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The End of a War Does Not End its Adverserial Reach: The Federal Government's Indemnification of World War II Contractors for Toxic Waste Cleanup Resulting from Wartime Manufacturing Efforts in Shell Oil Co. et al. v. United States

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THE END OF A WAR DOES NOT END ITS ADVERSARIAL REACH: THE FEDERAL GOVERNMENT'S INDEMNIFICATION OF WORLD WAR II CONTRACTORS FOR TOXIC WASTE CLEANUP RESULTING FROM WARTIME MANUFACTURING EFFORTS IN *SHELL OIL CO. ET AL. V. UNITED STATES*

> "United determination, and with unshakable faith in the cause for which we fight, we will, with God's help, go forward to our greatest victory."[1]
>
> - Gen. Dwight D. Eisenhower

I. Introduction

Although World War II ended nearly seventy years ago, litigation continues between the federal government and various World War II contractors.[2] The United States was determined to bring the war to a swift, decisive and victorious conclusion.[3] To that end, the federal government shifted manufacturing and production efforts from domestic goods, such as cars, ovens, and other items, to wartime goods, such as tanks, guns, and ammunition.[4] Aircraft production and aviation fuel refining were part of the government's new focus.[5]

Following World War I, many countries refined their weapons in preparation for another war.[6] The airplane, in particular, saw significant improvements, which had a substantial impact on the next war, World War II.[7] During World War II, the United States produced over 304,000 planes in only four years.[8] These planes

1. *Nazis Will Fail - Eisenhower*, The Miami News (Dec. 22, 1944), http://news.google.com/newspapers?nid=2206&dat=19441222&id=UBUyAAAAIBAJ&sjid=EucFAAAAIBAJ&pg=1532,2045606 (quoting United States General Dwight D. Eisenhower, Supreme Allied Commander, during German offensive).

2. Shell Oil Co. v. United States, 751 F.3d 1282, 1282 (Fed. Cir. 2014) (identifying generally extent of World War II litigation).

3. *See War Production*, Pub. Broad. Serv. (PBS) (Sept. 2007), http://www.pbs.org/thewar/at_home_war_production.htm (identifying purpose of high-yield war production).

4. *See id.* (referencing productions shifts for war effort).

5. *See id.* (identifying major focus of federal government war production).

6. *See* H.P. Willmott et al., World War II 206 (2004) (providing background of technological advancements in modern warfare).

7. *See id.* (highlighting innovations in war).

8. *See War Production*, *supra* note 3 (identifying scope of aircraft production during World War II).

consumed approximately 9.7 billion gallons of fuel during their service, at home and abroad.[9] One of the United States' newest airplanes was the Boeing B17, known as the "Flying Fortress," capable of transporting large quantities of bombs deep into enemy territory.[10] The United States produced over 13,000 B17s for the war effort.[11] Each B17 required approximately 2,800 gallons of fuel to complete a mission.[12]

World War II resulted in many scientific achievements ranging from nuclear energy and the atomic bomb, to improvements in communication, and in gasoline production.[13] One of these achievements was a new high-octane fuel known as aviation fuel (avgas).[14] Avgas significantly increased aircraft engine performance.[15] When tested in the Spitfire, a World War II British fighter plane, avgas increased the plane's flying speed by thirty miles per hour (mph).[16] The avgas also increased the aircraft's rate of climb by 950 feet per minute.[17] With the use of avgas, the United States' P-51D Mustang fighter maintained an airspeed of 613 mph, exceeding that of Germany's Messerschmitt BF109 and Japan's Mitsubishi Zero with airspeeds of 438 and 492 mph respectively.[18] Avgas increased aircraft engine performance, thereby making the airplane a fundamental element to the Allied victory in World War II.[19]

After the United States entered World War II, the demand for avgas increased dramatically, which required the federal govern-

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9. *WWII Aircraft Facts*, WORLD WAR II FOUND., http://www.wwiifoundation.org/students/wwii-aircraft-facts/ (last visited Feb. 24, 2015) (stating number of gallons of gas consumed during World War II).

10. *See* WILLMOTT, *supra* note 7, at 206 (highlighting capabilities of B17).

11. *See id.* (stating number of B17s built during World War II).

12. DONALD L. MILLER, MASTERS OF THE AIR 178 (2006) (estimating gallons of avgas required for B17).

13. *See War Production*, *supra* note 4 (identifying importance of manufacturing shift for technological advancements).

14. *See WWII Aircraft Facts*, *supra* note 9 (identifying importance of avgas production to war effort).

15. *See* Neil Stirling & Mike Williams, *100/150 Grade Fuel*, WWIIAIRCRAFTPERFORMANCE.ORG, http://www.wwiiaircraftperformance.org/150grade/150-grade-fuel.html (last visited Feb. 24, 2015) (stating operational improvements of aircraft using avgas).

16. *Id.* (reporting airspeed performance results when comparing regular gasoline to avgas).

17. *Id.* (reporting rate-of-climb performance results when comparing regular gasoline to avgas).

18. *Warplanes*, WORLD OF WARPLANES, http://worldofwarplanes.com/warplanes (last visited Feb. 24, 2015) (stating aircraft speeds and relevant operational statistics).

