JOHN F. CLOUGH, III
CLOUGH & ASSOCIATES
431 N. Franklin Street, Suite 202
Juneau, Alaska 99801
(907) 586-5777

WARREN CHRISTOPHER
PATRICK LYNCH
THOMAS G. HUNGAR
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Exxon Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. EXXON CORPORATION AND EXXON SHIPPING COMPANY, Defendants.	NO. A90-015-1 CR

ERRATA

Due to an error in computerized transmission, Exxon Corporation's **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS ALL COUNTS INSOFAR AS THEY ATTEMPT TO CHARGE OFFENSES BASED ON VICARIOUS LIABILITY** was filed in an erroneous computer format which resulted in the length of the memo exceeding the Court's page limitation.

Attached hereto is a reformatted version of the memo which meets the Court's standard. The text of this memo is identical to that of the memo filed yesterday with the court.

Counsel for the United States and for Exxon Shipping Company have authorized us to state that they have no objection to this filing.

DATED: August 21, 1990

JOHN F. CLOUGH, III
CLOUGH & ASSOCIATES

WARREN CHRISTOPHER
PATRICK LYNCH
THOMAS G. HUNGAR
O'MELVENY & MYERS

By _____
Robert L. Reeves Jr
Attorneys for Exxon Corporation

CLOUGH & ASSOCIATES
Attorneys at Law
431 Franklin Street
Suite 202
Juneau, Alaska 99801

JOHN F. CLOUGH, III
CLOUGH & ASSOCIATES
431 N. Franklin Street, Suite 202
Juneau, Alaska 99801
(907) 586-5777

WARREN CHRISTOPHER
PATRICK LYNCH
THOMAS G. HUNGAR
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Exxon Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. EXXON CORPORATION AND EXXON SHIPPING COMPANY, Defendants.	NO. A90-015-1 CR EXXON CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS ALL COUNTS INSOFAR AS THEY ATTEMPT TO CHARGE OFFENSES BASED ON VICARIOUS LIABILITY (ALL COUNTS)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CODES, RULES, STATUTES, ETC.

TREATISES, ETC.

I. INTRODUCTION.

The Superseding Indictment (the "indictment") purports to be a routine statement of offenses allegedly involved in the grounding of the Exxon Valdez. However, as revealed by the bill of particulars filed July 31 ("7/31/90 BOP"), the charges against Exxon Corporation ("Exxon") are based principally on two unprecedented and insupportable theories of vicarious criminal liability for the actions of a corporate subsidiary. In fact, in no case has the federal government ever obtained the conviction of a parent corporation based solely on the acts of its subsidiary. In the rare case in which a parent corporation has been convicted of crimes committed by a subsidiary, the conviction has been founded on the active involvement of employees of the parent corporation.

The Government's revolutionary purpose has been disguised by indiscriminately lumping Exxon together with its wholly-owned subsidiary, Exxon Shipping Co. ("Shipping") in the concluding paragraph of each count. These paragraphs simply repeat, in the language of the statutes asserted, that "EXXON CORPORATION and EXXON SHIPPING COMPANY" committed some predicate act. The 7/31/90 BOP, however, exposes the factual and legal rationale for this prosecution of Exxon and reveals the legally deficient nature of these charges.

The Government now contends that the indictment contains two bases for imposing vicarious criminal liability on Exxon:

> 1st: "Exxon may be held liable [under all five counts] as a principal for the conduct of its agent, Exxon Shipping" and for the conduct of Shipping's employees as "subagents" of Exxon under the "criminal respondeat superior doctrine" developed in a line of cases following New York Central &

H.R.R. Co. v. United States, 212 U.S. 481 (1909) (U.S. Opposition to Motion for Bill of Particulars ("Opposition") at 17-19, 7/31/90 BOP at 26); and

2nd: "The aim of [the statutes under which Exxon has been accused in all five counts] would be thwarted if parent corporations could escape liability for the violations of their wholly-owned subsidiaries, particularly where the subsidiary is simply one part of a vertically integrated enterprise subject to the complete control of the parent," and therefore each of the five statutes should be construed to impose criminal responsibility on a parent corporation as a "person" subject to the statute "regardless of the formal existence of its subsidiary." (Opposition at 20-25, 7/31/90 BOP at 28-31.)[1]

This memorandum will demonstrate that the indictment fails to allege a criminal offense under either of the Government's two vicarious-liability theories.[2]

---

[1]Although the possibility of reliance on the civil equitable doctrine of "piercing the corporate veil" was recognized in Exxon's motion for bill of particulars, it is clear from the July 31 bill (as well as from the fact that the indictment charges both entities as defendants) that the Government does not contend that the indictment alleges criminal liability under any "piercing" theory. That theory (as well as any other theory seeking to punish both a parent corporation and its subsidiary for the same offense committed by one entity and imputed to the other) would be barred by the Double Jeopardy Clause, which "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969); see Western Laundry & Linen Rental Co. v. United States, 424 F.2d 441, 444-445 (9th Cir. 1970).

[2]The bill of particulars also alleges that Exxon has "direct" liability under Counts One, Two and Three. The insufficiency of the allegations of "direct" liability is addressed in the concurrently filed motions addressed to those counts individually. The Government has now conceded, however, that the sole basis for the charges against Exxon in Counts Four and Five is vicarious liability: the 7/31/90 BOP states that the Government (and thus the grand jury) has no knowledge that any Exxon employee violated the statutes charged in Counts Four or Five. 7/31/90 BOP at 22, 25. As a result, while this motion applies to all five counts, if granted it would have a dispositive effect on Counts Four and Five.

II. THE INDICTMENT FAILS TO STATE AN OFFENSE AGAINST EXXON ON THE GROUND THAT SHIPPING ACTED AS EXXON'S AGENT.

A. The Doctrine of *Respondeat Superior* Has No Application In A Criminal Case Involving Separate Corporate Defendants.

The Government claims that the indictment can be read to charge Exxon with vicarious liability for the alleged criminal conduct of Shipping on the ground that "Exxon established its subsidiary [Shipping] as its agent and bears responsibility for its agent's criminal activities." 7/31/90 BOP at 28. In particular, the Government relies on the doctrine established in New York Central & H.R.R. Co. v. United States, 212 U.S. 481 (1909), under which corporations may be held responsible for crimes committed by their individual officers and employees within the scope of employment and with the intention of benefiting the corporation. The Government asserts "that Exxon can be held liable, under the same respondeat superior doctrine, for crimes of another corporation that was acting as its agent." Opposition at 18. This is simply wrong.

