

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EXXON CORPORATION, Petitioner
v. CENTRAL GULF LINES, INC., ET AL

CASE NO: 90-34

PLACE: Washington, D.C.

DATE: April 15, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EXXON CORPORATION, :

4 Petitioner :

5 v. : No. 90-34

6 CENTRAL GULF LINES, INC., :

7 ET AL. :

8 - - - - - X

9 Washington, D.C.

10 Monday, April 15, 1991

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 1:58 p.m.

14 APPEARANCES:

15 ARMAND MAURICE PARE, JR., ESQ., New York, New York; on
16 behalf of the Petitioner.

17 STEPHEN L. NIGHTINGALE, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.;
19 United States, as amicus curiae, in support of the
20 Petitioner.

21 FRANCIS A. MONTBACH, ESQ., New York, New York; on behalf
22 of the Respondents.

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5	STEPHEN L. NIGHTINGALE, ESQ.	
6	On behalf of United States, as	
7	amicus curiae, in support of the	
8	Petitioner	17
9	FRANCIS A. MONTBACH, ESQ.	
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1 PROCEEDINGS

2 (1:58 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 90-34, the Exxon Corporation v. Central
5 Gulf Lines, Inc.

6 Mr. Pare.

7 ORAL ARGUMENT OF ARMAND MAURICE PARE, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. PARE: Mr. Chief Justice, and may it please
10 the Court:

11 On October 26, 1983, petitioner effected, that
12 is it arranged under its contracts, advanced its credit
13 and paid for a supply of bunker fuel oil at Jeddah, Saudi
14 Arabia. 3 weeks earlier it had effected a similar supply
15 in New York. At all relevant times the vessel, William
16 Hooper, was operating in the maritime commerce of the
17 United States.

18 The district court and the court of appeals held
19 that with respect to Exxon's delivery in New York, Exxon
20 was entitled to admiralty jurisdiction, it was entitled to
21 a lien, and it was entitled to summary judgment. However,
22 with respect to Exxon's delivery at Jeddah, Saudi Arabia,
23 the district court and the court of appeals held that that
24 case was outside admiralty jurisdiction. The district
25 court's opinion and the court of appeals' opinion was

1 based on this Court's 1855 decision in *Minturn v. Maynard*.
2 *Minturn* stands for a per se rule that the services
3 provided by general agents are outside admiralty
4 jurisdiction.

5 QUESTION: Mr. Pare, before you go any further,
6 do you -- what do we have before us here? The question
7 whether there is admiralty jurisdiction or the question
8 whether there is an admiralty lien, or both, or is the one
9 automatically subsumed within the other?

10 MR. PARE: Your Honor, the primary question is
11 whether there is admiralty jurisdiction. The suit --

12 QUESTION: Can I find that there is admiralty
13 jurisdiction and say that I don't know whether there's a
14 lien or not? Is that possible?

15 MR. PARE: It is possible to find that, Your
16 Honor. However the evidence on this subject, as we will
17 get to later, is crystal clear that on the facts of this
18 case Exxon should be, but for the *Minturn* rule, entitled
19 to a lien. Since *Minturn* there has been a transformation
20 in the legal thinking --

21 QUESTION: Well, will there be cases in which
22 there is admiralty jurisdiction but no lien when the cause
23 of action is to recover for the furnishing of money or
24 supplies?

25 MR. PARE: For the furnishing of --

1 QUESTION: Of money or supplies.

2 MR. PARE: There, in such cases there will be,
3 presuming the necessary ingredient is admiralty
4 jurisdiction, but whether there is a lien will depend
5 perhaps on, to some extent on the status of the party
6 providing the lien involved. But if there is a particular
7 clause in the contract, such as there is in this case,
8 then clearly under the existing law that party should be
9 entitled to a lien. Not all admiralty jurisdiction cases
10 give rise to a lien.

11 QUESTION: No, because there are admiralty
12 collision cases, et cetera. But will there be cases in
13 which there are suit brought for recovery of monies on
14 account of monies or supplies advanced to the shipper
15 where there will be admiralty jurisdiction but no lien?

16 MR. PARE: Your Honor, I could certainly
17 conceive of -- I would believe that in the area of
18 physical supplies of necessities to vessels, in most cases
19 that I can conceive of right now that should probably give
20 rise to a lien.

21 QUESTION: Of course they could recite in the
22 contract I am relying exclusively upon the solvency of the
23 owner. If they recited that in the contract there
24 wouldn't be an implied lien, right?

25 MR. PARE: That is correct, Your Honor.

1 QUESTION: But it would still be an admiralty
2 contract.

3 MR. PARE: That is correct, Your Honor.

4 QUESTION: So it would be resolved in an
5 admiralty court --

6 MR. PARE: That is correct.

7 QUESTION: -- but without a lien.

8 MR. PARE: That is correct, and there is --

9 QUESTION: Is it a correct -- is it a correct
10 statement of the law to say that not every maritime
11 contract action gives right -- gives rise to a maritime
12 lien?

13 MR. PARE: Absolutely, Your Honor. In fact, for
14 instance, in the case of the payment of insurance
15 premiums. They do not give rise to a lien and are not
16 considered necessities under the lien act.

17 QUESTION: Nonetheless admiralty jurisdiction
18 would entertain that sort of suit?

19 MR. PARE: Absolutely. This Court's decision in
20 Insurance Co. v. Dunham.

21 Since Minturn there has been a transformation in
22 the legal thinking with respect to jurisdiction. First, a
23 contract, in order to be maritime, need not be performed
24 substantially on the sea. Secondly, this Court has
25 recognized that at the heart of admiralty jurisdiction is

1 maritime commerce. The Minturn rule excludes the services
2 provided by general agents, which all agree are critical
3 to maritime commerce. It is for that reason that the
4 commentators and the courts, including the Second Circuit,
5 have urged that this Court reject the Minturn rule.

6 Respondent argues that to reject the Minturn
7 rule will open up the Federal courts to suits by all
8 agents of all types. We submit that this is incorrect.
9 First, Minturn itself is a discrete rule. As the
10 commentators, and I make particular reference to Gilmore
11 and Black at pages 22 and 29 of their treatise, have
12 indicated that in other areas of jurisdictional -- in
13 other jurisdictional areas the jurisdiction is fairly well
14 defined. Secondly, there is a rational jurisdictional
15 boundary that has already been offered.

16 This Court has never ruled on the so-called
17 preliminary contract doctrine. However, in the recent
18 decision in the Second Circuit of *Ingersoll Milling v.*
19 *Bodena*, which is found at 829 F.2d 293, specifically at
20 page 302, that court has offered a jurisdictional
21 rationale which seems to make sense and is consistent with
22 the commentators.

23 QUESTION: Well, why isn't the preliminary
24 contract rule adequate for differentiating contracts
25 within and without admiralty jurisdiction?

1 MR. PARE: Your Honor --

2 QUESTION: It seems to have been employed quite
3 extensively.

4 MR. PARE: I think a redefined preliminary
5 contract rule, as apparently exists in Bodena, would be an
6 acceptable way to delimit admiralty jurisdiction.
7 Specifically in the Bodena case there was an agent
8 involved. That was a freight forwarding agent. The
9 freight forwarding agent performed certain services.
10 Specifically he arranged and he prepared bills of lading.
11 Under the old preliminary contract rule such services
12 would be considered preliminary because they were
13 preliminary to the actual marine contract, i.e. the bill
14 of lading. The Bodena court, however, did not so hold,
15 and it held that the services provided by the freight
16 forwarding agent were themselves, quote, "essential to the
17 voyage," unquote, and on that basis held that those
18 services were not preliminary services.

