

ORIGINAL

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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner v. BESTFOODS, ET AL.
CASE NO: 97-454
PLACE: Washington, D.C.
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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 97-454

BESTFOODS, ET AL. :

- - - - -X

Washington, D.C.

Tuesday, March 24, 1998

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:13 a.m.

APPEARANCES:

LOIS J. SCHIFFER, ESQ., Assistant Attorney General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioner.

KENNETH S. GELLER, ESQ., Washington, D.C.; on behalf of
the Respondents.

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1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 97-454, the United States v.
5 Bestfoods, et al.

6 Ms. Schiffer.

7 ORAL ARGUMENT OF LOIS J. SCHIFFER

8 ON BEHALF OF THE PETITIONER

9 MS. SCHIFFER: Mr. Chief Justice, and may it
10 please the Court:

11 At issue in this case is under what
12 circumstances is a parent corporation directly liable
13 through its own acts as an operator of a facility under
14 CERCLA?

15 This is a case of statutory construction.
16 Congress, to carry out its intent to have those
17 responsible for causing pollution at a facility
18 responsible to remediate it created a system that holds,
19 among others, "any person who owned or operated" a
20 facility liable for cleanup of that facility. It is a
21 direct liability standard.

22 Owner or operator is a defined term in the
23 statute. A pertinent part of the definition, any person
24 who operates the facility, is circular, and so according
25 to the teachings of this Court must be given its common

1 and ordinary meaning.

2 The dictionary definition of operate is in the
3 context of an industrial facility any person who exercises
4 managerial control over that industrial plant, and we
5 think that this is the appropriate test to apply here.

6 Under CERCLA, the term any person is given a
7 broad definition and includes any corporation, whether a
8 parent or a subsidiary. Thus --

9 QUESTION: Well, Ms. Schiffer, surely you would
10 agree that under the statute not every parent is liable
11 under this statute for the operation of a facility by a
12 subsidiary.

13 MS. SCHIFFER: We would absolutely agree with
14 that.

15 QUESTION: And there mere fact that there are
16 interlocking directorships, or perhaps managers who serve
17 both corporations, wouldn't determine that, would it?

18 MS. SCHIFFER: That is exactly correct, Justice
19 O'Connor. It would not determine it. The fact that there
20 are interlocking directorships may be an evidentiary
21 factor in determining whether the parent corporation is
22 operating the facility.

23 QUESTION: Well, I'm not sure it should even do
24 that, I mean, if our ordinary understanding of the
25 corporate structure and reasonable investment-backed

1 expectations is that we recognize the corporate separate
2 entities, and we recognize that a parent can have a
3 subsidiary and that a parent isn't liable for what the
4 subsidiary does in normal circumstances.

5 MS. SCHIFFER: Justice O'Connor, what we're
6 talking about here, and which is consistent with the
7 common law, is what the action of the parents are as a
8 company toward the facility, not what the actions of the
9 parent are toward the subsidiary, and while there may be
10 useful evidence in how the parent acts toward the
11 subsidiary, the real question is, how did the parent
12 company directly affect or actively participate in the
13 management of the facility.

14 QUESTION: I think that's helpful, and I don't
15 think the district court did that. It seemed to me that
16 the district court focused on the relation of the parent
17 to the subsidiary, and a corporate veil-piercing type of
18 analysis, and certainly the Sixth Circuit did.

19 MS. SCHIFFER: Well, let me start first with the
20 district court, Justice Kennedy. What the district court
21 did is make very detailed and extensive factual findings
22 that included information about the activities of the
23 parent toward the subsidiary, but was in no way limited to
24 that.

25 For example, there were specific factual

1 findings made about Mr. Williams, who was a -- an employee
2 of the parent company, and the actions he had toward
3 pollution-related activities at the facility that was
4 operated by the subsidiary.

5 The -- it's easy to confuse here, because, in
6 fact, for much of the time at issue the subsidiary
7 companies operated only a single facility. Ott II
8 operated the facility at Muskegon, Michigan. For 3 years
9 it was its only activity. For the remaining 4 years that
10 Ott II was active here it owned one other facility in
11 North Carolina, but all of the evidence the district court
12 looked at went to the facility in Michigan.

13 Similarly, as to the --

14 QUESTION: Ms. Schiffer, is that so? I mean, he
15 did discuss financial control and he discussed many things
16 that gave me the impression the distinction between the
17 parent controlling the subsidiary and the parent
18 controlling the facility of the subsidiary is a
19 distinction much easier said than applied in fact, because
20 much of what the district judge said, it seemed to me,
21 could be fit under the category, this parent is
22 controlling the subsidiary.

23 MS. SCHIFFER: Your Honor, it may be instructive
24 to look at some of the specific findings that the district
25 court made, keeping in mind, again, that for much of the

1 time, or for a substantial part of the time the subsidiary
2 owned only this one facility, so that when we're talking
3 about -- when the district court was talking about
4 activities of the subsidiary it was really talking about
5 activities at this particular facility.

6 But for example, at petitioner's appendix 75a,
7 where there are facts about the activities of Mr.
8 Williams, it talked about Mr. Williams instructed Ott II
9 officials to limit cooperation with State and Federal
10 regulators regarding waste disposal, plainly implicitly at
11 this facility, and to consult with CPC before responding
12 to regulatory questionnaires or other inquiries.

13 There are also a list of the pertinent -- some
14 of the findings that the district --

15 QUESTION: He was an Ott board member though,
16 wasn't he?

17 MS. SCHIFFER: Mr. Williams was not an Ott board
18 member, Your Honor. Mr. Williams was simply an employee
19 of CPC.

20 QUESTION: Okay. Okay. I'm -- I --

21 QUESTION: May I ask if the case would be
22 different if Mr. Williams, in addition to his
23 responsibilities for the parent, had also been on the
24 board of directors of the subsidiary and on the payroll of
25 the subsidiary and an officer of the subsidiary?

1 MS. SCHIFFER: We do not think the case -- it
2 would be a different set of facts, Your Honor, but we do
3 not think the outcome would be particularly different,
4 because we think what is probative and what the standard
5 is is, did the parent company participate in management of
6 the facility, and the activities of Mr. Williams were such
7 that --

8 QUESTION: But you suggested at the outset that
9 there's a distinction between controlling the subsidiary
10 and directly controlling the facility, and if everything
11 that they did to control the facility was done by
12 directing an officer to do what he thought was
13 appropriate, then the officer went ahead and ran the
14 facility, would that meet your test or not?

15 MS. SCHIFFER: It's a very fact-specific test,
16 Your Honor, but it is likely that it would meet it. We
17 can get some helpful guidance from the lender liability
18 provisions of this statute, which were added in 1996 by
19 Congress and which defined participation in management,
20 and what they look at is the particular act -- it is
21 Congress giving content to the concept participation and
22 management in the context of banks or lenders, but they
23 provide helpful guidance for any corporation that is
24 actively participating in management.

25 QUESTION: Were there any other individuals in

1 Williams' position who had no position, nominal or
2 otherwise, either on the board or in the management of the
3 subsidiary, but who were nonetheless directing the
4 subsidiary's own offices and employees?

5 MS. SCHIFFER: I have two responses to that,
6 Justice Souter. The district court made specific findings
7 about something called the CPC Development Company, which
8 was a division of CPC, and while some of the people
9 involved at the CPC Development Company were related to
10 the Ott II facility, the Court indicates that not all of
11 them were.

