to compete in the foreign trade--

MR. McDANIELS: That is correct.

Q --without the subsidy.

MR. McDANIELS: We cannot return to a subsidized state. We must compete on a par with the unsubsidized vessels.

Q And you say that is contrary to the declaration of Congress that the welfare of the country depends on a strong Merchant Marine.

MR. McDANIELS: Consistent with it.

Q Yes.

MR. McDANIELS: Absolutely consistent with it because the strong Merchant Marine would not have been served if this vessel and its capacities were put into dry dock and not available. The keeping of a viable vessel, American owned with an American crew, is a primary goal of the Merchant Marine Act, particularly when it causes no adverse competitive effects to the unsubsidized carrier, which is the situation here based on all the findings in the case.

Q If there is no adverse competitive effect, they are spending quite a bit of money and effort litigating this case. They must think that there is some.

MR. McDANIELS: They must, but, Your Honor, they are in the trade. They still have their charters. They are still doing business. There still is a need for further vessels in the trade. So, there has been a finding of no adverse competitive effect by this transaction.

Q But their claim in part at least is that they should be free from competition, federally financed enterprises.

MR. McDANIELS: And they are free from that in this case because we are no longer such a ship.

Q Initially it was federally financed.

MR. McDANIELS: But we could not compete with them

at that time.

Q There is an administrative finding, but it has never been reviewed.

MR. McDANIELS: I am sorry?

Q There has been an administrative finding there is no competitive effect.

MR. McDANIELS: Which has never been reviewed because of the procedural posture we are in; that is correct.

Q The finding was no competitive effect.

MR. McDANIELS: None or minimal competitive effect by the secretary upon remand.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

[The case was submitted at 1:57 o'clock p.m.]

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