Sovereign Immunity - Government Contractor Defense - Implied Warranty of Specifications - Implied Contractual Indemnification

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Sovereign Immunity—Government Contractor Defense—Implied Warranty of Specifications—Implied Contractual Indemnification—The United States Supreme Court held that the federal government cannot be liable in contract for breach of implied-in-law warranties by government contractors who incur expenses in defending third party tort claims arising from the contractors' compulsory production of war materials in accordance with government-furnished specifications.


Hercules, Incorporated ("Hercules") and Wm. T. Thompson Company ("Thompson") (collectively, "contractors") were among seven producers of a chemical defoliant, manufactured under fixed price mandatory contracts issued by the United States military from 1964 to 1968 pursuant 1.


2. A defoliant is a chemical that causes plant leaves to drop off prematurely when applied by either spraying or dusting. Merriam Webster's Collegiate Dictionary 303 (10th ed. 1994).

3. Agent Orange is comprised of an equal mixture of two herbicides: 2,4-Dichlorophenoxyacetic Acid ("2,4-D") and Trichlorophenoxyacetic Acid ("2,4,5-T"). SCHUCK, supra note 1, at 16. Production of 2,4,5-T caused the creation of varying amounts of the contaminant 2,3,7,8 Tetrachlorodibenzo-p-dioxin ("TCDD" or "dioxin") as a byproduct of the manufacturing process; this contaminant remained in the final product. Wm. T. Thompson Co. v. United States, 26 Cl. Ct.17, 20 (1992), aff'd sub. nom. Hercules, Inc. v. United States, 24 F. 3d 188 (Fed. Cir. 1994), aff'd, 116 S. Ct. 981 (1996). TCDD has been described as "perhaps the most toxic molecule ever synthesized by man." SCHUCK, supra note 1, at 18, quoting RICHARD EPSTEIN, MODERN PRODUCTS LIABILITY LAW (1980).
to the Defense Production Act of 1950 ("DPA"). In support of these contracts, the government supplied detailed specifications to the contractors regarding the chemical formula and packaging of Agent Orange.

Specially equipped, low-flying American military cargo aircraft sprayed Agent Orange in high concentrations over the jungles and cultivated areas of South Vietnam from early 1965 through April of 1970 in an operation code-named "Ranch Hand." The purpose of this aerial operation was to frustrate the Viet Cong's


(a) Allocation of materials and facilities. The President [or his authorized representative] is hereby authorized

(1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and

(2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.


5. Government research into the military applications of herbicides began during World War II at Fort Detrick, Maryland. *SCHUCK*, supra note 1, at 16. The defoliants developed by the government during this program proved more potent, cheaper and were thought to be safer than existing commercial herbicides. *Id.*

6. *Hercules III*, 116 S. Ct. at 983. Agent Orange was one of a series of specific herbicides produced during the same period by commercial herbicide manufacturers exclusively for military use. *SCHUCK*, supra note 1, at 17. The other military herbicides were code-named Agents Pink, Blue, Green, Purple and White. *Id.* at 16. Agent Orange eventually displaced the other Agents in the series, accounting for sixty percent of the defoliant used in Vietnam. *Id.* at 17. The Agents' designations derived from the three inch wide colored stripes the contractors were required by specification to place on the metal drums containing the defoliants. *Id.* The legend "[n]o further identification as to content" was the only other marking permitted under the specifications to appear on the metal drums. *Hercules III*, 116 S. Ct. at 984. The government's specifications did not include a requirement for instructions for use to be placed on the drums, nor were instructions provided by the government to field troops, with the result that empty defoliant drums were frequently converted by soldiers into barbecues and field showers. *Id.* at 990.

7. *SCHUCK*, supra note 1, at 17. During the five year period of its use, the United States military sprayed an estimated 11.2 million gallons of undiluted Agent Orange over approximately 6,635 square miles (or ten percent of the land area of South Vietnam) at an average rate of three gallons per acre per application. *Id.* at 17; RAND MCNALLY - READERS WORLD ATLAS xiv (1958). The solution strength and rate of application of Agent Orange by the American military sharply contrasted with standard commercial practice, which called for dilution of agricultural herbicide with water, to a concentration of one percent of total volume, sprayed at a rate of one gallon per acre. *Thompson*, 26 Cl. Ct. at 20.

8. *Schuck*, supra note 1, at 16. Aerial spraying of defoliants was initially approved by President Kennedy on the joint recommendation of the Defense and State Departments following successful field experiments in Vietnam in 1960. *Id.*
successful use of the land as a military resource. Delivery of the defoliant by aerial spraying was necessarily imprecise, resulting in exposing not only the Viet Cong to Agent Orange, but also American and Allied soldiers (collectively "veterans").

Many of these veterans and their families filed suit against the contractors in the late 1970's, claiming that they had been harmed by exposure to the dioxin contained in Agent Orange. These separate actions were consolidated and certified as a class action by the United States District Court for the Eastern Dis-

9. Hercules III, 116 S. Ct. at 983. The dense jungle foliage screened Viet Cong camps and troop movements from Allied ground and aerial detection; civilian farms and the jungle provided the Viet Cong with food, heightening guerilla unit mobility and lessening the need for frequent resupply. Id. at 983; SCHUCK, supra note 1, at 16.


11. Hercules III, 116 S. Ct. at 984. While a definite causal link in humans has yet to be established scientifically between exposure to Agent Orange and the incidence of cancers, miscarriages, birth defects and other health problems, the veterans alleged that the dioxin present in Agent Orange was responsible for these occurrences. Id.; Thompson, 26 Cl. Ct. at 20 n.2. Studies performed in 1965-66 by Bionetics Research Laboratories under contract to the National Cancer Institute indicated, however, that 2,4,5-T (one of the components of Agent Orange) caused teratogenic effects (fetal abnormalities) in mice and rats at exposure rates of thirty parts of dioxin per million. SCHUCK, supra note 1, at 19-20.

The same study, which was not published until 1969, indicated that 2,4-D (the other component of Agent Orange) was also a potential source of similar birth defects. Id. at 20. When the Pentagon was apprised of these findings, military officials initially maintained that exposure levels to Agent Orange were much lower in the field than those in the animal studies. Id. In 1970, however, military use of Agent Orange was temporarily, and later permanently, halted. Id.

In 1979, a study conducted by Arthur Galston, a Yale biologist specializing in herbicide research, found that daily ingestion by rats of TCCD-contaminated food with a concentration of fifty parts per billion caused rapid death from acute toxicity, one part per billion caused premature death from toxic aggregation and five parts per trillion (approximately one drop per four million gallons of water) induced cancers. Id. at 18. Galston’s report also provided that lower concentrations of TCCD eventually produced the same effect as higher concentrations, merely taking longer to do so. Id. Military estimates on the amount of TCCD that the veterans were exposed to are considered unreliable, as it is impossible to determine how much Agent Orange actually reached ground level where it could be ingested or inhaled. Id. Testing of the remaining stockpiles of Agent Orange after the war, however, revealed an average TCCD concentration of two parts per million, with some discrete samples testing up to one hundred and forty parts per million. Id.

On May 23, 1996, less than three months after the decision in Hercules III, a Rhode Island jury found that Agent Orange, used from 1968-72 to clear tree branches from electric high tension wires, was the proximate (legal) cause of the development of bone marrow cancer in a utility company lineman. Jody McPhillips, Warwick Man Wins Agent Orange Suit, PROVIDENCE [R.I.] JOURNAL-BULLETIN, May 24, 1966, at B01. The jury awarded the lineman 1.2 million dollars in damages, a judgment which the defendant, Dow Chemical, is expected to appeal. Id.
The contractors filed motions for summary judgment, arguing that they were immune from suit due to their status as "government contractors." The district judge agreed, granting the contractors' motions. Before entry of that judgment, the case was transferred to a successor judge who ruled that the government contractor defense was an issue to be determined at trial, thereby reinstating the contractors as defendants.

Just hours before trial, the court engineered a settlement between the contractors and the veterans. The settlement agreement specified that the contractors would create a settlement fund of $180 million; each contractor's contribution determined by combining two factors: market share and dioxin content of the Agent Orange produced. In later proceedings, the court granted the manufacturers' motion for summary judg-

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13. A party filing a motion for summary judgment alleges that there is no genuine issue of material fact for a court to adjudicate (reasonable men could not differ with the moving party's interpretation of the fact), and that, therefore, the moving party is entitled to prevail as a matter of law, without a trial. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE, 435-38 (2d ed. 1993).
14. In re "Agent Orange" Prod. Liab. Litig., 565 F. Supp. 1263, 1273-74 (E.D.N.Y. 1983). The "government contractor defense" grants immunity to a government contractor from tort actions resulting from the contractor's manufacture of products for the government in accordance with government provided specifications, if the contractor warned the government about hazards in the product that became known to the contractor, of which the government was unaware. Hercules III, 116 S. Ct. at 985.

