

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: HERCULES, INCORPORATED, ET AL.,
Petitioners v. UNITED STATES
CASE NO: 94-818
PLACE: Washington, D.C.
DATE: Monday, October 30, 1995
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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-818, Hercules, Incorporated v. United
5 States.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONERS

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

11 This is a case about simple fairness. The
12 petitioners were compelled under the threat of civil and
13 criminal penalties to produce Agent Orange. They were
14 required to produce it according to precise specifications
15 commanded by the United States Government.

16 The specifications ensured that dioxin would be
17 produced, which the United States knew, and the Government
18 also knew, and the court of appeals expressly found that
19 dioxin is an extremely hazardous substance. Petitioners
20 knew none of these facts, and the United States knew them
21 and declined to divulge any of that information to the
22 United States -- or, excuse me, to the petitioner.

23 The Agent Orange that was produced by the
24 petitioners was done so in strict conformity to the
25 requirements of the United States, and the United States

1 then used it in unheard-of concentrations and exposed
2 thousands of American military and others to the risks
3 that arise from the dioxin.

4 QUESTION: Who can't recover against the United
5 States.

6 MR. PHILLIPS: Who cannot recover against the
7 United States?

8 QUESTION: I mean, I really find your simple
9 fairness argument a little hard to take in this field. I
10 mean, if there's anybody who's been done out of simple
11 fairness, it's the soldiers who were injured by this
12 thing, and they can't sue, so haven't we abandoned simple
13 fairness in this field?

14 MR. PHILLIPS: No. I think it's a question
15 of --

16 QUESTION: Should we be outraged that the
17 companies cannot pass on their liability, when the injured
18 parties themselves can't recover?

19 MR. PHILLIPS: Well, at least some portion of
20 the injured parties, of course, are taken care of by
21 veterans benefits programs, and that was a decision the
22 court made a long time ago with respect to the --

23 QUESTION: Sure, the companies had golden
24 parachutes, too, or something else, but that's a different
25 question, whether they can get moneys --

1 MR. PHILLIPS: But the -- as I understand the
2 theory, Justice Scalia, the quid pro quo for depriving
3 soldiers of the ability to go against the United States on
4 a tort theory was because they have other remedies, and
5 therefore the Court interpreted the Tort Claims Act not to
6 prove -- not to allow recovery.

7 That says nothing, though, about what ought to
8 be the relationship between the contractors and the United
9 States. It seems to me quite clear that in defining that
10 relationship you have to look to the basic law of -- the
11 basic Federal common law, and what rules make sense there.

12 QUESTION: Well, but it's been established for a
13 long time, Mr. Phillips, that he who deals with the
14 Government must turn square corners. That is, it's not a
15 matter of equity, or something like that, it's a matter of
16 waiver of sovereign immunity, which is always strictly
17 construed.

18 MR. PHILLIPS: That's absolutely correct, Your
19 Honor, but there's no question in this case that there's
20 been a waiver of sovereign immunity. The lodgings that
21 were filed with the Court demonstrate the existence of a
22 contract. The Tucker Act expressly waives sovereign
23 immunity for all contract claims.

24 We're simply trying to ascertain the broad
25 outlines of what's within those contracts based on

1 principles this Court has long followed in terms of when
2 do you imply either indemnification agreements or
3 warranties based on the relationship between the parties
4 and the course of conduct between the parties.

5 The litigation in this particular case arose in
6 the wake of the initial settlements that were done by the
7 petitioners after they were sued by the -- those who had
8 been exposed to Agent Orange.

9 QUESTION: Mr. Phillips, with respect to that,
10 suppose this case had developed that Judge Pratt's
11 acceptance of the Government's contractor defense had
12 stuck, that there had been no change of district judges,
13 and he had entered that judgment, an appeal is taken, and
14 the companies are concerned about how the court of appeals
15 would resolve the Government contractor defense, so they
16 settle, precisely the terms that we have before us here.
17 They settle, and then they want to be reimbursed by the
18 Government for the cost of that settlement. Would they
19 have a claim then?

20 MR. PHILLIPS: Yes, Your Honor, I believe they
21 would have a claim. They would unquestionably have a
22 claim under an implied indemnification theory, because it
23 is well settled under standard contract rules that if you
24 are indemnified against losses, that whatever losses arise
25 out of your course of conduct, assuming you're an innocent

1 party, are recoverable.

2 QUESTION: But the loss in what I've described
3 to you is their decision, their uncertainty whether their
4 victory in the district court will prevail. That's --
5 they don't want to take a chance on losing on appeal.
6 They've won in the district court, and yet you say that
7 the Government would be responsible under the contract.

8 MR. PHILLIPS: Yes, Your Honor, under an implied
9 indemnification, which is either a variant of Spearin, or
10 a concept that you ought to take directly from Ryan
11 Stevedoring, where the nature of the relationship between
12 the parties demonstrates the kind of control that we're
13 talking about here, where you have compelled production,
14 you have precise specifications, and you have superior
15 knowledge. In that situation, you would ordinarily -- in
16 an ordinary agency relationship you would immediately
17 assume indemnification, and that --

18 QUESTION: But if the law is as a Government
19 contractor you have a complete defense to the tort action,
20 if that's what the law is, and then the manufacturers say,
21 yes, we urge that that was the law, it was accepted by the
22 court that that was the law, but we know those courts of
23 appeals are not reliable, so we're going to settle rather
24 than risk a reversal.

