

**Shell Oil Co. v. United States, 751 F.3d 1282 (Fed. Cir. 2014).**

Date: 4/28/2014

- Majority Opinion by Judge Wallach for the court, joined by Judge O’Malley; Judge Reyna dissented.
- Reversing the decision of Judge Thomas Wheeler of the United States Court of Federal Claims of January 14, 2013 as to liability, and remanding for determination of damages issues.

**Overview: Why is Shell Oil Worthy of our Attention?**

This is a significant decision of the Federal Circuit that will govern a number of contract claims based on World War II era contracts for the production of aviation gas. It is unclear whether there are other claims pending, or which could still be brought, which turn on identical or nearly identical contract language. Narrowly construed, so as to control only cases with similar contract language –in other words as the Government may read this case, it may not have a substantial precedential effect. But more broadly construed, as some of the amici curiae clearly do view the decision, the reasoning of this case may affect a larger class of cases involving government contracts with reimbursement or indemnification provisions. Its potential precedential and practical impact may be greatest with respect to government contracts that are not traditional procurement contracts.

Specifically, this decision may tend to make it easier to recover on indemnification and related breach of contract claims where the Anti-Deficiency Act might be urged as an obstacle to recovery, particularly in light of *Hercules, Inc. v. United States*.<sup>1</sup> Certainly some parts of the oil industry and ideological supporters of broader government liability for changes in regulatory policy are optimistically portraying the case in that light. For instance, Christopher Marraro has written in a Legal Backgrounder for the Washington Legal Foundation<sup>2</sup> that

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<sup>1</sup> 516 U.S. 417 (1996) (indemnification obligation may not be read into government contract, nor implied in fact, where there is no appropriation that would make such an undertaking by the Government lawful under the Anti-Deficiency Act).

<sup>2</sup> Christopher H. Marraro, Washington Legal Foundation Legal Backgrounder: “Shell v. U.S.: Court Holds Government to its World War II-Era “Grand Bargain” With Aviation Gas Refiners,” [http://www.wlf.org/upload/legalstudies/legalbackgrounder/071114LB\\_Marraro.pdf](http://www.wlf.org/upload/legalstudies/legalbackgrounder/071114LB_Marraro.pdf). Mr. Marraro of Baker Hostetler LLP, together with others at that firm represented as amicus curiae the American Fuel and Petrochemical Manufacturers in this litigation.

It is also worth noting that Baker Botts L.L.P. represented Exxon Mobil as amicus curiae in the *Shell Oil* litigation in the Federal Circuit.

The Federal Circuit’s ruling sends a critical message to both regulators and the private entities that contract with them: The courts will enforce the government’s contractual promises regardless of changes in circumstances or how long ago the bargain was struck.”<sup>3</sup>

This reading, though optimistic from the point of view he represents, is not without a plausible foundation in the opinion of the Federal Circuit.

On the other hand, practitioners must be aware that the case may turn out to have a much less sweeping impact than Christopher Marraro’s reading foretells. Certainly, the standardized clauses required in typical federal government contracts for the procurement of goods and services should cause us to qualify his sweeping prediction. For instance, the broad termination for convenience and unilateral changes clauses that are mandated in most federal government procurement contracts (and covered by the *G.L. Christian*<sup>4</sup> doctrine) tell us that, absent the kind of contractual language at issue in *Shell Oil*, the government certain **can** limit the enforcement of its contractual promises at least where there are changed circumstances since the original bargain was struck.<sup>5</sup>

As was the case in the *Winstar*<sup>6</sup> litigation, the government’s vulnerability may be

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Finally, particularly given the broad reading that Mr. Marraro gives the case, it is worth noting that counsel for the claimants were the law firm of Cooper & Kirk, founded by Chuck Cooper, who along with others such as Jerry Stouck prominent in the bar of this court, were instrumental in bringing the *Winstar* litigation forward and shepherding it all the way to the Supreme Court. Mr. Marraro’s reading of the potential reach of the decision is certainly reminiscent of what Chuck Cooper and Jerry Stouck and others tried to achieve in *Winstar*.

<sup>3</sup> *Id.*

<sup>4</sup> *G. L. Christian and Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963), *reh’g denied*, 320 F.2d 345, *cert. denied*, 382 U.S. 821 (1965)(mandatory standardized government contract clause to be interpolated into contract from which it has been inadvertently omitted).