The court found that Thompson had extremely limited knowledge as to the alleged hazards of Agent Orange (as it maintained no testing facility) and that the dioxin content of the Agent Orange produced by Thompson contained very low levels of dioxin, ranging from .1 - .3 parts per million. "Agent Orange," 506 F. Supp. at 1273. In addition, the court found that the Agent Orange Hercules sold to the government after 1965 contained no measurable levels of dioxin. Id. at 1274. In both instances, the court found that the government possessed superior knowledge (as compared with the contractors) of the risks associated with dioxin. Id. at 1273-74.
18. Hercules III, 116 S. Ct. at 984; SCHUCK, supra note 1, at 156. The district court made the following calculations:

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<thead>
<tr>
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<th>Market Share</th>
<th>% of Damages Assessed</th>
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<tbody>
<tr>
<td>Diamond Shamrock</td>
<td>5.1%</td>
<td>12.0%</td>
</tr>
<tr>
<td>Dow Chemical</td>
<td>28.6%</td>
<td>19.5%</td>
</tr>
<tr>
<td>Hercules Inc.</td>
<td>19.7%</td>
<td>10.0%</td>
</tr>
<tr>
<td>Monsanto Chemical</td>
<td>29.5%</td>
<td>45.5%</td>
</tr>
<tr>
<td>T.H. Agriculture &amp; Nutrition</td>
<td>7.2%</td>
<td>6.0%</td>
</tr>
<tr>
<td>Wm. T. Thompson</td>
<td>2.2%</td>
<td>2.0%</td>
</tr>
<tr>
<td>Uniroyal</td>
<td>6.5%</td>
<td>5.0%</td>
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Hercules was required to contribute $18,772,568 to the settlement fund; Thompson's contribution was $3,096,597. Their combined defense fees exceeded nine million dollars. Hercules III, 116 S. Ct. at 984.
ment against the two hundred and eighty-seven veterans and their families who "opted-out" of the class action,\(^1\) based on three alternative grounds: (1) the manufacturers' assertion of the "government contractor" defense; (2) the veterans' inability to establish Agent Orange's causative role in their alleged individual injuries; and (3) the veterans' inability to establish which manufacturer produced the Agent Orange that caused the alleged harm.\(^2\) On appeal, the United States Court of Appeals for the Second Circuit found the government contractor defense a complete bar to liability and affirmed the district court's ruling.\(^3\)

Attempting to obtain reimbursement from the government for the litigation and settlement costs incurred in the class action suit, the contractors filed suit in the United States District Court for the Eastern District of New York.\(^4\) The contractors claimed damages under tort theories of contribution and noncontractual indemnification. The court dismissed their claims, reasoning that because the veterans failed to prove a causative link between exposure to Agent Orange and their injuries, the government cannot be liable for costs the contractors incurred in defending and settling the veterans' rejected claims.\(^5\) On appeal, the Second Circuit affirmed this ruling.\(^6\)

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20. *Hercules III*, 116 S. Ct. at 984 n.1; *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1263-64 (E.D.N.Y. 1985), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988). None of the injuries suffered by the veterans were exclusively attributable to exposure to the dioxin in Agent Orange; all had other potential origins. *Schuck, supra* note 1, at 18; "Agent Orange," 611 F. Supp. at 1260-63; "Agent Orange", 597 F. Supp. at 783. Since the drums containing Agent Orange did not bear the name of the manufacturer, the district court concluded that the drums and their contents were completely fungible, and thus, identification of the source of the alleged harm was indeterminable. "Agent Orange," 597 F. Supp. at 818-19.

21. "Agent Orange," 818 F.2d at 189. The Second Circuit thus failed to reach the issue of causation in the "opt-out" cases. *Id.* at 194.


23. "Agent Orange," 611 F. Supp. at 1222. In response to the veterans' claims in the class action suit, the government asserted the defense of sovereign immunity under the "injury suffered incident to military service" exception to the Federal Tort Claims Act ("FTCA"). *In re "Agent Orange" Prod. Liab. Litig.*, 603 F. Supp. 239, 243 (E.D.N.Y. 1985). See infra note 87 for the relevant text of the FTCA. The district court concluded that since the government was immune to the claims of the veterans, it was similarly immune to the claims of the contractors. "Agent Orange," 611 F. Supp. at 1222. In dictum, the court called the government's assertion of sovereign immunity under the FTCA and refusal to indemnify the contractors "shortsighted," predicting that future government contractors might demand indemnification or raise their prices significantly to cover the contingent cost of litigation of third party claims. *Id.*

24. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 204, 206-07 (2d Cir. 1987). The court stated that recovery was barred under the doctrine propounded in *Stencel Eng'g Corp. v. United States*, 431 U.S. 666 (1977) (holding that the same rationale gener-
Hercules and Thompson then filed suit individually in the United States Court of Federal Claims, asserting jurisdiction under the Tucker Act.\(^{25}\) The contractors requested damages in the form of contractual indemnification for litigation and settlement expenses incurred in the class action suit under various theories of breach of implied-in-fact contract.\(^{26}\) The court granted the government's motion for summary judgment against both contractors.\(^{27}\) Employing nearly identical language in the Hercules I and Thompson opinions, the court explained that even if the contractors could establish a factual basis for any of their implied-in-fact theories, they were barred from recovery by the provisions of the Anti-Deficiency Act.\(^{28}\)

Hercules’ and Thompson’s appeals were consolidated in an action before the United States Court of Appeals for the Federal Circuit which, in a 2 - 1 decision, affirmed the rulings of the Court of Claims.\(^{29}\) The majority found that assertion of the gove-
ernment contractor defense would have prevented liability from attaching to the contractors in the class action suit; and therefore, their participation in the settlement was a voluntary act. 30

Accusing the Hercules II majority of "unwarranted historical revisionism," 31 Judge Plager of the Federal Circuit Court of Appeals pointed out that the viability of the government contractor defense was still unsettled in 1984. 32 Therefore, at the time of the class action suit, the contractors were justifiably concerned that liability might be found, as evidenced by the strong and repeated recommendations of settlement by both the trial judge and the contractors' attorneys. 33 The contractors then appealed to the United States Supreme Court, which granted certiorari. 34

On appeal, Chief Justice Rehnquist, writing for a majority of six justices, affirmed the Federal Circuit's grant of summary judgment to the Government in Hercules II. 35 The Supreme Court noted that in order for the federal government, as the sovereign authority, to be sued, it must consent to the suit under the terms of the Constitution or some relevant act of Congress. 36 Jurisdiction was deemed appropriate under the Tucker Act to hear appeals regarding contractual claims brought against the United States. 37 The Court, however, found the scope of the Tucker Act limited to express or implied-in-fact terms, obligations and contracts, but inapplicable to contracts implied-in-law. 38 In order to obtain an award of damages from the government for breach of contract under the Tucker Act, the contractors

31. Id. at 207 (Plager, J., dissenting).
32. Id. at 206. The United States Supreme Court first considered the issue of the government contractor defense in Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (holding that government contractors are immune from third party tort suits). As Boyle postdated the settlement of the class action suit by four years, Judge Plager found it unreasonable to apply Boyle to the Agent Orange contractors. Id.
33. Id. at 205-06 (Plager, J., dissenting). Judge Plager declared, "[i]t ill behooves the Government, or this court, years later to question whether the trial judge properly understood the law of the case before him." Id.
34. Hercules, Inc. v. United States, 115 S. Ct. 1425 (1995). "Certiorari" is a written order issued by a higher appellate court to a trial or appellate court directing that court to provide a "certified" record of the proceeding for review. BLACK'S LAW DICTIONARY 228, 1609 (6th ed. 1991).
35. Hercules, Inc. v. United States ("Hercules III"), 116 S. Ct. 981, 985 (1996). Justice Stevens did not participate in either the consideration or decision in the case. Id. at 983.
38. Hercules III, 116 S. Ct. at 985. The Court explained that an implied-in-fact contract or term need not be express, but it must be reasonably inferable from the conduct of the parties that a "meeting of the minds" existed at the moment of contract formation. Id. at 986. This type of implied contract is distinguishable from an implied-in-law
were required to prove: (1) the existence of an implied agree-
ment reasonably inferable from the conduct of the parties at the
time of contract formation; (2) the government impliedly agreed
to indemnify the contractors’ losses stemming from potential
third-party tort claims; and (3) the government impliedly war-
ranted the specifications for Agent Orange.\textsuperscript{39}

Rejecting the contractors’ assertion that the government was
responsible for the costs of settling and defending against the
tort claims of the veterans, the Court stated that by providing
specifications, the government warranted only that the contrac-
tor would be able to adequately perform the contract.\textsuperscript{40} The jus-
tices refused to enlarge the government’s warranty of
specifications to encompass the third-party claims,\textsuperscript{41} concluding
that the contractors were seeking the same reimbursement rem-
edy under contract theory previously disallowed under tort the-
ory.\textsuperscript{42} In addition, the claim of breach of a reverse warranty by
the customer, rather than the supplier or seller, was held to be
without merit.\textsuperscript{43}

Thompson’s claim for relief on the grounds of involuntary com-
pulsory production under DPA contracts was also rejected,\textsuperscript{44} as
the events leading up to the contract “only served to illuminate
the terms” the parties had agreed to in fact.\textsuperscript{45} Further, the Court
reasoned that government contracting officers were prohibited

contract or term, which is a legal fiction judicially created to infer a promise where none,
in fact, exists. \textit{Id.}\textsuperscript{39} Id. at 986.