19 QUESTION: Well, that's kind of a modification,
20 is it, of that preliminary contract rule. Now here you
21 have a contract to make some phone calls to provide fuel
22 in bunker's. How is that a maritime contract, do you
23 suppose?

24 MR. PARE: Well, Your Honor, we submit that the
25 essence of what is going on in here, as this Court has

1 recognized, you don't look to what is going on physically
2 on the vessel but you look at the essence of the
3 transaction in a maritime contract. And what was going on
4 here was that Exxon was not only arranging under its
5 contracts, but it was advancing its credit and it was
6 paying for the fuel. Without Exxon's involvement that
7 physical delivery never would have taken place.

8 Perhaps more importantly, to answer Your Honor's
9 question, the key here should be that what is being done
10 is there is a performance of a service that is essential
11 to the operation of the voyage. And that, I think, would
12 be the key to any jurisdictional rationale.

13 QUESTION: Well, I wanted to ask you, you want
14 the Court to overrule Minturn, but I'm curious exactly
15 what rule you would have us adopt? The scholarly writing
16 on the subject suggests several different ones, and it's a
17 little hard to understand what your proposal is. Anything
18 that your, would enable your client to win, or do you have
19 --

20 MR. PARE: No, Your Honor. And in fact --

21 QUESTION: -- a more specific rule in mind?

22 MR. PARE: In fact, your Honor, we believe that
23 rejecting the Minturn rule itself should enable any
24 general agent to have admiralty jurisdiction. That is not
25 inconsistent, and in fact it is perfectly consistent with

1 what we are saying with respect to other agents. If you
2 have a traditional maritime agent, such as a freight
3 forwarder, who performs services which are essential to
4 the operation of the voyage, not perhaps the general
5 business of shipping but the operation of the voyage, then
6 such services should be considered within admiralty
7 jurisdiction.

8 QUESTION: What about a travel agent who gets
9 the passengers for a cruise line? Would that be an
10 admiralty contract? I mean, I assume if you're carrying
11 passengers they're just as essential for your voyage as if
12 you're carrying freight. I have trouble -- you know, it's
13 the devil we know is maybe better than the one we don't
14 know. I don't know where we're going if we --

15 MR. PARE: Well, Your Honor, the devil that we
16 do know has led to mass confusion --

17 QUESTION: He's a pretty bad devil, yes.

18 MR. PARE: -- as we have indicated in our brief.

19 To answer your, Your Honor's question
20 specifically, certainly, if I may step back and take the
21 cargo setting, if somebody performs services that lead to
22 cargo being put on board the vessel the argument would
23 perhaps be the same, that the cargo is the service. I
24 would submit that the physical operation of the vessel is
25 a higher degree, or a stronger degree, of what is going

1 on, and you could make a rational distinction and keep
2 both cargo, the cargo broker and the passenger or the
3 reservation people out, but yet keep people who run the
4 vessel, people who provide fuel, people who provide the
5 crew, people who provide what is necessary for
6 navigational activity in.

7 QUESTION: Well, Mr. Pare, you say some agents
8 would be kept out by your rule, the general agent would be
9 put in. What's the difference between the general agent
10 and the freight forwarder and the passenger agent?

11 MR. PARE: Well, Your Honor, it's almost by
12 definition that a general agent performs key services on
13 behalf of the vessel. And it's almost by definition that
14 the general agent should be in because he is performing
15 services which are essential to the voyage.

16 QUESTION: Well, is that actually how a general
17 agent is defined, is that he performs services that are
18 essential to the voyage? Or is that simply your equation
19 of the two things?

20 MR. PARE: There are several definitions of what
21 a general agent is. I believe in this case the district
22 court and the court of appeals agreed the definition
23 should really key off continuity of service.

24 So to answer Your Honor's question, there may
25 conceivably be some situations in which a general agent

1 does not provide services that are critical to the
2 operation of the voyage, but right now I cannot conceive
3 of any such situations.

4 QUESTION: If the general agent in a particular
5 case did not provide services that were essential to the
6 operation of the voyage, would that part of the general
7 agent's services nonetheless be subject to admiralty
8 jurisdiction?

9 MR. PARE: It would depend on what they were,
10 Your Honor.

11 QUESTION: So the fact you have a contract of
12 general agency doesn't get you an admiralty jurisdiction
13 automatically? It depends on the nature of the services
14 to be provided?

15 MR. PARE: I would think so, but certainly in
16 the normal course of the way the steamship business runs,
17 as I say, I cannot conceive of a situation where a general
18 agent would be performing services which were not
19 essential to the voyage.

20 QUESTION: May I ask you a question, Mr Pare?
21 In your view was Exxon a general agent?

22 MR. PARE: Well, that certainly was something
23 that we opposed at the court of appeals level, but lost,
24 and we take that finding for what it is.

25 QUESTION: So all the talk about general agents

1 doesn't really decide this case if Exxon is not a general
2 agent?

3 MR. PARE: No, Your Honor, but the corollary or
4 the other part of what we're arguing here is really one
5 and the same, because if -- certainly Exxon is performing
6 an essential maritime service. And --

7 QUESTION: Well, I can understand an argument
8 that an agent that performs -- services essential to the
9 voyage be the kind of relationship that supports admiralty
10 jurisdiction. I'm a little puzzled about all the argument
11 about the status of general agents, and why that is
12 relevant to this particular case.

13 MR. PARE: Well, simply because the finding, the
14 final finding in this case, is that Exxon was a general
15 agent.

16 QUESTION: Was a general agent?

17 MR. PARE: Yes. And under the doctrine --

18 QUESTION: Holding of Minturn that general
19 agents are per se excluded from admiralty jurisdiction.

20 QUESTION: Yeah.

21 MR. PARE: That is the per se rule of Minturn,
22 yes.

23 QUESTION: Well, was this case even within the
24 Minturn rule?

25 MR. PARE: Well, that's what the court of

1 appeals found, Your Honor.

2 QUESTION: Well, do you agree with that?

3 MR. PARE: Well, if you take the proposition
4 that a general agent is one who provides continuity of
5 service, which is what the restatement on agency provides,
6 then we are a general agent and we are therefore covered
7 by the Minturn rule.

8 QUESTION: You couldn't make the argument that
9 in Minturn there was a wide variety of services, and here
10 just the supply of fuel?

11 MR. PARE: We made that argument in the court of
12 appeals and we lost.

13 QUESTION: The court of appeals really thought
14 that if you supplied napkins to the ship regularly for 20
15 years you become a general agent? Is that it, just
16 continuity? It doesn't matter subject matter at all?

17 MR. PARE: Well, I perhaps would be not speaking
18 fairly about the court of appeals if I were to say that
19 they would agree with that. I believe that they would
20 probably still be looking for some finding of an essential
21 marine supply. And certainly in the run-of-the-mill
22 Minturn, Peralta, Binnings-type cases there is no question
23 about the fact that a general agent provides key maritime
24 services, and not simply napkins. I have never seen such
25 a case in the general agency setting.