In general, "the doctrine of respondeat superior has no application in criminal law." Empire Printing Co. v. Roden, 247 F.2d 8, 17 (9th Cir. 1957).[3] A person is not criminally liable for the actions of another person, even his employee, unless it is shown that the defendant willfully authorized the other's unlawful act. See Gordon v. United States, 347 U.S. 909, 910 (1954) (per curiam); United States v. Kemble, 198 F.2d 889, 893 (3d Cir. 1952) (en banc); Pearson v. United States, 147 F.2d 950, 952-953 (9th

---

[3]Subsequent history citations appear only in the table of authorities unless directly relevant.

Cir. 1945); Paschen v. United States, 70 F.2d 491, 503 (7th Cir. 1934); Nobile v. United States, 284 F. 253, 255 (3d Cir. 1922). "To render a principal liable criminally for acts of his agent, the principal must, . . . as a general rule, have authorized, commanded, or connived at the commission of the offense, or knowingly and intentionally aided, advised, or encouraged the criminal act committed by the agent." 22 C.J.S. Criminal Law § 131, at 161 (1989) (footnotes omitted).

Federal criminal law recognizes this general rule and provides only four means by which a person may be held criminally responsible for the acts of another:

(1) Aiding and abetting, under 18 U.S.C. § 2(a);

(2) Willfully causing another person to commit acts which, if done by the causer, would be an offense, under 18 U.S.C. § 2(b);

(3) Conspirator liability for reasonably foreseeable substantive offenses committed by a coconspirator, under Pinkerton v. United States, 328 U.S. 640, 646-48 (1946); and

(4) Attribution of the acts and state of mind of officers and employees of a corporate employer to that corporation, under statutes to which the New York Central doctrine, supra, is applicable.

Thus, Congress has comprehensively addressed the question of derivative liability in the criminal context by adopting conspiracy statutes such as 18 U.S.C. § 371 and by codifying the rules governing liability of accomplices and aiders and abettors in 18 U.S.C. § 2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

Proof of liability under 18 U.S.C. § 2(a) requires a showing of mens rea on the part of the defendant; an aider and abettor "must know that the activity condemned by law is actually occurring and must intend to help the perpetrator." United States v. McDaniel, 545 F.2d 642, 644 (9th Cir. 1976). The "mens rea of aiding and abetting is 'guilty knowledge.'" Id. (citing Grant v. United States, 291 F.2d 746, 749 (9th Cir. 1961)). Under 18 U.S.C. § 2(b), proof of liability is also premised on the showing of a specific intentional act on the part of the defendant. The "willful causation to which [§ 2(b)] refers must be purposeful rather than be based simply upon reasonable foreseeability." United States v. Berlin, 472 F.2d 13, 14 (9th Cir. 1973).

Thus, 18 U.S.C. § 2 -- the legislative expression of the requirements for a charge of vicarious criminal liability outside the conspiracy context -- does not allow attribution of criminal liability based on mere corporate ownership and general control, because ownership and control alone do not prove purposeful authorization or knowledge of a violation or intent to assist it. Cf. United States v. Carter, 311 F.2d 934 (6th Cir. 1963) (parent corporation not liable for crime committed independently by corporate subsidiary). The Government's attempts to avoid these fundamental principles of criminal law must be rejected.

It is true that a narrow exception to the general prohibition against attribution of criminal liability was created in New York Central, supra, as a matter of statutory interpretation, to address the special situation of crimes committed by individuals on behalf of their own corporate employers. Since a corporation can act only through its

individual officers and employees, it could never be subjected to criminal liability if it were not deemed answerable for crimes committed by those individuals acting on the corporation's behalf. In recognition of this fact, and in order to avoid entirely exempting corporations from criminal liability, courts have usually attributed both the actions and the mens rea of corporate employees to their own corporate employer. See New York Central, 212 U.S. at 492-93; United States v. Chicago Express, Inc., 273 F.2d 751, 753 (7th Cir. 1960).

New York Central upheld the constitutionality (against a due process challenge) of a statute that expressly attributed to a corporate common carrier the actions of "any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment." 212 U.S. at 491. The Court explained that the applicable statutes "could not be effectually enforced so long as individuals only were subject to punishment for violation of the law," since the proscribed conduct "enured to the benefit of the corporations of which the individuals were but the instruments." Id. at 495. Accordingly, the Court concluded that where "the crime consists in purposely doing the things prohibited by statute," corporations could be "held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them." Id. at 494-95.

It warrants emphasis that the New York Central Court itself articulated the narrow scope of its holding. As its rationale, the Court explained that a corporation "can only act" through its "agents and officers," id. at 495 (emphasis added), and in context it is clear that the Court was referring

exclusively to individuals employed by a corporation. The Court further emphasized that because attribution from a corporation's personnel to the corporation was the only means available to impose corporate responsibility, attribution was a necessary incident of the statutory obligation: "If it were not so, many offenses might go unpunished . . . ." Id. at 495.

Only in this limited New York Central context has the doctrine of respondeat superior been applied in criminal cases as a narrow exception to the criminal law's traditional abhorrence of vicarious criminal liability. This unique exception to the general rule of non-attribution provides no support for the Government's case against Exxon, however, because the exception cannot properly be extended beyond the limits of the rationale justifying its existence. The New York Central doctrine is premised on the assumption that a corporation has the right to control in detail the conduct of its servants -- an assumption whose application to a parent-subsidiary relationship is expressly disavowed by the corporation statutes, charters and bylaws that govern the relationships between corporations and their stockholders. Moreover, there is no logical reason to apply the doctrine of respondeat superior to hold a corporation criminally responsible for acts committed by employees of a second corporation. In that circumstance, the concerns that prompted the creation of the New York Central exception are simply not present, because the criminal liability and intent of each respective corporation can and should be judged by the acts and intentions of that corporation's own personnel. Since each corporation can be held fully responsible for any criminal conduct committed by its

own officers and employees, there is simply no principled basis for ignoring the general rule that a person should not be held responsible for crimes committed by another person absent actual authorization of, or participation in, the criminal conduct -- the type of conduct addressed in 18 U.S.C. § 2(a) and 2(b) and the Pinkerton doctrine.

Nor does the relevant case law authorize shortcutting the normal requirements for criminal attribution when one corporation is charged with the crimes of a second corporation on a theory of agency. Although the cases applying respondeat superior in the context of crimes committed by individual corporate employees occasionally use the word "agent" when speaking of individuals acting on behalf of a corporation, see, e.g., New York Central, 212 U.S. at 492, no federal court has ever invoked respondeat superior to hold a corporation liable for crimes committed by another corporation. Instead, the few cases in which prosecutions of parent corporations have been upheld have involved active participation of employees of the parent.[4]

---

[4] Even in civil cases, moreover, the law draws a sharp distinction between the scope of an employer's liability for the acts of an employee, on the one hand, and a much narrower scope of liability for the conduct of a non-servant agent, on the other. As the Restatement notes:

> "A principal is not liable for physical harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal's business, if he neither intended nor authorized the result nor the manner of performance, unless he was under a duty to have the act performed with due care."