12 In addition --

13 QUESTION: But were the ones who were not so
14 related independently and directly -- directly giving
15 orders to the subsidiary?

16 MS. SCHIFFER: The district court's findings go
17 to the CPC Development Company as an entity, not -- one I
18 believe can't discern from the facts --

19 QUESTION: So that's not quite on the same plane
20 with Williams. Anyone else like Williams?

21 MS. SCHIFFER: There was no one else singled out
22 particularly, but I would suggest to the court that the
23 district court's findings, which talk about CPC, not -- in
24 a number of instances, not CPC's officers, not CPC's
25 managers, CPC itself, don't -- doesn't -- the Court

1 doesn't directly say that its finding that those officers
2 and managers were acting when they were involved with the
3 Ott facility as in their CPC capacity, but it certainly is
4 the sensible reading and the implicit reading we --

5 QUESTION: Well --

6 QUESTION: What does not that mean? What does
7 that mean, to be acting in your CPC capacity, when you are
8 both an officer of CPC and an officer of the subsidiary of
9 CPC? Is there any difference between the two? The
10 interest of CPC and the interests of the subsidiary are
11 identical.

12 MS. SCHIFFER: If the legal -- the legal
13 standard we're espousing is that it is CPC that is
14 actively managing the facility. If the question is
15 whether the district court's findings that talk about CPC
16 really mean that it is Ott that's taking the actions, in
17 fact the court specifically talks about CPC itself, and we
18 think that, and particularly the facts that are listed at
19 pages 11 and 12 of our opening brief, underscore that it
20 is the parent company that is operating the facility
21 within the meaning of operate.

22 QUESTION: No, but unless we get a situation
23 like Williams, how do we avoid the problem that Justice
24 Ginsburg said that she had in reading the findings?

25 How do we draw some metaphysical line between

1 CPC as the operator and CPC simply getting the benefit of
2 the influence which it undoubtedly has as a parent through
3 the ownership of stock and through the frequently
4 overlapping composition of the officers and directors?
5 How do we draw that line when we don't have kind of an
6 easy Williams example?

7 MS. SCHIFFER: Your Honor, the legal standard
8 is, was the parent company acting at the facility, and the
9 district court findings which talk about CPC managing and
10 controlling and operating at the facility don't give the
11 Court an easy line but they certainly give the Court a
12 base, a basis, with these extensive findings of fact, for
13 determining that it was the parent company that was
14 undertaking the operation.

15 QUESTION: Well, if I may interrupt you, I don't
16 see that it gives me a basis.

17 It seems to me that what it gives me is a
18 conclusion. To say that CPC is doing it, that CPC is
19 operating, when all I can tell beyond that conclusion is
20 that their -- that CPC owns the stock, that there are some
21 directors who sit on each of the two boards, that there
22 may be some officers or some individuals who are officers
23 of each of the two corporations, that leaves me saying,
24 what is peculiar about CPC's operation which
25 differentiates it from the position of any parent of any

1 operating subsidiary, and I don't know the answer to that
2 question here.

3 MS. SCHIFFER: We think that this is not the
4 same as any -- as the typical parent of the typical
5 corporation, because CPC here was undertaking much more
6 active involvement.

7 Under the findings of fact of the district court
8 it was making managerial decisions about waste handling,
9 it was making managerial decisions about a number of other
10 operative aspects of the facility, and that when the
11 district court findings talk about CPC, not CPC's
12 officers, not CPC's directors, though it does that, too,
13 but CPC specifically, it was indicating that the CPC
14 officers, managers, and directors who were active at the
15 Ott facility were there with their CPC hat on, not with
16 the Ott --

17 QUESTION: Well, now do we know they have their
18 CPC hat on by virtue of some unusual resolution of the CPC
19 board that they were executing? For example, do we have
20 any resolutions from the CPC board getting down into the
21 minutiae of operating the subsidiary to a degree that a
22 parent normally would not?

23 MS. SCHIFFER: Your Honor, what we have is very
24 detailed findings of the district court about the day-to-
25 day involvement and the overall managerial involvement of

1 CPC at the Ott II facility.

2 QUESTION: Well, do we have any of the sort that
3 I just asked you about?

4 MS. SCHIFFER: Not that were in the district
5 court findings, Your Honor.

6 QUESTION: Ms Schiffer --

7 QUESTION: May I --

8 QUESTION: -- may I ask you, in view of -- this
9 question has been brewing for some time, and there are
10 diverse statutes where Congress does provide for reaching
11 a parent -- sometimes 80 percent test -- has there been in
12 all this time any proposal, any direct confrontation by
13 the legislature of this question of parent liability for
14 the subsidiary's conduct?

15 MS. SCHIFFER: Not that I'm aware of, Your
16 Honor. When Congress enacted CERCLA in 1980 it enacted a
17 broad statute that defined any person in a broad way
18 certainly to include a parent company if the parent
19 company was actively managing the facility.

20 There has been over the past 5 years a lot of
21 activity in Congress looking at Superfund reauthorization
22 and to my knowledge this issue has not come up.

23 QUESTION: What is magic about the word manage?
24 I mean, if you say that there's some special participation
25 test when the word manage is used, why wouldn't you use

1 the same test if it were a statute that used the word use?
2 Why couldn't you say just as easily that the parent uses
3 the facility or uses some -- or any verb?

4 I don't know what there is distinctive about the
5 verb manage, so that we're going to have a special test
6 for this statute. I worry that whatever test we apply to
7 this statute ought to be applied to any statute.

8 MS. SCHIFFER: Justice Scalia -- and this is --
9 we think that each statute needs to be looked at in its
10 own terms for what it does. Here, Congress used the term
11 operate and operator. The dictionary definitions of those
12 have, for industrial plants have a concept of managerial
13 control.

14 Congress also was helpful in the lender context
15 in using the words, participate in management, which are
16 helpful, but the courts that have looked at this issue
17 have used slightly different verbal formulations. They
18 come down to the same idea, which is --

19 QUESTION: I'm sorry, I used the wrong word.
20 It's operate, which you say is -- includes management, but
21 what's magic about the word operate?

22 MS. SCHIFFER: Operate is the term that Congress
23 used in this statute, and defined to mean operate so
24 that --

25 QUESTION: But we normally think that when a

1 subsidiary is operating something the parent is not
2 operating it, unless, you know, there's veil-piercing.

3 Now, you say that because the word -- the word
4 operate is used here, that there's some special -- we're
5 not supposed to treat it like an ordinary corporate
6 situation. I don't see what that verb -- why that verb
7 has that special meaning.

8 MS. SCHIFFER: We do not think this is a
9 situation where what is the key test is the relationship
10 between the parent and the subsidiary, which is what veil-
11 piercing gets to, but rather what is the relationship of
12 the parent company or any company to the facility, to the
13 activities that are causing the pollution that then is
14 leading to the cleanup, or to the activity of managing the
15 whole facility, even without regard to the pollution, but
16 which leads to the causing of the pollution.

17 What Your Honor is describing is the corporate
18 veil standard which, when it's pierced, is pierced for all
19 purposes, which goes to the relationship between the
20 parent and the subsidiary.

21 What we are looking at is the relationship of
22 the parent company to the site, to the site where the
23 pollution is being caused.

24 QUESTION: May I interrupt with a -- but in
25 doing that you look at specifically what Mr. Arnold Ott

1 did and James Eiszner and some of these others, and you
2 have to sort of say what hat were they wearing at the time
3 they did it.