\textsuperscript{40} \textit{Id.} (citing \textit{United States v. Spearin}, 248 U.S. 132 (1918), in which the Court
held that when the government furnishes defective specifications to a contractor that
make performance impossible, the government incurs liability for damages to the
contractor).

\textsuperscript{41} \textit{Id.}\textsuperscript{42} \textit{Id.} The district court dismissed the contractors’ noncontractual indemnifica-
tion claims against the government arising out of the class action settlement, relying on
\textit{Stencel Aero Eng’g Corp. v. United States}, 431 U.S. 666 (1977) (holding that the government
is not liable for indemnification and contribution to a subcontractor for damages
paid by the subcontractor to an injured military member when the military member can-

\textsuperscript{43} \textit{Hercules III}, 116 S. Ct. at 989. \textit{Hercules III} characterized the contractors’
claim of breach as a “reverse warranty,” an implied promise by the government to use
Agent Orange safely, preventing unreasonable risk to the contractors as well as the users.
\textit{Id.} A reverse warranty, the Court found, is a legal impossibility since it imposes a duty
on the customer rather than the supplier. \textit{Id.}\textsuperscript{44} \textit{Id.} at 987. The DPA provides, in part:

\textbf{§ 2073. Penalties}

Any person who willfully performs any act prohibited, or willfully fails to perform
any act required by the provisions of this title [50 U.S.C. app. §§ 2071-76 (1994)] or
any rule, regulation, or order thereunder, shall upon conviction, be fined not more
than $10,000 or imprisoned for not more than one year, or both.

from entering into indefinite term contracts.\textsuperscript{46} The Court took note of specific statutes that permitted indemnification of contractors in extraordinary circumstances in contravention of the Anti-Deficiency Act, concluding that if the government felt such an indemnification provision was necessary in the Agent Orange contracts, the means were available to include one.\textsuperscript{47} The majority rejected Thompson's argument that Section 2157 of the DPA acts as a hold-harmless provision, indemnifying contractors for liabilities accruing from performance of contracts issued pursuant to the Act.\textsuperscript{48}

The Court viewed the contractors' final equitable appeal to "simple fairness" as an admission of the deficiency of the contractors' other legal arguments.\textsuperscript{49} Finding "fairness" to be a relative term, the majority found the impact of the contractors' argument was considerably weakened in this instance by the fact that the veterans were precluded from recovery of their alleged damages from the government under the \textit{Feres} doctrine.\textsuperscript{50} Further, the Tucker Act prohibited the Court from ruling on exclusively equi-

\begin{itemize}
\item \textsuperscript{47} \textit{Hercules III}, 116 S. Ct. at 988. The Court cited as an example of such means \textit{50 U.S.C. § 1431 (1988 & Supp. V. 1996)} authorizing the President to suspend other provisions of Title 50 (government procurement) when he deems it necessary in the interest of national defense. This presidential authority is delegated to the Department of Defense with the provisos that: (1) amounts expended are within the amounts appropriated by Congress; (2) authorized under the contract; and (3) adequate documentation is maintained. \textit{Hercules III}, 116 S. Ct. at 988 (citing Exec. Order No. 10789, 23 Fed. Reg. 8897 (Nov. 15, 1958), \textit{reprinted as amended in} \textit{50 U.S.C.A. at §§ 489-92 (1991)})
\item \textsuperscript{48} \textit{Hercules III}, 116 S. Ct. at 988. The Defense Production Act of 1950 provides, in part:
\begin{quote}
No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation or order issued pursuant to this Act [\textit{50 U.S.C. § 2061-70 (1994)}] notwithstanding that any such rule, regulation or order shall thereafter be declared by judicial or other competent authority to be invalid.
\end{quote}
\textit{50 U.S.C. app. § 2157 (1994)}. The Court interpreted this provision as providing immunity to government contractors, not indemnity. \textit{Hercules III}, 116 S. Ct. at 989. The government argued that Section 2157 merely grants immunity from liability to the contractor's commercial customers whose orders have been displaced due to the priority performance accorded to the government DPA contract. \textit{Id.} at 989 n.14.
\item \textsuperscript{49} \textit{Hercules III}, 116 S. Ct. at 989.
\item \textsuperscript{50} \textit{Id.} (citing \textit{Feres v. United States}, 340 U.S. 135 (1950), where the Supreme Court held that the government, in the interest of preserving military order, is not liable under the Federal Tort Claims Act to military members on active duty injured as a result of the negligent acts or omissions of other military members).
table matters due to the limited scope of jurisdiction provided by
the Act, regardless of the merits of the fairness claim.\textsuperscript{51}

In a spirited dissenting opinion, Justice Breyer suggested that
although the contractors acknowledged that there were no
explicit warranties in the DPA contracts, warranties were
\textit{implicit} in the bargained-for-exchange represented by the con-
tracts.\textsuperscript{52} The contractors offered examples of common industry
practice and trade usage, course of dealings between the parties
and existing statutes and rules of law\textsuperscript{53} that the dissent found
supported the contractors' allegation that the government knew
Agent Orange produced in conformance with government fur-
nished specifications would prove unsafe.\textsuperscript{54} In addition, Justice
Breyer found reasonable the contractors' assertion that the gov-
ernment's superior knowledge caused an inequity in bargaining
power between the parties.\textsuperscript{55} The dissent noted that the Federal
Circuit in \textit{Hercules II} assumed the existence of implied warran-
ties in the Agent Orange contracts,\textsuperscript{56} but rejected the circuit
court's conclusion that by failing to pursue the government con-
tractor defense at trial and engaging in a pretrial settlement, the
contractors severed the causal connection between the breach of
the implied promises by the government and the subsequent
harm to the contractors.\textsuperscript{57} Justice Breyer criticized the Court for
ignoring the \textit{Hercules II} holding of "no causation" between the
promise, the breach and the harm.\textsuperscript{58} Instead, the Court held that
the contractors would not be able to prove the existence of the
implied promises — a holding, in the dissent's view, unsupported
by the record of the Federal Circuit proceeding, and therefore,
impermissible.\textsuperscript{59}

The dissent found that the Federal Circuit's reliance on hind-
sight flawed its holding of lack of causation, explaining that the
law had changed substantially in the twelve years since the set-

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.} (Breyer, J., dissenting). Justice O'Connor joined in dissent. \textit{Id.}

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{Hercules III,} 116 S. Ct. at 989. The government specifications were silent on
providing instructions for safe use of Agent Orange, either through labeling the drums or
providing technical orders for its safe use to field units. \textit{Id.} at 990.

\textsuperscript{55} \textit{Id.} at 990. The contractors argued that this inequity of knowledge created an
assumption of risk by the government due to the defective specifications, creating a gov-
ernment duty of indemnification owed to the contractors. \textit{Id.} As the contractors had lit-
tle or no knowledge of the risks that might attach to the production of Agent Orange, they
were unable to include appropriate monetary contingencies in the price charged under
the DPA contracts. \textit{Id.}

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.} at 990 (Breyer, J., dissenting).