Restatement (Second) of Agency § 250; see also id. § 283, comment a.

The crucial distinction between a corporation's responsibility for criminal acts of its own employees and its responsibility (or rather, its lack of responsibility) for the criminal acts of employees of a second corporation is illustrated in United States v. Little Rock Sewer Comm., 460 F. Supp. 6 (E.D. Ark. 1978), a case previously relied upon by the Government. Opposition at 17-18. In that case, the Little Rock Sanitary Sewer System was operated and managed by the Sewer Committee, a separate municipal body created and controlled by the City of Little Rock. See id. at 7 n. 1; Ark. Code Ann. §§ 14-235-206, -207 (1987) (recodifying Ark. Stat. Ann. §§ 19-4102, -4103) (providing that the Committee would "act under the control of" the Municipal Council and that Committee members were subject to removal by the Council "with or without cause"). An employee of the Sewer Committee willfully filed false reports concerning discharges from the Committee's sewage treatment plant.

Apparently on the theory that the City had ultimate responsibility for the operations of the sewer system, the Government charged the City with filing false reports in violation of the Clean Water Act. The City moved to dismiss on the ground that "the employee charged with the duty of filing [such] reports was under the sole supervision, direction and control of the Little Rock Sewer Committee, rather than the City of Little Rock functioning as a municipal corporation." 460 F.Supp. at 7. The court granted the motion, finding "that the City of Little Rock, per se, played no part in obtaining the permit, that the City had no knowledge of the contents of the Discharge Monitoring Reports, and that the City was not charged with the responsibility of

submitting these reports to the Environmental Protection Agency." Id. Thus, the Little Rock court refused to attribute the unknown and unauthorized acts of an employee of the Sewer Committee to the City despite the statutorily mandated close corporate relationship between the two entities. The court went on to hold that although the Committee was equally unaware of the actions of its employee, the knowledge and intent of the employee could be attributed to the Committee under the doctrine of criminal respondeat superior. The very same distinction -- namely, that the actions and mens rea of employees may be attributed to their corporate employer, but not by an unprecedented second step of attribution to the corporate parent of their employer -- is applicable here.

The holding of Little Rock is similar to the ruling in United States v. Carter, 311 F.2d 934 (6th Cir. 1963). In Carter, the Government charged Carter, the president of Pilsener Brewing Co., along with Pilsener itself and Pilsener's parent corporation, City Products, with a violation of the Taft-Hartley Act. The evidence showed that Carter had made an illegal payment, in the form of a purported loan, to an official of a union that represented Pilsener's (but not City Products') employees. As in Little Rock, the court drew a sharp distinction between a corporation's criminal responsibility for acts of its own employees, which is governed by the doctrine of criminal respondeat superior, and attribution of liability for acts of a subsidiary corporation, which is instead governed by traditional rules of criminal culpability. Thus, the court affirmed Pilsener's conviction, holding that the knowledge of its employee, Carter, was attributable to the corporate employer. 311 F.2d at

942-43. But the court reversed as to the parent corporation, holding that the parent could not be treated as the "employer" of the subsidiary's employees, and that the Government had failed to make the necessary showing that an officer or an employee acting on behalf of the parent itself had willfully authorized any criminal payment. Id. at 941.[5] Although the parent's corporate secretary had "authorized" the loan, even this did not suffice to render the parent criminally liable, because the court did "not believe that the evidence would justify an inference that [the secretary], at the time he gave his consent, knew that such loan was but a cover for an illegal payment to" the union representative. Id. (Emphasis added).

The one case cited by the Government to support its novel agency theory is United States v. Johns-Manville Corp., 231 F.Supp. 690 (E.D. Pa. 1963). Yet Johns-Manville merely held that a parent corporation could be convicted for acts done by subsidiary corporations where the employees of the parent had directed those subsidiaries to carry out a price-fixing conspiracy.[6] In short, Johns-Manville merely applied standard

---

[5]Defendant Carter, who made the payment, was a vice president of City Products, the parent, as well as president of Pilsener. Thus, there was a colorable basis to treat Carter as an employee of the parent. This point was not discussed in the court's opinion, but from context it seems clear that all parties agreed that Carter acted on behalf of Pilsener, the subsidiary, and not on behalf of the parent.

[6]According to the opinion, the conspiracy was directed by Robert F. Orth, the parent's own vice president. 231 F. Supp. at 696 et seq. The parent's involvement is even more clear from the bill of particulars in Johns-Manville, a copy of which was filed as an exhibit to Exxon's reply brief in support of its motion for bill of particulars. The bill indicates that active participants in the conspiracy included not only Orth, but also several other Johns-Manville officers and employees, including its president.

principles of criminal responsibility to a case in which the parent's officers knowingly and intentionally directed employees of a subsidiary to carry out a price-fixing conspiracy. Nothing remotely similar has been charged in the present indictment.

The indictment in this case fails to allege a basis for charging Exxon with vicarious liability in light of the principles embodied in Little Rock and Carter. The indictment specifically admits that Shipping, not Exxon, owned (¶ 4), operated (id.), manned (¶ 8) and sailed the Exxon Valdez, and "employed 'able seamen' and officers aboard the Exxon Valdez who were responsible for the operation, direction and control of the" vessel. ¶ 8. The indictment and the bill of particulars clearly state that it was the alleged acts of these seamen, together with various shoreside employees of Shipping, that allegedly violated federal law. As Carter and Little Rock indicate, Exxon's ownership of and exercise of general control over Shipping does not entitle the Government to attribute the conduct or mens rea of Shipping's employees to Exxon. The Government has not alleged, and has now conceded it cannot allege, that Exxon willfully authorized or directed Shipping to commit any of the alleged criminal acts. The indictment thus simply does not charge an offense, whether under the doctrine of criminal respondeat superior set forth in New York Central, or under any of the recognized statutory vehicles by which a non-employer principal may be held criminally responsible for the acts of an agent.

This is purely an issue of law. As the Court noted in its order granting Exxon's motion for a bill of particulars,[7] the indictment alleges certain relationships between Shipping and Exxon in ¶¶ 3-6. Then in ¶ 7, the indictment makes the conclusory legal charge upon which the liability of Exxon is premised: that

> "[a]t all times pertinent to this indictment, EXXON SHIPPING COMPANY acted for the benefit of EXXON CORPORATION, and within the scope of authority granted it by EXXON CORPORATION."