25 MR. PHILLIPS: As I understand the standard

1 rules of damages in an indemnification arrangement, the
2 fact that you had to expend moneys under any circumstances
3 is recoverable against the indemnitor.

4 Now, the question is, were the expenditures
5 reasonable? That is, has the indemnitee in some sense
6 squandered the assets of the indemnitor?

7 Now, in your hypothetical, you could argue that
8 you're getting close to that, because in some situation
9 where you have an absolute slam dunk winner, it may be
10 that it would be inappropriate to settle. In the facts of
11 our case, obviously, that's not what we faced. We didn't
12 have a guaranteed defense, and we weren't even being
13 supported by the United States as part of that process.

14 The other portion of why an indemnification fits
15 neatly into this whole arrangement is that under standard
16 indemnification law the Government would, as an
17 indemnitor, be in a position to step into the shoes of the
18 indemnitee and therefore take over the defense, and if,
19 under those circumstances the Government wanted to ensure
20 1) that no settlements would go forward that they hadn't
21 approved of, they could exercise that right, but they
22 would have to take over the defense under those
23 circumstances.

24 But it seems to me that that's just standard
25 indemnification law as it would apply in the facts of this

1 particular case.

2 Now, with respect to breach of warranty, the
3 issue is a little less clear because the causation
4 requirement between a breach of warranty and the
5 particular damages is less clearly supported by the
6 position that you're entitled not only to recover anything
7 that you spend in consequence of a judgment, but that
8 you're also entitled to any settlement that you reasonably
9 enter into.

10 I think part of the reason why it's less clear
11 is because you don't have the indemnitor there to protect
12 itself, and under those circumstances, the courts take, I
13 think, a much harder look at whether or not the particular
14 damages were caused by the particular breach.

15 But here, we're dealing with a situation of
16 summary judgment, and we've not had an opportunity to
17 prove any of those relationships under the circumstances
18 in this case, and I'm confident that if we get back to the
19 claims court and we can demonstrate that the
20 specifications create both breaches of warranty and
21 breaches -- and that the -- and indemnification rights,
22 we'll be able to demonstrate under the traditional common
23 law rules that otherwise would apply precisely how the
24 damages ought to flow.

25 QUESTION: Did you allege that you had been

1 compelled within the meaning of section 101, that you had
2 been compelled to produce this stuff?

3 MR. PHILLIPS: Yes, we did allege that we had
4 been compelled to produce under -- that there were orders
5 entered under section 707 of the defense production - -

6 QUESTION: Why should we get into
7 indemnification when you had a defense under 707 by virtue
8 of the compulsion?

9 MR. PHILLIPS: Well, I mean we argued that we --

10 QUESTION: I mean, leaving aside whatever under
11 other circumstances might or might not be implied, doesn't
12 your allegation, if it is accepted, entitle you to a
13 defense and, therefore, why should we get into implying
14 indemnification that you don't need?

15 MR. PHILLIPS: Well, I've two answers to that.
16 First of all, we tried that defense and it didn't succeed.
17 We asserted in the Agent Orange litigation that we should
18 not be held liable, that we should be held harmless, as
19 the provisions seemed to indicate, and were told that it
20 only swept to the extent of the priority, and protections
21 against the priority of contracts, not from the rest of
22 the damages that would flow from performance of the
23 particular contract, so it may --

24 QUESTION: Should you be excused from litigating
25 your position on that? In other words, I don't know how

1 that will ultimately play out, but it seems to me you have
2 a strong argument. Should we excuse you for carrying that
3 issue as far as you can, and go to the convenience of
4 implying this indemnification so that you don't have to
5 bother to litigate your 707 position?

6 MR. PHILLIPS: Let me step back for a second in
7 terms of the sort of convenience of an indemnification,
8 because I think it's quite clear that that's not a matter
9 of convenience, it's a matter of the basic way of
10 interpreting the relationship between the parties under
11 these particular circumstances.

12 QUESTION: Well, regardless of whether you call
13 it a convenience or not, if, to the extent that we are
14 going to do any implying here, or find an implication, why
15 should we find an implication when, on your own
16 allegations, you have a defense under 707 and, secondly,
17 why shouldn't you have to litigate that point?

18 MR. PHILLIPS: Well, we did litigate that point
19 up to the stage where we faced a \$40 billion claim, and at
20 that point we blinked. I think that is a perfectly
21 reasonable litigating judgment.

22 QUESTION: It may be reasonable, but if we have
23 to choose between allowing you to blink at the expense of
24 an indemnification which, in fact, may not be necessary,
25 or may not have proven to be necessary even on your own

1 theory had you pursued your defense, why should we prefer
2 you to the Government?

3 MR. PHILLIPS: Well, I think the basic reason is
4 that the Government contractor whose entire enterprise is
5 controlled exclusively by the United States is an innocent
6 party to this entire proceeding, and as between an
7 innocent party and a not-innocent party in an implied
8 indemnification arrangement, it's Hornbook law that you
9 favor the innocent party.