1 QUESTION: Under Minturn we know that general
2 agents are excluded from admiralty jurisdiction. Does it
3 follow a fortiori from that case that freight forwarders
4 and passenger agents are also excluded from admiralty
5 jurisdiction?

6 MR. PARE: It does not follow a fortiori. And
7 in fact it is only by virtue of the fact in Second
8 Circuit, that the Second Circuit has fused the general
9 agency rule with the preliminary contract rule, that they
10 have cited cases like Minturn in nongeneral agency cases.

11 QUESTION: So your position would be that you're
12 not asking us to move admiralty jurisdiction outward all
13 the way in a sense?

14 MR. PARE: Not at all, Your Honor. We're only
15 asking that you overrule the per se arbitrary rule in
16 Minturn. And there is no danger there in setting any
17 greater boundaries for admiralty jurisdiction because the
18 rule simply would be that any services that are performed
19 by a traditional maritime agent that are essential to the
20 operation of the voyage would be entitled to admiralty
21 jurisdiction.

22 QUESTION: The thing that bothers me is I don't
23 understand, you are not arguing that even if Minturn
24 continues to state the correct rule for general agents,
25 you should nevertheless win because you're the kind of

1 agent that provided essential services and therefore
2 should support admiralty jurisdiction?

3 MR. PARE: If it were still within our power to
4 argue that we weren't a general agent we would certainly
5 argue that in the alternative.

6 QUESTION: I see. You think you're beaten by
7 the findings of the lower court on that?

8 MR. PARE: Yes, Your Honor. We certainly have
9 not urged those arguments here.

10 The logical corollary to this rule would be that
11 any agent in the maritime area who provides essential
12 maritime services and who advances his credit and pays for
13 them is entitled to a lien. That is consistent with the
14 commentators and that is, I would refer the Court
15 specifically to Gilmore and Black at pages 31 and to
16 Benedict at section 183. It is also, of course,
17 consistent with the goal of admiralty jurisdiction, which
18 is the protection and the promotion of maritime commerce,
19 and not the lining up of contracts along a chain.

20 In this case Exxon, but for Minturn, should have
21 a lien. That is true under the decisions in the Golden
22 Gate and it is also true by virtue of the fact that Exxon
23 advanced its credit under Panamanian Flag Barge. There
24 should be no remaining issue before this Court. We have
25 indicated in our brief why any other points that have been

1 urged by Central Gulf are insubstantial.

2 QUESTION: It isn't entirely clear to me that
3 you have even raised the lien question in your questions
4 presented for certiorari. It seems to me they pertain
5 mostly to jurisdiction.

6 MR. PARE: Well, Your Honor, for purposes of
7 judicial economy and also for purposes of clarity in this
8 confusing area, we respectfully submit that it would be
9 appropriate and in keeping for the Court to pass on the
10 lien question and direct the lower court below to enter
11 judgment in favor of Exxon.

12 I would like to reserve the rest of my time for
13 rebuttal.

14 QUESTION: Very well, Mr. Pare.

15 Mr. Nightingale, we'll hear now from you.

16 ORAL ARGUMENT OF STEPHEN L. NIGHTINGALE

17 ON BEHALF OF UNITED STATES,

18 AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

19 MR. NIGHTINGALE: Thank you, Mr. Chief Justice,
20 and may it please the Court:

21 The Second Circuit disposed of this case its per
22 se rule that agency contracts cannot give rise to
23 obligations enforceable within the admiralty jurisdiction.
24 As the briefs demonstrate, that rule has been widely
25 criticized by other courts, by commentators, and indeed by

1 the Second Circuit itself in the Peralta case.

2 Perhaps even more important, the rule produces
3 very anomalous results. Two firms furnishing essentially
4 the same goods or services, assuming the same risk of
5 nonpayment, and occupying essentially the same
6 relationship to maritime commerce are treated differently
7 based solely on the legal label that is given to the
8 relationship as a whole.

9 QUESTION: Well, what is the label that is given
10 to the firm that is allowed to recover in your two
11 examples?

12 MR. NIGHTINGALE: Your Honor, we believe that
13 the test should be --

14 QUESTION: No, I'm not asking what the test
15 should be. You say that the Minturn rule produces an
16 anomaly because two people doing basically the same thing,
17 one loses and the other wins. What is the doctrine
18 espoused by the courts which let the second person win
19 under the Minturn?

20 MR. NIGHTINGALE: Your Honor, this case is the
21 perfect example. Exxon --

22 QUESTION: Well, this person lost.

23 MR. NIGHTINGALE: Exxon, with respect to one of
24 the deliveries at issue, the New York delivery, it was
25 characterized as a seller and it won. It got a lien as to

1 the fuel supplied in New York because the court concluded
2 that in that, with respect to that transaction, it was
3 wearing its seller hat.

4 QUESTION: So it's the intervention of an agent,
5 basically.

6 MR. NIGHTINGALE: That's correct. The Second
7 Circuit's rule is whether or not the agent is a so-called
8 special agent, a general agent, or an agent under a so-
9 called managing agreement. That individual or that firm
10 is out of court under admiralty jurisdiction regardless of
11 the substance of what it does for the ship owner or the
12 shipping industry. And we think that's an anomalous rule.
13 Our --

14 QUESTION: Now, normally someone who supplies
15 necessities to a vessel in reliance on the credit of the
16 vessel is entitled to a maritime lien?

17 MR. NIGHTINGALE: That's correct, Your Honor,
18 with this qualification. Under the Federal Lien Act it's
19 not necessary for that claimant to prove reliance on the
20 credit of the vessel. The statute establishes a
21 presumption which unless waived by means of a showing that
22 --

23 QUESTION: But because of the application of
24 Minturn that relief is denied if the supplier is
25 characterized as a general agent?

1 MR. NIGHTINGALE: That is true, again, I'm
2 sorry, with one qualification. In some circuits the
3 general agent rule is viewed as a rebuttable presumption.
4 In the Third, Fourth, and Fifth Circuits a general agent
5 is allowed to come forward with an express or implied
6 agreement showing reliance on the credit of the vessel and
7 establish a lien. The Second Circuit holds that the
8 status of an agency forecloses a lien altogether. And
9 that is a very significant, incidentally, doctrinal
10 difference --

11 QUESTION: And what do you think the test should
12 be? You started to say.

13 MR. NIGHTINGALE: We believe that the test
14 should be, should depend on the nature of the goods or
15 services furnished, regardless of the legal label. There
16 are a number of cases that show those sorts of services
17 that have been considered traditionally within admiralty.
18 Provision of fuel to a vessel is a traditionally -- is a
19 traditional necessary. It is the sort of service that has
20 traditionally been considered within admiralty
21 jurisdiction.

22 QUESTION: Would that include some general
23 broker in the oil business who could just buy and sell oil
24 all over the world, and just happened to fill a contract
25 in one place?

1 MR. NIGHTINGALE: My understanding, Your Honor,
2 is that the admiralty jurisdiction extends only to those
3 contracts providing goods or services for a particular
4 vessel. In other words, if the contract is I'll fill your
5 tank every 2 months, and some of it may go into your
6 vessels and some of it may go into your office buildings,
7 that that would not be a contract within admiralty
8 jurisdiction.

9 QUESTION: What about a spot purchase just for a
10 particular vessel? Then it would be covered, I guess,
11 even if just through a general broker? It's the only
12 contact he ever had with the company, but he arranged a
13 purchase to fill up the ship when it left Saudi Arabia or
14 wherever it was.