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Hercules III,} 116 S. Ct. at 990-91.
tlement of the class action suit — the viability of the government contractor defense had not been decided by the Supreme Court. In the legal climate of 1984, the settlement might have been reasonable because the circuits that had addressed the issue of the government contractor defense had arrived at very different conclusions and the issue had not yet come before the Second Circuit where the Agent Orange litigation took place. Further supporting a finding that the settlement was reasonable was the fact that even the two district court judges assigned to the class action suit had issued contradictory rulings on the subject. If the settlement was reasonable in light of the circumstances in 1984, it was not unforeseeable litigation and within the purview of the contracts' implied warranties. Moreover, the contractors mitigated their damages by settling, avoiding further litigation costs and potentially incredible financial liability.

The Hercules III majority assumed that a government contracting officer would not enter into a contract that might create even an implicit promise of postperformance indemnification. The dissent, however, found this reasoning spurious and unsupported by fact. Justice Breyer pointed to various regulations and documents in effect in 1964 bolstering the contractors' position that implied indemnification was permissible at the time the

60. Id. at 991. Justice Breyer strongly disagreed with the Federal Circuit's portrayal of the contractors' settlement of the class action suit as unreasonable, unforeseeable litigation behavior, stating that the record did not support that contention. Id. at 990-91.

61. Id. Since the Supreme Court decided the validity of the government contractor defense in Boyle v. United States, 487 U.S. 500 (1988) on different grounds than those found persuasive by the circuit courts, Justice Breyer reasoned it was more logical for the Court to conclude that the issue was unresolved at the time of the class action settlement. Id.


63. Hercules III, 116 S. Ct. at 991.

64. Id. The number of eligible class members was never exactly determined (the veterans estimated the number as 2.4 million persons). Schuck, supra note 1, at 162. The veterans' complaint alleged damages between four and forty billion dollars, more than the combined liquid assets of all seven manufacturers. "Agent Orange," 635 F.2d at 989 n.5.


66. Id.
contracts were entered into. Further, Justice Breyer disagreed with the majority's holding that Comptroller General opinions generally supported the proposition that an implied promise of indemnification would contravene the Anti-Deficiency Act, explaining that Comptroller General decisions in effect in 1964 implied the opposite conclusion — that indemnification agreements capped at an amount that could be covered by private insurance were proper. Envisioning the government in the role of self-insurer, Justice Breyer suggested such a contingency factor could be built into the contract price as the cap would assure that the amount was within the appropriation.

The dissent, disagreeing with the Court's interpretation of the holding in *United States v. Spearin* that the implied warranty of specifications only assured possibility of performance, suggested alternatively that the implied warranty of specifications in *Spearin* acted to hold the contractor harmless when the product produced in accordance with the specifications was defective. Justice Breyer also found the Court placed the wrong emphasis on the contractors' reliance on the hold-harmless provision of the DPA.

67. *Id.* The language of the 1964 edition of the Anti-Deficiency Act was ambiguous regarding indemnification. *Id.* Executive Order No. 10789 (Nov. 15, 1958), as amended, did not mention indemnification until the 1971 amendment (Exec. Order No. 11610 (July 22, 1971)), when it established special procedures for indemnification and cited circumstances under which indemnification is appropriate and permissible. *Id.* The Code of Federal Regulations ("C.F.R.") at 32 C.F.R. § 17.204-4 and 32 C.F.R. § 17.206(I) provides that indemnification contracts are limited to the amount authorized by the contract and the amount of the Congressional appropriation. *Id.* 32 C.F.R. § 17.204-4 provides:

Informal commitments may be formalized under certain circumstances to permit payment to persons who have taken action without formal contract [e.g., where a person has furnished property or services to the military in good faith reliance on the apparent authority of the person giving an oral instruction]. Formalization of commitments under such circumstances normally will facilitate the national defense by assuring such persons that they will be treated fairly and paid expeditiously.

32 C.F.R. § 17.204-4 (1960).


69. *Id.*

70. *Id.* at 993.

71. 248 U.S. 132 (1918).


73. *Id.* Justice Breyer found that the contractors were not claiming that Section 2157 of the DPA offered explicit indemnity, but that the provision could reasonably lead a contracting officer of the period to believe that an implied agreement to indemnify was reasonable in providing contractors with relief from unanticipated liability. See *supra* note 47 for the relevant text of the DPA. Further, a government contracting officer might have reasonably assumed the government was accepting a duty of indemnification under the compulsory production provisions of the Act. *Hercules III*, 116 S. Ct. at 993 (Breyer, J., dissenting).
In addition, the dissent believed that the Court's reliance on the rule announced in *Stencel Aero Eng'g Corp. v. United States* was misplaced when used for the purpose of finding only immunity for government contractors, rather than the implied promise of indemnity urged by the contractors. Justice Breyer based his conclusion on the fact that *Stencel* was decided thirteen years after the issuance of the Agent Orange contracts and dealt with noncontractual indemnification under state tort law, rather than contractual indemnification under federal contract law.

While the dissent agreed with the majority's position that contractual indemnification should never be readily granted, it disagreed with the majority's absolute prohibition of indemnification, finding that the majority did not consider the contracting parties' expectations of fair allocation of risks and good faith dealing. In addition, Justice Breyer believed the majority distorted past circumstances by viewing them through present law, rather than the laws in effect in the 1960s. Justice Breyer recommended that the case be remanded to the trial court for additional fact finding, commenting that the Court of Federal Claims had greater familiarity with the factual matters of the case and could further investigate matters outside the scope of the Supreme Court's appellate jurisdiction.

In *Hercules, Inc. v. United States*, the Supreme Court examined both tort and contract theory in its analysis of the issues in the case. Since the compulsory DPA contracts the contractors performed for the government provided the underlying source for the veterans' tort suits, the Court addressed the issue of whether the veterans could assert a tort claim directly against the government for injuries allegedly caused by Agent Orange, finding the "Feres doctrine" controlling on this issue.

In *Feres v. United States*, the military member plaintiffs alleged that negligence by other military personnel caused their

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76. *Id.* at 994.
77. *Id.*
78. *Id.*
79. *Id.*
82. *Hercules III*, 116 S. Ct. at 989. The Court has previously held that "liability may be styled in tort, but it arises out of performance of the [government] contract—and traditionally has been regarded as sufficiently related to the contract [to directly affect government interests]." *Boyle*, 487 U.S. at 505.
injuries. To support their claims, the plaintiffs relied on the language in the Federal Tort Claims Act ("FTCA"), stating that liability for the negligent conduct of government employees acting within the scope of their employment would attach to the government unless the government could claim immunity under some act of Congress or the judiciary. Therefore, the Feres Court held that Congress clearly intended the government to be immunized, as sovereign, from liability for injuries or death to military personnel on active duty arising from the negligent acts or omissions of other military personnel. The Court reasoned that Congress had provided mechanisms for recovery of damages.

85. Feres, 340 U.S. at 136. The three plaintiffs' cases were consolidated to resolve a conflict on the issue of sovereign immunity between the circuit courts. Id. Plaintiff Feres was the executrix of the estate of an active duty military member who claimed the government was responsible for the negligent conduct of other military personnel when plaintiff's decedent was killed in an Army barracks fire, alleging that Army personnel knew or should have known the building's heating plant was defective and therefore unsafe. Id. Plaintiff Jefferson was an active duty military member who claimed the government was responsible for the negligent conduct of an Army surgeon who allegedly left a towel measuring eighteen inches wide by thirty inches long, marked "Medical Department U.S. Army," inside the plaintiff's stomach during surgery. Id. at 137. Plaintiff Griggs was the executrix of the estate of an active duty military member who claimed the government was responsible for her decedent's death at the hands of allegedly negligent Army surgeons. Id.

86. Id. at 138. The Federal Tort Claims Act was originally enacted as Chap. 753, Title IV, 60 Stat. 843 (1946). FTCA was repealed as a separate statute and its provisions recodified in 28 U.S.C. Sections 1291, 1346 (b)(1), 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671-2680 (1982, as amended). The consent of the Government to be sued under the FTCA is embodied in 28 U.S.C. Section 1346 (b)(1) (1994):

§ 1346. United States as defendant

(b) (1) Subject to the provisions of chapter 171 of this title [28 U.S.C. § 2671 et seq.], the district courts,... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages,... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.


87. Feres, 340 U.S. at 140. The FTCA provides, in part:

§ 2674. Liability of the United States

The United States shall be liable... relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, ...

With respect to any claim under this chapter [28 U.S.C. § 2671 et seq.], the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

28 U.S.C. § 2674 (1994). The Feres Court found, however, that the relationship between the government and military members was unique in character and had no parallel to relationships between private individuals, thereby excepting military personnel from coverage under the FTCA. Feres, 340 U.S. at 141-42.