10 QUESTION: Well, but my difficulty is, your
11 argument seems to be proving, if I accept it, that you do
12 have a defense under 707 and the question is, who should
13 be, in effect, relieved from establishing this.

14 MR. PHILLIPS: Well, you know, the other side of
15 that is that when we argued this, the United States did
16 not come in and argue that we were entitled to protection
17 under section 707. They didn't view that as a defense.
18 We've never been -- never got the benefit of the
19 Government supporting our particular position.

20 QUESTION: Well, by the same token -- I don't
21 know the answer to this, but did you request the
22 Government to take part in the settlement? Did you
23 request the Government to take a position?

24 MR. PHILLIPS: Well, absolutely. From day 1 we
25 sought the Government's assistance throughout this

1 litigation, and failed to --

2 QUESTION: Well, I assume it follows from your
3 position that if you would -- if the Government would have
4 to contribute to your settlement you would also logically
5 have a claim against the Government if you didn't settle
6 and ultimately won. You'd have a claim against the
7 Government for your attorney's fees, I suppose.

8 MR. PHILLIPS: Yes, Your Honor. I believe that
9 that's standard indemnification law.

10 QUESTION: Well, my goodness, why is that? I
11 mean, even people who are prosecuted criminally by the
12 Government and expend, you know, hundreds of thousands of
13 dollars to defend themselves and are ultimately found
14 innocent do not have a claim for indemnification against
15 the Government.

16 MR. PHILLIPS: I understand that, Justice
17 Scalia, but those people also don't have a contractual
18 relationship with the Federal Government.

19 QUESTION: Yes, but whether it's reasonable to
20 imply that term in a contract with the Government surely
21 is colored by the fact that the Government doesn't even
22 pay off when it's prosecuted you wrongfully and you have
23 to expend hundreds of thousands of dollars to defend
24 yourself.

25 MR. PHILLIPS: Justice --

1 QUESTION: Would the same Government who doesn't
2 pay you off in that situation likely have entered into an
3 implied contract with you to pay you off in what seems to
4 me the much less heinous situation that you're complaining
5 about?

6 MR. PHILLIPS: Well, it's difficult for me to --

7 QUESTION: This is a different Government you're
8 talking about, it seems to me.

9 MR. PHILLIPS: But I mean, under ordinary
10 indemnification rules, Justice Scalia, the party who has
11 the power to compel, the party who has the power to
12 require compliance, and the party who has superior
13 knowledge and who allows the innocent contractor to engage
14 those kinds of expenses is entitled to be indemnified.

15 QUESTION: But this party is the Government.
16 The average party is not a party who has sovereign
17 immunity, and what terms are implied in a contract with
18 the Government surely is -- ought to be colored by the
19 fact that the Government usually doesn't pay people off
20 for litigating.

21 MR. PHILLIPS: Well, let me suggest there are
22 two answers to that. First of all, essentially it seems
23 to me the same argument would have been -- could have been
24 made and probably was made in Spearin, and this Court
25 nevertheless implied warranties arising out of the course

1 of conduct between the parties and, therefore, it seems to
2 me the same argument that was available there didn't
3 prevent the Government contractor from being protected.

4 QUESTION: Between the parties have you got any
5 case in the Spearin line where, not the parties to the
6 immediate contract was involved, but where Spearin was
7 successfully invoked to recover money paid to third party
8 tort claimants, as here?

9 MR. PHILLIPS: The two closest cases on point in
10 that regard are the Traveler's Insurance case out of the
11 Federal Circuit and the -- or is it -- I'm sorry, maybe
12 the Third Circuit, and the Williams-McWilliams case that
13 we cited. Those are two court of appeals cases that
14 applied Spearin directly and said there's no reason to
15 restrict Spearin and the basic implied warranties that are
16 embodied in Spearin to be cut off based simply on contract
17 performance when to do so is to expose these individuals
18 to greater harms, and basically --

19 QUESTION: Were they third party tort claimants?

20 MR. PHILLIPS: Yes. In the one case a person
21 fell off of a tower that had been improperly built
22 according to Government specifications.

23 QUESTION: Well, I don't read Spearin to say
24 that the law of implied warranties is -- or indemnity is
25 just going to be incorporated bag and baggage into every

1 deal with the United States.

2 MR. PHILLIPS: Well, I don't read that --

3 QUESTION: Spearin is a fairly limited case on
4 its facts.

5 MR. PHILLIPS: Well, the one thing that Spearin
6 says, and I think this applies just as well with the
7 warranty as it does with the -- excuse me, with the
8 indemnification as with the warranty, the contractor will
9 not be responsible for the consequences of defects in the
10 specifications.

11 That's the rule of law that Spearin announced
12 and, interestingly, it derived that rule from a series of
13 State court cases applying just general common law
14 principles, that it's a settled rule that you are not held
15 responsible for defects that the Government foists upon
16 you.