Although this allegation still falls short of asserting the relationship between a corporate employer and its individual employee that is a prerequisite to criminal respondeat superior liability, no plainer statement of misplaced reliance on the New York Central doctrine can be imagined. That doctrine's inapplicability to the parent/ subsidiary relationship is a legal deficiency that requires dismissal of Counts Four and Five and the striking of vicarious-liability theories of culpability from the remaining counts.

B. The Rule of Lenity and the Doctrine of Separation of Powers Forbid Judicial Application of Civil Attribution Rules in This Case.

Courts do not have the flexibility to make or extend criminal law. Since the beginning of the Republic it has been established that federal criminal law cannot be developed as a common law process. United States v. Hudson and Goodwin, 11 U.S. 32, 33-34 (1812); see United States v. Bass, 404 U.S. 336, 348 (1971) ("[L]egislatures and not courts should define criminal activity"); Liparota v. United States, 471 U.S. 419, 424 (1985)

---

[7] Order (Bill of Particulars) of July 24, 1990 at 3-4.

("the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute"). The Court also warned in Dunn v. United States, 442 U.S. 100, 112-13 (1979), that "courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed" by Congress.

The principle that only Congress can declare conduct criminal is closely allied with the fundamental requirement that criminal statutes must provide fair notice of the type of conduct they proscribe. Because of this fair notice requirement, judges cannot alter or expand existing law to penalize prior conduct. Marks v. United States, 430 U.S. 188, 191-192 (1977); Bouie v. City of Columbia, 378 U.S. 347, 351-352 (1964); Pierce v. United States, 314 U.S. 306, 311 (1941); see also Screws v. United States, 325 U.S. 91 (1945).

These twin principles are embodied in the rule of lenity, which requires that criminal statutes be narrowly construed and that any ambiguity be resolved in favor of the defendant. Huddleston v. United States, 415 U.S. 814, 830-832 (1974); United States v. Campos-Serrano, 404 U.S. 293, 297-298 (1971); Bell v. United States, 349 U.S. 81, 82-84 (1955). "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222 (1952).

The Supreme Court has twice this year applied the rule of lenity to strike down overreaching by the Government in

attempting to stretch criminal statutes beyond the bounds intended by Congress. Hughey v. United States, 110 S.Ct. 1979 (1990); Crandon v. United States, 110 S.Ct. 997 (1990). The Court in Crandon emphasized the dual, related requirements of the rule of lenity: "that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." 110 S.Ct. at 1001-1002 (emphasis added).

For these reasons, this Court should reject the Government's attempt to create new criminal sanctions by extending agency principles, developed in civil cases, to allow attribution of Shipping's criminal liabilities, if any, to its parent Exxon. In no instance do the statutes and regulations involved in this case "plainly and unmistakably" extend, as required by Dunn and the rule of lenity, derivative liability to a corporate parent for the criminal actions of employees of its subsidiary. If parent corporations are to be held derivatively liable for the first time in the criminal context, the authority to impose such liability must be clearly expressed by Congress itself, not the courts.

C. The Indictment Fails to Allege Even a Civil Agency.

For the reasons set forth above, the Government's assertion that civil agency law can serve as the predicate for imposition of criminal liability on a parent corporation is wholly unprecedented, and represents an attempt to overturn longstanding principles of criminal culpability. Exxon urges this Court to reject the Government's agency theory for what it is, an attempt to obtain a dramatic post hoc expansion of the scope of corporate criminal liability without seeking congressional approval. But wholly apart from this defect, the Government's case must fail

because the indictment does not allege either of the two elements necessary to establish an agency relationship even for civil purposes.

The Government's claim of agency is set out at length in the July 31 bill, but it must be emphasized here that the bill of particulars does not have a life of its own, for it cannot allege charges not fairly stated in the indictment itself. Russell v. United States, 369 U.S. 749, 770 (1962). Thus, the Government's assertion that "Exxon Shipping was acting as the agent of Exxon at the time of the Valdez oil spill" (7/31/90 BOP at 1-2) cannot be entertained if the indictment fails to allege the "essential facts" to support that assertion. See Fed. R. Crim. P. 7(c)(1).

The starting point is the fact that "no allegation is made [in the indictment] that Shipping is the agent or alter ego of Exxon, nor is either a necessary conclusion from what is alleged regarding the relationship between these defendants." Order (Bill of Particulars) at 5-6. Thus, when the bill of particulars now claims that the indictment charges that Shipping was the agent of Exxon, there is reason to question whether the bill is an attempt to assert "facts not found by, and perhaps not even presented to, the grand jury." United States v. Keith, 605 F.2d 462, 464 (9th Cir. 1979).

The Government concedes that the relationship between a parent corporation and its subsidiary is not, as a general rule, one of principal and agent. "'[A] corporation does not become an agent of another corporation merely because the other has stock control.'" 7/31/90 BOP at 27 (quoting Restatement (Second) of Agency § 14M, comment a (1958)). Nor are employees of a

subsidiary generally treated as agents of the parent. See United States v. Strang, 254 U.S. 491, 492-93 (1921) (applying general rule in criminal case).

The Government asserts, however, that "[a]gency is established between parent and subsidiary corporations when, as in Exxon's conduct of its vertically-integrated energy business, the parent corporation chooses to directly control virtually all of the subsidiary's policy determinations and operating structure in order to achieve the parent's goals." 7/31/90 BOP at 27-28. This simply is not the law. Vertical integration and policy-level control do not establish a civil agency. Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980).

Further, a claim of agency is a matter quite different from a claim that a subsidiary is the civil alter ego of the parent. See Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 842 F.2d 1466, 1477 (3rd Cir. 1988). Indeed, insofar as the Government claims the existence of an agency between Exxon and Shipping, the parent-subsidiary relationship is only coincidental:

> "One corporation whose shares are owned by a second corporation does not, by that fact alone, become the agent of the second company. However, one corporation -- completely independent of a second corporation -- may assume the role of the second corporation's agent in the course of one or more specific transactions. This restricted agency relationship may develop whether the two separate corporations are parent and subsidiary or are completely unrelated outside the limited agency setting." Id., 842 F.2d at 1477.

Thus, to make good on the contention that the indictment alleges an agency relationship, the indictment must charge the two "essential facts" necessary to any such relationship: "'Agent' describes [1] a person who has undertaken to act for another and [2] to be controlled by the other in so acting." Seavey, Law of

Agency § 3 (1964); see Restatement (Second) of Agency § 1(1); Nelson v. Serwold, 687 F.2d 278, 282 (9th Cir. 1982).