<sup>5</sup> Compare *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982)(en banc)(plurality opinion)(requiring objective change of circumstances for government’s use of termination for convenience; tfc not permitted for simple “exculpation”) with *Krygoski Constr. Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1210 (1997)(retreating from broad understanding of *Torncello*; Chief Judge Friedman’s narrowly framed *Torncello* concurrence treated as the precedential opinion for; objective changed circumstances not necessarily required for exercise of tfc; bad faith the ultimate test; tfc purely for exculpation still impermissible per se).

<sup>6</sup> *United States v. Winstar*, 518 U.S. 839 (1996). See Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633 (1996); Joshua I. Schwartz, *Assembling Winstar: Triumph of the Ideal*

greatest in breach of contract cases that do not arise out of classic government procurement contracts, as for instance, when the government employs contracts as an instrument of regulatory policy, which then may be subject to change, or when the government is effectively the seller of goods or services or leases or concessions in cases like *Mobil Oil*.<sup>7</sup> However, precisely this shakes out in the end, certainly this is a case worthy of our careful attention.

**Background:**

During World War II, the government contracted with Atlantic Richfield Oil Co., Shell Oil Co., Texaco Inc. and Union Oil Co. (“the Oil Companies”) to produce high-octane gasoline for military aircraft, known as “avgas.” These contracts were specially designed to incentivize the oil companies dramatically to expand their refining capacity to produce this avgas in vast quantities for the government. The contracts had a number of features carefully crafted to produce the desired incentive:

- Each contract had a three-year term designed to assure the refiners of continuing demand that would cover the capital investments required to produce the required quantities of avgas.
- Each contract specified a base price calculated, based on the particular refiner’s production costs, to provide the particular refiner with an estimated profit of between 6 and 7%. Moreover:
  - Prices were subject to redetermination based on actual costs experienced by the refiners for raw materials and transportation
  - Actual profits earned were then subject to the Renegotiation Act of 1942, which required the contractors to repay excess profits.
- **Finally, and most importantly here, the contracts allocated to the government agency buying the gas, the duty to pay both:**
  - “any now existing taxes, fees or charges . . . imposed upon [the particular oil company] by reason of the production, manufacture, storage, sale or delivery of [the avgas produced and sold.]

**and**

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*of Congruence in Government Contract Law?*, 26 PUB. CON. L. J. 481(1997); and Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of Winstar: An Interim Report*, 51 ALA. L. REV. 1177 (2000).

<sup>7</sup> *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000). The *Hughes* litigation arising out of the termination of the United States’ government’s program to launch commercial satellites, by President Reagan, in response to one of the space shuttle disasters, also exemplifies this point. *Hughes Communication Galaxy, Inc. v. United States*, 998 F.2d 953, *reh’g denied* (Fed. Cir. 1993).

- ***“any new or additional taxes, fees or charges, . . . which the [oil company] may be required by any municipal, state or federal law in the United States . . . to . . . pay by reason of the production, manufacture, sale or delivery of the [avgas] (emphasis added).***

This case concerns a dispute between the government and the Oil Companies under the last clause, rendered here in boldface, as to who should ultimately bear certain the hazardous waste cleanup costs. These particular costs pertained to acid sludge generated by the Oil Companies as a by-product in the production of the avgas in the performance of the foregoing contracts. The Oil Companies had dumped this acid sludge at what is now known as the McColl Superfund site in Fullerton, California.<sup>8</sup> Federal and state environmental agencies cleaned up the site for \$100 million, then sued the oil companies to recover the costs under CERCLA, the Comprehensive Environmental Response, Compensation and Liability Act, enacted long after the War. The Oil companies were required to bear the cost of this cleanup in CERCLA litigation running through the 1990s and early into the first decade of this century. Specifically, their efforts to have those costs reallocated to the government were unsuccessful.<sup>9</sup>

In the California federal court CERCLA litigation, the oil companies had counterclaimed against the government based on the above-quoted language of the avgas contracts. At the end of the cleanup cost litigation, those claims were transferred back to the Court of Federal Claims, by the district court and re-filed there after they satisfied pertinent administrative exhaustion requirements.<sup>10</sup> **The oil companies theory was that the cleanup costs allocated to them (rather than the government) in the CERCLA litigation were “new or additional . . . charges which [the Oil companies were] . . . required by . . . federal . . . to . . . pay by reason of the production, manufacture . . . of the [avgas].”**

***Accordingly, the companies claimed, the government was responsible for reimbursing them under the quoted provisions of their wartime contracts.***

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<sup>8</sup> The avgas contracts were terminated shortly after the end of World War II.