88. Feres, 340 U.S. at 146. The FTCA provides, in part:

§ 2680. Exceptions
by military members under various statutes, similar to state workmen's compensation arrangements, and therefore, injured military members and their estates had no additional rights under the FTCA to sue the government for injuries or death incident to military service. Relying on this reasoning, the Court in Hercules III held that the veterans and their families were compensated for their injuries through the operation of statutory provisions, and thus were precluded from asserting claims for negligence against the government in the class action and opt-out suits.

In Hercules III, the Court also considered the question of whether the government could similarly assert the defense of sovereign immunity to deny indemnification and contribution to a government contractor when the government supplied the specifications for a product that allegedly caused injury to an active duty service member. The Court distinguished its 1918 holding in United States v. Spearin, stating that the warranty of specifications in Spearin extended only to possibility of performance and could not be expanded to cover unforeseen third-party tort claims. The majority found that the "Stencel doc-

The provisions of this chapter [28 U.S.C. §§ 2671 et seq.] . . . shall not apply to—

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
(k) Any claim arising in a foreign country.


90. Feres, 340 U.S. at 145.
91. Hercules III, 116 S. Ct. at 989.
92. Id. at 986.
93. 248 U.S. 132 (1918). In Spearin, a government contractor sued for payment for work performed under a construction contract in accordance with government furnished plans and specifications. Spearin, 248 U.S. at 133. Due to conditions known to the government but not the contractor, and conditions known to neither party, unexpected weather destroyed the work already performed and made the site unsafe. Id. at 134.
The contractor refused to proceed with reconstruction unless the government agreed to the following conditions: (1) pay him for work already completed; (2) make the site safe; and (3) assume liability for future damage caused by the defective plans and specifications. Id. at 135. Instead, the government repudiated the contract. Id.
The Court found that while differing site conditions or unforeseen events did not entitle a contractor to additional compensation in excess of the agreed contract price, the government, as author of the plans and specifications, incurred liability for damages to the contractor due to the defective specifications. Id. at 136-37. The Court reasoned that a warranty of specifications was created by the government's provision of the specifications to the contractor, assuring the contractor that if he complied with the specifications, the finished product would be sufficient for its intended purpose. Id.
94. Hercules III, 116 S. Ct. at 986. The Spearin Court found that if the government had envisioned the advent of such third-party claims, it probably would have expressly stated in the contracts that it would not accept responsibility. Id.
trine" controlled this issue, even though it was decided thirteen years after the formation of the first DPA contracts for Agent Orange.\textsuperscript{95}

In \textit{Stencel}, a manufacturer of an aircraft ejection system claimed indemnification and contribution from the government, as joint tortfeasor and supplier of the specifications, for damages that might prospectively accrue to the manufacturer from loss of a suit brought by a National Guard fighter pilot who was permanently disabled when the ejection system failed in flight.\textsuperscript{96} The Supreme Court found that since the \textit{Feres} doctrine prevented the injured pilot from recovering damages from the government in excess of statutory compensation provisions, Stencel Aero should likewise be prohibited from recovering damages under the same rationale since the relationship of the government to its suppliers is analogous to the relationship between the government and its military members.\textsuperscript{97} In addition, the Court held that under the reasoning of \textit{United States v. Brown},\textsuperscript{98} permitting subordinates to sue their superiors in the military for negligent acts and omissions would cause an unacceptable breakdown in military discipline.\textsuperscript{99} The Court distinguished its previous holding in \textit{United States v. Yellow Cab},\textsuperscript{100} in which the claimants were civil-

\begin{itemize}
\item \textsuperscript{95} \textit{Id.}; \textit{Stencel Aero Eng'g Corp. v. United States}, 431 U.S. 666 (1977). The \textit{Hercules III} Court stated that although it realized \textit{Stencel} was decided after the contracts were formed, the same rationale had been applied by the Ninth Circuit in \textit{United Air Lines v. Weiner}, 335 F.2d 379, 404 (9th Cir. 1964), \textit{cert. denied}, 379 U.S. 951 (1964), and therefore, should have "at the very least suggested that the government would not be liable under tort theory." \textit{Hercules}, 116 S. Ct. at 987. In \textit{Weiner}, the Ninth Circuit held that the government is not liable for indemnification and contribution to its joint tortfeasor, a civilian airline company, for damages paid to the estates of government employees killed in a mid-air collision between a commercial airliner and a military fighter aircraft when the government employees are covered by the provisions of the Federal Employees Compensation Act, 5 U.S.C. § 757 (b) (1994). \textit{Weiner}, 335 F.2d at 455.
\item \textsuperscript{96} \textit{Stencel}, 431 U.S. at 667. Stencel Aero provided the ejection system under subcontract to North American Rockwell, which contracted with the government to supply F-100 fighter aircraft. \textit{Id.} at 667-68 n.2. Thus, no contractual relationship existed between Stencel and the government. \textit{Id.}
\item \textsuperscript{97} \textit{Id.} at 671-72.
\item \textsuperscript{98} 348 U.S. 110 (1954) (holding that payment of compensation by the government to a military member under the VBA does not preclude the member from also recovering from the Government under FTCA for negligent aggravation of a pre-existing injury by military physicians).
\item \textsuperscript{99} \textit{Brown}, 348 U.S. at 112. The Court feared that all military orders might be subjected to hindsight, opening a Pandora's box of potential individual and governmental liability in any case involving the injury or death of a service member. \textit{Id.}
\item \textsuperscript{100} 340 U.S. 543 (1951) (holding that the government could be impleaded as a third party defendant and be liable for indemnity and contribution for damages paid by transportation companies to civilian passengers injured when the vehicle, in which they were riding, was struck by a vehicle negligently driven by a government employee acting within the scope of employment).  
\end{itemize}
ians and not subject to the military exclusion provision of the FTCA or the Feres doctrine.\textsuperscript{101}

Following the reasoning of \textit{Stencel}, the Hercules III Court ruled that the provision of specifications for Agent Orange by the government implied only the creation of a narrow warranty of specifications: if the contractor followed the specifications, satisfactory performance of the contract was possible.\textsuperscript{102} Therefore, the Court concluded that permitting indemnification under contract theory on the grounds of an implied warranty of specifications defeated the purpose of the FTCA, which denied the same indemnification to the contractor under tort theory.\textsuperscript{103} In either case, the Agent Orange veterans would essentially be receiving compensation indirectly from the government.\textsuperscript{104}

On the issue of whether the government contractor defense provided immunity to the contractors, and thus, made settlement of the class action suit by the contractors unnecessary, the Hercules III Court found the rule established in \textit{Boyle v. United States}\textsuperscript{105} applicable.\textsuperscript{106} In \textit{Boyle}, a Marine pilot drowned when the escape hatch in his helicopter jammed after a crash at sea.\textsuperscript{107} The decedent's representative claimed that the hatch was either defectively repaired by military maintenance personnel or defectively designed by the manufacturer.\textsuperscript{108}

The \textit{Boyle} Court found the need for uniformity in the disposition of civil claims by third parties against government contrac-

\textsuperscript{101} \textit{Stencel}, 431 U.S. at 670.

\textsuperscript{102} \textit{Hercules III}, 116 S. Ct. at 986.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} 487 U.S. 500 (1988).

\textsuperscript{106} \textit{Hercules III}, 116 S. Ct. at 985. Prior to \textit{Boyle}, the circuit courts had approached the government contractor issue in differing ways. \textit{Id.} at 991 (Breyer, J., dissenting). The Third and Ninth Circuits held that the government contractor defense was viable due to the "Feres doctrine." \textit{See} Brown v. Caterpillar Tractor Co., 696 F.2d 246, 249-54 (3d Cir. 1982) (holding that government contractor defense provides immunity to the manufacturer of a bulldozer which injures a military reservist when the government furnishes the specifications for the bulldozer); McKay v. Rockwell Intl Corp., 704 F.2d 444, 448-451 (9th Cir. 1983) (holding that a supplier of military aircraft is not strictly liable to service members or their heirs when the government either provides specifications to the contractor or approves the contractor's detailed final specifications).

The Fifth Circuit did not recognize the government contractor defense. \textit{See} Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036 (5th Cir. 1984) (holding that, under Texas law, an asbestos manufacturer was liable for compensatory and punitive damages to a decedent's estate even though the government had established product specifications and government's knowledge of the hazards of asbestos was equal to the manufacturer's).

\textsuperscript{107} \textit{Boyle}, 487 U.S. at 502. During the accident investigation, a small piece of loose wire unlike that used anywhere in the helicopter was found in the motor that operated the escape hatch. \textit{Id.} at 503.