15 MR. NIGHTINGALE: An owner engages someone to
16 make a spot purchase, that person pays for the fuel, puts
17 it -- it is put aboard the vessel, whether by the spot
18 purchaser or someone else, we believe that's within agency
19 -- I mean within, excuse me, admiralty jurisdiction. It
20 depends again on the substance of what happened, how
21 closely related is the service or the provision of goods
22 in relation to the maritime commerce.

23 QUESTION: I take it --

24 QUESTION: Did you understand the rule suggested
25 by Mr. Pare, is that the same rule that you suggest or are

1 there differences between you?

2 MR. NIGHTINGALE: I don't understand there to be
3 any differences, Your Honor. Mr. Pare operates as an
4 admiralty lawyer. I don't. He operates, I believe, with
5 an understanding of what it is that a general agent
6 traditionally does, and works with the understanding that
7 a general agent is a husbanding agent who buys
8 necessaries. That is the central function of a general
9 agent. I don't believe that Mr. Pare would suggest that
10 if, as clause 10 of a general agency contract it was
11 agreed that the agent would build an office building, that
12 that would be within admiralty jurisdiction.

13 QUESTION: Tell me if I'm right. I understand
14 it to be the case that the question whether there's a lien
15 and whether there's maritime jurisdiction are separate
16 questions, but because of this Maritime Lien Act they tend
17 to merge, because maritime jurisdiction is important not
18 just because you get before a maritime court but because
19 if it -- if there is maritime jurisdiction the Maritime
20 Lien Act applies and you get the lien on much more liberal
21 terms than you otherwise would. You don't have to show
22 all sorts of things that you would otherwise have to show.
23 Is that what's going on here?

24 MR. NIGHTINGALE: Yes, Your Honor. I think it's
25 important --

1 QUESTION: They don't really care what court
2 they get into, whether it's a maritime court or not. They
3 want the lien, right?

4 MR. NIGHTINGALE: In this particular case it's
5 essential. In other cases it may assure access to a
6 Federal forum.

7 Let me discuss briefly the relationship between
8 the statute and the lien, because I understand that is one
9 of respondents' principal points in opposition to the
10 result we suggest. Respondents suggest that the statute
11 forecloses adoption of the rule that we advocate here.
12 The statute does not speak to what causes of action are
13 within the admiralty jurisdiction. If, for example, Exxon
14 had brought an in personam action, I don't believe it
15 could fairly be argued that the lien act would foreclose
16 admiralty jurisdiction.

17 So what the lien act does, as Your Honor
18 suggested, is to provide that when admiralty jurisdiction
19 is otherwise available, the lien act is potentially
20 available as a means of providing a lien. It is not even
21 the exclusive source of a lien, incidentally. It does not
22 purport to occupy the field or exclude other arguments for
23 a lien. There are liens that exist independent of the
24 statute.

25 A second point in opposition to the rule that we

1 suggest is that it would undercut the stability and
2 certainty in an area of jurisdiction. The devil we know
3 is better than the devil we don't know. First of all,
4 it's clear that the Minturn has not -- the rule of the
5 Minturn has not provided stability in this area. There is
6 disagreement among the circuits as to whether special
7 agents are outside the rule, as to whether managing
8 operators are outside the rule, even within the confines
9 of general agents as to whether this rule is a presumption
10 or a conclusive rule of law.

11 Secondly, this Court, of course, could select
12 from among those approaches, choose one, and make it the
13 national rule. But we submit that so long as the rule
14 depends on status and not function, that the rule will
15 continue to generate uncertainty. The lines between
16 agents, special agents, managing agents, are not clear.
17 That's point number 1.

18 Second point, so long as those distinctions
19 don't line up with the substantive considerations
20 underlying admiralty jurisdiction they will be the subject
21 of continuing controversy. They are traps for the unwary,
22 as presently constructed, as the Court indicated. Exxon
23 might have had trouble anticipating that it would be
24 considered indistinguishable from Mr. Minturn.

25 Thirdly, it is not the case that the shipping

1 industry is less important now than in the 1850's. This
2 is an industry whose importance is growing. The grant of
3 admiralty jurisdiction to this Court reflects, first, that
4 -- this Court and the Federal courts reflects first the
5 national importance of that industry, and second, we
6 believe, the judiciary's responsibility for seeing that
7 that jurisdiction is exercised in a rational fashion, in
8 cases like the *Maret* and the *Genesee*, in which the Court
9 extended admiralty jurisdiction to the inland lakes and
10 waters. In other cases, the Court has not hesitated to
11 reconsider decisions that have spawned uncertainty and
12 have resulted in anomalous limitations on jurisdiction.

13 Thank you very much.

14 QUESTION: Thank you, Mr. Nightingale.

15 Mr. Montbach, we'll hear now from you.

16 ORAL ARGUMENT OF FRANCIS A. MONTBACH

17 ON BEHALF OF THE RESPONDENTS

18 MR. MONTBACH: Mr. Chief Justice, and may it
19 please the Court:

20 The issue before this Court is whether the rule
21 of law that an agency contract is not a maritime contract
22 should be overturned. The district court below declined
23 to grant admiralty jurisdiction to Exxon's claim, holding
24 that preliminary services are not within such
25 jurisdiction. While preliminary services may relate to

1 maritime services and are often helpful for the operation
2 of a vessel, they are essentially nonmaritime in nature.
3 They are shoreside services. There is nothing inherently
4 maritime about these services. There is nothing in the
5 nature of preliminary contracts that distinguishes them
6 from other shoreside contracts or warrants the extra
7 security of a lien upon a vessel. In this instance the
8 vessel --

9 QUESTION: Why can't -- wow. I thought we were
10 talking about agency contracts, general agencies, and now
11 we're talking about preliminary versus nonpreliminary.
12 Why can't we adopt that rule, I mean, the rule that
13 preliminary contracts don't make it, but no rule that
14 agency contracts as a class don't make it at all? Is
15 every agency contract involved with preliminary contract?

16 MR. MONTBACH: Your Honor, we submit that an
17 agency contract is, by its very nature, a preliminary
18 contract. It is --

19 QUESTION: Why?

20 MR. MONTBACH: It is no different from any other
21 non-maritime contract. In this instance you had a, they
22 were providing for a supplier. They were not supplying
23 themselves. Exxon in this instance placed an order a
24 number of weeks beforehand, in fact took over an order
25 that had been placed beforehand, typical of an agency, and

1 then sat back, did nothing with regard to the actual
2 supply -- someone else did that, someone that they had a
3 separate arrangement with -- and then a week or so
4 afterwards found out that the order had actually been
5 fulfilled and then did their other administrative function
6 of a collection.

7 So that we don't think that the rule should be
8 changed at this time. In a commercial context it is known
9 that agency contracts, general agency contracts, are not
10 within admiralty jurisdiction.

11 QUESTION: I take it, would you say that the --
12 when Exxon itself is furnishing the fuel, such as in New
13 York, would that contract to that extent be within
14 maritime jurisdiction?