The first element of agency identified above includes the requirement that the principal must have granted to the agent the authority to act on the principal's behalf and to bind the principal in dealings with other parties. "An essential characteristic of an agency is the power of the agent to commit his principal to business relationships with third parties." Whisper Soft Mills, Inc. v. N.L.R.B., 754 F.2d 1381, 1386 (9th Cir. 1984) (citing Restatement (Second) of Agency § 12 (1958)). No such allegation is made in the indictment. Although it alleges that "EXXON SHIPPING COMPANY was acting for the benefit of EXXON CORPORATION, and within the scope of authority granted it by EXXON CORPORATION" (¶ 7), this does not equate to agency. Every corporation acts for the benefit of its shareholders, and corporate charters and bylaws, by definition, limit the authority of the corporation's managers and reserve certain corporate decisions for action by the shareholder or shareholders. This is all that the indictment alleges, and all that it truthfully could allege.

Even where the necessary authorization to act for the principal is present, moreover, an agent's power to bind the principal extends only to those subjects as to which the agent has been granted authority to act. A person authorized to act as an agent for one purpose is not necessarily empowered to act for other purposes. Thus, "when customary agency is alleged the proponent must demonstrate a relationship between the corporations and the cause of action. Not only must an arrangement exist

between the two corporations so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing." Phoenix Canada Oil Co., 842 F.2d at 1477.

The crux of the charge of wrongdoing in all five counts of the indictment is the manning and navigation of the Exxon Valdez on the night of March 23, 1989. Beginning from the perspective that the facts alleged in the indictment do not necessarily imply the existence of any agency, does the indictment state facts sufficient to state a charge that Shipping was acting for Exxon's account in the way it selected the officers and crew of the Exxon Valdez? Or in the way it supervised and monitored their skills and abilities? Or in the way the officers and crew handled the ship on the night of March 23-24, 1989? Clearly not.

The second element that must be shown to establish the existence of an agency relationship is that of control. It is important in this regard to distinguish between the conduct-specific control that a principal exercises over an agent and the more general control inherent in the ownership of a company's stock. As the Government's earlier brief concedes (Opposition at 18-19), an agency relationship involves an exercise of control that is more specific and detailed than the policy-level supervision normally exercised by a controlling shareholder. The July 31 bill ignores this critical distinction, and instead dwells repetitively on the allegation that, on matters of policy applicable to multiple Exxon entities, Exxon promulgated uniform policies that affiliated corporations were expected to adopt. E.g., 7/31/90 BOP at 10-15. Yet "[o]wnership of a controlling

interest in a corporation entitles the controlling stockholder . . . to . . . set general policies," Baker v. Raymond Int'l, Inc., 656 F.2d 173, 180 (5th Cir. 1981), and "[o]ne company's exercise over a second corporation of a controlling influence through stock ownership does not make the second corporation an agent of the first." Quarles v. Fuqua Industries, Inc., 504 F.2d 1358, 1364 (10th Cir. 1974).

The bill asserts that, on some matters, Shipping was required to obtain Exxon's consent or approval, and that Shipping's officers were required to report on the status of Shipping's business twice each year. These are the hallmarks of stock ownership, not of agency. "[I]t is inherent in the stockholder-corporation relationship that the stockholder should ask for reports, sometimes consult with corporate officers, offer advice and even object to proposals." Quarles, 504 F.2d at 1363. Likewise, the bill lists general and administrative services that Exxon supplied to Shipping in addition to the five listed in the indictment. E.g., 7/31/90 BOP at 9-10. It is commonplace for related corporations to provide services to each other without thereby creating an agency relationship. See Quarles, 504 F.2d at 1363-1364 (parent provided "general financial, legal, tax and administrative services" and "purchased insurance for its subsidiaries"); see also, H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1548-49 (8th Cir. 1989). In any event, the assignment and supervision of vessel officers and crews is conspicuously absent from the listing of services provided to Shipping by Exxon. On the contrary, paragraph 8 of the indictment specifically alleges that "EXXON SHIPPING COMPANY," not Exxon,

"employed 'able seamen' and officers aboard the Exxon Valdez who were responsible for the operation, direction, and control of the Exxon Valdez."

The bill also refers to procedures followed by Exxon and Shipping to assure parity between salaries paid to executives, and to the payment of bonuses or the issuance of options on Exxon's publicly-traded common stock. 7/31/90 BOP at 15-16. These facts are not indicative of an agency on any subject, and they certainly do not suggest an agency with regard to the navigation (Counts One, Two and Three) or manning (Counts Four and Five) of the Exxon Valdez. "The existence of an employees stock purchase plan . . . does not show lack of corporate separation; the parent corporation was thereby providing a financial benefit to electing employees of subsidiaries." Quarles, 504 F.2d at 1364.

Taken as a whole, the bill confirms what the indictment implies: Exxon merely exercised the sort of policy and bottom-line oversight that any majority or sole shareholder with a multimillion dollar investment in a corporation would be expected to exercise. "[F]ew individuals establish a corporation and then ignore it." Johnson v. Flower Industries, Inc., 814 F.2d 978, 980 (4th Cir. 1987). The indictment and the bill do not allege that Shipping was controlled in the day-to-day maritime decisions involved in the actual operation of its fleet. This point is driven home with unmistakable force by the Government's response to Request 1:1, which asked for the identification of the employee(s) or agent(s) of Exxon Corporation responsible for the spill. That answer lists thirteen individuals by name, not one of

whom was employed by Exxon, and each of whom was solely an employee of Shipping. 7/31/90 BOP at 3.

The difference between the control alleged in the indictment (even as supplemented by the bill of particulars) and the transaction-specific control necessary to show the existence of a common-law agency is illustrated by Childs v. Local 18, IBEW, 719 F.2d 1379 (9th Cir. 1983). Childs was a Title VII case in which the court declined to treat a local union, Local 18, as the agent of its international affiliate, the IBEW. Id. at 1382-1383. The court rejected the plaintiff's assertion that the IBEW exercised sufficient control over the daily business decisions of Local 18 to satisfy the control element of the agency relationship. Id. at 1382 n.2. The court reached this conclusion even though the IBEW had the power to approve Local 18's bylaws (compare Indictment ¶ 6), collect a portion of the dues paid to Local 18 by its members (compare id. ¶ 3), and require Local 18 to adhere to the IBEW's constitution and rules (compare id. ¶ 5). This general supervision did not amount to an agency relationship in view of the fact that Local 18 elected its own officers, hired and fired employees, maintained its own treasury, and generally conducted its own "day to day business." Id. at 1382-1383 n.2.

In Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175 (9th Cir. 1980), the issue was whether a U.S. distributor subsidiary, BLMI, was the agent of its British parent for jurisdictional purposes. The record revealed that the parent and subsidiary had some common directors, the parent "had general executive responsibility for the operation of BLMI [the subsidiary], and reviewed and approved its major policy

decisions," id. at 1177, the parent guaranteed the subsidiary's bank debts, and executives of the parent and its affiliated companies "work closely with executives of BLMI on pricing of vehicles for the United States market." Id. On those facts, the Ninth Circuit concluded that BLMI was not an "agent" of the parent even for jurisdictional purposes. As the court explained, the parent corporation and its affiliates did not "control[] the internal affairs of BLMI or determine[] how it operates on a daily basis." Id. Moreover, the parent did not implement, supervise, or propose changes in the specific marketing plan giving rise to the lawsuit, id. at 1178, although it did approve the plan. Id. at 1177, 1178.[8]

---

[8]The Ninth Circuit's holding in Kramer Motors is particularly striking in light of the principle that the plaintiff's burden in demonstrating a factual basis for the exercise of jurisdiction over an absent parent corporation is significantly less than the burden of proving parental liability for the acts or obligations of a subsidiary. See Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1393-1394 (9th Cir. 1984); Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1161 (5th Cir. 1983).

Cases from other circuits are in accord with the approach followed in Childs and Kramer Motors. In H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531 (8th Cir. 1989), the court held that no basis existed for a finding of agency where a wholly-owned subsidiary and its parent filed consolidated financial statements, the subsidiary's corporate secretary was an employee of the parent, the subsidiary's president reported to a vice-president of the parent and received training from the parent, the subsidiary utilized the parent's legal department for legal services, and the subsidiary sometimes used the parent's logo and relied on its relationship with the parent in obtaining financing. Id. at 1548-1549. Similarly, in Quarles, supra, the court affirmed the trial court's finding that the subsidiary was not the parent's agent for jurisdictional purposes even though the parent provided "general financial, legal, tax and administrative services" and financing for the subsidiary, approved the subsidiary's budgets, purchased insurance for the subsidiary, and permitted employees of the subsidiary to participate in its stock purchase plan, and employees of the parent served as officers and directors of the subsidiary. 504 F.2d at 1363-1364.

There is one respect in which the bill of particulars alleges facts that seem to bear on actions of Shipping that are the gravamen of the five charges. This is the contention that:

> "Exxon created a Navigation and Bridge Organization Manual, which Exxon required all of its marine affiliates to utilize. Exxon imposed this Manual on Exxon Shipping and required that it be maintained on each vessel operated by Exxon Shipping. Thus, Exxon determined the rules for the actual operation of Exxon Shipping's vessels." 7/31/90 BOP at 17.

As a starting point, it needs to be repeated that the foregoing statement (which is not true as a matter of fact) is not controlling as to the sufficiency of the indictment. The indictment must state the essential facts; the contents of the bill may not be considered unless they conform to what is alleged in the indictment. Nothing in the indictment foreshadows the charge that "Exxon determined the rules for the actual operation of Shipping vessels." Indeed, this paragraph of the bill directly contradicts ¶ 8 of the indictment.[9]

In its Opposition to Exxon's Motion for Bill of Particulars, the Government asserted that the meaning of the indictment could be ascertained from the grand jury materials provided in discovery. The same approach should apply to the interpretation of the indictment for Rule 12 purposes. In

---

[9]In Singer v. United States, 58 F.2d 74 (3rd Cir. 1932), a charge went to trial because the Government persisted in misstating the defendant's tax liability. The court was rightly critical of this unnecessary waste of trial time, saying: "All of this could and would have been avoided by a proper bill of particulars which would have shown the falsity of the allegations and enabled the defendant to eliminate untrue and prejudicial charges from the indictment and irrelevant and harmful evidence from the jury." Id. at 75. Here, it is the bill of particulars that would foist an inaccurate and prejudicial characterization of the facts upon the Court. It is no less appropriate to insist upon an accurate bill of particulars here, thus eliminating untrue and prejudicial charges from this case.

deciding whether Exxon in fact "determined the rules for actual operation of Exxon Shipping's vessels" by "impos[ing]" the Bridge Operations Manual on Shipping, it is only necessary to look at that document. A copy of the Manual, which was produced in discovery, is attached as Exhibit A to this Motion. It reveals on its face that it was not a straightjacket "imposed" on Shipping by Exxon, but was instead a cooperative effort of maritime professionals employed by the Exxon affiliates that operate ocean-going fleets, and that Shipping was one of the willing and independent contributors. Thus, the transmittal accompanying the Bridge Manual, dated May 30, 1986 states:

> "Responding to a request from some of the marine affiliates, Exxon Corporation convened a work group in May 1984 to review General Navigation Policy. Exxon Shipping Company participated in the work group, which used as a basis for discussion items agreed upon in advance by the five affiliates represented."

The Manual itself is entitled "Exxon Shipping Company Navigation & Bridge Organization Manual", and it states the policy of Exxon Shipping as follows:

> "The prime objective when navigating company vessels is the safety of personnel, vessel and cargo. Speed and economy, while important, are secondary considerations."

In short, on the only issue possibly germane to a charge that Shipping acted as Exxon's agent with reference to the acts for which Exxon has been charged in this case, ¶ 8 of the indictment states the controlling allegation; the Government's attempt to allege different facts in the bill of particulars must be disregarded. The Bridge Manual itself corroborates ¶ 8's allegation that Shipping, not Exxon, was responsible for the manning, "operation, direction and control of the Exxon Valdez."

The Manual was not "imposed" by Exxon; it was the product of an effort originated by Exxon affiliates, including Shipping, to develop procedures "to assist the Master and deck officers in planning for the safe navigation of their vessel." As such, it provides no support for a claim that Shipping acted as Exxon's common-law agent in day-to-day operation of Shipping's tanker fleet.

The bill of particulars expands on the indictment by describing certain delegation of authority guides which were prepared as a part of a system of management control followed by Exxon and its affiliates. 7/31/90 BOP at 11-12. A copy of Shipping's guideline is attached as Exhibit B for reference. These guidelines clearly relate to management of Shipping as a corporate personality in its own right. In some cases, decisions by Shipping required clearance with its shareholder contact; in other cases, Shipping personnel were directed to confer with staff organizations of Exxon U.S.A. Such consultations between parent and subsidiary do not establish agency. The agency question is different: whether Exxon authorized Shipping to act on Exxon's behalf and subject to Exxon's day-to-day control with reference to the actions alleged to have been criminal. Even the bill of particulars does not make that claim.