17 And in this case, to go back to the implied
18 warranty component of the case, the defect that we were
19 dealing with was that a process that, if you followed
20 exactly what the Government commanded you to do under the
21 contract, would create dioxin, and everyone concedes that
22 dioxin is an extremely hazardous substance, and it was
23 that dioxin that the United States then used to defoliate
24 the jungles of Vietnam and expose thousands of people to
25 injury.

1 QUESTION: Mr. Phillips, how does the Defense
2 Production Act work? Suppose you were ordered to produce
3 this. Could you say, well, we'll negotiate the contract.
4 Now, we want an indemnity clause in the contract. Did you
5 have that option, that choice?

6 MR. PHILLIPS: We could ask for that, yes.

7 QUESTION: And does the Government have to give
8 it to you? I mean, how does this work? If they're making
9 you do something --

10 MR. PHILLIPS: Well, we don't have any leverage
11 at that point. I mean, we can ask for indemnification,
12 but they can say, we're not going to put in an express
13 indemnification provision.

14 QUESTION: Well, can they force you to proceed
15 then anyway?

16 MR. PHILLIPS: Yes, of course they can. Either
17 that, or you can face civil or criminal penalties, but it
18 doesn't seem like a good option.

19 And you will recall in the Thompson facts, which
20 I think are the most compelling facts you could possibly
21 have, they had given up producing these kind of
22 herbicides. They were then ordered to produce them.
23 Mr. Thompson came to the Defense Department and begged not
24 to have to do this, and was told no, and that was after
25 they had refused to make a proposal to bid on the

1 particular manufacture.

2 QUESTION: Just following up on Justice Kennedy,
3 what happens if -- how do they fix the price? Suppose the
4 company says, we don't want to produce this thing. They
5 say, you have to. How do they decide what the price is?

6 MR. PHILLIPS: The Government asks the
7 contractor to provide them with cost information, and they
8 build that in, and then they set a price.

9 You'll notice the price of the --

10 QUESTION: Who sets the price, the Government?

11 MR. PHILLIPS: The United States sets the price
12 They set -- and then --

13 QUESTION: Did you allege -- excuse me.

14 QUESTION: Would you be here at all if the
15 petitioners had an option to enter into the agreement?

16 MR. PHILLIPS: I think you would still have a
17 specifications argument, and you would still have a
18 superior knowledge argument, but I do agree that the
19 underlying compulsion that forces us to the table in the
20 first instance provides the strongest argument in my mind
21 with respect to implied indemnification.

22 QUESTION: Certainly this Court would not have
23 to adopt any theory that would extend beyond the
24 compulsion --

25 MR. PHILLIPS: No, and in fact --

1 QUESTION: -- combination.

2 MR. PHILLIPS: In fact, Justice O'Connor, this
3 Court doesn't have to adopt a theory that extends beyond
4 the combination of compulsion and compelled specifications
5 and superior knowledge as a combination.

6 QUESTION: Right.

7 MR. PHILLIPS: Because all three of those
8 uniquely fit into the facts of this particular case in
9 which --

10 QUESTION: Is this case sort of a sport, because
11 in most instances the lower courts are going to find that
12 the companies have a full defense?

13 MR. PHILLIPS: Under section 707? No.

14 QUESTION: Well, under -- under the law that
15 allows the contractors to have a defense to third party
16 claims. Boyle --

17 MR. PHILLIPS: Well, there are a number of cases
18 in which the lower courts have in fact held in that
19 manner. On the other hand, this particular case went the
20 other way. It's far from clear to me that --

21 QUESTION: But is this kind of a sport in that
22 regard? I mean, I would think that in most instances the
23 Boyle rule would protect the contractor in these
24 circumstances.

25 MR. PHILLIPS: Well, that -- you see, my theory

1 on Boyle is -- I mean, the Government argues that Boyle is
2 rendered superfluous by the provision of a contract remedy
3 here, and I think that's wrong on two counts.

4 First of all, I think consistent with the way
5 the Court analyzed the relationship between tort claims
6 and contract claims in Hatzlachh, in Hatzlachh you recall,
7 that was the case of an implied bailment agreement and
8 there was also a tort claims immunity, and there was also
9 the right to go against individual officers in order to
10 recover, and the Court said the availability of that
11 remedy in no way undermined the ability to get a contract
12 remedy and, therefore, under the facts of our case, the
13 availability of a "remedy Boyle" shouldn't in any way
14 deprive us of what otherwise would be a valid contract
15 remedy.

16 I think the logic of Hatzlachh applies here
17 directly, but I also think the importance of Boyle is that
18 it require -- is that if we're right, and we are entitled
19 to be indemnified under these circumstances, what that
20 means is that the Government's exposure to liability will
21 be significantly reduced. We should win most of these
22 cases, and the Government should act responsibly to
23 recognize its role as a putative indemnitor and come to
24 our defense in situations in which these issues arise.

25 QUESTION: Except that it will always pay your

1 attorney's fees, and that's why this case, on the way you
2 present it, is not a fluke. Even when your client wins,
3 as it ought to in the lower courts, your client will have
4 a claim against the United States for whatever it cost to
5 defend those suits, successfully or unsuccessfully.