\textsuperscript{108} \textit{Id.} The hatch opened outward, making it impossible to open due to water pressure when the helicopter was submerged. \textit{Id.}
tors an area of "uniquely federal interest," justifying the preemption of state law by "federal common law." The Court held this unique federal interest is best served by extending the immunity enjoyed by the government, as sovereign, to its contractors under the "government contractor defense," since those contractors are performing functions at the behest of, and under the authority of, the government.

Rejecting Feres and the FTCA as the bases for finding that the interests of the Government could best be served by extending government immunity to contractors doing the government's work, the Boyle Court reasoned that if government contractors were found liable to third parties, the interests of the government would not be served. The threat of liability would probably significantly increase the costs of procurement in order to cover contractors' potential liabilities to third parties; or, if they were unable to increase prices, contractors would refuse to perform to specifications developed by the government.

Instead, the Boyle Court reasoned that although the FTCA authorized the payment of damages by the United States to persons harmed by the wrongful or negligent acts or omissions of government employees and agencies, the FTCA does not apply to claims resulting from the performance of discretionary functions or duties by government employees or agencies. The Court found the design or approval of military specifications by the government to be such a discretionary function. Therefore,

109. Id. at 504. Federal common law is fashioned by the courts in the absence of statutory authority, displacing state law in instances where procurement contracts affect the rights and duties of the United States. Id.
110. Id. at 506.
111. Id. at 510. The Court found the holding in Feres too narrow, as it only addresses claims by military personnel and does not encompass civilian claims. Id.
112. Boyle, 487 U.S. at 507.
113. Id. Either result would adversely affect government interests in keeping prices reasonable and maintaining sufficient sources of supply to meet government needs. Id.
114. Id. (emphasis supplied); see supra note 85 for the relevant text of Section 1346 of the FTCA, entitled "United States as defendant."
The provisions of this chapter [28 U.S.C. § 2671 et seq.] and section 1346 (b) of this title shall not apply to—
(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. § 2680 (1996).
116. Boyle, 487 U.S. at 511. Essentially, the contractor stands in the place of the government. Id.
a suit by a person claiming injury due to defective military specifications is not consented to by the government because of the military exception to the consent provisions of the FTCA.117

The Court in Boyle formulated a new three-part test for determining when federal common law will be applied over state law in cases where claims of injury are based on defective specifications.118 The elements of the test are: (1) the government approved reasonably detailed specifications; (2) the equipment or product conforms to those specifications; and (3) the contractor warned the government about the dangers in the use of the equipment or product that are known to the supplier, but not the government.119

By applying the Boyle test, the Court in Hercules III speculated that the contractors could have successfully asserted the government contractor defense.120 The Court found, however, that by failing to assert this affirmative defense, the contractors had voluntarily assumed liability for the veterans' injuries that could otherwise have been avoided.121 Thus, the government was...

117. Id. The Court found state laws that create liability for design defects in government contracts to be in conflict with federal policy (the state erroneously assumed the existence of a distinction between the government and a contractor performing the government's bidding). Id. at 512. In such cases, the Court stated that federal common law displaces state law in order to achieve national uniformity regarding suits against government contractors, regardless of the place where the alleged act or omission occurs. Id.

118. Id. at 512.

119. Id. at 512-13. The third element (the superior knowledge of the contractor must be divulged to the government) is imposed to prevent the contractor from suppressing important, but adverse, information about the equipment or product that might cause production interruptions to interfere with discretionary decisions of the government under the provisions of the FTCA. Id.

120. Hercules III, 116 S. Ct. at 985. The Court in Boyle addressed the issue of displacement of state tort law by federal common law. Boyle, 487 U.S. at 504.

The district court initially claimed jurisdiction in the class action suit under federal common law because of the presence of "significant federal interests" (federal question jurisdiction). In re "Agent Orange" Prod. Liab. Litig, 506 F. Supp. 737, 740 (E.D.N.Y. 1979), rev'd, 635 F.2d 987 (2d Cir. 1980). On appeal, a divided Second Circuit reversed the district court's choice of federal common law, finding that although the government has an "obvious interest" in supporting both its veterans and manufacturers, a federal policy striking the proper balance between the competing parties was "as yet undetermined." In re "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 995 (2d Cir. 1980). The circuit court concluded that prior to the formation of federal common law rules, the use of state law must pose a threat to an "identifiable" federal policy. Id.

The veterans amended their complaint to assert diversity of citizenship as the basis for federal jurisdiction. In re "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 692 (E.D.N.Y. 1984). In order to cope with the special circumstances of the case, in which over forty state jurisdictions were then represented, Judge Weinstein created the legal fiction of "national consensus law," assuming that all state transferor courts would probably treat the substantive issues in the same way. Id. at 693.

121. Hercules III, 116 S. Ct. at 985. The Court tacitly adopted the reasoning of the Federal Circuit in Hercules II, which stated that since the settlement by the contractors...
not liable to the contractors for damages that the Court found resulted from acts outside the government’s control.\textsuperscript{122}

The five courts involved in the Agent Orange litigation\textsuperscript{123} were obviously uncomfortable with the suits. Judge Plager, in his dissenting opinion in \textit{Hercules II}, clearly enunciated this uneasiness: "[i]t may be that it is best to put this chapter of our nation’s history [the Vietnam War] behind us, and to bury the issues with the dead. Appellants, by bringing this suit, do not allow us that peace. . . ."\textsuperscript{124}

The tortuous and prolonged course of the Agent Orange litigation over nearly two decades might have been curtailed at any phase by judicial acknowledgment that the controversy was non-justiciable. A broad political question lies at the heart of the Agent Orange litigation — whether the hope of an early end to a unpopular war justified decisions by the military department of the executive branch concerning the conduct of the war in Southeast Asia.

The constitutional doctrine of separation of powers dictates that the role of the judicial branch is to interpret the laws of the United States, not review the political decisions made by another branch of the government.\textsuperscript{125} The military’s decision to order the production of Agent Orange under DPA contracts was such a political decision, as was the decision to issue specifications for those contracts mandating that the drums bear no instructions

was a voluntary act, settlement severed any causative link between the DPA contracts and the contractors’ alleged injury. \textit{Id.; see also Hercules II}, 24 F.3d at 200.

\textsuperscript{122} \textit{Hercules III}, 116 S. Ct. at 985.

\textsuperscript{123} Five courts have issued ninety-two opinions or rulings on some aspect of the Agent Orange litigation:

(1) The United States District Court for the Eastern District of New York: fifty-eight opinions on various procedural and substantive issues in the class action, opt-out and corporate tort claims issued between 1979 and 1992.

(2) The United States Court of Appeals for the Second Circuit: eighteen appellate opinions on various procedural and substantive issues in the class action, opt-out and corporate tort claims issued between 1980 and 1993.


(5) The Supreme Court of the United States: one appellate opinion on corporate contract claims issued in 1996; one writ of certiorari granted in 1995; eleven writs of certiorari denied on various procedural and substantive issues in the class action, opt-out and corporate tort claims between 1981 and 1994.

\textsuperscript{124} \textit{Hercules II}, 24 F.3d at 205 (Plager, J., dissenting).

\textsuperscript{125} As Chief Justice Marshall wrote:

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. . . . The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

for use or manufacturer's name. The manner of Agent Orange's use by the government was, similarly, a political decision. The Hercules III Court did not discuss the effect of the underlying political question, or acknowledge that such a question existed.

Instead, the Court assumed jurisdiction of this case under the Tucker Act. By asserting Tucker Act jurisdiction, the contractors fought their battle under the wrong flag. The Tucker Act explicitly states that its jurisdiction extends to express or implied contracts between private parties and the United States and to liquidated or unliquidated damages in actions not sounding in tort. The Supreme Court has consistently interpreted the phrase "implied contracts" in the Tucker Act to mean contracts implied-in-fact: unspoken agreements reasonably inferable from the conduct of the parties. The Hercules III Court held that at the time the contracts were issued, no reasonable inference could be drawn from the conduct of either the government or the contractors that future indemnification was contemplated as an unspoken provision in the DPA contracts for Agent Orange. There is nothing in the record to suggest that either of the contractors requested an indemnification provision to be added to the contracts.