<sup>9</sup> Indeed, in this litigation the Ninth Circuit ultimately reversed a district court decision that had allocated those costs to the government. *United States v. Shell Oil Co.*, 294 F.3d 1045 (2002).

<sup>10</sup> The Oil Companies then voluntarily dismissed their contract reimbursement claims without prejudice, exhausted administrative remedies with the GSA, unsuccessfully, under Contract Settlement Act of 1944, 41 U.S.C. §41 U.S.C. 113, and re-filed their complaint in the Court of Federal Claims.

### *The Proceedings and Rulings of The Court of Federal Claims*

The case in the Court of Federal Claims was initially heard by Senior Judge Loren Smith, who ruled for the claimants, holding that the United States was required to reimburse the Oil companies for 100% of the cleanup costs at stake in this proceeding.<sup>11</sup> However, on appeal from that decision, the Federal Circuit held that, although there was no evidence or even an allegation that he had been improperly influenced, Judge Smith had been required to recuse himself because of his wife's stock ownership in corporate parent of two of the claimant oil companies in the proceeding.<sup>12</sup> The case was remanded with instructions that it be reassigned to a different trial judge.<sup>13</sup>

On remand, The Court of Federal Claims, Wheeler, J., ruled for the government on summary judgment motions. Embracing the government's key contentions, the Court of Federal Claims held:

- First that the CERCLA costs incurred by the Oil Company claimants were not "charges," within the contemplation of the "new or additional taxes, fees or charges" clause of their government contracts to produce the avgas.
- In any event, the Oil Companies had released any valid claim that they might have had in this regard when the avgas contracts were terminated and they thereafter in the mid-to-late 1940's entered into a comprehensive settlement with the government of "all other issues."
- The Anti-Deficiency Act, in any event, barred payment to the Oil Companies under their broad construction of the "new or additional . . . charges" language because it would render that language an open-ended indemnification clause for which there was neither an available appropriation nor a valid authorization (circumventing or satisfying the Anti-Deficiency Act) so to enable the government to have so contracted in the absence of such an appropriation.

Perhaps significantly, as we shall see, although each of these rulings was independently a sufficient basis for denying the Oil Companies' motion for summary judgment and for granting the government's cross-motion for summary judgment, Judge Wheeler addressed one more point:

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<sup>11</sup> *Shell Oil Co. v. United States*, 80 Fed. Cl. 411 (2008) (liability decision); *Shell Oil Co. v. United States*, 86 Fed. Cl. 470 (2009) (damages decision); *Shell Oil Co. v. United States*, 93 Fed. Cl. 153 (2010); *Shell Oil Co. v. United States*, 93 Fed. Cl. 439 (2010).

<sup>12</sup> *See Shell Oil co. v. United States*, 672 F. 3d 1283, 1294 (Fed. Cir. 2012); *see also Shell Oil Company v. United States*, 751 F.3d 1282 (Fed. Cir. 2014).

<sup>13</sup> *Id.*

An additional ground for denying the Oil Companies' motion, he ruled, would have been the need for a trial to determine whether the waste at issue was dumped—and the CERCLA costs incurred “by reason of” the Oil Companies “production, manufacture, sale or delivery” of avgas. Judge Wheeler explained:

*Setting aside the question of what level of causation this phrase connotes, the issue of what portion of the non-benzol waste was created “by reason of” the avgas program raises factual questions that are simply not adequately answered by the evidence or stipulations currently before the Court. (Slip op. at 36; emphasis added.)*

Judge Wheeler went on to detail some of the factual issues that he considered worthy of exploration if the government's legal grounds for summary judgment had not been persuasive (*id.*), concluding

In any event, the Court reiterates that resolution of these questions (among other similar ones) is not, in the end, necessary to its disposition of this matter. To the contrary, the Court has found three other, independent bases for dismissing the Oil Companies' claims as a matter of law and entering judgment in favor of the Government. Consequently, the Court need not further address or require the evidentiary proceedings that would be necessary to resolve the “by reason of” factual issue.

### **Opinion of the Court of Appeals**

A divided Federal Circuit reversed and remanded, rejecting each of the Court of Federal Claims' alternative holdings, and upholding only the remand for a trial on damages. Judge Reyna dissented, reaching --and endorsing-- only the first legal ground offered by Judge Wheeler for ruling for the government.