6 MR. PHILLIPS: Absolutely, Justice Scalia.
7 That's the nature of --

8 QUESTION: It's not a fluke. This will come up
9 all the time now. Whenever the suit is brought, money
10 expended will be ultimately taken out of the United
11 States' pocket.

12 MR. PHILLIPS: Unless the United States
13 exercises its role as an indemnitor and takes over the
14 defense of the claim, in which case it doesn't lose
15 anything as a consequence of that.

16 QUESTION: That's another result which is -- you
17 know, you can say the -- or, it's quite different, because
18 ordinarily, in any sort of litigation, to recover
19 attorney's fees against the Government there has to be an
20 express statutory provision for it.

21 MR. PHILLIPS: We're not attempting to get the
22 Government to pay us attorney's fees in this particular
23 litigation. We're talking about attorney's fees as
24 damages arising out of third party litigation, and that
25 kind of damages is quite common, and -- I'm sorry.

1 QUESTION: Yes, but you have to look at the
2 whole picture, it seems to me, just as Justice Scalia says
3 you have to look at the whole picture when you're saying
4 the Government doesn't indemnify people wrongly prosecuted
5 under criminal law. You may have a different theory that
6 can be distinguished, but it fits in oddly with the way
7 the Government treats a lot of other people.

8 MR. PHILLIPS: But the point -- and I think the
9 reason why it's different is that the Government has a
10 unique relationship with contractors. They enter into a
11 special relationship, and while it is true that there's a
12 general maxim of law that you have to deal in straight
13 corners when you contract with the Government, there's
14 also a rule of law that says that the Government, when it
15 enters into a contract with private individuals, tends to
16 assume the same obligations as private individuals.

17 QUESTION: Could you have built -- in setting
18 the price of this contract, the question that Justice
19 O'Connor and Justice Breyer were asking about before,
20 you're compelled to make the contract with the Government,
21 but could you have put in as a cost the cost of insuring
22 against potential tort liability?

23 MR. PHILLIPS: We can put in - we don't put in
24 the costs. We submit what we think our costs are and the
25 Government sets the price, and the Government is free to

1 exclude that as a legitimate cost if it chooses to do so.
2 We don't have any leverage, Justice Ginsburg, in dealing
3 with the price term. That term is set by the Government,
4 just as every other term in this contract is set --

5 QUESTION: In your view --

6 QUESTION: Does that argue against the -- the
7 theory that this is somehow implied in fact, do you
8 concede that if you get what you want the basis upon which
9 you get it is going to be totally divorced from any
10 concept of implied in fact?

11 MR. PHILLIPS: No, not in the way that term is
12 used in the context of an existing contract. The
13 difference between an implied in law contract that is not
14 subject to the Tucker Act is one like the Baltimore and
15 Ohio Railroad case the Government cites, where you provide
16 a benefit to the Government without any agreement, and
17 then you seek to be reimbursed on a quantum meruit theory.

18 This Court and the Federal Circuit has
19 consistently held that that's the implied-in-law contract
20 for which there is no Tucker Act sort -- excuse me,
21 waiver.

22 With respect to a situation where, here we have
23 an existing agreement, then you can imply the terms to
24 that agreement based on the relationship between the
25 parties, and I can --

1 QUESTION: Well, certainly not based upon any
2 theory --

3 MR. PHILLIPS: Oh, no --

4 QUESTION: -- that assumes that, in fact, this
5 was implicit in the agreement that they actually made.

6 MR. PHILLIPS: Right, and the argument is that
7 under ordinary contract principles involving
8 indemnification, the underlying assumption is, is that the
9 party who has control will indemnify the party who is
10 innocent and is exposed to particular injury.

11 QUESTION: But is that general rule, taking it
12 on its face, plausible in the very case that you are
13 arguing in which you are acting under compulsion?

14 The -- whatever plausibility that may have,
15 whatever justifiability that may have as a general rule, I
16 suppose is premised on the assumption that you have two
17 parties who are capable of deciding whether or not -- each
18 of them are capable of deciding whether or not to deal
19 with the other, and yet the very premise of your argument
20 and of your claim here is that you do not have that
21 option, and hence it raises the question why these
22 plausible implications in other circumstances should be
23 imported into this one.

24 MR. PHILLIPS: Well, I have not seen from the
25 Government a persuasive argument why anything in the

1 nature of the relationship between the United States and
2 the petitioners should cause the Court to deviate from
3 what the ordinary rules of contract interpretation would
4 be.

5 And the three arguments the Government put
6 forward are that this will interfere with the tort claims
7 remedies, and this Court specifically rejected that in
8 Hatzlachh, saying, we look at contract as a contract
9 issue, we look at torts as a tort issue, is there a
10 contract situation here? If that's all you're looking at,
11 then we look to ordinary principles of Federal common law
12 contract law, and those principles, it seems to me, say
13 that when you have compulsion and specifications and
14 superior knowledge that there ought to be indemnification.

15 And when the defect -- remember, we were
16 compelled to make a product that was inherently dangerous.
17 That's the defect. That creates a warranty, and that
18 creates another contract right.