19. *See id.* (highlighting importance of avgas and aircraft during World War II).

ment to quickly contract with Shell Oil Co.; Atlantic Richfield Co.; Texaco, Inc.; and Union Oil Co. of California (collectively, Oil Companies) to produce avgas to fuel Allied airplanes.[20] Avgas production subsequently increased from "40,000 barrels per day in 1941 to 514,000 barrels per day in 1945."[21] The production process created a petroleum by-product consisting of alkylation acid and an "acid sludge."[22] The government resolved the pollution issue by dispersing the by-product in locations across the United States including California's "McColl" site, which is the basis for the litigation in *Shell Oil Co. et al. v. United States*.[23]

Approximately fifty years after the Allied victory, California and the federal government were successful in enforcing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against the Oil Companies.[24] While CERCLA requires the cleanup of sites contaminated with hazardous substances, the question that arises is who is responsible to pay for the cleanup.[25] In *Shell Oil*, the court addressed this very issue.[26] The court analyzed government "contracts [that] promise reimbursement for 'any new or additional taxes, fees, or charges' imposed on the Oil Companies, with certain exceptions not relevant here."[27] In *Shell Oil*, the court agreed with the Oil Companies, finding the contract provisions required the government to indemnify the Oil Companies.[28]

Shell Oil, however, reveals a significant issue that may arise for current and future contractors in their contract recovery efforts.[29] Contractors who supported the war effort had limited recovery options because the Anti-Deficiency Act (ADA) prohibited any indemnification amount that exceeded the amount originally appropriated for the contract.[30] The court's decision, nevertheless, provides contractors protection from unknown costs associated with

20. Shell Oil Co. v. United States, 751 F.3d 1282, 1284 (Fed. Cir. 2014) (citing war contractors who are included in this litigation).

21. *Id.* at 1287 (stating production increase after federal government contracted with Oil Companies to produce avgas).

22. *Id.* at 1288 (identifying avgas by-product pollutant).

23. *See id.* (highlighting Superfund toxic waste site at issue in litigation).

24. *Id.* at 1285 (identifying source of litigation).

25. *See* 42 U.S.C. §§ 9601-9675 (2006) (stating CERCLA's requirements for EPA cleanup of hazardous waste sites).

26. *See generally Shell Oil*, 751 F.3d at 1285 (identifying scope of plaintiffs' claims).

27. *Id.* at 1290 (identifying main issue addressed by court).

28. *Id.* at 1285 (stating Federal Circuit Court's holding).

29. *See generally id.* (identifying issues that may arise from court's holding).

30. 42 U.S.C. § 9601 (highlighting ADA limitations).

the government's request for such contractors to "'undertake extraordinary modes of operation which [are] often uneconomical and unanticipated at the time of [a contractor's] entry into'" the contract.[31] At issue in *Shell Oil* are the "unanticipated" CERCLA costs resulting from the cleanup of the contaminated McColl site.[32]

Case law does not provide a clear answer regarding the liability associated with cleanup costs resulting from wartime avgas production.[33] The court in *Shell Oil* failed to resolve the extent to which the federal government is required to indemnify the Oil Companies?[34] If the cost of indemnification exceeds the appropriated amount, the Oil Companies may be liable for the difference and, therefore, will not be fully reimbursed for the costs.[35]

This Note examines the Court of Appeals for the Federal Circuit's decision in *Shell Oil*.[36] Part II of this Note offers a summation of the facts in *Shell Oil*, including its procedural posture.[37] Part III provides a legal background of the issues in this case.[38] Part IV reviews the court's legal analysis in *Shell Oil*.[39] Part V analyzes whether the court's holding was properly reasoned.[40] Finally, Part VI concludes with a discussion of *Shell Oil*'s impact, including issues that may arise in future litigation.[41]

II. FACTS

The federal government and the State of California commenced a CERCLA action against the Oil Companies who utilized a toxic waste disposal site during World War II.[42] The government

31. *Shell Oil*, 751 F.3d at 1287 (stating protection available and court's protection of war contractors).

32. *Id.* at 1288-89 (identifying main source of confrontation between contracting parties).

33. *See generally id.* at 1292-96 (highlighting difficulties in contract and statutory interpretation).

34. *See generally id.* at 1303 (articulating potential gaps in court's holding).

35. *See id.* at 1298-02 (recognizing limitations in recovery for contractors).

36. *See Shell Oil*, 751 F.3d at 1284-85 (providing introduction to case).

37. For a discussion of the factual issues surrounding *Shell Oil*, see *infra* notes 42-62 and accompanying text.

38. For a discussion of the background information relating to *Shell Oil*, see *infra* notes 63-111 and accompanying text.

39. For a discussion of the court's holding in *Shell Oil*, see *infra* notes 112-61 and accompanying text.

40. For a critical analysis of the holding in *Shell Oil*, see *infra* notes 162-88 and accompanying text.

41. For an analysis of the potential impact *Shell Oil* may have on future federal law, see *infra* notes 189-203 and accompanying text.

42. *Shell Oil*, 751 F.3d at 1288-89 (stating initial basis for litigation over McColl site).

sought recovery of cleanup costs associated with the toxic waste site, the McColl Superfund Site.[43] The Oil Companies then asserted their own claims to recover the CERCLA costs; asserting that the contracts entered into during World War II required reimbursement for CERCLA costs associated with the cleanup of toxic waste sites.[44] The Oil Companies based their claim on an indemnification provision in the war contracts, which provided that the federal government "reimburse the Oil Companies for all Government-imposed 'expenses or costs.'"[45] The indemnification provision analysis focused on avgas production and the cleanup costs arising out of the distribution of the toxic waste by-product.[46]

The contract counterclaim asserted by the Oil Companies was transferred from a district court in California to the Court of Federal Claims where the court focused its analysis on a specific section of these contracts, which "required the buyer[, a government entity] . . . 'to pay any *now existing* taxes, fees, or charges.'"[47] The Court of Federal Claims held that the term "charges" referred to expenditures that arise out of taxes or fees related to taxes or other encumbrances or liens.[48] It did not find the indemnification provision encompassed environmental cleanup costs.[49]

The court found the Oil Companies had used the McColl site to dispose of waste from avgas production, produced during World War II.[50] The court determined that 12% of the waste disposed of at the site was a result of alkylation acid and "82.5% was [an] acid sludge [mixture] resulting from chemical treatment of other petro-

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43. *Id.* at 1289 (identifying cleanup site at issue); *see also Superfund Site Overview McColl*, ENVTL. PROT. AGENCY, http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/ViewByEPAID/CAD980498695 (last visited Feb. 24, 2015) (explaining purpose for cleanup of McColl Superfund Site).