The government tested Agent Orange in the laboratory for more than ten years prior to the issuance of the contracts. The military successfully field tested defoliants in Vietnam during the Kennedy Administration. Based on the scientific evidence available to the government in the mid-1960's, defoliants seemed a safe and relatively inexpensive way to shorten a politically and emotionally divisive war. The contractors had produced herbicides containing the two Agent Orange components 2,4-D and 2,4,5-T for the commercial agricultural market. There was no

127. Id.
128. Hercules III, 116 S. Ct. at 985 (citing Sutton v. United States, 256 U.S. 575 (1921) (holding that the right to sue the United States under the Tucker Act is based on the existence of an enforceable contract, either express or implied-in-fact); Merritt v. United States, 267 U.S. 338 (1925) (holding that the Tucker Act does not apply to claims that can only be styled "a contract implied-in-law"); United States v. Minnesota Mut. Inv. Co., 271 U.S. 212 (1926) (holding that judgment under the Tucker Act must be predicated on a contract implied-in-fact); and United States v. Mitchell, 463 U.S. 206 (1983) (holding that although the language of the Tucker Act contains the term "implied contacts," the jurisdiction of the Act does not reach contracts implied-in-law, only contracts implied-in-fact)).
129. Id. at 987.
130. Schuck, supra note 1, at 16.
131. Id.
132. Id.
133. Hercules II, 24 F.3d at 191.
reason for the contractors or the government to believe at the
time of contract formation that Agent Orange production created
risks that would make the extraordinary inclusion of an indem-
nification clause necessary.\textsuperscript{134}

The Court in \textit{Hercules III} did not mention another salient fact
about Tucker Act jurisdiction: the Act specifically states that it
is inapplicable to actions for liquidated damages sounding in
tort.\textsuperscript{135} The fact that the contractors initially brought an action
for indemnification and contribution from the government under
tort theory lends credence to the hypothesis that this suit was
really an action sounding in tort masquerading as a breach of
contract action. From a practical litigation standpoint, the con-
tractors' would have put forth their strongest argument first —
the argument based on tort theory. Identical facts gave rise to
both the tort and contract lines of cases. The damages requested
were the same. The parties' briefs and the Court's majority and
dissenting opinions freely interjected tort terminology and case
law into an ostensible discussion of contract issues. As Gertrude
Stein once wrote, "A rose is a rose is a rose."\textsuperscript{136} \textit{Hercules III} can
be viewed simply as a second attempt by the contractors to
obtain indemnification and contribution from the government as
an alleged joint tortfeasor. Under this reasoning, the Court
lacked jurisdiction under the Tucker Act to hear the contractors'
appeal.

Further, the Court stated that the Tucker Act's jurisdiction
does not extend to contracts implied-in-law, and, therefore, did
not explore how the equitable theory of promissory estoppel
might have produced a different result.\textsuperscript{137} The contractors would
probably also have failed on equitable grounds because of the dif-
ficulty in proving the existence of the second element of promis-
sory estoppel: that a "promise" by the government produced a
reasonable expectation of reliance by the contractors. Even if the

\begin{footnotes}
\item[134.] \textit{Id. at} 204.
\item[135.] \textit{See supra} note 25 for the relevant text of the Tucker Act.
\item[136.] \textit{THE POCKET BOOK OF QUOTATIONS} 323 (Henry Davidoff ed.) (1952).
\item[137.] Promissory estoppel is an extraordinary equitable remedy used by courts to
prevent "manifest" injustice and unjust enrichment from occurring when one of the par-
ties to a promise has substantially and detrimentally changed his position in reasonable
reliance on the other party's performance of the promise. \textit{JOHN EDWARD MURRAY, JR.,
MURRAY ON CONTRACTS} 274-76 (3d ed. 1990). The elements of the doctrine of promissory
estoppel are:
\textit{§ 90 Promises Reasonably Inducing Definite Action or Forbearance}

(1) A promise which the promisor should reasonably expect to induce action or forbear-
ance on the part of the promisee or a third person and which does induce such action or
forbearance is binding only if injustice can be avoided by enforcement of the promise. The
remedy granted for breach may be limited as justice requires.
\end{footnotes}
Court accepted the contractors' premise that Section 2157 of the DPA implied a government promise to hold the contractors harmless for consequential damages arising directly or indirectly from the contract, the Court would probably hold that reliance by the contractors was unreasonable. The government explicitly refused to participate in the settlement negotiations on the grounds of sovereign immunity. This refusal leads to the inescapable conclusion that the government never intended the contractors to rely on an implied promise to hold harmless or indemnify.

The Hercules III opinion is vulnerable to criticism on the issue of the government contractor defense principally because the Court held the contractors to rules only announced definitively long after the contracts' formation, and four years after the district court urged the settlement. The majority stated that the contractors should have realized the future viability of the government contractor defense based on existing circuit court decisions. This thesis that the contractors should have known what the state of the law would be four years later is both unrealistic and unjust. The Supreme Court has recognized in other contexts that the state of the law at the time an action arises provides the only rational basis for decision. The circuit courts at the time of settlement were sharply divided on the issue of whether a government contractor defense existed.

The two district court judges overseeing the class action suit resolved the government contractor issue in opposite ways. Judge Pratt granted summary judgment to the contractors, but through an accident of bad timing for the contractors, his order was never formally entered before he left the court. Judge Weinstein ruled that the issue of government contractor immu-

139. The Court's decision in Boyle was announced in 1988, recognizing authoritatively for the first time the doctrine of government contractor immunity. Boyle, 487 U.S. at 500.
140. See Randall v. Loftsgaarden, 478 U.S. 647, 662 (1986) (holding that the state of the law when Congress enacts legislation provides courts with the appropriate guidance for limiting rescission remedies in securities contracts); Reed v. Ross, 468 U.S. 1, 16 (1984) (holding that when a defendant fails to challenge a jury instruction based on a novel constitutional issue in accordance with state court procedures, he or she is not barred from raising the issue for the first time in a later federal habeas corpus proceeding); Merrill Lynch v. Curran, 456 U.S. 353, 378 (1982) (holding that Congress demonstrates intent to preserve a judicially created remedy in a private cause of action not specifically addressed in a statute when it takes no action to fill the gap in the statute).
141. See supra note 105 for examples of the diverse conclusions reached by the circuit courts on the issue of the "government contractor" defense.
nity was one not for the court to determine, but for the jury.143 The contractors were rightly concerned that a jury might be so swayed by the emotional testimony of the veterans that a fair trial on the merits might be impossible. In addition, pretrial settlement has always been favored by courts in the interest of judicial economy.144 By settling, the contractors mitigated their damages, which might have proved ruinous for even the largest producers, such as Dow and Monsanto, had the case proceeded to trial.145 Finally, the government, the only common link between the veterans and the contractors, actively opposed the government contractor defense. One might say that the government had its cake and ate it too. After effectively removing itself from the case by asserting sovereign immunity, the government continued to meddle in the case from the safe fortress created by that immunity.

The Hercules III Court's application of future law to the issue of the government contractor defense is legally indefensible, creating the overwhelming impression that the Court first decided the outcome of the issue, and perhaps the case, and only then searched for arguments to support the preordained result that the government would prevail, whether or not those arguments logically fit the facts.146 By demanding clairvoyance from the contractors, the Court's decision as a whole loses credibility,


144. The Federal Rules of Civil Procedure provide in part:

Rule 1. Scope and Purpose

These rules govern the procedure in the United States district courts in all suits of a civil nature. . . . They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

FED. R. CIV. P. 1.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties . . . to appear before it for a conference or conferences before trial for such purposes as . . .

(5) facilitating settlement of the case.

FED. R. CIV. P. 16(a)(5).

145. The veterans in the class action suit claimed damages "in the range of four to forty billion dollars." "Agent Orange," 635 F.2d at 989 n.5.

146. Justice Benjamin Cardozo admonished judges to avoid exceeding their authority in pursuit of a particular result:

The judge, even when he is free, is still not wholly free. He is not to innovate at his own pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains.

leading to the conclusion that no matter what flag the contractors fought under, the outcome of the battle was known before the combatants took the field.

On the other hand, the Court may have reasoned that the risks attending a finding for the contractors were too great. Although this reasoning is unexpressed in Hercules III, there is a strong undercurrent suggesting that the Court believed the government must prevail in this case. If the contractors had succeeded in their claim for reimbursement of the settlement costs under either tort or contract theory, the doctrines of sovereign and government contractor immunity might both be called into serious question, creating financial vulnerability for the government. A finding for the contractors could have resulted in the overturning of Boyle, 47 Stencel, 148 and perhaps even Feres. 149

The Court drew a parallel in the relationships between the government and those who serve its interests in Feres and Stencel. Future litigants claiming injury from government acts or omissions could probably demonstrate a reverse parallel—that government liability to a government contractor under Stencel creates at least a tacit admission of government liability to the injured military member under Feres because of the analogous relationships. If Feres was overruled, the military exclusion under the Federal Tort Claims Act 150 might also be challenged in the future by military members suffering from the mysterious Persian Gulf War Syndrome. 151 One current theory of causation for the syndrome is the government's prophylactic administra-


148. Stencel Aero Eng’g Corp. v. United States, 431 U.S. 666 (1977) (holding the government not liable under the FTCA for indemnifying a subcontractor not in privity for damages paid to an injured military member).