19 QUESTION: Is there a general principle that
20 underlies -- do you have a lot of experience in Government
21 contracts, a certain --

22 MR. PHILLIPS: Not an extraordinary amount of
23 experience, no, Your Honor, I'm sorry.

24 QUESTION: Then maybe you can't answer this, but
25 what I'm looking for is, it seems to me that these

1 things -- there's a superior knowledge claim. There's a
2 Spearman claim.

3 That there's a this-case claim or there's a
4 that-case claim is really an example of a more general
5 principle that there is somehow thousands and thousands of
6 Government contracts, and sometimes in silences in those
7 millions of different Government contracts that arise in
8 millions of different circumstances courts will imply
9 terms that don't appear there in writing, and they'll take
10 into account all kinds of things, including the fact that
11 the Government is at issue.

12 What I'm looking for is the general principle,
13 because it seems to me that's what you're looking for
14 here. You have very unique circumstances, and you want
15 some kind of term implied that will get you the
16 reimbursement, and what I'm looking for is a place where
17 it's written, or a case where it's written as to what are
18 the general principles that might lead someone here to
19 imply a term that, where the Government doesn't cooperate
20 with you, or, you know, all the things --

21 MR. PHILLIPS: Right.

22 QUESTION: -- you say, they -- there's a promise
23 to pay.

24 MR. PHILLIPS: Justice Breyer, I think it comes
25 out of just straight indemnification law. The rules of

1 indemnification say we should be protected.

2 If there are no questions, I'd --

3 QUESTION: I have one other question. Did you
4 ever allege at any point that there was a taking, or you
5 think that this doesn't arise to that?

6 MR. PHILLIPS: There was an allegation of a
7 taking in the Thompson complaint, but until we are not
8 compensated under the contract theories, there wouldn't be
9 a basis for saying we had not received just compensation
10 yet, but there is a takings issue that underlies all of
11 this.

12 QUESTION: Thank you, Mr. Phillips.

13 Mr. DuMont, we'll hear from you.

14 ORAL ARGUMENT OF EDWARD C. DuMONT

15 ON BEHALF OF THE RESPONDENT

16 MR. DuMONT: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 In our view, there are three related reasons why
19 petitioner's implied warranty claim in this case should
20 fail. Let me touch on them briefly. I think the Court
21 has already touched on them.

22 First, judicial implication of what amounts here
23 to an open-ended indemnity against third party product
24 liability claims brought years after performance is
25 completed under the contract would be unreasonable as a

1 matter of straightforward contract interpretation.

2 Second, it would be unnecessary, because even on
3 petitioner's view of the facts, because of the existence
4 of the Government contractor defense to tort liability,
5 there is no unfairness here in this kind of situation, and
6 third, it would be unwise, because it would permit exactly
7 the kind of cost-shifting to the Government that this
8 Court has held would impermissibly undermine the
9 Government's retention of immunity from suit for exercise
10 of its discretionary functions.

11 Now, we start out by saying what we all know
12 here. There's nothing written in these contracts about a
13 warranty or indemnity running from the Government to the
14 suppliers. In fact, the only thing you'll find if you
15 look at those contracts is a warranty running from the
16 supplier to the Government that the product would be free
17 of defects in manufacture and design.

18 Leaving that aside, we all recognize that
19 what -- and even petitioners recognize what they have to
20 establish here is a contract implied in fact, or a
21 contract term implied in fact, and yet what we've heard,
22 as the Court has pointed out, is an argument for a
23 contract implied at law, an argument that it is unfair to
24 do what was done here, an argument that the Government
25 compelled them to do certain things -- I mean, if you push

1 that argument to its extreme, you eliminate the contract
2 entirely, and so their argument --

3 QUESTION: Let me ask you this. Suppose you win
4 here, can Thompson assert a valid takings claim? The
5 company was compelled, over its objection, to produce this
6 substance for the Government. It had no choice.

7 MR. DuMONT: I wouldn't want to comment on the
8 validity of the claim. They could assert --

9 QUESTION: Well --

10 MR. DuMONT: -- I think, the claim.

11 QUESTION: -- and do you -- does any logical
12 reason occur to you why they wouldn't prevail on the
13 claim?

14 MR. DuMONT: I have two answers. 1) I think it
15 would be a much better claim than the claim they have
16 raised here.

17 2) The context of this, of course, is requiring
18 citizens to do things in time of war that help the
19 Government in prosecuting its war effort.

20 Now, the Government required a lot of people to
21 go to Vietnam and use Agent Orange.

22 QUESTION: I don't see what that has to do with
23 whether it's a valid takings claim or not.

24 MR. DuMONT: Well, only this, that, you know --

25 QUESTION: I mean, the Government compelled them

1 to do it against their will.

2 MR. DuMONT: Only this --

3 QUESTION: They lost their company, everything.

4 MR. DuMONT: That might prove to be a valid
5 claim. It is not a valid resistant -- it is not a valid
6 answer to the Government's ability to compel you to do
7 military service, that you are being forced into
8 involuntary servitude. It is not necessarily a taking of
9 your property for the Government to contract with you on
10 commercially reasonable terms to produce a product --

11 QUESTION: Yes, but --

12 MR. DuMONT: -- at a normal price. Now,
13 remember that -- excuse me, but just -- remember that
14 these are products that these companies produced for the
15 commercial market. Agent Orange is not a magical thing.