4 Does the record tell us who paid their salaries
5 when they were doing these things?

6 MS. SCHIFFER: It -- there are not specific
7 factual findings as to that, Your Honor.

8 QUESTION: Do you know if there's evidence in
9 the record on that point?

10 MS. SCHIFFER: The district court findings talk
11 about each of those people and -- who served at the same
12 time --

13 QUESTION: Right.

14 MS. SCHIFFER: -- as both on the parent and on
15 the subsidiary.

16 QUESTION: But the district court doesn't tell
17 us who paid their salaries.

18 MS. SCHIFFER: I don't have a recollection.

19 QUESTION: Do you think that would be relevant?

20 MS. SCHIFFER: I think it would be a factor,
21 Your Honor, but even if the salaries were being paid by
22 the subsidiary, if what the people were doing is acting in
23 their capacity as -- for the parent, and were making
24 managerial decisions at the facility, then it would really
25 be the parent who --

1 QUESTION: Well, supposing -- and with regard to
2 Mr. Williams' case I guess is your strongest case,
3 supposing the record showed that whenever he went down --
4 went over to Muskegon or wherever he went to look at the
5 facility and participate, he was especially put on the
6 payroll of the subsidiary for that period of time, and
7 paid by the subsidiary for the work he did, would that
8 make a difference?

9 MS. SCHIFFER: It would certainly be a factor,
10 Your Honor. In fact, the facts here --

11 QUESTION: But we don't know whether that
12 happened.

13 MS. SCHIFFER: What we know as to Mr. Williams
14 is that he always worked for -- he was an employee of CPC,
15 and there's no indication in the record that he was in the
16 employ of Ott II, the subsidiary.

17 QUESTION: Ms. Schiffer, is it the Government's
18 view that if its view of the law is accepted this Court
19 could simply order the district court judgment affirmed?

20 MS. SCHIFFER: It is our view, Your Honor, that
21 there were extensive factual findings in the district
22 court that under rule 52(a) they were left undisturbed
23 by --

24 QUESTION: That really doesn't answer my
25 question at all. I asked you, is it the view of the

1 Government that if we accept your view of the law, that we
2 could order that the district court's judgment be
3 affirmed?

4 MS. SCHIFFER: Yes, it is, because our view of
5 the law is essentially what the district court applied to
6 its fact-findings.

7 QUESTION: Is it -- suppose -- I don't -- I'm
8 having trouble with the -- you've said two separate
9 things. One is, just look at the relation of the parent
10 to the dump, and the other thing was that the parent would
11 have to take some action not normal to the parent's
12 subsidiary relation. I'm trying to sort those out.

13 Suppose that Mr. and Mrs. Smith and their son,
14 John, run a toxic waste dump, and they have a company
15 called the Smith Family Limited Liability Corporation.
16 They do everything themselves. Nobody else does a thing.
17 They operate it. They're not personally liable, are they?

18 MS. SCHIFFER: Under the standard that we
19 propose, Your Honor, if Mr. or Mrs. Smith -- if Mrs. Smith
20 made active managerial decisions --

21 QUESTION: Look, I said Mr. and Mrs. Smith and
22 their son, John, do everything. They have a shovel. They
23 put the dirt in. They do everything themselves. They are
24 doing it through -- they are paid -- the checks are made
25 out to the Smith Family Limited Liability Corporation.

1 Now, I would think that that is the classic
2 situation of where a group of people form a corporation to
3 limit their liability. That's why we have corporations.

4 Is there any suggestion in what you say that the
5 Smith family is personally liable? Nothing special's
6 going on. It's ordinary.

7 MS. SCHIFFER: Any facility can have more than
8 one operator, Your Honor, and it is our view that if Mr.
9 and Mrs. Smith themselves personally operated the
10 facility, that is, actively participated in the management
11 of the facility, that they would be liable.

12 QUESTION: Isn't the next case exactly that?
13 Wasn't there already a case by this same -- of a sole
14 shareholder corporation?

15 MS. SCHIFFER: There was, Your Honor. Donahey
16 v. Bogle was that case, and the sole shareholder also ran
17 the place.

18 QUESTION: So your view is that if a group of
19 people incorporate themselves and they personally operate
20 the dump, they are personally liable, so in this statute
21 alone -- I've never seen another statute like that --
22 there is no way for a group of operators to form a
23 corporation and thereby exempt themselves from personal
24 liability.

25 I mean, is -- that's the view of the Government?

1 Because I would have thought that if that's the view you
2 would have expected Congress to say something about that
3 rather unusual -- I think it would be unusual.

4 MS. SCHIFFER: Congress did say two things, Your
5 Honor. One is that it defined any person in a broad
6 fashion to include a corporation or to include
7 individuals.

8 It was not looking at the corporate form, but
9 rather at the reality of what was happening, and secondly
10 it began the section 107 liability provision by saying,
11 notwithstanding any other provision of law and subject
12 only to three specified defenses in the statute.

13 QUESTION: Is there any other statute, of which
14 you are aware, where it imposes liability is imposed on
15 some entity -- call it person, individual, whatever -- and
16 without saying it explicitly, the liability flows to
17 individual shareholders, it flows to directors, it flows
18 to the corporate form makes no difference, doesn't limit
19 liability?

20 MS. SCHIFFER: Your Honor, the -- in the -- I'm
21 not particularly aware of any other case, but decisions of
22 this Court under other statutes have looked beyond
23 corporate form to what is actually going on here, and here
24 Congress was particularly concerned that those who were
25 making decisions that caused the pollution would bear the

1 economic responsibility for cleaning it up.

2 QUESTION: Well, Ms. Schiffer, your position on
3 behalf of the Government does propose a very fuzzy sort of
4 line here to do something that is quite contrary to normal
5 investment-backed expectations, and which may not be
6 clearly mandated by the language of the statute.

7 And maybe because of that the Sixth Circuit,
8 whose judgment we're reviewing, said, we give up. We're
9 going to apply normal State veil-piercing doctrine, and
10 unless the veil is pierced so the corporation is a sham,
11 we're going to protect the corporate entity. I guess
12 that's what happened.

13 MS. SCHIFFER: The Sixth Circuit really looked
14 at the concept of derivative liability. That is, when is
15 the parent company responsible for actions of the sub.

16 What Congress did in the Superfund law is look
17 at the direct liability of the parent, which is really
18 consistent with --

19 QUESTION: Well, I know that's what you're
20 saying, but it gets us back to that same question of how
21 you draw the line and whether the statute is, indeed, that
22 clear.

23 MS. SCHIFFER: Your Honor, we think that operate
24 is, indeed, defined in a circular way, and we looked at
25 the dictionary, but we think the Court can get some good

1 guidance from the lender liability provisions adopted in
2 the lender context, but which spell out a set of standards
3 for how much activity and operation is necessary to meet
4 the standard.

5 QUESTION: And under that definition, and under
6 what I think is your answer to Justice Breyer, and I want
7 to be very clear about this, it would be very rare that a
8 corporation would be solely liable and not have some of
9 its principal managers, operators, officers, also liable,
10 is that not right?

11 MS. SCHIFFER: It would not be -- it would be
12 very rare, Your Honor, because the ordinary corporation
13 which is acting in a supervisory capacity through a
14 subsidiary and not with active management would not be
15 liable --

16 QUESTION: No, forget parent and subsidiary.
17 It's very unusual for a corporation to commit a tort by
18 itself without some human actor.