149. Feres v. United States, 340 U.S. at 135 (1950) (holding the government not liable to military members for injuries incident to military service). Although the Feres doctrine has been criticized by both the Supreme Court (see Boyle, 487 U.S. at 510) and many legal scholars (see, e.g., David E. Seidelson, From Feres v. United States to Boyle v. United Technologies Corp.: an Examination of Supreme Court Jurisprudence and a Couple of Suggestions, 32 Duq. L. Rev. 219 (1994)), Congress has not amended the FTCA to legislatively overrule Feres. The Feres Court itself was unsure of whether it had interpreted the FTCA correctly, due to the absence of legislative history, but stated, "if we misinterpret the [Tort Claims] Act, at least Congress possesses a ready remedy." Feres, 340 U.S. at 138. Congress' inaction for the past forty-seven years signifies tacit approval of the Feres Court's interpretation of the FTCA.

150. See supra note 87 for the relevant text of Section 2680 to the FTCA ("Exceptions").

tion of vaccinations and medications to military members to combat the effects of possible Iraqi nerve gas and biological weapons.\textsuperscript{152} If this theory proves valid, the courts may be confronted with another mass toxic tort suit.

The government’s victory in \textit{Hercules III} may prove a Pyrrhic
\textsuperscript{153} one. This case concerned contracts performed under a mandatory statute, but the effect of the Court’s decision will reach far beyond the narrow realm of the DPA and the Anti-Deficiency Act to the voluntary purchasing transactions that comprise the bulk of government procurement. The dire predictions of the \textit{Boyle} Court\textsuperscript{154} may come to pass — contractors will be unwilling to rely on the uncertain protection afforded by the government contractor defense because of the Court’s ruling in \textit{Hercules III}.

Many commercial suppliers already avoid doing business with the government because of the bureaucratic maze of paperwork and regulations, not to mention the frequent delays in payment. It is a near certainty that future contractors will demand higher prices for government orders, attempting to cover both foreseeable and unforeseeable contingencies. These increased costs will prove vastly more expensive than the approximately thirty million dollars the contractors sought in damages in this case. The decision in favor of the government may also result in a diminution of the current government supplier base, as this decision sent a clear warning to potential government contractors that the government will not accept financial liability if it can find some other party to bear that burden.\textsuperscript{155}

Ironically, if the contracting parties had both been private entities, unshielded by statutory immunity, the contractors could have recovered their damages easily with the blessing of the

\textsuperscript{152} William Brook Lafferty, \textit{The Persian Gulf War Syndrome: Rethinking Government Tort Liability}, 25 \textit{STETSON L. REV.} 137, 144-45 (1995). Prior to deployment to the Gulf, military members received three vaccinations of anti-toxins and enzyme tablets and each was issued a field kit containing syringes of anti-spasmodic drugs to be self-administered in case of Iraqi nerve gas exposure. \textit{Id.} A Senate committee report postulated that the previously untested combination of these preventive measures may have resulted in the symptoms experienced by Persian Gulf Syndrome sufferers. \textit{Id.} (citing Committee on Banking, Housing and Urban Affairs, \textit{U.S. Chemical and Biological Warfare-Related Dual Use Exports to Iraq and Their Possible Impact on the Health Consequences of the Persian Gulf War}, 103d Cong., 2d Sess. 7 (May 25, 1994)).

\textsuperscript{153} A "Pyrrhic" victory is one whose gains are more than offset by the magnitude of the victor’s losses. \textsc{Merriam Webster’s Collegiate Dictionary} 953 (10th ed. 1994).

\textsuperscript{154} The Court predicted that contractors would either decline to produce items to government-furnished specifications or raise prices. \textit{Boyle}, 487 U.S. at 507.

\textsuperscript{155} Thompson ceased operations entirely, largely as a result of this litigation. Petitioners’ Brief, Hercules, Inc. v. United States, 23 F.3d 188 (Fed. Cir. 1994) (No. 94-818) (citing 27-28 app.).
Court. It is a further irony that the appellant contractors were probably the least culpable of the Agent Orange producers. Agent Orange supplied by Hercules contained no measurable dioxin after 1965. Thompson, one of the smallest of the producers, repeatedly begged the government for release from its two contracts; nonetheless, Thompson's Agent Orange contained extremely low levels of dioxin. Both the district court and the Second Circuit found the contractors' knowledge of the potential risks of Agent Orange vastly inferior to the government's when the government was forced to disclose scientific and military documents during discovery.

Justice Breyer suggested in his dissent that the Court had insufficient facts on which to base its decision. If the facts were not sufficiently discovered in the nineteen years of litigation that preceded Hercules III, it is unlikely that further proceedings will reveal some previously elusive material facts. Remanding this case would be both a waste of judicial time and attorneys' fees for both the contractors and the government. Sufficient facts were developed in the district, claims and circuit courts to adjudicate this case. It is highly unlikely that further discovery would influence the Supreme Court sufficiently to produce a different result, given the Hercules III majority's discounting or disregard of facts, statutory provisions and precedent tending to support the contractor's claims.

Chief Justice Rehnquist, author of the Hercules III majority opinion, in several of his past dissents quoted Justice Oliver Wendell Holmes' famous observation that "great cases, like hard cases, make bad law." Hercules III is exactly the kind of case Justice Holmes had in mind. The case was "great" both in its

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156. See supra note 18 for trial court's allocation of damages among the seven manufacturers of Agent Orange in the settlement of the class action suit.
158. Id. at 1273.
159. Id. at 1274.
160. The first Agent Orange suit was filed in July 1978. Hercules II, 24 F.3d at 206 n.3 (Plager, J., dissenting).
161. Larkin v. Grendel's Den, 459 U.S. 116, 127 (1982) (Rehnquist, J., dissenting) (holding that a state statute delegating the state's power to veto liquor licenses to churches and school located in proximity to the proposed licensee's establishment violates the Establishment Clause of the First Amendment to the United States Constitution); Green v. Georgia, 442 U.S. 95, 98 (1979) (Rehnquist, J., dissenting) (holding that the Due Process Clause of the Fourteenth Amendment to the United States Constitution is violated when a trial court excludes evidence tending to exculpate a defendant, thereby denying the defendant a fair trial); Davis v. U.S., 417 U.S. 333, 367 (1974) (Rehnquist, J., dissenting) (holding that a defendant's conviction should be set aside when after conviction, but before appeal, there is an intervening change in the law rendering the act no longer a crime).
162. Justice Holmes commented:
scope and complexity. Like the Agent Orange cases which pre-
ceded the Hercules cases, the Hercules cases arose out of one of
the most controversial chapters in this nation's history, affected
a huge number of individuals and explored the relationship
between the two capacities in which the government may act —
its sovereign capacity and its contractual capacity.163 This case
was "hard" because of the intricacy, novelty and variety of the
interrelated legal theories presented for adjudication, the dura-
tion of the litigation and the number of courts and litigants
involved. The result is that Hercules III is "bad law" since the
underlying historical facts create serious doubt as to whether the
government acted with the good faith expected from a party to a
contract in either its dealings with the veterans or with the
Agent Orange contractors who performed the government's
bidding.

The result reached by the Court in Hercules III will be debated
for many years. There were no true victors in this litigation, only
victims. The contractors were damaged financially by their expo-
sure to Agent Orange, but the damage to the credibility of the
government and the Court may be far greater. The tragedy of
the Agent Orange litigation, like the tragedy of the Vietnam war,
is not yet complete; it will continue to haunt American society
and its institutions long after the last of the Agent Orange veter-
ans and their children are dead.

Leslie A. Sherman

Great cases, like hard cases, make bad law. For great cases are called great, not by
reason of their real importance in shaping the law of the future, but because of
some accident of immediate overwhelming interest which appeals to the feelings
and distorts the judgment. These immediate interests exercise a kind of hydraulic
pressure which makes what previously was clear seem doubtful, and before which
even well settled principles of law will bend.
Northern Securities Co. v. United States, 193 U.S. 197, 364 (1904) (Holmes, J.,
concurring).

163. In its sovereign capacity, the government is immune to suit unless it expressly
waives that right. BLACK'S LAW DICTIONARY, 1396 (6th ed. 1991). In its contractual
capacity, the government waives its sovereign immunity, becoming an ordinary market
participant with the same rights and obligations as any other party to a contract. Tucker