44. *Shell Oil*, 751 F.3d at 1289 (stating claims asserted by Oil Companies).

45. *Id.* at 1290 (citing Oil Companies' claims).

46. *Id.* at 1290-99 (highlighting scope of litigation).

47. *Id.* at 1287 (identifying specific contract language at issue). The indemnification provision states:

> (b) Buyer shall also pay in addition to the prices as established in [Sections IV and V] hereof, any now existing taxes, fees, or *charges* measured by the volume or sales price of the aviation gasoline delivered hereunder, imposed upon Seller by reason of the production, manufacture, storage, sale or delivery of such gasoline, unless Buyer or Seller is entitled to exemption from a given tax, fee or *charge* by virtue of Buyer's governmental status . . . .

Id. at 1290-91.

48. *Id.* at 1291 (identifying lower court's contract provision interpretation).

49. *Shell Oil*, 751 F.3d at 1291 (identifying limitation to lower court's holding).

50. United States v. Shell Oil Co., 841 F. Supp. 962, 975-76 (C.D. Cal. 1993) (discussing district court's finding that Oil Companies must pay cleanup costs).

leum products."[51] The federal government was liable for "[t]he remaining 5.5%" of the waste at the site as a result of its attempt to treat benzol pollution.[52] The Court of Federal Claims held the Oil Companies liable for the CERCLA cleanup costs.[53]

In *Shell Oil*, the United States Court of Appeals for the Federal Circuit was left to decide the liability associated with the remaining 94.5% of the waste and whether the lower court properly interpreted the meaning of "charges."[54] This case involved the Oil Companies' action to recover the CERCLA cost judgment by enforcing the indemnification provision.[55] The Oil Companies' basis for its claim was that the federal government was contractually obligated to indemnify the Oil Companies from any "'new or additional taxes, fees, or charges'" that may arise from the Oil Companies' participation in World War II avgas production.[56]

The Oil Companies brought their initial claims under the Contract Settlement Act of 1944 (CSA).[57] The CSA provides war contractors with a "'speedy and equitable final settlement of claims *under terminated war contracts*'" with no set period limiting when a claim for recovery may be asserted.[58] The court in *Shell Oil* determined that the CERCLA costs were "charges," therefore, the government must indemnify the Oil Companies for these costs.[59] The court held the "contracts promise[d] to pay for 'any' government-imposed 'charges' incurred 'by reason of' the avgas contracts."[60] The court indicated, "No special words are required to create a promise of indemnification."[61] The court, however, left undetermined "how much of the acid waste dumped at the McColl site was 'by reason of' the avgas program."[62]

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51. *Shell Oil*, 751 F.3d at 1288 (identifying exact type and amount of toxic waste requiring cleanup).

52. *Id.* (identifying government's contribution to waste site).

53. *Id.* at 1289-90 (citing lower court's holding).

54. *See id.* at 1288 (identifying waste not directly attributable to government cleanup).

55. *Id.* at 1285, 1290 (identifying issue that Note discusses).

56. *Shell Oil*, 751 F.3d at 1290 (quoting indemnification provision to show provision at issue that must be interpreted by court).

57. *Id.* at 1289 (stating Oil Companies' original claim for relief).

58. *Id.* at 1297-98 (citing CSA language affording protection to contractors).

59. *Id.* at 1284 (noting court's holding in indemnification claim).

60. Government Contractor, *WWII Contracts Require Government Reimbursement of CERCLA Costs, Fed. Cir. Holds*, 56 NO. 18 GOV'T CONTRACTOR ¶ 156 (May 7, 2014) (quoting opinion of court in *Shell Oil*).

61. *Id.* (quoting extent of court's applicability of its opinion).

62. *Shell Oil*, 751 F.3d at 1303 (quoting court's remaining issue to determine monetary amount government must indemnify Oil Companies).

III. BACKGROUND

After the United States entered World War II, the federal government contracted with petroleum producers to produce avgas.[63] The First War Powers Act of 1941 afforded the executive branch with the power to enter into petroleum contracts without Congressional approval.[64] Specifically, the First War Powers Act authorized the President of the United States to delegate contracting powers to various departments and agencies, regardless of the appropriation amounts or any statutory restrictions including any limitations imposed by the ADA.[65]

Under this power, various departments entered into contracts with the Oil Companies to produce avgas for the war effort.[66] The authorized government agencies permitted to enter into contractual obligations on behalf of the government during World War II were the: "(i) Office of Petroleum Coordinator for National Defense (OPC), later replaced by the Petroleum Administration for War (PAW)[;] and (ii) Office of Production Management (OPM), later replaced by the War Production Board (WPB)."[67] Through these entities, "the Government exercised substantial wartime regulatory control over almost every aspect of the petroleum industry."[68]

A. Comprehensive Environmental Response, Compensation, and Liability Act

In 1980, the introduction of CERCLA provided the United States Environmental Protection Agency (EPA) with organizational and procedural authority to "prepare[ ] for and respond[ ] to discharges of oil and releases of hazardous substances, pollutants, and contaminants."[69] CERCLA requires potentially responsible parties (PRPs), who contributed to the release of a hazardous substance that may threaten the general welfare and health of others, to reim-

63. *See id.* at 1284-85 (highlighting importance of war contracts and how they supported war effort).

64. *Id.* at 1300-01 (stating source of executive, agency, and departmental contracting power).

65. *Id.* at 1300 (identifying scope of wartime Presidential power).

66. *Id.* at 1285 (highlighting scope of contracts within contractors during World War II).

67. *Shell Oil*, 751 F.3d at 1286 (listing government entities with authority to contract with Oil Companies during World War II).

68. *Id.* at 1285 (citing federal government authority over petroleum production).