19 MS. SCHIFFER: Yes, and --

20 QUESTION: And the human actor is a co-
21 tortfeasor, and I take it your answer to Justice Breyer
22 was that by using the word, any person, in 9607(b), that
23 the Congress would make all of the people in his
24 hypothetical that were actively participating in the waste
25 disposal personally liable.

1 MS. SCHIFFER: We believe that that is correct,
2 Your Honor.

3 QUESTION: And even if they hire somebody? I
4 mean, let's say the largest corporation in the world
5 decided to operate toxic waste dumps, hires four people
6 from the assembly line at a company and says, you go out
7 and you pull the switches, and what they do is, they pay
8 them \$42 an hour or something, and they go out there and
9 pull switches, and those people, those individuals, those
10 workers they just hired, assuming that they, you know,
11 turn the shovels and so forth, in your view, they're
12 liable, too?

13 MS. SCHIFFER: We do not think they are liable,
14 Your Honor.

15 QUESTION: Oh, well, why not?

16 MS. SCHIFFER: Because the concept is
17 participation in management, and --

18 QUESTION: No, no, but what they do is -- yes,
19 they --

20 MS. SCHIFFER: -- not in management.

21 QUESTION: It says owner or operator. Certainly
22 Justice Breyer's people are operating the thing.

23 QUESTION: I'm trying to assume facts that they
24 are, you know.

25 I'm trying to assume facts such that these are

1 the people -- they're fairly low-level supervisors, and so
2 forth, but it's a small dump, and what they do is, they
3 turn shovels, they make all the decisions there, they
4 decide what to bury, what not to bury, they dig -- you
5 understand what I'm driving at.

6 MS. SCHIFFER: Right.

7 QUESTION: I'm saying, in the Government's view,
8 is that kind of person who's, let's say, a fourth tier
9 employee of the big corporation, also personally liable?

10 MS. SCHIFFER: If it was a small facility and
11 they were the managers, they would be liable. If they're
12 the fourth tier employees and not the managers, they would
13 not be.

14 I'd like to reserve the remainder --

15 QUESTION: May I ask you one question, though,
16 before you sit down?

17 I take it that you could maintain your position
18 in this case simply by saying, I will -- the Government
19 assumes that Congress meant to respect corporate forms,
20 that Congress did not mean to look behind every corporate
21 structure whenever an employee of the corporation performs
22 a duty, and still maintain your position.

23 For example, what I'm thinking of is, if CPC
24 passed a resolution, or if its president said to Williams,
25 consistently with the corporate resolution, Williams, go

1 down there and make sure that they dump the waste in the
2 sand immediately, you don't have to say that Williams is
3 liable under those circumstances in order to get CPC
4 liability as well as the subsidiary liability, do you?
5 You could respect the corporate form and still, in effect,
6 get your -- the result that you think is proper in this
7 case?

8 MS. SCHIFFER: That's exactly correct, Your
9 Honor, and we think that our theory is consistent with
10 respecting the corporate form because it looks at what is
11 the corporation doing for its own activities.

12 QUESTION: Right, but I thought in answer to
13 Justice Breyer's question you were getting to the point
14 where -- of saying that whenever the employee of a
15 corporation does the act which forms a part of the
16 operation, that the employee is an operator and therefore
17 liable regardless of whether the employee is acting as a
18 maverick in relation to his corporate organization or
19 whether he is doing exactly what his corporate
20 organization told him to do, and now I think you're saying
21 you're maybe not going that far.

22 MS. SCHIFFER: The test is participation in
23 management.

24 If there is a maverick employee who midnight-
25 dumps in the back 40, we would look at the activities of

1 that particular person, but if the people are working for
2 the corporation, following the orders of management, then
3 we -- it is the management and not the individual
4 employees who would be liable.

5 QUESTION: So --

6 QUESTION: So I think that you were saying that
7 in any close corporation there would be shareholder
8 liability.

9 MS. SCHIFFER: In fact, what the cases that look
10 at shareholder liability really are taking people who are
11 shareholders and chief executive officers and really are
12 the active managers.

13 QUESTION: I'm referring to a family
14 corporation, the kind Justice Breyer described, a one-
15 person corporation, a closed corporation, very small
16 group, where they're all involved in running the business.
17 In all those cases your theory is, you would reach the
18 people who are operating, the participants in those close
19 corporations.

20 MS. SCHIFFER: We think that is what Congress
21 intended by its definition of the term, operator, to
22 assure that those who are responsible for the pollution
23 are responsible for cleaning it up, Your Honor.

24 QUESTION: Thank you, Ms. Schiffer.

25 Mr. Geller, we'll hear from you.

1 ORAL ARGUMENT OF KENNETH S. GELLER

2 ON BEHALF OF THE RESPONDENTS

3 MR. GELLER: Thank you, Mr. Chief Justice, and
4 may it please the Court:

5 Under CERCLA, a past or present owner or
6 operator of a hazardous waste facility is liable for
7 cleanup costs paid by the Government. The question in
8 this case is whether a parent corporation becomes an
9 operator under CERCLA simply by participating in and
10 exerting some unspecified degree of control over the
11 affairs of a subsidiary that operates such a facility.

12 The answer to that question, in our view, turns
13 entirely on whether Congress meant to sweep away
14 traditional common law principles of limited shareholder
15 liability merely by using the word operator in CERCLA.

16 We believe that the Government's theory of
17 parent company liability is unsupportable for a number of
18 reasons. The most obvious reason is that is plainly
19 inconsistent with the language of the statute itself.
20 CERCLA imposes liability on persons that operate a
21 facility. That is, a place where hazardous substances are
22 deposited. It doesn't impose liability, as the Government
23 would have it, on persons that control separate entities
24 that in turn operate that facility.

25 QUESTION: But the Government told us very

1 clearly that that is not the way it would have it. It
2 says the parent must operate the facility, not the sub.

3 MR. GELLER: Yes.

4 QUESTION: And then I asked, well, how do we --

5 MR. GELLER: Justice Ginsburg, there's a lot of
6 historical revisionism going on here today. The
7 Government's position from the moment this case was
8 brought was that all it had to show was that CPC
9 controlled the affairs of its subsidiary. It never took
10 the position that it had to prove that CPC actually
11 operated the Muskegon facility based on --

12 QUESTION: Well, I think the district court's
13 findings have that same flaw.

14 MR. GELLER: They absolutely do, Justice
15 Kennedy.

16 QUESTION: However -- however, in determining
17 what the test is, it seems to me that if this corporation,
18 whether it's a parent, whether it's a partner, where it's
19 just as a lease, is simply a co-tortfeasor in the
20 management of the company. It seems to me the facts of
21 the record could support that --

22 MR. GELLER: I don't believe so.

23 QUESTION: Could support that test if we send it
24 back. I think we'd probably have to remand.

25 MR. GELLER: I don't believe it could, Justice

1 Kennedy. Corporations can only act through their
2 employees, obviously. In order to show that CPC operated
3 this facility, you have to show that some employee of CPC
4 did something that could be construed as operating this
5 facility.

6 QUESTION: Granted.

7 MR. GELLER: Now --

8 QUESTION: And if we can just stick with Justice
9 Breyer's hypothetical a minute, because that's where we
10 ended the argument --

11 MR. GELLER: Yes.

12 QUESTION: -- would you agree that if three
13 people were all actively involved in managing a facility,
14 that they would all be operators?