The bill also refers to William Stevens' statement that "those of us in the management of Exxon do and must fully accept that it was our ship, it's our oil in the water, and it was our employees who were involved." 7/31/90 BOP at 4. Taken with a literalism that the hectic conditions of April 3 did not allow, Stevens' statement might be used by the Government to suggest that

Exxon was treating Shipping as if the subsidiary and the parent were the same entity. Any such suggestion would be entirely unwarranted, and even if accepted arguendo, would lack relevance because equitable "piercing" (or any cognate theory of liability) is not, and cannot be, the Government's theory in this case. See supra at 2 n.1. Moreover, it is clear that Stevens' comments were not a description of legal relationships, but rather simply an assurance that Exxon was involved in "dealing with the consequences of what happened." 7/31/90 BOP at 5. Such statements of good corporate citizenship, made after the event, do not equate to admission of criminal responsibility where none exists.

The Government's eagerness to seize upon what it apparently views as statements by "Exxon" or its officers that might appear to blur intercorporate distinctions is illustrated further by several misleading quotations in the 7/31/90 BOP. For example, at page 5, the bill recites that "Exxon is a . . . company whose 'principal business is energy, involving exploration for, and production of, crude oil and natural gas, manufacturing of petroleum products, and transportation and sale of crude oil, natural gas and petroleum products,'" citing the inside cover leaf of Exxon's 1989 Annual Report. (Emphasis supplied.) However, that Report in fact recites that "[d]ivisions and affiliated companies of Exxon Corporation operate in the United States and 79 other countries. Their principal business is . . . petroleum products." (Emphasis supplied.) The same two-paragraph "profile" of Exxon elaborates only ten lines further down the page:

> "The terms corporation, company, Exxon, our, we and its, as used in this report, sometimes refer not only to Exxon Corporation or one of its divisions but collectively to all of the companies affiliated with Exxon Corporation or to any one or more of them. The shorter terms are used merely for convenience and simplicity." (Emphasis original.)

The bill at page 9 also ignores the careful explanation of collective terms just quoted, mischaracterizing Exxon's role in the development and construction of the Exxon Valdez and Exxon Long Beach by quoting from the 1986 Annual Report that the two ships were "the largest in Exxon's U.S. flag fleet," without also quoting the explanation of collective terms. (A similar clarification of terms appears in the 1986 Report).

Similarly, at page 12 the bill alleges that Exxon "imposed" a revised policy on alcoholism "on all Exxon divisions and affiliates, including Exxon Shipping," relying on a quotation from the 1989 Exxon Annual Report stating:

> "We revised the procedures concerning any employee substance abuse to require random testing of employees in designated safety-sensitive positions, such as . . . tanker officers . . . ." (Emphasis supplied.)

The bill again fails to refer to the explanation of terms such as "we." Mr. Stevens' references to "Exxon" and "our," supra p. 26, must be considered in the same light.

The 1989 and 1986 Annual Reports are attached as Exhibits C and D to this Motion. Exxon respectfully directs the Court's attention to the paragraph containing the profile and clarification of terms at the upper left of each inside cover leaf. We respectfully ask the Court to exclude from its consideration these (perhaps unintended) misleading quotations in the bill.

The Government's failure to allege the two elements essential to a charge of civil agency is not simply a matter of pleading technicality. To satisfy the Sixth Amendment and Rule 7, the indictment must state the factual premise for the charges against Exxon with sufficient clarity to give reasonable assurance that the charge being prosecuted by the Government is the charge made by the grand jury. Russell v. United States, 369 U.S. at 765. The indictment does not give that assurance. It would not have been difficult for the indictment to present a "clear, concise and definite written" allegation setting forth the requisite elements of common-law agency had those elements been present in this case.[10] The lack of that clear statement compels the conclusion that the grand jury did not find a proper basis to charge Exxon on a theory of agency. As a result, the Government's agency theory must be rejected; even if civil agency were a sufficient basis for imposition of criminal liability on a parent corporation, as the Government mistakenly contends, the indictment would nevertheless be insufficient because it fails to allege

---

[10]The allegation in Count Four that Hazelwood acted as the agent of defendants, while a clear attempt to allege that Hazelwood was Exxon's agent, does not state a basis for holding Exxon liable under Count Four. Paragraph 2 of Count Four refers to Hazelwood's activities in the navigation of the Exxon Valdez. But ¶ 8 of Count One (which is incorporated by reference into Count Four) clearly states that the officers of the Exxon Valdez were responsible for its operation, direction, and control in their capacity as employees of Shipping. No facts are alleged that support the inconsistent conclusion that Hazelwood was acting as Exxon's agent in the operation of the Exxon Valdez. To the contrary, the 7/31/90 BOP states clearly that the only basis for the allegation that Hazelwood was Exxon's agent is the proposition, nowhere alleged in the indictment, that Shipping was Exxon's agent and that Shipping's employees, including Hazelwood, were therefore Exxon's sub-agents. 7/31/90 BOP at 22.

facts establishing either of the two necessary elements of a common-law agency.

III. THE STATUTES UNDER WHICH EXXON HAS BEEN CHARGED DO NOT REFLECT A LEGISLATIVE INTENT TO MAKE SHAREHOLDERS LIABLE FOR THE CRIMINAL ACTS OF THEIR SUBSIDIARY CORPORATIONS.

The Government has argued, in the alternative, that the indictment charges Exxon with liability for the alleged criminal acts of Shipping because the aim of the five statutes involved would be "thwarted" unless parent corporations (as sole stockholders) were held liable for the criminal acts of their subsidiaries.[11] Opposition at 24. The Government relies for this contention on miscellaneous civil cases, all of which are wholly inapposite to the issue of whether vicarious liability may be imposed as criminal punishment.

---

[11]The Government's rationale that statutes which protect the environment should be broadly construed to reach parent corporations is reminiscent of efforts, twice repudiated by the Supreme Court in the past ten years, to avoid the application of ordinary principles of law in environmental litigation. Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 542 (1987), and Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-13 (1982), both held that courts must apply in environmental cases "well-established" principles governing the award of equitable relief, rejecting arguments that environmental statutes permit plaintiffs to obtain injunctive relief without regard to a customary balancing of equities, in the absence of a "clear indication that Congress intended to deny federal courts their traditional equitable discretion. . . ." 480 U.S. at 544. There is no such "clear indication" in any of the five statutes directed toward holding parent corporations criminally liable for the acts of their subsidiaries.