69. 40 C.F.R. § 300.1 (2014) (stating purpose and objectives of CERCLA and its National Oil and Hazardous Substances Pollution Contingency Plan).

burse the EPA for "response or remediation costs."[70] The following parties are liable for CERCLA reimbursement:

> (1) [t]he owner and operator of a facility; (2) [t]he owner and operator of a facility at the time the hazardous substance was disposed of; (3) [a]ny party who arranges for the disposal or treatment of hazardous substances by some third party; and (4) [a]ny person who accepts hazardous substances for transport to a disposal or treatment facility selected by that person.[71]

The above-referenced parties are liable for cleanup costs completed by the EPA and various state agencies.[72] In *United States v. Atlantic Research Corp.*,[73] the United States Supreme Court found that CERCLA allows PRPs to bring a contribution action against other PRPs for their contribution to the toxic waste site.[74] The Court defined contribution as a "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."[75] The extent of liability is:

> (1) [a]ll removal or remedial action costs incurred by the federal government, a state or an Indian tribe[,] provided such costs are not inconsistent with the National Contingency Plan ("NCP"); (2) [a]ny response costs incurred by any other person; provided such response costs are consistent with the NCP; (3) [d]amages for injury to, destruction of, or loss of natural resources; and (4) [c]osts of any health assessment or health effects study carried out under the applicable provisions of CERCLA.[76]

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70. *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, ENVTL. PROT. AGENCY (June 27, 2012), http://www.epa.gov/agriculture/lcla.html#Summary%20of%20CERCLA (stating purpose and scope of CERCLA).

71. Kenneth A. Hodson & Charles H. Oldham, *Defenses to Liability Under CERCLA*, 46 ARIZ. ST. L.J. 459, 460 (Summer 2014) (quoting CERCLA identifying entities liable for CERCLA cleanup). A facility is "any area where a hazardous substance [is] located." 42 U.S.C. § 9601(9). A hazardous substance is a substance defined in 40 C.F.R. table 302.4 and those defined in the Clean Water Act, 33 U.S.C. § 132(b)(2)(A).

72. *Id.* (identifying scope of reimbursement for cleanup efforts).

73. United States v. Atlantic Research Corp., 551 U.S. 128, 138-40 (2007) (highlighting breadth of entity liability).

74. *Id.* (highlighting reimbursement liability).

75. *Id.* at 138 (defining contribution as defined by *Black's Law Dictionary* 353 (8th ed. 2004)).

76. *See* Hodson, *supra* note 72, at 460 (quoting general scope of liability under CERCLA).

CERCLA specifically addresses the extent of sovereign immunity and contributions made by the government or by its contractors to a waste site.[77] CERCLA highlights that the United States is equally liable for all EPA reimbursements for the cleanup of hazardous waste resulting from the government's actions.[78] The government's liability does not end with its own actions.[79] The government is vicariously liable for the actions of its contractors.[80] Moreover, courts have found "CERCLA[ ] liability is strict, joint, and several."[81]

Alternatively, these contractors may also be liable for a violation by the United States government, depending upon the circumstances.[82] For example, government contractors incur millions of dollars in liabilities as a result of testing and cleaning hazardous waste sites.[83] In previous hazardous waste site litigation resulting from war contracts, contractors and the government have been held liable for up to "100 percent of remediation costs, as owner, operator, and/or arranger" for contributions to or approval of toxic waste dumping sites.[84]

Federal circuit courts have previously identified specific tests to determine whether pre-CERCLA indemnification clauses are enforceable.[85] The United States Court of Appeals for the Third Circuit previously held that the indemnification "clause must be either '(1) specific enough to include CERCLA liability or (2) general enough to include any and all environmental liability which would, naturally, include subsequent CERCLA claims.' "[86] The Federal Cir-

77. *See* Harvey G. Sherzer et al., *Supreme Court To Decide Boundaries Of Government Liability Under CERCLA*, 42-SPG PROCUREMENT LAW. 1, 1 (Spring 2007) (stating liability for United States and its war contractors).

78. *Id.* at 23 (identifying government's liability).

79. *See* Chris M. Amantea & Stephen C. Jones, *The Growth of Environmental Issues in Government Contracting*, 43 AM. U. L. REV. 1585, 1585-87 (Summer 1994) (highlighting liability of government contractors for hazardous waste cleanup).

80. *See* Sherzer, *supra* note 78, at 25 (stating government is liable for contractor actions).

81. *See* Hodson, *supra* note 76, at 460 (quoting extent of liability on parties).

82. *See* Sherzer, *supra* note 80, at 25 (discussing contractor liability).

83. *See* Amantea, *supra* note 79, at 1586-87 (explaining monetary extent of liability).

84. *See* Sherzer, *supra* note 78, at 25 (considering government and contractors' liability from previous litigation).

85. E.I. Du Pont de Nemours & Co. v. United States, 365 F.3d 1367, 1373 (Fed. Cir. 2004) (quoting Beazer E., Inc. v. Mead Corp., 34 F.3d 206, 210 (3d Cir. 1994)) (citing alternative circuit court decisions as to enforceability of indemnification contract clauses).

86. *Id.* (quoting specificity of contract clause required to enforce indemnification provision).

cuit Court has decided similar cases, *E.I. Du Pont de Nemours and Co., Inc. v. United States*[87] and *Ford Motor Co. v. United States*,[88] regarding contract review of indemnification clauses in war contracts.[89] In *Du Pont*, the court reviewed the contractual language, the historical context surrounding the contracts, and the power vested in the agency representing the government to enter into an indemnification provision that protects the contractors.[90] Additionally, the court in *Ford* determined the federal government's indemnification liability did not terminate as a result of the conclusion of World War II.[91] Both decisions held that the wartime contracts provided for indemnification for future costs arising from the contracts even if not expressly defined.[92]

B. Contract Settlement Act of 1944

Less than a month after the Allied landing on Normandy Beach, Congress enacted the Contract Settlement Act of 1944 (CSA).[93] The CSA was regarded as "one of the most carefully considered pieces of legislation ever to have been enacted by the Congress."[94] The CSA had two guiding principles.[95] The first guiding principle was "to avoid mass business failures and widespread unemployment, termination claims of all war contractors—prime contractors and subcontractors alike—must be settled and paid with the greatest possible speed."[96] This first principle strived to protect contractors and, ultimately, the workers to ensure continued war production.[97] The second guiding principle aimed to protect "[t]he Government, in settling and paying such claims," as well as shielding the government from "waste and fraud."[98] The goal of

87. 365 F.3d 1367 (Fed. Cir. 2004).