15 MR. GELLER: Yes.

16 QUESTION: All right.

17 MR. GELLER: Yes, but the point in this case,
18 Your Honor, is --

19 QUESTION: Excuse me. The shareholders? You
20 would --

21 MR. GELLER: If the shareholders were actually
22 operating the facility.

23 QUESTION: As officers of their corporation?

24 MR. GELLER: No. No. No, if they were actually
25 personally involved in operating, they may well be

1 operators. That's not what we have here. We simply have
2 a shareholder here that did nothing that could be
3 construed as operating the facility.

4 All of the employees of CPC --

5 QUESTION: Let me be sure I understand your
6 position, Mr. Geller. You take Justice Breyer's
7 hypothetical and say yes, Mr. and Mrs. Smith and their son
8 would be liable, if I understand your --

9 MR. GELLER: If they were actually physically
10 engaged in operating the facility, they would fall within
11 the statute, I would think, but that's not --

12 QUESTION: So that any employee of a corporation
13 with a facility can be liable?

14 MR. GELLER: If someone satisfies the definition
15 of operator, they're liable under the --

16 QUESTION: If I go to work for \$40 a week and
17 they tell me to dump the waste in the sand, I am liable
18 under the statute? Do you concede that?

19 MR. GELLER: Technically if you're a person, if
20 you're operating the facility you would be liable.

21 QUESTION: So that the corporate --

22 MR. GELLER: There may well be -- you know,
23 the --

24 QUESTION: I'm not operating it on my own
25 behalf. I'm operating it as an agent of someone else.

1 MR. GELLER: And under --

2 QUESTION: Does it make any difference?

3 MR. GELLER: -- respondeat superior principles
4 the corporation would be liable as well and this issue
5 we're debating now would not be relevant.

6 But I want to make -- bring us back to this
7 case --

8 QUESTION: Well, why wouldn't it be relevant? I
9 mean, they can sue both of us. They can sue my superior
10 and -- you know, the company and --

11 MR. GELLER: That's -- that's -- we're not here
12 to argue that the employee would be liable in that
13 situation. You'd have to know the facts of that case.
14 The facts of this case show that no CPC employee did
15 anything that could be construed as operating this
16 facility. All of the --

17 QUESTION: But what about Williams? That seems
18 to be the toughest case.

19 MR. GELLER: Williams is the only person that
20 they have identified as an employee of CPC and nothing
21 that Williams did can be construed as operating this
22 facility. He attended a single meeting. He gave some
23 advice which was not followed. That was the extent of
24 Williams' involvement in this case.

25 When you look at the list of factors that the

1 district court identified as to why it concluded that CPC
2 was an operator here, Williams is far down the list. What
3 the district court principally referred to was the fact
4 that CPC owned 100 percent of the stock here. There were
5 some dual officers and directors. The fact is, there is
6 no employee of CPC that did anything here that could be
7 construed as operating the facility.

8 QUESTION: Well, what did Williams do in
9 particular? I'm concerned in particular.

10 MR. GELLER: He --

11 QUESTION: Even if we eliminate all the rest,
12 should we send it back to the district court --

13 MR. GELLER: No, I --

14 QUESTION: -- and tell the district court, you
15 know, is -- was Williams, what Williams did enough?

16 MR. GELLER: If the -- Justice Scalia, if the
17 Sixth Circuit adopted the right legal standard, which we
18 conclude it did, there's no reason to send it back because
19 the Sixth Circuit looked at all the evidence in this case,
20 including Williams, and concluded that none of that
21 amounted to operating a facility on the part of CPC.

22 But I'd like to return the Court, if it would,
23 because there's a lot -- been a lot of --

24 QUESTION: Mr. Geller, before we get off
25 Mr. Williams, what you said is, well, he was just sort of

1 a peripheral character, but at least one of these briefs
2 told us that the sub didn't even fill out a questionnaire
3 without consulting him, because he was responsible for the
4 environmental affairs of the corporate unit, that is, both
5 parent and sub.

6 MR. GELLER: Justice Ginsburg, that is
7 completely untrue. Williams was a lawyer-lobbyist who
8 worked for CPC who attended a single meeting, would
9 occasionally give advice to Ott II, which was frequently
10 ignored.

11 But as I say, all of this was before the Sixth
12 Circuit, which concluded that none of this amounted to
13 direct operation of the facility by CPC.

14 QUESTION: Well, where did Williams live? I'd
15 like to get something concrete here.

16 MR. GELLER: Williams lived --

17 QUESTION: Did he live in Muskegon?

18 MR. GELLER: No. No, he didn't. None of the --
19 none of the C -- none of the people whose activities here
20 were attributable to CPC, none of the dual employees lived
21 at the Muskegon site.

22 QUESTION: Where did they live?

23 MR. GELLER: They all lived in New Jersey, where
24 CPC had its corporate headquarters. None of them was --

25 QUESTION: Even Mr. Ott? Was Mr Ott --

1 MR. GELLER: Mr. Ott -- the two corporate
2 officers who had dual -- who wore the two hats, Ott and
3 Eiszner, who had been employees of Ott I when it was taken
4 over by CPC, shared their time between Muskegon and New
5 Jersey, spent most of their time at CPC --

6 QUESTION: It would be better for your case if
7 the dual employees lived in Muskegon. What's better for
8 your case is if the sole employee, such as Williams, lived
9 in New Jersey. That helps you.

10 But the fact that the dual employees were at
11 CPC's headquarters --

12 MR. GELLER: It doesn't matter where they lived.
13 The question is, when these dual employees took actions on
14 behalf of Ott II, is it appropriate to attribute those
15 actions to the parent CPC, and the common law rule is
16 clearly no.

17 QUESTION: But do you agree the record doesn't
18 tell us who paid their salary when they were working?
19 Supposing they were paid entirely by the parent for
20 everything they did, would that make a difference?

21 MR. GELLER: If they were employee -- if they
22 were acting -- if they were dual employees, it seems to
23 me, Justice Stevens, it doesn't matter who paid their
24 salaries. The question is, in what capacity were they
25 acting, and if they were acting in their capacity as

1 Ott II employees it is inappropriate -- inappropriate --

2 QUESTION: Do you think he'd be acting in his
3 capacity as an Ott II employee if all his money came from
4 the parent?

5 MR. GELLER: Well, the record doesn't reflect,
6 of course, and it's --

7 QUESTION: Strange.

8 MR. GELLER: -- silly to speculate. The
9 question is, who is responsible for the activities of
10 these dual employees, and the common law answers that
11 question quite clearly. What the Government is asking for
12 here is a new Federal common law rule to attribute all of
13 that activity to the parent, and there's absolutely no
14 basis --

15 QUESTION: Well, no, they just say you've got to
16 attribute some of it to the parent. If you attribute some
17 of it to the parent, it's -- you know, maybe half-time
18 he's an operator and half-time he's the general --

19 MR. GELLER: The Government has never made that
20 case. What they suggest is simply because CPC controlled
21 and participated in the activities of its --

22 QUESTION: Well, the district court did
23 emphasize that a lot, I agree with you, but I'm not sure
24 they confined it to the corporate control.

25 MR. GELLER: Well, I would like if I could to

1 turn the court's attention to the district court's fact-
2 findings, because it seems to me they are fairly
3 significant in this case, and quite contrary to what the
4 Government suggests here.