Reviewing Judge Wheeler's interpretation of the avgas contracts language *de novo*, and the grant of summary judgment *de novo*, the court of appeals majority concluded, initially, that the language of the Avgas contracts required the government to reimburse the Oil Companies' CERCLA costs. The Oil Companies viewed the reimbursement provision set forth above as a broad indemnification provision designed to encompass all government-imposed costs including environmental liabilities such as those established by CERCLA; the government viewed that provision as limited to taxes and other similar tax-like charges. The divided court concluded that the government's obligation to reimburse the Oil Companies extended to all new costs imposed on them by “authorities at any level of Government ‘by reason of the production, manufacture or sale of [avgas.]’” (Slip op. 17.) Furthermore, the dissent's narrower interpretation of the reimbursement obligation undertaken by the government failed, the majority reasoned, to give independent effect to the obligation to reimburse new or additional charges, in addition to new and additional taxes and fees. *Id.* at 18-20 & n. 7.

The majority also rejected the Government's argument that the indemnification obligation established by the reimbursement language could not encompass environmental liabilities. Despite some differences in the relevant language the court thought the indemnification obligation created in the avgas contracts should not be distinguished from superficially broader indemnification language construed in previous cases extending CERCLA cost indemnification rights to World War II procurement contracts.<sup>14</sup>

Next, the Court of Appeals rejected the trial court's determination that the Oil Companies contractual claims had been released. The Government bore the burden of proving that these claims had been released, yet neither party could actually locate the agreements by which outstanding disputes following the termination of the avgas contracts were settled. Accordingly, the government had not carried its burden to establish a release of claims broad enough to encompass the Oil Companies claims for CERCLA indemnification.

Finally, the Court of Appeals rejected the Court of Federal Claims' final alternative holding that the Anti-Deficiency Act barred the Oil Companies' indemnification claims. The claimants did not assert that there was any appropriation that would fund the indemnification provision as applied here, but argued that the indemnification provisions were "authorized by law," and thus within a statutory exception to the prohibition on entering a contract for which there are no covering appropriations. 31 U.S.C. §1341. The court of appeals concluded that the broad indemnification provision it had recognized in the avgas contracts was authorized by law and thus was permissible under the Anti-Deficiency Act.<sup>15</sup>

Specifically, the court concluded that the new or additional charges indemnification provision was authorized by First War Powers Act of 1941, Executive Order 9024 of Jan. 17, 1942, and finally by a Feb. 13, 1942 letter by the Chairman of the War Production Board (WPB) subdelegating particular authority to the Office of the Petroleum Coordinator for National Defense (OPC) and other authority to the Defense Supplies Corporation (DSC). The 1941 statute clearly granted the President the power to authorize any agency to enter into contracts that would otherwise violate the Anti-Deficiency Act "whenever he deems such action would facilitate the prosecution of the war." The Executive Order established the WPB and delegated certain authorities, rather broadly, to that body, but did not specifically mention the availability of appropriations or the Anti-Deficiency Act or exceptions to its mandate. And the WPB Letter authorized the DSC, which had actually entered the avgas contracts, "to determine . . . the other [non-

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<sup>14</sup> *E.I. DuPont de Nemours & Co. v. United States*, 365 F.3d 1367 (Fed. Cir. 2004); *Ford Motor Co. v. United States*, 378 F. 3d 1314 (Fed. Cir. 2004).

<sup>15</sup> On appeal the Oil Companies argued, preliminarily, that the contracts of the Defense Supplies Corporation were outside the Anti-Deficiency Act, but the Court of Appeals declined to consider this contention as it had not been raised before the Court of Federal Claims.

price] terms and the form of such [avgas] contracts.” The Court found this to be sufficient to empower the DSC to enter a binding contract with the broad indemnification undertaking that the panel found to exist in the avgas contracts.

Finally, in this connection with the Anti-Deficiency Act arguments, the Court rejected the Government’s argument that E.O. 9024, which explicitly provided that prior “conflicting” Executive Orders “are hereby superseded,” specifically had the effect of superseding Executive Order 8512 of August 15, 1940. That earlier EO had provided that “No agency shall make expenditures or involve the Government in any contract or other obligation for the future payment of money in excess of the amounts currently available therefor . . . .” The Government’s final argument was that nothing in the terms of EO 9024 conflicts with the EO 8512’s ADA strictures, and that the earlier EO therefore had not been superseded. The Court, however, concluded that by delegating the full contracting authority of the President, the later EO effectively delegated the President’s authority under the First War Powers Act to enter into contracts that would otherwise violate the ADA. The Court thus reversed The Court of Federal Claims’ third holding that the ADA precluded interpretation of the reimbursement provision in the avgas contracts as an indemnification undertaking broad enough to encompass the CERCLA costs that the Oil Companies had been required to bear.