15 MR. MONTBACH: At that -- in their status as a
16 physical supplier in New York, our position was that they
17 were not entitled to a lien, but as far as being a
18 maritime contract, as a physical supplier, as Justice
19 O'Connor said --

20 QUESTION: So that you think --

21 MR. MONTBACH: They had the --

22 QUESTION: -- that contract to that extent would
23 be within maritime jurisdiction?

24 MR. MONTBACH: When they had that hat on, yes.
25 When they had their agency hat on to procure somebody else

1 or to provide for somebody else, be it themselves --

2 QUESTION: Well, didn't they do a little bit
3 more in this case? They not only -- they not only got
4 somebody else to furnish the fuel, but it became necessary
5 for them to pay the supplier. And they paid it. It was
6 just like they bought the oil and then sold it to the
7 vessel, isn't it?

8 MR. MONTBACH: No, Your Honor. In this instance
9 -- in fact, their contract was applied -- it provided that
10 Exxon did not buy the fuel.

11 QUESTION: Well, yeah, but -- it may not buy it,
12 but it became necessary for Exxon to pay the supplier
13 itself.

14 MR. MONTBACH: That was part of their
15 longstanding relationship, their agency relationship --

16 QUESTION: Well, I know, but nevertheless Exxon
17 in this case paid the supplier for the fuel that the
18 supplier furnished to the vessel.

19 MR. MONTBACH: Eventually, yes, Your Honor, they
20 did.

21 QUESTION: Well, eventually, just as soon as it
22 was billed it paid.

23 MR. MONTBACH: Yes. They were billed a number
24 of weeks later on, Your Honor. But this was part of the
25 longstanding --

1 QUESTION: You think that's legally a
2 distinction from what its status is in New York?

3 MR. MONTBACH: Yes, I do, Your Honor. I think
4 it is because they are doing this as part of their agency
5 relationship. It is not an advancement, like the normal
6 situation would be.

7 QUESTION: You used the term, and counsel have
8 used the term for other things -- agency relationship.
9 Agency relationship as distinguished from what?

10 MR. MONTBACH: From a direct supplier.

11 QUESTION: From someone who has a direct
12 contract with the ship or the ship's owner?

13 MR. MONTBACH: Direct contract -- contact with
14 the navigational operation or a direct juridical contact
15 with maritime commerce. In this instance --

16 QUESTION: Well, what does a direct juridical
17 contact with maritime commerce mean?

18 MR. MONTBACH: I had to look up juridical
19 myself, Your Honor.

20 QUESTION: Well, I don't want to suggest I don't
21 know what juridical means --

22 MR. MONTBACH: I understand.

23 (Laughter.)

24 QUESTION: -- but I don't understand what the
25 phrase means.

1 MR. MONTBACH: It means that they had to be
2 involved in the maritime environment. It was something
3 that had to have a -- almost a hands-on relationship with
4 the supply. In this instance --

5 QUESTION: Like selling oil to the ship.

6 MR. MONTBACH: Pardon me?

7 QUESTION: Like selling fuel to the ship.

8 MR. MONTBACH: They were not selling it, Your
9 Honor. They were arranging for someone to sell it to the
10 ship.

11 QUESTION: I know, but in New York they are
12 selling it.

13 MR. MONTBACH: Yes, Your Honor, they were.

14 QUESTION: And that is a direct enough
15 connection with the ship to --

16 QUESTION: The claimant owns the oil and
17 supplies it directly to the ship --

18 MR. MONTBACH: And then bills directly for that,
19 yes.

20 QUESTION: -- and bills direct. That is not an
21 agent, that is a seller?

22 MR. MONTBACH: That is a supplier, yes.

23 QUESTION: Supplier.

24 MR. MONTBACH: There's a direct relationship.

25 QUESTION: But an agent is someone who is a step

1 removed from that?

2 MR. MONTBACH: A step removed, yes. It is a --
3 there is a preliminary nature. And this is why Peralta,
4 Binnings, and the recent case in Planned Premium Services
5 talks about the step backwards, even though the service
6 may be essential, not quite essential but necessary. And
7 a convenient usage in the maritime industry is the step
8 backwards. It is not a maritime contract itself.

9 QUESTION: May I ask this question, Mr.
10 Montbach? Supposing Exxon had not paid the Saudi Arabian
11 retailer, whatever, the Arabian Marine or whatever its
12 name was --

13 MR. MONTBACH: Arabian Marine.

14 QUESTION: Would Arabian Marine have had a lien
15 on the ship?

16 MR. MONTBACH: It is my understanding that they
17 would have, possibly under Saudi law.

18 QUESTION: So if looking at it from the point of
19 view of general creditors wondering when the ship is
20 subject to a lien, they could assume normally the supplier
21 would have a lien, but then they'd realize they'd have
22 these cases where there's an indirect relationship which
23 would be excluded from what would otherwise be the general
24 lien for fuel?

25 MR. MONTBACH: As far as Saudi is concerned,

1 they would not have a lien under the U.S. lien statute,
2 because they specifically relied -- I mean, Arabian Marine
3 --

4 QUESTION: Because they relied on Exxon.

5 MR. MONTBACH: They relied on Exxon's credit.

6 QUESTION: But it's only the terms of the
7 contract between Arabian and Marine and Exxon that brings
8 that about, something which the other general creditors
9 wouldn't be aware of.

10 MR. MONTBACH: Well, Your Honor -- that's true,
11 Your Honor, but also Arabian Marine specifically in this
12 instance said they would not supply the vessel --

13 QUESTION: Without getting paid first.

14 MR. MONTBACH: They would not supply it at all
15 unless Exxon said we will guarantee.

16 QUESTION: Yeah, I understand.

17 MR. MONTBACH: So they specifically relied on
18 the credit of Exxon.

19 QUESTION: Eventually they did, in your own
20 words.

21 MR. MONTBACH: I'm sorry, Your Honor?

22 QUESTION: Eventually they relied on --

23 MR. MONTBACH: No, they came to Exxon and said
24 we will not supply this vessel.

25 QUESTION: Exactly.

1 MR. MONTBACH: And then Exxon said we will take
2 over the credit, the guarantee. They relied upon Exxon's
3 promise and not on Waterman's promise.
4 QUESTION: Originally Arabian was furnishing oil
5 directly to the vessel --
6 MR. MONTBACH: Yes, they were.
7 QUESTION: -- without relying on Exxon's credit.
8 MR. MONTBACH: For about a year-and-a-half
9 period.
10 QUESTION: Yes. And then it turned out that the
11 vessel wasn't good for it, I guess.
12 MR. MONTBACH: No, it turned out that Waterman
13 --
14 QUESTION: Yeah.
15 MR. MONTBACH: They thought Waterman was not
16 good for it.
17 QUESTION: Yes, yes. And so they relied on
18 Exxon.
19 MR. MONTBACH: Yes..
20 QUESTION: And Exxon said, well, so we'll pay
21 you.
22 MR. MONTBACH: Yes.
23 QUESTION: And they did.
24 MR. MONTBACH: And they did, yes.
25 QUESTION: And you say that doesn't change the

1 situation at all --

2 MR. MONTBACH: Well, it doesn't change the --

3 QUESTION: -- with respect to Exxon?

4 MR. MONTBACH: With respect to Exxon, no, Your
5 Honor, it doesn't. Because Exxon was doing so as part of
6 their longstanding 4-year-old relationship with Waterman.