5 QUESTION: Mr. Geller, may I ask for a
6 clarification before you do that, and that -- you said the
7 Sixth Circuit took care of Williams. They made him a
8 minor player and that's that.

9 But I took it that the big difference between
10 the district court and the Sixth Circuit was, what is the
11 source of law that we look to, because if it's State law
12 veil-piercing, then it takes a sham, a fraud to go
13 through, but if you -- on the district judge's view and on
14 the Government's view it's not State law, it's Federal
15 common law. They called it, what, a middle ground or
16 something, but not the traditional State veil-piercing.
17 Some uniform Federal notion that the Federal courts will
18 develop of a parent liability.

19 MR. GELLER: That's correct, Justice Stevens.
20 The district court adopted this new middle ground of
21 liability, which is something in between direct liability
22 and State common law veil-piercing, and the question in
23 this case, the question for this Court is, is there
24 anything in CERCLA that could be read on the part of
25 Congress to want to have a new rule for attributing the

1 liability of the subsidiary to the parent where the
2 Congress --

3 QUESTION: Well, but the Government -- the
4 Government says that's not its theory now, at least. The
5 Government says you have to define the term operate, owner
6 and operate. These people were actively engaged in
7 management and participating. Therefore, they're
8 operators.

9 Now, maybe that's right, maybe that's wrong, but
10 it seems to me that the test the Government suggests is
11 correct.

12 MR. GELLER: The test is whether the parent can
13 be said to be operating. The only way a corporation can
14 be operating, Justice Kennedy, is through its employees,
15 and therefore, in order to meet the Government's test you
16 have to show that some employee of CPC did anything that
17 constitutes operating here.

18 QUESTION: The word she used there was not
19 normal. She said -- Ms. Schiffer said, well, look at
20 this, and if you see something happening here in respect
21 to operation that is not normally present where you have a
22 simple parent-subsidary relationship -- let's say the
23 parent is significantly more active in operating than a
24 company that was the classic parent subsidiary
25 relationship.

1 Where that occurs, then you could say, without
2 getting into all the problems you're talking about, that
3 the parent has operated it, and then you look at the
4 record here and they seem to have some things that would
5 go beyond what would be normal. That's what I took
6 partly, that -- I heard her say the word normal, and I've
7 extrapolated on that a little.

8 MR. GELLER: Well, there was a -- if I could
9 just finish the answer to Justice Kennedy's question, if I
10 could, you have to find that some employee of CPC was doing
11 something here that could be considered operating before
12 you could conclude that CPC itself -- there was no
13 evidence here.

14 The only evidence that the district court
15 relied on was the dual officers, that Ott and Eiszner
16 worked both for CPC and for Ott II. If you -- now, the
17 question is, how can you attribute what Ott and Eiszner
18 did in their role as Ott II employees and officers to CPC
19 in a way that makes CPC the operator?

20 The normal common law rule would not allow you
21 to do that, and therefore the only question really is, did
22 Congress, in enacting CERCLA, intend to have a different
23 attribution rule?

24 Is there any evidence in the statute itself that
25 Congress intended to eliminate or supplant the normal

1 common law rule of limited shareholder liability and
2 create some amorphous, undefined test that suggests that
3 if the parent takes an active role in controlling its
4 subsidiary, which all parents of wholly-owned subsidiaries
5 do, then there's going to be liability on the part of the
6 parent, and our submission is --

7 QUESTION: Well, do you say that dual officers,
8 people who are officers in both parent and subsidiary
9 corporation, is not a relevant fact at all to be
10 considered?

11 MR. GELLER: Under the common law, it would be a
12 typical situation and not a relevant fact to consider in
13 veil-piercing. You'd have to show something far more than
14 simply that they were dual officers.

15 Several of the amicus briefs filed in this Court
16 have cited numerous authorities to the Court, including
17 this Court's own cases, that suggest that it's the typical
18 situation, particularly in a case of a wholly-owned
19 subsidiary, to have some dual officers, and in fact you
20 had fewer here than you had in the normal case. Remember,
21 this was Ott --

22 QUESTION: Well, do you say, Mr. Geller, that
23 it's only if you can pierce the veil that you can impose
24 liability on the parent?

25 MR. GELLER: We agree that there are two ways,

1 as the Sixth Circuit said, to show that the parent is
2 liable under CERCLA. First, if the parent itself, through
3 its own officers, has done something that could constitute
4 operating, the parent is liable.

5 If, for example, at this facility CPC had been
6 using the facility as part of its foreign business, or had
7 in some way directed the disposal of the hazardous waste,
8 it would be liable as an operator. Secondly, there's
9 vicarious liability. CPC as the parent could be liable if
10 you could pierce the corporate veil. The Government --

11 QUESTION: Well, what if CPC sends a memo to the
12 people at Ott and says, look, we know the pollution
13 inspectors are coming around on Friday, so dump this stuff
14 on Saturday, not Thursday, and nobody ever goes to
15 Muskegon to do it themselves. They simply send that memo
16 to the subsidiary.

17 MR. GELLER: If -- in that sort of situation, if
18 you have direct parental involvement in something that
19 might constitute operating the facility, there may well be
20 liability.

21 There isn't a stitch of evidence in this
22 particular case that any sort of -- any of that sort of
23 thing happened.

24 Remember, Ott I was a functioning business here
25 before CPC came into the picture. When CPC bought Ott I

1 and it became Ott II, basically the same officers were
2 left in place, Ott and Eiszner. Ott and Eiszner were then
3 given additional responsibilities at the parent CPC, but
4 this isn't the case in which CPC suddenly took over and
5 implanted its own officers throughout the subsidiary's
6 corporate structure.

7 QUESTION: But that wouldn't matter in your
8 view, anyway.

9 MR. GELLER: It wouldn't matter, Justice Scalia,
10 except atmospherically. This is hardly a case of an
11 atypical parent-subsidary relationship. In fact, the
12 evidence here suggests more of a hands-off relationship
13 and while I'm not going to take the time now to read any
14 of this, I would refer the Court to the findings of the
15 district court at pages 67 and 69a of the appendix to the
16 petition, where the district court makes thorough findings
17 that this was a facility that was completely operated by
18 Ott II's officers and management.

19 There isn't any suggestion that any employee of
20 CPC had anything to do with the management of this
21 facility. It's purely a vicarious liability theory that
22 the Government from day one in this case has tried to --
23 has argued for in order to impose liability on CPC.

24 And therefore the question is, did Congress mean
25 to impose a completely different rule of vicarious

1 liability here beyond that what the common law for 100
2 years has required in order to have a shareholder be
3 liable for the operations of this corporation, and we
4 suggest that there are lots of indications that Congress
5 never had that intention in CERCLA.

6 To begin with, this Court has many times said
7 that in order for Congress to supplant a common law rule,
8 particularly a rule as ingrained as the --

9 QUESTION: May I ask a question, Mr. Geller,
10 before I forget it? There is the special provisions about
11 lender liability.

12 MR. GELLER: Yes.

13 QUESTION: Where -- which are a departure from
14 normal rules.

15 If the parent's participation fit into the fact
16 pattern that would have made a lender liable, would the
17 parent then be liable as an operator?

18 MR. GELLER: I don't think so, Your Honor,
19 because it seems to me that participating in the
20 management facility is not the same thing as operating the
21 facility. To begin with, this is --

22 QUESTION: So that what your -- I just want to
23 be sure I understand your position. So it is -- a lender
24 has a greater exposure than a parent.