88. 378 F.3d 1314 (Fed. Cir. 2004).

89. Shell Oil Co. v. United States, 751 F.3d 1282, 1294 (Fed. Cir. 2014) (citing additional decisions relating to present issue).

90. *See E.I. Du Pont de Nemours*, 365 F.3d at 1372-74 (discussing government indemnification provision).

91. *See Shell Oil*, 751 F.3d at 1294 (discussing government's liability in *Ford*).

92. *Id.* at 1297 (identifying scope of federal government's liability under war contracts in *Du Pont* and in *Ford*).

93. *See* James E. Murray, *Contract Settlement Act of 1944*, 10 LAW & CONTEMP. PROBS. 683-92 (Spring 1944), *available at* http://scholarship.law.duke.edu/lcp/vol10/iss4/8/ (discussing enactment of CSA).

94. *See id.* (commenting on specificity of CSA).

95. *Id.* at 685 (stipulating CSA's two governing principles).

96. *Id.* (discussing first guiding principle).

97. *Id.* (discussing second guiding principle).

98. *See* Murray, *supra* note 95, at 685 (stating protection for contractors and government).

this second principle was to protect the government's interests by utilizing safeguards to ensure the government did not unnecessarily expend vital resources.[99]

The CSA charged the Contract Settlement Advisory Board (the Board) with advising and consulting with the contracting government agencies to ensure that the agencies achieved the CSA's principles.[100] The Board possessed the authority to settle contracts with war contractors.[101] All settlements "are final and conclusive except (1) to the extent otherwise agreed in the settlement; (2) for fraud; (3) upon renegotiation to eliminate excessive profits under the Renegotiation Act; or (4) by mutual agreement before or after payment."[102]

The CSA also provided that each government-contracting agency had the legal authority to enter into an agreement, regardless of any legal restrictions.[103] The CSA was drafted to ensure the procurement process for World War II continued to produce the vital supplies necessary for the war effort.[104] The contract's provisions were applicable even when the contract had been terminated, if it was "necessary and appropriate" to enforce the contract provisions in the future.[105] The government remained liable, even after termination of a contract, for indemnifying the "war contractor against, any claims by any person in connection with such" terminated or settled contract.[106]

C. Anti-Deficiency Act

The ADA was promulgated in 1982 to restrict federal government employees from contracting on behalf of the government for goods or services in excess of the appropriation amount.[107] The ADA provides, in relevant part:

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99. *See id.* (providing government with necessary resources to protect interests).

100. *See id.* (charging Contract Settlement Advisory Board with contracting authority).

101. *See id.* at 687 (identifying various authority levels).

102. *Id.* (describing requirements for settlements).

103. Shell Oil Co. v. United States, 751 F.3d 1282, 1301 (Fed. Cir. 2014) (citing CSA statutory language identifying government agent authority).

104. For a further discussion of Congressional purpose when drafting the CSA, see *supra* notes 95-102 and accompanying text.

105. *Id.* (quoting CSA contract provision indemnifying future claims arising out of contracts).

106. For a further discussion of Congressional purpose when drafting the CSA, see *supra* notes 95-102 and accompanying text.

107. 31 U.S.C. § 1341 (identifying ADA's general purpose).

> An officer or employee of the Unites States Government or the District of Columbia government may not[:] (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . . .[108]

Moreover, "[t]he [ADA] bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation."[109] In a previous opinion, the Federal Circuit Court held that an appropriation must contain an explicit statement that provides for costs exceeding the appropriation amount for indemnification purposes.[110] Finally, the ADA prohibits government employees from entering into or enforcing "express open-ended indemnification clauses."[111]

IV. NARRATIVE ANALYSIS

The Federal Circuit Court in *Shell Oil* analyzed the Court of Federal Claims' contract interpretation of World War II contract indemnification provisions.[112] The contract dispute arose out of CERCLA cleanup costs billed to the Oil Companies.[113] The Oil Companies challenged the decision of the Court of Federal Claims.[114] The court reviewed the Court of Federal Claims' opinion *de novo*.[115] The Federal Circuit Court held the term "charges" within the indemnification provisions included environmental cleanup costs; therefore, the government was liable for all CERCLA costs arising out of avgas production under the contracts.[116]

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108. 31 U.S.C. §§ 1341(a)(1)(A)-(B) (presenting restrictions provided by ADA on government employees).

109. E.I. Du Pont de Nemours & Co. v. United States, 365 F.3d 1367, 1374 (Fed. Cir. 2004) (citing Hercules, Inc. v. United States, 516 U.S. 417, 426 (1996)) (highlighting applicability and implementation of ADA provisions).

110. California-Pacific Utils. Co. v. United States, 194 Ct. Cl. 703, 715 (Fed. Cir. 1971) (discussing ADA restrictions).

111. *E.I. Du Pont de Nemours*, 365 F.3d at 1374 (stating explicit restriction of government employees when entering into contracts on behalf of federal government).

112. Shell Oil Co. v. United States, 751 F.3d 1282, 1288-89 (Fed. Cir. 2014) (highlighting cause of action by Oil Companies).

113. *See generally id.* at 1288-02 (identifying arguments court addresses in its analysis).

114. *Id.* at 1289-90 (identifying basis for appeal).

115. *Id.* at 1290 (identifying general standard of review).

116. *Id.* at 1296 (identifying contractual standard of review).