7 QUESTION: Yes, but you haven't made anything
8 about that. I have not understood your -- it doesn't seem
9 to me you can equate what we're talking about here with
10 simply proximity to maritime commerce, because the fact is
11 that it doesn't matter if you're an agent. You have to be
12 a general agent to come within the disqualifying rule. So
13 that if the ship company had come to Exxon and simply said
14 on a one-shot deal, had no continuing relationship with
15 Exxon, just said, either give me oil yourself or get
16 somebody else to give me oil, if they had said that just
17 for this one occasion, Exxon wouldn't be a general agent.
18 And even if Exxon acted as an agent and got someone else
19 to provide the oil, they wouldn't be barred from the lien,
20 would they?

21 MR. MONTBACH: If they had paid for it, Your
22 Honor, then they would possibly fall within --

23 QUESTION: Possibly?

24 MR. MONTBACH: -- within the advance theory.

25 QUESTION: I thought it's just general agents

1 that are covered, and I wouldn't consider that a general
2 agent. What does general --

3 MR. MONTBACH: No, as a one term, as a one shot,
4 one vessel --

5 QUESTION: Right.

6 MR. MONTBACH: -- one port proposal, there have
7 been some exceptions to this Minturn rule on the basis of
8 the --

9 QUESTION: So it doesn't have anything to do
10 with proximity. It has to do with general agency.

11 MR. MONTBACH: It has to do with whether the
12 contract that is entered into is a maritime contract. The
13 Fifth Circuit last -- a week or so ago came down with a
14 decision saying we can't look at the
15 quantitative/qualitative aspects of this in a particular
16 service and a particular instance. We have to have a
17 general rule which will serve the national interest of
18 securing a stable, uniform rule applicable to --

19 QUESTION: Yeah. I thought your rule made a lot
20 of sense. I could figure that one out. Is it direct?
21 You know, are you putting the oil on the boat or not. But
22 it turns out that's not the rule. You don't have to put
23 the oil on the boat. It's just whether you're --

24 MR. MONTBACH: Some courts have held it as the
25 exception under the preliminary contract doctrine which is

1 part of this general agency rule, or the general agency
2 rule is subsumed within it. If you are not a direct
3 supplier, you're not doing something directly or
4 operationally involved in the maritime commerce and the
5 navigation of the vessel, then you are not entitled to
6 admiralty jurisdiction. You have other forums you can go
7 to, Your Honor. And we need a stable rule here, not as
8 the Second Circuit said, hair splitting a case by case.
9 The --

10 QUESTION: What do you want us to do? You want
11 us to reaffirm Minturn or do you want us to adopt your
12 rule, which is --

13 MR. MONTBACH: We want you to reaffirm Minturn.

14 QUESTION: Well, but that's not the rule you
15 have been talking about. It doesn't have anything to do -
16 -

17 MR. MONTBACH: Minturn, as it is part of the
18 preliminary contract rule, yes.

19 QUESTION: Well, you don't have to be -- it can
20 be a preliminary contract so long as you're not a general
21 agent, so long as you don't do this regularly. It can
22 still be a preliminary contract.

23 MR. MONTBACH: Preliminary contracts do not of
24 necessity have to be general agency rules, but general
25 agency rules, contract, excuse me, are preliminary

1 contracts.

2 QUESTION: That's true.

3 MR. MONTBACH: Just as you can have -- if you
4 don't have a maritime lien you don't have admiralty
5 jurisdiction. But you can have admiralty jurisdiction
6 without having a maritime lien.

7 Your Honor, it is our feeling that there has to
8 be, and based upon what this Court has said in the past,
9 substantial justification that's apart from stare decisis.

10 This is a long-established rule. It has been in
11 effect for 135 years at least. Exxon says it's anomalous
12 but it doesn't effect its status. The fact that the
13 Minturn decision may have gone the opposite direction in
14 1854 doesn't change its status. The fact is it has been a
15 rule of law for 135 years. Commerce has gone on for
16 years, for 135 years on the basis of this rule of law. If
17 Congress at some point in time decides to change it, then
18 it will do so prospectively, not retrospectively.

19 QUESTION: How can Congress change it? Can
20 Congress change it?

21 MR. MONTBACH: Congress has looked at this area
22 four times. Minturn has been the rule for 135 years.

23 QUESTION: There's no equation between what the
24 Constitution means by admiralty jurisdiction and what the
25 statute does?

1 MR. MONTBACH: Your Honor, there is an equation,
2 yes. And this Court can address admiralty jurisdiction.
3 But we're saying in this instance we'd have to take our
4 guidance from Congress. Congress has looked at what
5 constitutes --

6 QUESTION: You don't expect Congress to pass a
7 statute -- would Congress responsibly be passing a statute
8 that ignores Minturn? Could it do that?

9 MR. MONTBACH: If Congress wants to change the
10 rule, as they did in 1910 and in 1920 to allow
11 beneficiaries -- in this instance change the Minturn rule,
12 allow general agents to have liens -- they can do so.

13 QUESTION: To be within admiralty jurisdiction?
14 How can Congress --

15 QUESTION: Congress is -- our Court held in 1825
16 that admiralty jurisdiction was limited to tidal waters.
17 Congress passed a law saying no, it extends to the Great
18 Lakes, and in the Genesee Chief we upheld that.

19 MR. MONTBACH: Yes. I'm saying that the
20 Congress can add a group of beneficiaries, in effect
21 expand the jurisdiction to include a class within
22 admiralty jurisdiction, and include a class that will get
23 a lien. Congress did that in 1920 when they amended the
24 lien act to include towage. This Court and other courts
25 between 1910 and 1920 said no, the lien act does not

1 provide for towage. Therefore --

2 QUESTION: We're not talking the lien act, we're
3 talking about admiralty jurisdiction.

4 MR. MONTBACH: I think they're mixed. The
5 action is based upon the lien act in part, Your Honor.
6 The action is based upon the lien act and traditional
7 maritime law. This Court has repeatedly said, and other
8 courts have agreed with this, that maritime liens are to
9 be interpreted strict to Uris, and that the only source is
10 either statute or traditional maritime law. And if a lien
11 did not exist under the statute or did not exist under
12 traditional maritime law, then courts should not grant
13 such liens.

14 QUESTION: Are agency contracts somehow to be
15 discouraged because they are not promotive of sound growth
16 for admiralty and for maritime commerce?

17 MR. MONTBACH: No, they are not, Your Honor.
18 They're not to be discouraged. The point is should they
19 be included with a group of services or groups of
20 beneficiaries who are entitled to lien of vessel, to put a
21 secret lien on a vessel that travels with that vessel. If
22 Congress or --

23 QUESTION: Well, it's a secret lien, but the
24 last in time always prevails, this odd rule in admiralty,
25 so that it's not really so bad either, is it?

1 MR. MONTBACH: It does, but it's still secret to
2 anyone who isn't aware of it. If this vessel was sold --

3 QUESTION: Well, if anybody provides services
4 and they're last in time, then they collect.

5 MR. MONTBACH: If the vessel was sold subsequent
6 to that last provision of services the new buyer has no
7 idea that there is a lien on this vessel. Other
8 jurisdictions, England and Canada, create an in rem lien
9 for someone who supplies bunkers, but that lien does not
10 follow the vessel. It's an in rem statutory lien.

11 QUESTION: It's an in rem against what?

12 MR. MONTBACH: Against the vessel, but it does
13 not follow the vessel once the vessel is sold. It's a
14 statutory in rem lien, a right to an in rem action. I
15 shouldn't say lien. It's an in rem action.