25 MR. GELLER: Because a lender is already --

1 first of all, not every lender is liable.

2 QUESTION: No, I understand that, but --

3 MR. GELLER: Only a lender that has indicia --

4 QUESTION: But I want to be sure that I get in
5 my -- sort it out for myself.

6 MR. GELLER: Yes.

7 QUESTION: The facts that would make a lender
8 liable, in your view, would not be sufficient to make a
9 parent liable.

10 MR. GELLER: They may or may not. The lender --
11 the lender may be participating in the management of a
12 facility to such an extent that it has become an operator,
13 but --

14 QUESTION: No, but I thought the object of the
15 particular lender provision was directed at owning rather
16 than operating.

17 MR. GELLER: Absolutely, Justice Souter. That
18 was the point I was going to make with Justice Stevens.
19 It's an exception to owner liability. It has nothing at
20 all to do --

21 QUESTION: Well, that's not what the statute
22 says. The statute, which is at 2a of the Government's
23 brief in the middle of the page, says the term owner or
24 operator does not include a person that is a lender that
25 did not participate --

1 MR. GELLER: Yes, but --

2 QUESTION: -- in the management of a vessel.

3 MR. GELLER: Justice Kennedy, if you look -- the
4 only reason this is in here is because if you look at the
5 bottom of that, holds indicia of ownership -- in other
6 words --

7 QUESTION: Whereabouts on 2a are you reading?

8 MR. GELLER: I'm on -- well, actually, I'm on 1a
9 of the appendix to the Government's brief, where the --
10 9601 is reprinted, and (20)(A), if you look at the last
11 sentence in that paragraph, such term does not include, if
12 you see that, such term does not include a person who
13 holds indicia of ownership primarily to protect a security
14 interest.

15 In other words, these are people who would have
16 been considered owners because they had indicia of
17 ownership primarily to protect their security interest.

18 QUESTION: Yes, but the such term is owner or
19 operator.

20 MR. GELLER: Well, that may be. I'm not sure it
21 changes anything, Justice Kennedy.

22 In fact, if you look at the derivation of this,
23 this came into a House bill, H.R. 85, that only defined
24 owner, and this was an exception to owner liability. When
25 the bills were combined it was put in this way, but it's

1 clear that what Congress was talking about here are people
2 who hold security interests in States that would make them
3 owners.

4 QUESTION: Well, but it seems to me, as Justice
5 Stevens indicates, that if management participation, which
6 is what the Congress is interested in, is management
7 participation, who's doing this, if that suffices to hold
8 a lender liable, surely it should hold a corporate -- an
9 affiliated corporation liable.

10 MR. GELLER: For several reasons not so, Justice
11 Kennedy. First of all, it's not participation in the
12 management of a subsidiary. It's participation in
13 management of a facility.

14 QUESTION: I agree.

15 MR. GELLER: And I don't -- CPC would not
16 satisfy that definition here, because it did not
17 participate -- no one played --

18 QUESTION: Well, but we're talking about the
19 test.

20 MR. GELLER: I understand.

21 QUESTION: If a parent participated in
22 management, as defined in this section that is applicable
23 to lenders, would that parent, by reason of that
24 participation in management, be an operator?

25 MR. GELLER: It would -- no. They would not be

1 liable as operators, Justice Kennedy. They would not
2 satisfy the exemption from liability as owners. That's
3 the point. This is an exemption from -- these are people
4 who would otherwise be liable as owners, and Congress --

5 QUESTION: But Mr. Geller, on 2a, sub -- (E)(i),
6 it's exclusions of lenders not participant in management,
7 (i) indicia of ownership to protect security, the term
8 owner or operator does not include a person that is a
9 lender without -- blah, blah, blah.

10 MR. GELLER: I understand that, Justice Stevens,
11 but it's only because of the indicia of ownership that
12 this matters. These are people who would be liable as
13 owners.

14 QUESTION: Right. Regardless -- if -- but in
15 any event, do you think that if a lender, say the Chase
16 Bank, or some large lending institution, did exactly what
17 the parent did in this case, sent Williams out to tell
18 them not to open that one facility and so forth and so on,
19 do you think they would be liable as a lender or not?

20 MR. GELLER: No. No. Not so, Justice Stevens.
21 I don't think they would satisfy the definition of who are
22 participating in management of this facility.

23 QUESTION: But your submission is that even if
24 they might, the parent would not?

25 MR. GELLER: The parent would not be liable in

1 that situation.

2 QUESTION: Even if the lender would be under
3 the --

4 MR. GELLER: Yes, because this is a --
5 participating in the management is not the same -- as EPA
6 has conceded, participating in the management is not the
7 same thing as operating. This is an exemption that
8 applies to owner liability. It has no relevance here.

9 QUESTION: It would be a meaningless exception
10 to the exemption --

11 MR. GELLER: That's exactly right, Justice
12 Scalia.

13 QUESTION: -- if participating in management
14 were the same as operating --

15 MR. GELLER: Absolutely.

16 QUESTION: -- because then you wouldn't have to
17 get them as an owner.

18 MR. GELLER: Absolutely.

19 QUESTION: You could get them as an operator.

20 MR. GELLER: Absolutely, Justice Scalia. It
21 wouldn't make any sense to say that the only way you can
22 satisfy the exemption from owner liability is to show that
23 you're not an operator, because if you are an operator you
24 wouldn't need the exemption from owner -- you're
25 absolutely right.

1 QUESTION: You wouldn't need it. It wouldn't do
2 you any good.

3 MR. GELLER: It wouldn't do you any good. You'd
4 be liable in exactly the same way under CERCLA.

5 I want to just continue this point that there's
6 no evidence here that Congress mean to change the common
7 law rule. To begin with, this Court has said that
8 Congress will not be taken to change common law rules,
9 particularly ones as ingrained as limited liability for
10 shareholders, without clear evidence that it intended to
11 do so. There is absolutely no clear evidence here.

12 In fact, in this statute there is another
13 provision of this statute in which Congress did import a
14 control test. When you're dealing with abandoned
15 facilities, Congress provided that people are liable not
16 only if they owned or operated the facility, but also if
17 they otherwise controlled the facility, so Congress
18 clearly knew how to import the concept of control when it
19 wanted to do so, but it didn't do so in this case.

20 QUESTION: But Mr. Geller, the Government told
21 us that that was meant to deal with facilities that had
22 long ceased operating, that that was otherwise controlled.
23 You stopped any operations at the place but you have
24 security guards or whatever you have. That was the
25 picture that I got.

1 MR. GELLER: That's what they say. There's
2 certainly nothing in the legislative history or anywhere
3 else to support that, but even if that were true, in their
4 view operating includes the concept of control, and
5 therefore there would still have been no reason for
6 Congress to have put otherwise controlled in there.

7 Congress could have said, whoever was operating
8 the facility immediately before it was abandoned, but
9 Congress didn't do that. They said, owned, operated, or
10 controlled the facility immediately before it was
11 abandoned, so this clearly shows that operator requires
12 something different than mere control.

13 In addition, as you said, pointed out, Justice
14 Ginsburg, there are many other statutes, many other
15 statutes, including important statutes like ERISA and the
16 Fair Labor Standards Act, the Securities Exchange Act,
17 where Congress has imposed liability on people who control
18 violators.

19 In other words, corporations are liable, as are
20 their parents, in those situations. Congress specifically
21 did not do that in this particular statute. And it would
22 be inappropriate, we think, for the Court to read that in
23 there when Congress has not chosen to put it in.