16 QUESTION: And Thompson had given up production
17 of this. They were not producing it. They were compelled
18 to produce it by a Government order.

19 MR. DuMONT: Thompson is, in that regard,
20 different, very different from Hercules, that's true.

21 QUESTION: Are you finished?

22 MR. DuMONT: Quite, sir.

23 QUESTION: Okay. If the city council passed a
24 regulation that made a house owner put out some kind of
25 paint or something in the garage and he said, no, I don't

1 want to do it, I don't want to do it -- you have to do
2 it -- and then everybody sues the house owner, wouldn't
3 the court sort of strain at an interpretation that said,
4 oh, the house owner has to pay the whole thing, the city
5 council's off free, that you just have to do these things.
6 It incurred tremendous liability. They'll take your house
7 away. Wouldn't you at least look to see if the statute
8 couldn't be interpreted differently?

9 MR. DuMONT: Well --

10 QUESTION: The answer's yes, right?

11 MR. DuMONT: -- to the extent I understand --

12 QUESTION: Okay. Then my question is -- I mean,
13 that was the sort of set-up.

14 (Laughter.)

15 QUESTION: The question is, that being so, why
16 wouldn't the Federal Circuit and the court of claims and
17 everybody else involved in interpreting contracts also try
18 to interpret a contract in a way that suggests the
19 Government will not try to stick a person with such an
20 unfair result.

21 And that's just a way -- I don't know whether it
22 falls in a Spearman category or an Ex-Cello category or
23 some other category, but at least, wouldn't you interpret
24 a Government contract normally where it's open to it to
25 suggest that there is a way of reading this contract to

1 stop people from having to go to the Takings Clause in
2 order to prevent some kind of tremendously unfair result,
3 even if it's unique and, therefore, if that's so, why
4 shouldn't we send it back to see if there is such a thing
5 here, or to see if the facts warrant it, and it seems to
6 me on the issue that we took this for you basically
7 conceded error.

8 I mean -- those are all my questions.

9 (Laughter.)

10 MR. DuMONT: Well, I'm not sure I can sort them
11 out, but let me try to direct my answer to one of them,
12 which is the notion of wouldn't it be reasonable to
13 interpret the contract in light of all the surrounding
14 circumstances.

15 Well, I think our answer to that is, of course
16 one interprets a contract in light of the surrounding
17 circumstances. A contract implied in fact is one that is
18 taken not out of the court's views of what is just or
19 right, but out of what it believes the parties might
20 reasonably have -- either did agree to through their
21 course of contract or their words, or might reasonably
22 have agreed to, and there's obviously a gray area. There
23 are some cases where no one had any contemplation of a
24 particular situation.

25 Now, when we get to that in a Government

1 contract, whatever the rule would be in the case of an
2 ordinary contract between private parties, when we get to
3 a Government contract, there are particular reasons for
4 believing the Government would not have agreed to any such
5 thing, any kind of indemnity such as petitioners are
6 seeking.

7 First of all, there's the Anti-Deficiency Act.
8 Congress has made it very clear for 180 years that they do
9 not want Government officials, Government officers
10 entering into obligations on behalf of Congress that have
11 open-ended liability, go beyond current appropriations,
12 and can stick the United States with huge, uncertain
13 bills.

14 QUESTION: But just stop -- isn't that an
15 argument against all implied terms in Government
16 contracts?

17 MR. DuMONT: There is definitely a gray area
18 there. It could be --

19 QUESTION: It's not a gray area at all. I mean,
20 the argument proves much too much. It means you cannot
21 have any implied terms.

22 MR. DuMONT: Well, the issue was not raised in
23 Spearin. If the Court would like to revisit Spearin on
24 that basis, I think that might be a good idea, but the
25 answer is that what the lower courts have tried to do with

1 that is say, look, there's a difference between breach of
2 contract in which the officer had the authority to enter
3 into the contract, and we're talking about breach damages
4 which are relatively reasonably bounded by what the
5 original contract was about, what the original
6 appropriation was about and so on. There's a difference
7 between that and an open-ended sort of indemnity
8 provision.

9 That's the line the Federal Circuit has drawn,
10 which, of course, is the court that is primarily charged
11 in the claims court, the courts that are primarily charged
12 with making sense out of this area.

13 Now, the other thing I would point out, when the
14 Government -- when Congress decides it wants to give
15 indemnities, it does so specifically, and with great care:
16 50 U.S. Code section 1431 provides for indemnities in
17 exactly the kind of situations that we're talking about
18 here with defense contracts, gives the Secretary of
19 Defense, the President, broad authority to enter into
20 contracts without regard to normal terms like the Anti-
21 Deficiency Act, but it requires procedures.