16 QUESTION: Would our courts have authority to do
17 that, or would that contradict the existing statute?

18 MR. MONTBACH: I think the courts would have the
19 -- not the courts, Congress would have the ability --

20 QUESTION: No, would our courts have the
21 authority to --

22 MR. MONTBACH: To create a lien?

23 QUESTION: -- adopt such a rule that the lien is
24 in rem but doesn't follow the vessel, or would that
25 contradict the existing statute?

1 MR. MONTBACH: I think it would contradict the
2 existing statute. I think the courts should not expand
3 liens, create liens, either by analogy, this is a strict
4 to Uris doctrine, Your Honor.

5 QUESTION: Counsel, what's the significance of
6 any, of the provision in the contract for a lien? There
7 is one, isn't there?

8 MR. MONTBACH: Well, Your Honor, there is a
9 general provision in Exxon's boilerplate contract which
10 says that they reserve a right to lien --

11 QUESTION: For what?

12 MR. MONTBACH: For the provision of fuel,
13 themselves.

14 QUESTION: And so you think that provision would
15 only apply to situations like in New York?

16 MR. MONTBACH: I think as far as Exxon is
17 concerned it applies to them when they supply themselves.
18 It also provides that the supplying company has a lien
19 when they supply.

20 QUESTION: So does that add anything to maritime
21 law?

22 MR. MONTBACH: I don't think so, no, Your Honor.
23 It does not.

24 QUESTION: Then you might as well leave it out?

25 MR. MONTBACH: In this instance, yes.

1 QUESTION: Yeah, but here they say they would
2 have a lien on the vessel, wouldn't they? You would have
3 a lien on the vessel.

4 MR. MONTBACH: They say they have a lien on the
5 vessel.

6 QUESTION: And that seems -- they certainly were
7 contemplating -- both sides were, I suppose, that this
8 would be subject to maritime law.

9 MR. MONTBACH: I don't think both sides were
10 contemplating that. Remember, there are three sides here.
11 We have Exxon entering into a contract with Waterman, and
12 we have Exxon now trying to enforce that against Central
13 Gulf Lines, the owner of the vessel.

14 QUESTION: I see.

15 MR. MONTBACH: Central Gulf Lines had a contract
16 with Waterman that said don't put any liens, we prohibit
17 you from putting any liens on this vessel. But we once
18 again have in Exxon's instance a boilerplate global
19 contract they use for all of their customers, and they
20 have been using this for 40 years. I don't think it is
21 specific enough to show a common intent on the part of
22 Exxon and Waterman to put a lien on the vessel involved
23 herein.

24 In effect what it's saying to Waterman and
25 Exxon, Exxon knowing full well what the financial

1 situation of Waterman was, knowing that one supplier has
2 already said I'm not going to advance anything to this
3 vessel on any credit -- Waterman any credit -- Exxon can
4 say it's all right, I'll loan you the money as part of our
5 ongoing relationship. I'm in effect making an investment
6 in you to keep you going, because a third party over there
7 who knows nothing about this will pay me. They were aware
8 this was a chartered vessel. They had known it for 3
9 years.

10 This is the type of situation based upon this
11 long standing agency relationship, that Exxon in effect
12 could be considered an investor in Waterman, almost a part
13 owner with Waterman. They had \$4 million worth of credit
14 outstanding before this lifting. They increased it by
15 \$1.5 million, more than the value of this lifting at that
16 time, knowing full well of the financial condition of
17 Waterman.

18 Now, going into the contract itself, Your Honor,
19 the contract provides that Exxon has nothing to do with
20 the navigation of the vessel, and really nothing to do
21 with maritime commerce. As I said before, Exxon in this
22 instance confirmed an order that had been placed by
23 Waterman. But in the normal instance they take an order,
24 they put it on a telegraph or a fax machine or a telex
25 machine, pass it on to Arabian Marine in this instance, in

1 general terms at least 7 days beforehand, and they want
2 nothing else to do with this.

3 They say you, buyer, are responsible for letting
4 the local person know when your vessel is going to be
5 there exactly. You are responsible for any mistakes you
6 make in that. You, buyer, are responsible for everything
7 that has to do with loading the vessel with this fuel.
8 You, buyer, are responsible with everything afterwards.
9 You have to pay for all your permits and everything.

10 The next time Exxon has anything to do with this
11 is a week or two later when the bill comes in. They are
12 totally an administrative, shore side, and in this
13 instance we submit, if we're going to make a difference
14 between a preliminary and a general agency contract, a
15 preliminary contract situation.

16 So that we feel, Your Honor, that the rule in
17 Minturn individually should be upheld or affirmed. Any
18 problems as far as the so-called splits in the circuit,
19 our brief shows that the circuits are not at odds as far
20 as the general agency rule. As recently as a week and a
21 half ago the Minturn holding was cited with approval in
22 the Planned Premium Services case --

23 QUESTION: Mr. Montbach, supposing they had
24 constructed a little different kind of legal relationship
25 between the marine company in Saudi Arabia and Exxon

1 pursuant to which they had said we, Exxon, want to buy
2 100,000 gallons of oil to be resold to the ship owner of
3 the ship --

4 MR. MONTBACH: To Waterman.

5 QUESTION: -- and then in effect said well,
6 title will pass to us as soon as you pump it through the
7 pipe and then it will pass from us to the ship owner 10
8 seconds thereafter, and you will be our agent for
9 delivering our oil while we own it and while you're
10 delivering it to the other. So that they got title to the
11 oil, you know, Exxon. They would then have a lien, I
12 guess, wouldn't they?

13 MR. MONTBACH: In effect the argument could be
14 made that they were a fictional, or legally fictional -- a
15 supplier themselves. Because -- and I think the cases
16 that were cited for, by the other side and the Solicitor
17 General, where they're saying someone who doesn't
18 physically supply has been given a lien, if you -- we
19 don't have the benefit of those cases. But in some of
20 them they did say that there was a chain sale, the typical
21 petroleum -- and you talked about the brokerage, I don't
22 know if it was you, sir -- but the brokerage thing. A
23 chain sale. Title does pass, so that this becomes a
24 direct supplier.

25 QUESTION: Yeah.

1 MR. MONTBACH: Even though it is for 10 seconds.

2 QUESTION: Yeah.

3 MR. MONTBACH: So that we feel that this rule
4 should be upheld. It will continue the stability in this
5 area of law. Justice Scalia spoke about, cited Mr.
6 Black's Columbia Law Review article in *Sisson v. Ruby* and
7 your concurrence about the irregular verbs that are better
8 learned rather than changing the whole grammar around.
9 Industry has gone along very well, with a few exceptions,
10 and there are not a lot of exceptions to this general
11 rule. There has to be some special justification for
12 overturning this rule, not just that a couple of
13 commentators think it's an anomaly.

14 A ship-building contract certainly is subject to
15 the same arguments that are being made with regard to
16 *Minturn*. It was the same court that handed down the
17 *People's Ferry* case.

18 QUESTION: Well, do you really think that all
19 the courts of appeals that have dealt with this matter see
20 eye to eye with you?