24 QUESTION: Mr. Geller, could I call you back to
25 Mr. Williams again and ask you to address the findings of

1 the district court concerning Williams? They're set forth
2 on 75a of the joint appendix, and the -- the district
3 court finds that he exerted control over a variety of Ott
4 II environmental matters.

5 MR. GELLER: Well --

6 QUESTION: Where are you reading from?

7 QUESTION: 75a in the middle of the page.

8 MR. GELLER: There is no -- if I could say,
9 Justice Scalia, there's no evidence to support that
10 finding. The district court doesn't cite any evidence.

11 QUESTION: Well, it goes on to give what I take
12 are -- its -- what it believed constituted exerting
13 control.

14 In a meeting with the Water Resources
15 Commission, Williams participated in discussions which, as
16 a result of his influence, did not include presentation by
17 Ott II. I guess influence wouldn't be the same as
18 directing, would it?

19 MR. GELLER: Right. In fact, I think all these
20 fact-findings are not supported by the record, but even if
21 they were taken as true, and I would refer the Court to
22 our reply brief and our supplemental brief for why they're
23 not true, I don't think that would rise to the level --

24 QUESTION: What about the next one?

25 MR. GELLER: -- operating this facility,

1 operating --

2 QUESTION: Operating -- but the next one said,
3 he instructed them regarding various responses to State
4 and Federal --

5 MR. GELLER: There was a -- they were
6 negotiating --

7 QUESTION: You say that's not operating?

8 MR. GELLER: That's not operating this facility.
9 There were negotiations going on at the time with the
10 Michigan Water Resources Commission as to use of the water
11 facility, the county water facility, and Williams attended
12 one of a dozen of those meetings. He made some
13 recommendations, most of which were not accepted. This is
14 all, I think, in our reply brief.

15 None of this, even if true, I think would amount
16 to operating the Muskegon facility, which is what's
17 relevant here.

18 QUESTION: If we have a 4,000-page record on
19 this, is it perhaps -- if they've made the findings not
20 supported, we should send it back under a correct
21 standard, and is that correct --.

22 MR. GELLER: I --

23 QUESTION: -- standard, in your view, the
24 standard that if a parent operates simply as a
25 shareholder -- a shareholder, which includes appointing

1 directors and doing those things that 100-percent
2 shareholders often do, that that is not sufficient for
3 liability, but if it goes beyond what shareholders
4 normally do in the direction of making operational
5 decisions, then it is liable, so we would look to what is
6 normal in a relationship between parent and sub, a 100-
7 percent shareholder.

8 I mean, I'm looking for a way of stating the
9 correct standard. The Sixth Circuit itself thought that a
10 parent could go beyond what is normal --

11 MR. GELLER: What the Sixth Circuit said was
12 that the -- that the parent --

13 QUESTION: It said about joint venture, but I
14 mean, that --

15 MR. GELLER: No. What was --

16 QUESTION: -- doesn't really capture it very
17 well.

18 MR. GELLER: This is at 17 and 18 of the
19 joint -- of the appendix to the petition, Justice Breyer.
20 What the -- it said a parent could be liable if it
21 directly operated the facility. It didn't say -- have
22 anything to do with --

23 QUESTION: All right, then we use the word -- is
24 the word -- is --

25 MR. GELLER: -- the influence that the parent

1 had over the subsidiary, which is what you're talking
2 about now, I believe.

3 QUESTION: I'm looking for the best way to state
4 what I think you might agree and everyone might agree that
5 it's certainly possible for a parent to go out and begin
6 to operate the facility irrespective of whether the
7 subsidiary does as well.

8 MR. GELLER: If employees --

9 QUESTION: All right. So what's the word --
10 yes.

11 MR. GELLER: If employees of the parent are
12 directly involved in operating the facility, in other
13 words, engaged in the day-to-day running of the facility,
14 involved in the dumping of the hazardous waste of the
15 facility --

16 QUESTION: What about making managerial
17 decisions that determine how those operations will take
18 place?

19 MR. GELLER: If you could show that the parent,
20 as opposed to dual officers, which is what we have in this
21 case, if you could show that the parent was making all of
22 the decisions for the subsidiary --

23 QUESTION: Why all?

24 MR. GELLER: Or decisions related to the
25 facility --

1 QUESTION: How about actually participated in
2 the management or operational affairs of the facility?

3 QUESTION: Yes.

4 MR. GELLER: If you could show that the parent
5 was actually doing that, but there's no evidence the
6 parent was doing that in this case.

7 All of the evidence that would support that sort
8 of a conclusion in this case, Justice Kennedy, has to do
9 with Ott and Eiszner, who were dual officers. There was
10 no -- I say this again because it's so significant. There
11 was no employee of CPC -- of CPC, as opposed to these dual
12 officers, whose actions cannot be attributed to CPC.
13 There was no employee of CPC that did anything in this
14 case that could be construed as operating this facility.

15 That's what the Sixth Circuit held. We think
16 the Sixth Circuit adopted the correct legal standard, and
17 we think that it reviewed the record in this case and
18 correctly came to the conclusion that there was no
19 operator liability.

20 Now, I just want to conclude by saying that
21 although the Government tries to sugar-coat its position,
22 if the evidence here is sufficient to find the parent
23 liable under a Federal veil-piercing theory, and it's hard
24 to imagine any parent of a wholly owned subsidiary that
25 wouldn't be liable for its subsidiary's acts under CERCLA

1 by virtue of the Government's two-step theory, it would
2 be -- this would be an astounding extension of CERCLA
3 liability.

4 Parents would never know when they have
5 overstepped what the Government thinks is an appropriate
6 investor relationship, as they say, and instead have left
7 themselves open for millions of dollars of unexpected
8 CERCLA liability.

9 It's an amorphous and unworkable test, and it's
10 contrary to the common law test that's been around for 100
11 years. There's no evidence that Congress intended to
12 supplant that common law test with this new middle ground
13 that the district court has adopted here.

14 QUESTION: Mr. Geller, let me just -- I don't
15 mean to be beating a dead horse here, but I do want to be
16 sure I understand completely your thought on this.

17 Supposing we went through this series of
18 reasoning and said, we've got to decide what an operator
19 is. You might say an operator is a person who
20 participates actively in management. That might be a
21 test. And then you'd say, well, what does participate in
22 management mean?

23 What would be wrong with saying, we look at the
24 definition of participation in management that Congress
25 provided us for determining when lenders become owners or

1 operators? What would be wrong with that approach?

2 MR. GELLER: Well --

3 QUESTION: It just occurred to me, and I should
4 have thought of it before, but --

5 MR. GELLER: It -- I think it would be wrong
6 because it equates participating in management with
7 operation.

8 QUESTION: And you don't -- you think
9 participating in management is not --

10 MR. GELLER: I think it's a different --

11 QUESTION: -- enough to be an operator?

12 MR. GELLER: I think it's a different test, but
13 I would also say that even if you did that, what CPC did
14 in this case --

15 QUESTION: Would not -- I'm not suggesting
16 you're giving that away.

17 MR. GELLER: Yes. It's a diff -- Congress could
18 have just said operates instead of participating in
19 management --

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Geller.
21 I think you've answered the question.

22 The case is submitted.

23 (Whereupon, at 11:14 a.m., the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

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The United States in the Matter of:

UNITED STATES, Petitioner v. BESTFOODS, ET AL.

CASE NO: 97-454

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