The Court of Appeals endorsed Judge Wheeler’s ultimate point: that disputed facts precluded granting summary judgment to the Oil Company claimants, and therefore remanded the case for trial. The exact breadth of the issues open on remand is, at least to this observer, less than clear. And this issue could well provoke a dispute on remand, and necessitate a further appeal. Judge Wheeler’s closing comments suggest that not only would historical factual issues need to be resolved at any trial but also subtle and difficult issues of causation, including determining “what level of causation” is necessary to demonstrate that the claimants’ avgas waste disposal practices leading to CERCLA liability represent “charges” incurred “by reason of” the Oil Companies “production, manufacture, sale or delivery: of avgas. It seems clear to me that Judge Wheeler envisioned issues of proximate causation to be resolved, among others.

But the court of appeals’ endorsement of the trial court’s ruling on the need for trial seems to turn a blind eye to the breadth of the issues that Judge Wheeler had thought would be open at trial, if one were to be held. Rather the panel mostly addresses—and rejects—the Oil Companies claim that these issues were foreclosed by issue preclusion because of a district court ruling in the California CERCLA litigation. The Court of Appeals concludes this way:

In short, the prior CERCLA litigation does not preclude the Government from *challenging the amount of acid waste attributable to the avgas contracts.*

Absent collateral estoppel, the Oil Companies do not contest the trial court’s findings of *a genuine dispute regarding how much of the acid waste at the McColl site resulted from the avgas contracts,* nor does this

court discern any error. . . . The case is remanded for The Court of Federal Claims to determine how much acid waste at the McColl site was “by reason of” the avgas contracts. (Slip opinion at 38-39; emphasis added.)

The Court of Appeals conclusion was then stated as follows: “this court reverses the Court of Federal Claims’ grant of summary judgment [to the Government] with respect to breach of contract liability, and remands for a trial on damages.” (*Id.*)

It certainly appears that the Court of Appeals simply did not address, one way or another, the breadth of the issues that Judge Wheeler envisioned as open for argument and decision in the event of a reversal on his liability ruling and a remand for trial. But the Court of Appeals surely appears to have contemplated a narrower and more factually-focused inquiry on the remand than did Judge Wheeler. And I would be surprised if the scope of the issues still open were not a point of further contention. Under Judge Wheeler’s formulation it still would appear to be open to the Government to argue that none of the cost of the CERCLA cleanup was by reason of the “production, manufacture sale or delivery” of the avgas under the contracts. It simply is not clear to me whether the Court of Appeals saw it this way.

Judge Reyna dissented. As noted previously he reached only the first ground for the Court of Federal Claims’ ruling denying liability—and endorsed that ground, declining to reach the release and the Anti-Deficiency Act issues. Judge Reyna appears to have viewed the litigation in the Court of Federal Claims as an attempt to circumvent the allocation of liability made in the California CERCLA litigation and something verging on a collateral attack on the decision of the Ninth Circuit in that litigation reversing the district court’s allocation of cleanup cost liability to the Government. In addition, Judge Reyna concluded that the plain language of the reimbursement provision invoked by the Oil Companies simply did not provide them with the broad indemnification against all government imposed costs envisioned and recognized by the panel majority. Instead the charges for which the Government is responsible are taxes and tax-like obligations that might be imposed on the Oil Companies, not environmental or tort-like liabilities for conduct. Judge Reyna asserts that “the majority’s interpretation ignores the plain meaning of the text, fails to give harmony to the contracts as a whole, and is overall unreasonable.” (Slip op. at 5.)

Furthermore, wrote Judge Reyna, even if the reimbursement undertaking of the Government transcends tax-like charges, it should not, under Circuit precedent, extend to indemnification for CERCLA liability. Citing, and quoting *E.I. Du Pont de Nemours & Co. v. United States*,<sup>16</sup> he asserted:

In order for a pre-CERCLA indemnification clause to cover CERCLA liability, courts have held that the clause must be either [1] specific enough to include CERCLA liability or [2] general enough to include any

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<sup>16</sup> 365 F.3d1367, 1373 (Fed. Cir. 2004)(quoting *Elf Atochem. N. Am. V. United States*, 866 F. Supp. 868, 870 (E.D. Pa. 1994).

and all environmental liability which would, naturally, include subsequent CERCLA claims.

Here, Judge Reyna explained, this standard is not satisfied.