21 MR. MONTBACH: I think as far as the general
22 agency rule is, yes. Some have carved out some
23 exceptions, but they have recently --

24 QUESTION: Pretty good ones, too.

25 MR. MONTBACH: The exceptions, Your Honor, have

1 to do with --

2 QUESTION: I mean pretty substantial ones.

3 MR. MONTBACH: The exceptions have to do with
4 entities that are involved with the operation, the
5 physical operation of the vessel. The Hadjipateras case
6 in the Fifth Circuit, which -- the Fifth Circuit still
7 follows the general agency rule -- dealt with some, an
8 entity that was involved with the physical operation of
9 the vessel. The Hinkins in the Ninth Circuit, Your Honor,
10 dealt with an entity on a one-port, one-call situation
11 where they had people down there overseeing, being
12 involved in the physical service that was being provided.

13 We don't have that in this instance, and in the
14 general rule you don't have that with husbanding agents or
15 general agents per se. They contact somebody. It's
16 basically having a black -- a telephone book. Well, if
17 you're in Jeddah, see so and so. If you're in Rotterdam,
18 see somebody else. There is no direct link with the
19 navigation of the vessel or in maritime commerce. It
20 wasn't done in a maritime environment.

21 So the circuits are not really in disarray or
22 discord as to the applicability of Minturn. There have
23 been some exceptions, but recent cases, even Justice Brown
24 in the Fifth Circuit again restates the general agency
25 rule with --

1 QUESTION: What are the time limitations on
2 enforcing a lien?

3 MR. MONTBACH: There are none. It follows the
4 vessel.

5 QUESTION: Just laches, or --

6 MR. MONTBACH: I think there is some laches,
7 yes. If a vessel comes into, leaves the United States and
8 comes back five times and you don't catch it here, I
9 assume -- and has been sold -- at some point in time the
10 courts can apply laches to it. And they do, have done it
11 at times. The statute of limitations also would apply.

12 QUESTION: Is it your submission that overruling
13 of Minturn would be detrimental to the commerce of the
14 purchase and sale of vessels?

15 MR. MONTBACH: I think it would be detrimental
16 to that area. It would be detrimental in commerce in
17 general because you would create a whole new group, just
18 if we're talking agents alone, of all sizes, types, would
19 be able to go into courts now and to -- before they -- go
20 into courts, and seize a vessel in the United States,
21 wherever it is in the United States. That certainly would
22 impede commerce. It might get them their money, but it
23 would impede commerce.

24 QUESTION: Well, I don't know that that's the
25 submission of the other side. I thought they, I thought

1 if they overruled Minturn you would nevertheless, you
2 still would have to sort out all sorts of contracts to see
3 which have enough connection with maritime commerce.

4 MR. MONTBACH: If you overrule Minturn you're
5 still going to have the vessel seized and an action in the
6 admiralty courts, and then you would have the sorting out
7 of the preliminary contract. It's not a question of
8 bringing an action and sorting it out and seeing if you're
9 entitled to a lien, and then enforcing the lien. In this
10 instance Exxon was ready to seize the vessel. Everybody
11 knew of it because of the Waterman bankruptcy and a side
12 arrangement was put up. Typically when somebody seizes a
13 vessel, the vessel will -- the owner will bond it or put
14 up an undertaking of some sorts.

15 But you're still having this continually --
16 somebody -- the marshall going out and seizing these
17 vessels for any and every type of agent. If we open it up
18 for an agent we have the passenger agent. We open it up
19 for the cargo brokers. We open it up for other types of
20 agents.

21 QUESTION: Well, I don't know --

22 QUESTION: Yes, but aren't those statutory
23 questions? I mean, the lien statute doesn't necessarily
24 cover all those. It seems there are two different issues,
25 one, where there's a maritime jurisdiction, and even if

1 there is it may well be the statute doesn't cover all
2 these different kinds of agents.

3 MR. MONTBACH: Yes, Your Honor, if we limit
4 ourselves to the statute. But in this instance the action
5 is based not only on the Maritime Lien Act, it's based on
6 traditional maritime law.

7 QUESTION: And you do argue, don't you, that
8 even if there's maritime jurisdiction that the terms of
9 the lien act don't cover this particular facts?

10 MR. MONTBACH: Yes, Your Honor. We're saying
11 that the lien act in and of itself does not provide for a
12 maritime lien for a general agent. Or in this instance a
13 preliminary contract.

14 QUESTION: Or for this agent even.

15 MR. MONTBACH: Or for this. Specifically not
16 this agent, Your Honor, yes.

17 Thank you, Your Honors.

18 QUESTION: Thank you, Mr. Montbach.

19 Mr. Pare, do you have rebuttal? You have 3
20 minutes.

21 REBUTTAL ARGUMENT OF ARMAND MAURICE PARE

22 ON BEHALF OF THE PETITIONER

23 MR. PARE: Yes, Your Honor.

24 First, with respect to the reference to the
25 Columbia Law Review article by Professor Black, I believe

1 that that article quite clearly states in the critique
2 section that there are a list of irregular verbs that seem
3 to have no principle, but I also believe that what the
4 Professor says there is that in that article that is how
5 he reads the present cases.

6 However, at pages 261 and then again at 273 and
7 beyond he goes on to suggest that should not be the case.
8 It happens to be the case now.

9 Central Gulf has raised the point and says that
10 all agency contracts are preliminary contracts. That
11 depends on your definition of a preliminary contract. We
12 have urged the definition provided by the Bodena court,
13 provided by Benedict, and provided by Gilmore and Black,
14 that makes sense. It's not a mechanical lining up of the
15 contracts.

16 Secondly, Exxon in this case supplied bunkers.
17 That is the key ingredient to make a vessel propelled --
18 be propelled in maritime commerce. It is the classic
19 service. As the decision by the Ninth Circuit in the
20 Golden Gate indicated, it is not necessary for the
21 physical supply to be made by the plaintiff. In that case
22 the supply was made by a third-party supplier. That is
23 precisely the case here. Exxon did not make the physical
24 supply, but that should not matter.

25 Furthermore, clearly, under any analysis Exxon's

1 involvement here was not preliminary. The proof shows
2 that the local supplier refused to make the supply. If
3 Exxon had not jumped in and put its contract on the line
4 the supply would not have happened. Exxon's involvement
5 was essential to the voyage. The proof also shows that
6 Exxon advanced its credit and it paid for the fuel. In
7 fact it remained involved in this case by virtue of the
8 fact that the contract provides if there was an oil spill
9 Exxon reserved the right to clean that spill up. Also,
10 the contract provides that, if there was a quality or
11 quantity claim, Waterman came to Exxon for that, not to
12 Arabian Marine.

13 The Fifth Circuit case of Planned -- Preplanned
14 Premium Services does not address the general agency
15 Minturn issue. In fact it only involves insurance
16 premiums, and those insurance premiums are not essential
17 to the operation of any voyage. In fact, as I already
18 indicated, they do not give rise to a lien, and they are
19 not essential services.

20 QUESTION: Well, Exxon -- Minturn has been
21 around for a long time, yet Exxon had this sort of a
22 contract.

23 MR. PARE: Well, Your Honor, Minturn was never
24 applied to the Exxon contract, and I think it came as --
25 well, I know it came as quite a shock to me to see Minturn

1 in this case.

2 Thank you.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pare.

4 The case is submitted.

5 (Whereupon, at 2:56 p.m., the case in the above-
6 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: 90-34

EXXON CORPORATION, Petitioner v. CENTRAL GULF LINES, INC.,

ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Raymond Hartel

(REPORTER)

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