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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-210346

DATE: June 2, 1983

MATTER OF: Lieutenant Colonel Marvin S. Shaffer, USAF,
Retired

DIGEST:

Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of Congress in Article I, section 9, clause 8 of the Constitution and the approvals required by section 509 of Public Law 95-105 (37 U.S.C. 801 note) in order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government.

This decision responds to a request from the Acting Assistant Secretary of Defense (Comptroller) concerning the limitations of Article I, section 9, clause 8 of the Constitution and the application of section 509 of Public Law 95-105, to those retired members of uniformed services employed by American corporations whose principal shareholders are foreign corporations which are in turn controlled by foreign governments. We do not find that the Constitutional provision or Public Law 95-105, is applicable.

This request for decision has been assigned Committee Action Number 556 by the Department of Defense Military Pay and Allowance Committee.

The Air Force is in receipt of a DD Form 1357, Statement of Employment, dated August 31, 1981, from Lieutenant Colonel Marvin S. Shaffer, USAF, Retired. It indicates that Colonel Shaffer is employed by American Motors Corporation

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(American Motors) as director of that firm's "China Project." This is apparently a "joint venture" between American Motors and the People's Republic of China, but the exact nature of the arrangement is unknown. The Committee Action notes that 46.9 percent of American Motors' stock has been acquired by the French automotive firm of Regie Nationale des Usines Renault (Renault), 92 percent of which is owned by the French government. Further, Colonel Shaffer has not requested or obtained permission from the Secretary of State and the Secretary of the Air Force to accept "foreign employment" as required by section 509 of the Foreign Relations Authorization Act, Fiscal Year 1978, Public Law 95-105, August 17, 1977, 91 Stat. 844, 859-860, 37 U.S.C. 801 note.

On the basis of these facts the submission poses the question:

"Whether a corporation, incorporated in the United States, becomes an instrumentality of a foreign government when its principal stockholder is a foreign corporation substantially owned by a foreign government, so as to subject retired members of the uniformed services employed by such corporation to the constraints of Article 1, section 9, clause 8 of the Constitution?"

Article I, section 9, clause 8 of the Constitution prohibits any person "holding any Office of Profit or Trust" under the United States from accepting any compensation, office or title from a foreign government without the consent of Congress. It is well established that that prohibition applies to retired members of the uniformed services. ~~58 Comp. Gen. 487~~ (1979), and cases cited therein. However, by enacting section 509 of Public Law 95-105, cited above, Congress gave its consent to the employment by foreign governments in the case of various categories of personnel, including retired members of a Regular component of a uniformed service, provided they receive the approval of both the Secretary of State and the Secretary of their service or department.

However, we feel that neither Article I, section 9, clause 8, nor section 509 of Public Law 95-105 is applicable in this case.

The Committee Action refers to a decision of the Comptroller General, 53 Comp. Gen. 753 (1974), in which we concluded that a retired Regular officer of the Air Force, although nominally employed by a domestic corporation, was actually employed by a foreign corporation which was a wholly owned instrumentality of a foreign government. In that case the foreign corporation was determined to be the instrumentality of the foreign government. It was further determined that the corporation had the right to control and direct the retiree as an employee; i.e., in the performance of his work and the manner in which it was to be done. In that decision we relied upon the common law of agency. In this case, it is also necessary to rely on some of the principles of the law of corporations. While these principles were developed for entirely different reasons, we find that their application in situations such as this one will adequately protect the interests of the United States without being overly restrictive on the individuals involved.

As a general rule, a corporation is a legal entity separate and distinct from its shareholders. However, where equity dictates the corporate entity will be disregarded. For example, this may be done when there is such unity of interest and ownership that the separate personalities of the corporation and its shareholders no longer exist. FMC Corporation v. Murphree, 632 F.2d 413 (1980). Also, when a parent corporation used its subordinate corporation as an instrumentality or mere agent, the corporate entity was disregarded. C. M. Corporation v. Oberer Development Co., 631 F.2d 536 (1980). These are but two of many variables to be considered in establishing whether a corporate entity should be disregarded in dealing with corporations and their shareholders. For the purposes of this decision we do not believe a detailed discussion of these concepts is necessary.

Here, Colonel Shaffer is an employee of American Motors Corporation, a domestic corporation. While it is true that a controlling interest has been acquired by a foreign corporation, which is in turn controlled by a foreign government, we find no basis to disregard the corporate entity of American Motors Corporation. No indication or evidence appears which requires a conclusion that American Motors is

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acting as an agent or instrumentality of Renault. Notwithstanding that both American Motors and Renault may have common directors, we see no indication that American Motors and Renault are not separate entities.

Accordingly, since Colonel Shaffer is employed by a domestic corporation which appears to be a separate legal entity from its dominant shareholder, and the power to control and direct his employment is with the domestic corporation, it is our view that no violation of Article I, section 9, clause 8 of the Constitution exists. As a result, it is not necessary for Colonel Shaffer to seek the Secretarial approval required by Public Law 95-105. Additionally, we do not view the fact that Colonel Shaffer will be working on the "China Project" as having any bearing so long as his employment is exclusively with American Motors. The basic question is answered in the negative. Since the two other questions presented were contingent on an affirmative answer, they are not relevant.

We would like to add that in circumstances where it appears that a domestic corporation is ultimately controlled by a foreign government and the domestic corporation acts as an agent or instrumentality of a foreign government, the approval required by Public Law 95-105, should be secured prior to employment. Since this is a complex area, and in order to avoid a violation, if any doubt exists concerning an employment situation, the individual concerned should request the required approval.

for Milton J. Fowler
Comptroller General
of the United States