The other noteworthy thread in Judge Reyna’s dissent is to task the majority for inconsistency with respect to its approach to contract interpretation. The majority asserts that it is focused on the plain language of the contract clauses, and disregards or rejects collateral evidence including that which addresses similarities and differences between the Avgas contracts reimbursement clause and that found in other World War II era contracts. But Judge Reyna concluded that the majority in fact is “heavily relying on extrinsic evidence” (slip op at 6). Citing and quoting the majority’s understanding of the motivation for the avgas contracts, Judge Reyna concludes, pointedly (*id.* At 6-7):

The majority thus justifies its broad interpretation of the “Taxes” clause not on the language of the clause itself but on a weighing of the equities in light of the wartime circumstances, subject matter not in the record before us and certainly not reflected by the terms of the contract. I believe that reliance on unsupported historical anecdotes should not trump the plain meaning of the contract terms, and, in this case, transform a straightforward “Taxes” clause into a catch all indemnification provision.

### **Concluding Observations—One commentator’s view**

For the reasons unpacked in the analysis above, both the breadth of this precedent and the posture of the case are clearly open to somewhat divergent interpretations.

Perhaps unsurprisingly, but still ironic and noteworthy, both the amicus/commentator who warmly welcomes the broadest implications that can be attributed to the Shell Oil decision of the Federal Circuit, and Judge Reyna, who evidently disapproves of the broad implications of the decision (but sees the potentially controversial reach and force of the decision) read the Court’s opinion broadly. On the other hand, it is entirely possible to read the case much more narrowly. Some combination of further proceedings and further development in the law will be needed to make clear whether the fondest hopes for and/or the darkest fears about, the consequences of this decision will be realized.

In its narrowest guise, this case is simply about the interpretation of particular –an unusual – contract language. Furthermore, the release issue is of limited generic importance because it is heavily fact-bound and turns largely on the unavailability of the actual release agreements.

The court’s analysis of the Anti-Deficiency Act issue, in the view of this commentator, takes rather casually to obligation to find an authorization for contracting outside of the normal strictures of the Anti-Deficiency Act. Although the First War

Powers Act clearly did give the President the authority to contract beyond available appropriations, it is far from clear that the President exercised that authority in EO 9024, delegating his authority to transcend available appropriations to the WPB or that the WPB in turn delegated that authority to the DSC, which exercised that authority by agreeing to a broad scheme for indemnification. Still it is far from clear that this is more than a fact-bound conclusion about a particular delegation of authority to transcend the normal limits of the Anti-Deficiency Act.

On the other hand, there is another side to this argument.

Indeed, I am inclined to see a tension between the interpretive approach taken by the majority in *Shell Oil* and that taken by the Supreme Court in *Hercules*. And I am inclined to think that there is something to Judge Reyna's observations about the way the Court of Appeals deploys information about the historical context –that the court did allow this significantly to shape its reading of the contract language. Whether that was inappropriate, is quite another matter however.

As I have discussed in connection with the *Brandt* case, and its predecessor *Leo Sheep*, the modern Supreme Court certainly does endorse use of historical context in the *interpretation of statutes*. It is hard to see why that approach would not be applicable to reading of contracts such those in this case.

More controversial I would think, is the suggestion that I will make here that different historical eras suggest different interpretive meta-approaches. *Hercules's* refusal to read an indemnification provision into a Viet Nam era contract for the manufacture of Agent Orange, which turned out to be contaminated by poisonous Dioxin, may be of a piece with the zeitgeist of the era from which that contract emerged. The *Shell Oil* decision of the court of appeals indeed reflects the spirit of a quite different, more heroic, era that we see in our collective rear view mirrors.

Perhaps it is fair to say that *Shell Oil* does reflect a move in the direction of treating Government undertakings as more resistant to revision. But if it does, it may be in part, as Mr. Marraro writes, because the Federal Circuit indeed perceived the Avgas contracts and their reimbursement provisions as an integral part of a “World War II-Era ‘Grand Bargain.’” But if that is indeed so, and I think it is, it is not so evident that his broader conclusion, that the “courts will enforce the government's contractual promises regardless of changes in circumstances or how long ago the bargain was struck” is equally supported.

Rather, on balance, I see the decision of the court of appeals as a triumph of advocacy by the Oil Companies' lawyers. They sold the panel on a particular understanding of the historical context from which the Avgas contracts emerged that push flesh on the rather bare bones of the contract language in this case. Strong and effective advocacy in this case may explain more compellingly the particular outcome here. I am more skeptical as to whether this reflects a sea change in the approach to be taken by the court in a broad range of cases.