A. Government Reimbursement to Oil Companies for CERCLA Costs

Although the lower court interpreted the indemnification provisions to only include charges during production or as a result of taxes, the Federal Circuit Court interpreted the term "charges" within the contract provision to include "any new or additional . . . charges . . . by reason of the production, manufacture, sale or delivery of" avgas.[117] The cleanup initiatives implemented under CERCLA were a result of petroleum production, here avgas production.[118] The toxic waste disposed of at the McColl site resulted from avgas production of which the associated dumping sites were a necessary part of the production process.[119] The court articulated that because the Oil Companies and the government could not agree as to the meaning of the contract provision, the government, as the buyer, must have a "governmental tax authority" to authorize a tax exemption if the CERCLA costs are to be classified as a tax.[120] A tax exemption was never issued; therefore, the court determined the contract must be interpreted "in a manner that gives meaning to all of [the] . . . provisions [so that they] make[ ] sense."[121]

The court then reviewed the government's argument that the term "charges" did not encompass environmental liabilities.[122] The court did not accept this argument, nor did the court agree with the government's assertion that the tort damage as a result of the toxic waste sites constituted "charges" under the war contracts.[123] Furthermore, the court analyzed the use of "charges" throughout the entire war contract.[124] For example, the court looked to provisions that discussed "charges" for raw materials, overhead "charges," and other uses of the term "charges."[125] In doing so, the

117. *Shell Oil*, 751 F.3d at 1292 (quoting Federal Circuit Court's interpretation of indemnification provision).

118. *See id.* (highlighting purpose of CERCLA cleanup).

119. *Id.* at 1288-89 (identifying importance of McColl site in production process).

120. *Id.* at 1293 (identifying requirements to consider CERCLA costs as taxes and not charges).

121. *Id.* (quoting court's standard in which to review war contract provision).

122. *Shell Oil*, 751 F.3d at 1294 (citing federal government's argument to narrow meaning of charges).

123. *Id.* at 1294-95 (citing court's determination of federal government's arguments).

124. *Id.* at 1296 (identifying meaning of "charges" by reviewing use of "charges" throughout agreement).

125. *Id.* (identifying specific uses of "charges").

court determined that throughout the contracts, the term "charges" also referred to costs for materials.[126]

Additionally, the Federal Circuit Court reviewed communications between the federal government and the Oil Companies.[127] The court reasoned that the term "charges" was used interchangeably with the term costs for the duration of the federal government's wartime relationship with the Oil Companies.[128] As a result, the court found that any costs arising out of the avgas contracts are "new or additional charges" that are included within the indemnification provision of the contracts.[129]

During World War II, the federal government controlled many production facilities contributing to the war effort, but needed the assistance of the Oil Companies to produce avgas.[130] In order to incentivize the Oil Companies to meet the avgas demand, the government liberally drafted war contracts with the Oil Companies to ensure that the Oil Companies would meet the "extraordinary demand for avgas."[131] In reviewing the contract provisions, the court determined the government assumed the risk of financial uncertainty arising from avgas production to ensure Oil Companies met the demand for avgas.[132] The CERCLA costs, therefore, were "charges" under the indemnification provision of the war contracts.[133]

Moreover, the court considered whether the government was released of all liability at the conclusion of World War II.[134] The court reviewed two Federal Circuit cases, *Du Pont* and *Ford*, which resolved the issue of whether the conclusion of World War II also terminated the war contracts.[135] The court highlighted that the government has the burden to show the contract release was executed.[136] If executed, the government would be absolved of all lia-

126. *Id.* (determining meaning of "charges").

127. *Shell Oil*, 751 F.3d at 1296 (identifying extent to which court reviewed surrounding circumstances).

128. *Id.* (stating meaning of "charges").

129. *See id.* (identifying scope of meaning of "charges").

130. *Id.* (describing rationale for liberal contract provisions).

131. *Id.* (identifying reasoning for federal government's liberal contract construction).

132. *Shell Oil*, 751 F.3d at 1296 (reasoning for federal government's indemnification provision).

133. *Id.* (holding that CERCLA costs are included under indemnification provision).

134. *Id.* at 1296-97 (identifying second issue on appeal).

135. *Id.* at 1297 (highlighting court's review of relevant jurisprudence).

136. *Id.* (highlighting scope of federal government's burden).

bility from any new or additional costs after 1945.[137] In *Shell Oil*, the court determined the government did not meet its burden and, therefore, held the release had not been executed.[138]

The court then addressed whether the government remained liable for the costs even if the release was executed.[139] The court determined CERCLA costs or any other costs that arose out of actions taken while the contract was in force could not be released, even if the contract had been terminated.[140] In its analysis, the court stated that the government must "prove the settlement agreements released future claims under the avgas contracts" for which, in this case, the government did not meet its burden.[141] Therefore, the contract indemnification provision included in the Oil Companies' contracts did not release the government from future costs incurred by the Oil Companies, including CERCLA cleanup costs.[142]

B. Applicability of the Anti-Deficiency Act

The Federal Circuit Court also considered the issue of whether the ADA precluded the government from indemnifying the Oil Companies for CERCLA cleanup costs.[143] The court quoted the applicable ADA language, in relevant part:

> No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations *unless such contract or obligation is authorized by law.*[144]

As an initial matter, the court analyzed whether the ADA precluded the party representing the government from entering into a contract with a broad indemnification provision.[145] The court re-

137. *Shell Oil*, 751 F.3d at 1296-97 (resulting implications of an executed release).

138. *Id.* at 1297 (holding by Federal Circuit Court of Appeals).

139. *Id.* at 1297-99 (identifying additional considerations of release provisions).

140. *Id.* at 1298 (finding by court under termination of liability issue).

141. *Id.* (identifying federal government failure to meet its burden).

142. *Shell Oil*, 751 F.3d at 1297 (citing court's interpretation of indemnification provision).

143. *Id.* at 1299 (identifying third consideration on appeal).

144. *Id.* (quoting ADA language at issue for CERCLA cost determination).