The Government's "legislative policy" theory is based principally on Anderson v. Abbott, 321 U.S. 349 (1944).[12] Abbott concerned the proper interpretation of statutes which expressly made the shareholders of national banks liable for the debts of the banks in which they owned stock, to the extent of the par value of their stock. The question in Abbott was whether these statutes should be interpreted to impose liability on individuals who owned bank stock indirectly through a holding company. Starting with the proposition that "[l]imited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted," the Court held that the general rule of limited liability would not be enforced in cases where its application would frustrate a clear statutory policy. Id. at 362-363. As the Court read the specific statutes involved in Abbott, Congress had clearly expressed a policy of making individual stockholders liable for the debts of the bank itself, and this "statutory policy of double liability will be defeated if

---

[12]The Government's statutory theory appears to be in the process of some evolution. In its Opposition, the Government relied on a series of cases (discussed infra) that it claimed showed general judicial disregard of corporate formalities where necessary to vindicate a legislative purpose. Opposition at 20-24. However, in the 7/31/90 BOP the Government suggested a new theory that the word "person" in each of the statutes underlying the indictment should somehow be expansively interpreted to include parent corporations within its sweep. Because specific response to this new statutory theory requires addressing each statute and regulation individually, we discuss it in the concurrently filed separate motions and memoranda addressing each Count. We note, however, that the Government "may not obtain a conviction on a theory different from that charged by the grand jury." United States v. Telink, Inc., ___ F.2d ___, 1990 WL 109457, at *3, No. 89-50063 (9th Cir. Aug. 6, 1990).

impecunious bank-stock holding companies are allowed to be interposed as non-conductors of liability." Id. at 362.

Far from providing support for the Government's attempt to impose criminal liability on Exxon in this case, Abbott conclusively demonstrates that the Government's theory must be rejected. After adopting the general rule of limited liability, Abbott carved out a narrow exception based on an express legislative decision to hold individual shareholders liable. This result was necessary to further "the federal policy [of double liability] concerning national banks which Congress has announced," and the Court expressly limited its holding to that situation. Id. at 365 (emphasis added). The clear implication of the Abbott Court's analysis, therefore, is that in the absence of such a congressionally-announced policy, the general rule of limited liability must be given effect. Indeed, the Ninth Circuit has limited Abbott to cases in which a federal statute "directly mandates individual [shareholder] liability." Seymour v. Hull & Moreland Engineering, 605 F.2d 1105, 1111 n.6 (9th Cir. 1979).

The Government points to no similar expression of a clear legislative policy to impose criminal liability on a shareholder for violations of the statutes at issue, and indeed its position is refuted by its own reliance on United States v. Little Rock Sewer Comm. The Little Rock court did hold that the Clean Water Act "should be construed and applied with a view toward achieving . . . 'maximum adherence'" (Opposition at 24 n.4, quoting 460 F.Supp. at 8); but, as already shown, the Little Rock court dismissed charges against the "parent" corporation, the City

of Little Rock, holding that only the entity whose employee actually committed the violation was answerable.

In addition to Abbott,[13] the Government relies on Sebastopol Meat Co. v. Secretary of Agriculture, 440 F.2d 983 (9th Cir. 1971). In that case, the Ninth Circuit upheld a cease and desist order entered against the corporate defendant's president and controlling shareholder in his individual capacity. The clear basis for the court's decision was the fact that the president had actually committed the acts violating the applicable statute. Id. at 985-986. Thus, Sebastapol simply did not present any question of imposing liability on a shareholder merely because of his ownership of shares and exercise of general control.

The Government's last case, Town of Brookline v. Gorsuch, 667 F.2d 215 (1st Cir. 1981), likewise has no application. The issue in Town of Brookline was whether a for-profit urban redevelopment corporation that was wholly owned by Harvard University could qualify for exemption from certain

---

[13]The Government string-cites three cases along with Abbott. None of these provides even remote support for the contention that the aims of the statutes cited in the indictment would be "thwarted" unless parent corporations are made automatically liable for alleged crimes of their subsidiaries. In First Nat. City Bank v. Banco Para El Commercio Exterior de Cuba, 462 U.S. 611, 633 (1983), and in Bangor Punta Operations, Inc. v. Bangor & Aroostook Ry. Co., 417 U.S. 703, 705 (1974), the Court expressly applied traditional equitable principles; no question of "thwarting" any legislative policy was involved. As for Schenley Distillers Corp. v. United States, 326 U.S. 432 (1946), that case is virtually at war with the Government's argument. In Schenley, a subsidiary argued that it should be treated as a mere department of its parent corporation because its business consisted exclusively of transporting goods for the parent and other affiliated companies. The Court held that a transportation subsidiary, comparable in some respects to Shipping, will be treated as a responsible actor in its own right "where no violence to the legislative purposes is done by treating the corporate entity as a separate legal person." Id. at 437.

requirements of the Clean Air Act as a "nonprofit health or educational institution." The First Circuit held merely that the meaning of the term "nonprofit institution" in federal law might be influenced by the institution's ownership and purposes. Town of Brookline had nothing to do with imposing even civil liability, let alone criminal liability, on a shareholder corporation.

In short, none of the cases cited by the Government provides any support for the contention that Exxon may be subjected to criminal liability merely because it owns Shipping's stock. Further, all of the Government's authorities deal with rights and liabilities in civil cases. Imposition of criminal liability is a wholly different matter. In a criminal case, the rule of lenity forbids imposition of criminal penalties based on legislative history or statutory policies rather than the language of the statute itself, and there is no exception from the rule for environmental prosecutions. Crandon v. United States, 110 S.Ct. 997, 1001-1002 (1990); see Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978) (applying rule of lenity in criminal prosecution for violation of Clean Air Act, 42 U.S.C. § 7401 et seq.). There is nothing in the statutes under which Exxon has been charged that gives fair notice that criminal liability for their violation is to be automatically extended to a parent corporation for crimes committed by a subsidiary. Accordingly, the Government's attempt to validate the indictment on grounds of "legislative policy" must be rejected.

IV. CONCLUSION

For all the foregoing reasons, the indictment and each count thereof fails to allege that Exxon can be held vicariously liable for the alleged criminal acts of Shipping or its employees.

DATED: August 20, 1990

JOHN F. CLOUGH, III
CLOUGH & ASSOCIATES

WARREN CHRISTOPHER
PATRICK LYNCH
THOMAS G. HUNGAR
O'MELVENY & MYERS

By _____
Robert K. Rogers Jr.
Attorneys for Exxon Corporation