145. *Id.* at 1300 (identifying first issue under ADA limitation).

viewed the First War Powers Act of 1941, which afforded government agencies with the authority to "enter into contracts that would otherwise violate the ADA."[146] The court determined the President had authorized the department to enter into the contracts with the Oil Companies.[147] As a result of the transfer of authority from the President to the contracting departments, the court held the ADA was inapplicable to the avgas gas contracts.[148] The court noted the necessity for avgas during the war supported the enforcement of these contracts.[149]

The Federal Circuit Court looked to the historical context surrounding the contracts and the need for avgas.[150] The government needed avgas and in order to provide the Oil Companies with certainty in revenues and liabilities, the government ensured the Oil Companies were indemnified for all costs associated therein, including future "charges."[151] The court then analyzed the CSA, which allowed contracts that did not comply with the law at the time of the contracts' execution to remain enforceable as a result of the necessity of the contracts.[152]

The Federal Circuit Court recognized that the President's previous Executive Orders limited a governmental agency's authority to enter into contracts that obligated the government to future payments.[153] The Executive Orders were limited, however, to contracts where future payments exceeded the appropriated amount and to contracts not otherwise associated with the war effort.[154] In its discussion, the court referred to the First War Powers Act of 1941 that authorized agents of the government to enter into agreements that otherwise violated the ADA.[155] The Federal Circuit Court deter-

146. *Id.* (quoting First War Powers Act limiting ADA intrusion into war contracts).

147. *Shell Oil*, 751 F.3d at 1301 (stating court's belief as to executive's action).

148. *Id.* at 1300-01 (concluding application of ADA to war contracts).

149. *Id.* at 1301 (identifying surrounding historical circumstances for provision).

150. *Id.* at 1287 (highlighting court's evaluation of surrounding circumstances).

151. *Id.* at 1296 (highlighting federal government's purpose for liberal contract construction).

152. *Shell Oil*, 751 F.3d at 1300 (highlighting CSA protection of war contract enforcement).

153. *Id.* at 1301 (identifying final issue raised under ADA contention).

154. *See id.* at 1301-02 (identifying exceptions to ADA).

155. *Id.* at 1301 (identifying basis for government agent authority).

mined that the ADA did not prohibit CERCLA cost reimbursement.[156]

Additionally, the court highlighted the general importance of properly apportioning the toxic waste among the entities responsible for the waste.[157] Apportionment, however, was not a contentious issue in this case.[158] The court did not identify the amount of toxic waste present as a result of avgas production.[159] The court, accordingly, remanded the case to determine "how much acid waste at the McColl site was 'by reason of' the avgas contracts."[160] The court determined the contract indemnification provisions, the termination of the contract in 1945, and the ADA allowed the Oil Companies to recover CERCLA costs under the indemnification provisions.[161]

V. CRITICAL ANALYSIS

In evaluating the contractual language, the court reviewed a variety of resources and federal jurisprudence to ensure it made a holistic interpretation of the term "charges" so as not to limit the term to a specific definition.[162] In its broad interpretation of "charges," the Federal Circuit Court provided much needed protection to war contractors, considering that the government had, and still has, enormous power to require contractors to engage in certain extraordinary activities.[163] Based on the court's deference to the executive branch's contracting authority during wartime, the court properly held that the ADA did not limit the Oil Companies' CERCLA recovery.[164]

156. *Id.* at 1302 (holding by Federal Circuit Court of Appeals for ADA limitation dispute).

157. *Shell Oil*, 751 F.3d at 1302 (identifying apportionment of CERCLA liability costs).

158. *See id.* (stating issue not addressed in litigation).

159. *See generally id.* (highlighting limitation to holding).

160. *Id.* at 1303 (identifying remanded portion of proceeding).

161. *See generally id.* at 1284-03 (finding that ADA exception applied).

162. For a further discussion of CERCLA liability, see *supra* notes 117-42 and accompanying text.

163. *Shell Oil*, 751 F.3d at 1296 (identifying degree of regulatory authority government maintained during World War II).

164. *Id.* at 1285 (highlighting basis for government's authority in contract negotiations and finding of court).

A. Government Liability for Indemnification of CERCLA Costs

The court correctly held the government was liable for CERCLA costs arising out of World War II avgas production.[165] The contracts explicitly held the government liable for charges incurred during avgas production, as well as for any future costs.[166] While the court appeared hesitant to extend the meaning of "charges" to include a wide-range of costs such as tort damages, the court convincingly reasoned that the federal government used the terms "charges" and "costs" interchangeably throughout the contract and throughout its communication with the Oil Companies.[167] The Federal Circuit Court's analysis remained focused on production, specifically any costs incurred for the sole purpose of producing avgas.[168] The court focused on the government's use of the word "charges" in relation to expenditures for facilities, materials, and employment, yet also used "charges" to encompass all "new or additional charges" relating to the production process of avgas.[169]

In support of its broad definition of "charges," the court looked to the historical context surrounding the contracts.[170] The court realized the government had an "extraordinary demand for avgas," which required unusual contractual obligations to incentivize the Oil Companies to meet the demand.[171] To meet the demand, the Oil Companies could not worry about potential future liability due to the disposal of large quantities of the toxic avgas byproduct.[172] In light of the contracts' use of the term "charges" and the context surrounding indemnification of future "charges," the court properly held the government liable for any future costs related to the production of avgas under World War II contracts.[173]

Another issue the court considered was whether the federal government executed its contract release at the conclusion of World War II.[174] The court properly found the government must

165. *Id.* at 1292 (identifying court's holding).

166. *Id.* (holding government liable for new or additional charges).

167. *Id.* at 1294 (discussing differences between "charges" and "costs").

168. *Shell Oil*, 751 F.3d at 1292 (addressing court's reasoning for application of definition).

169. *See id.* (stating provision at issue throughout appeal).

170. *Id.* at 1287 (describing context surrounding contract).

171. *Id.* at 1296 (describing need for avgas production).

172. *See generally id.* (discussing why indemnification provision was broadly interpreted).

173. For a further discussion of indemnification and release provisions, see *supra* notes 134-42 and accompanying text.

174. *See Shell Oil*, 751 F.3d at 1296-97 (determining applicability and execution of release provision).

submit evidence that it executed its contract release.[175] The court continued its analysis into the applicability of the indemnification provision despite its finding that the contract release provision was not executed.[176] The Federal Circuit Court broadly held the government liable for CERCLA cleanup costs where the contract release was executed.[177] Although the contracts did not explicitly provide for liability, even where the contract was released, the court's holding is supported from a public policy perspective.[178] Where the federal government has substantial power over wartime contractors, the court must give wartime contractors adequate protections from extraordinary liability resulting from the federal government's war effort demands.[179]

B. ADA Applicability to CERCLA Costs

In an over-protective decision, the Federal Circuit Court found the ADA did not preclude the Oil Companies' recovery for CERCLA costs.[180] Considering the ADA prohibited government agencies from entering into contracts where the expenses exceeded the appropriated amount, the court decided to sidestep this issue.[181] In this regard, the court drew a distinction between agencies, such as the EPA, and departments authorized by the President under the First War Powers Act of 1941.[182] Throughout the proceeding, the court remained sensitive to the extraordinary circumstances surrounding the contracting entities, the contracts themselves, and the overwhelming historical context.[183] Furthermore, the court closely analyzed the First War Powers Act of 1941, finding that the President and its agents may enter into contracts where necessary to support the war effort, regardless of any limitations imposed by law.[184]

175. *Id.* at 1297 (analyzing government liability regarding executed release).

176. *Id.* (identifying court's continued analysis).

177. *See id.* (holding of court on release provision issue).

178. *See id.* at 1297-99 (highlighting public policy concerns when release enforced).

179. *See Shell Oil*, 751 F.3d at 1297-99 (highlighting need for contractor protection).

180. *See id.* at 1299-02 (identifying scope of holding with regard to ADA).

181. *See id.* at 1299 (holding that ADA does not preclude CERCLA reimbursement).

182. *See id.* (identifying scope of First War Powers Act of 1941 authority afforded to agencies and departments during World War II).

183. *See id.* at 1287, 1296, 1301 (identifying authorized contracting agents of government).

184. *Shell Oil*, 751 F.3d at 1300 (focusing analysis on scope of First War Powers Act of 1941).

In an attempt to narrow its holding, the court identified various Executive Orders that restricted an agency's ability to enter into contracts providing for future payments.[185] Despite the valid restriction, the court properly determined that CERCLA costs were not restricted by the Executive Orders.[186] As such, the Executive Orders did not directly limit the authority of the agents acting on behalf of the President.[187] Therefore, the Executive Orders did not preclude future payments resulting from CERCLA costs.[188]

VI. IMPACT

The Federal Circuit Court's ruling in *Shell Oil* will likely provide greater protection and certainty to contractors who contract with the government during wartime.[189] This decision, however, may lead to increased litigation regarding government contract indemnification provisions.[190] The court broadened the meaning of "charges" within the indemnification provisions for future contractual interpretations.[191] The broader definition will likely change the interpretation of government indemnification provisions where the term "charges" exists.[192]

The holding in *Shell Oil* will also lead to further litigation to determine the government's contribution to toxic waste sites.[193] The Federal Circuit Court highlighted that the government need only reimburse the Oil Companies for CERCLA costs resulting from avgas production.[194] Determining the amount of toxic waste attributable to the war effort, and avgas production in particular, will be difficult with over seventy years of additional waste added to many sites used during wartime.[195] These uncertainties will give

185. *See id.* (identifying limitations to Executive Orders).

186. *See id.* at 1301-02 (analyzing Executive Orders restricting contract authority).

187. *See id.* (highlighting limited analysis of Presidential wartime power).

188. *See generally id.* (determining Executive Orders did not apply to CERCLA costs).

189. *See generally Shell Oil*, 751 F.3d at 1290-96 (highlighting application of indemnification for CERCLA costs).

190. *See id.* (identifying possibility of increased litigation).

191. *See id.* (addressing contractual indemnification provision interpretation).

192. *See id.* (debating whether "charges" was correctly defined).

193. *See id.* (determining extent this case will have on environmental and contract jurisprudence).

194. *See Shell Oil*, 751 F.3d at 1293 (limiting indemnification to subject of contract).

195. *See id.* at 1288-89 (limiting liability to contribution to toxic waste site).

rise to litigation where the plaintiffs seek to enforce the indemnification provisions resulting from wartime contracts.[196]

Future government contract construction will likely be affected by the court's holding in *Shell Oil*.[197] Government contractors, during both wartime and peacetime, will certainly seek increased specificity regarding the scope and the applicability of indemnification clauses.[198] This change will grow increasingly more important for the government, because the government has the burden of showing it properly executed its contract release, thereby limiting the government's indemnification exposure.[199] Contractors will also seek to include a broad indemnification provision that applies to police actions and other military demands to the extent these demands do not arise out of a Congressionally declared war.[200] The court appeared to focus on ensuring that a "speedy and equitable" termination of claims was available in order to avoid detrimental effects to the government.[201] The court, nevertheless, allowed the historical context surrounding a government contract to affect the meaning of the contract.[202] This includes interpreting a contract in a manner that, at one time, was prohibited by law.[203]

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196. *See id.* (acknowledging this holding will likely create future litigation).

197. *See id.* (identifying scope of interpretation).

198. *See id.* (identifying future litigant's likely assertions).

199. *See Shell Oil*, 751 F.3d at 1293 (addressing future concerns of contractors).

200. *See id.* (highlighting scope of contracts).

201. *See id.* at 1297 (addressing overall policy of court in proceeding).

202. *Id.* at 1296 (highlighting historical context).

203. *Id.* at 1301 (identifying broadened scope of indemnification for war contracts).

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