22 Now, petitioners never asked for it. Those
23 procedures weren't complied with. They don't even allege
24 that there was an indemnity under that provision. Well,
25 if there wasn't --

1 QUESTION: What provision is that you're relying
2 on, Mr. DuMont?

3 MR. DuMONT: That's 50 U.S. Code section 1431.

4 QUESTION: Thank you.

5 MR. DuMONT: And it's discussed at some length
6 in our brief at page 40, footnote 23.

7 There is another provision just -- I could go
8 on, but there's another provision -- this one is not cited
9 in our brief -- 10 U.S. Code section 2354, which happens
10 to have to do with military R&D contracts.

11 If you look at that one, you'll see again a kind
12 of careful structure. It looks like an indemnity, it
13 talks like an indemnity, and Congress put it there
14 specifically.

15 Now, the Government does not impliedly agree to
16 indemnify people for open-ended liabilities.

17 Now, another reason why, and this, I think, goes
18 back to your point about, when we're interpreting a
19 contract with the Government we think about what the
20 Government might have had in mind, and in this case the
21 Government would have had in mind that it is immune from
22 tort liability for injuries that allegedly arise from the
23 exercise of its discretionary functions.

24 Now, the Court made it very clear in Boyle that
25 the discretionary function exemption in tort law covers

1 design decisions for military equipment.

2 Now, we're not saying, under Hatzlachh, that
3 that precludes the Court from reading this contract to
4 include an indemnity or warranty provision, but it
5 strongly suggests to us that the Government would not have
6 wanted to enter in, sub silentio, to a warranty provision
7 that would have completely vitiated that important
8 immunity.

9 QUESTION: But I take it that their basic point,
10 in the lower courts, was yes, yes, that's quite right, but
11 you see, here we are trying to look at an implied, is
12 there a term to reimburse us implied in fact, and we argue
13 the Government had superior knowledge as to the danger.

14 We look at indemnity contracts and tell you that
15 indemnitors normally are liable when they won't take over
16 a lawsuit and then they force the other person to go and
17 litigate it, though they could come in and run it the way
18 they think it should be run.

19 Look at that policy, and look at the policy of
20 707, and when you put all those things together, you will
21 see there's some kind of implied term here.

22 I'm looking at it most favorably to them, and
23 what I don't see in the lower courts is a court, like the
24 Fed Circuit, that ever passed on that, and I don't see the
25 facts in the record that would permit them to pass on it,

1 and that's why I'm back to thinking -- indeed, what the
2 Fed Circuit said is it, in footnote 8 it hinted that
3 footnote -- both footnote 8 and the other thing and 707
4 discussion seemed to turn on errors of law that you seem
5 ready to admit are errors of law.

6 That is, the -- this problem of the causation,
7 and the problem of 707 being limited to just
8 prioritization of contract, and I'm not positive you admit
9 that, but you see, what I'm trying to get at is, don't we
10 have to send this whole thing back if we think those are
11 errors of law?

12 MR. DuMONT: No, you don't.

13 Now, I do want to be clear that I don't believe
14 we've conceded either of the points that you --

15 QUESTION: All right.

16 MR. DuMONT: -- that you mentioned. I mean, our
17 position is that although an argument under 707 raised as
18 a shield would certainly be a vastly stronger argument
19 than the one they've raised here, it was -- it's been
20 rejected by the three courts that have considered it, and
21 we consider that to be the right answer.

22 QUESTION: I don't mean it's a shield. They're
23 looking to the policy in order to decide whether, among
24 other reasons, there is an implied-in-fact --

25 MR. DuMONT: I understand that's what they're

1 trying to do here.

2 Now, I must say I agree with the implication of
3 a question I believe was from Justice Souter, which is
4 that, if anything, the existence of that shield provision
5 in the Defense Production Act shows that Congress thought
6 about this issue, and they resolved it by giving
7 contractors a shield of whatever scope it turns out to be
8 and there is, therefore, even less reason to think they
9 authorized their contracting officers to enter into broad
10 indemnities that would just simply get rid of the reason
11 for having that shield provision in the first place. Why
12 should they bother to invoke that when they've got an
13 indemnity from the Government?

14 Now, to your other point, petitioner's counsel
15 keeps talking about the law of indemnity as though it were
16 perfectly clear that if this were a contract between
17 private parties, an indemnity would be implied. I'm not
18 at all sure that that is correct, or that they have
19 established that.

20 But in any event, if you look at any of the
21 circumstances where the Government provides warranties and
22 there's an executive order after 50 U.S. Code 1431, which
23 I mentioned before, that goes into great detail about how
24 to do indemnities. That's one place you will find that
25 they look like an indemnity clause in a sophisticated

1 private contract.

2 That is, they give -- they give an explicit
3 indemnity, and then they give the indemnitor all sorts of
4 rights to participate in the defense, or control of the
5 defense. Now, of course, there wasn't anything like that
6 here.

7 Now, they say they asked us to participate in
8 the settlement. That's fine they asked us to do that, but
9 we had no liability. That was our position from the
10 beginning, that we were not liable, and we effectively
11 stood apart from the rest of that litigation until it was
12 settled.

13 We did not participate in the settlement because
14 we thought we had no liability. I find that unremarkable,
15 and I don't know why it should be implied or inferred from
16 that that we had made some sort of contractual commitment
17 to pay them for whatever they decided to settle for.

18 I would have thought rather the reverse. If we
19 thought we were on the hook -- if we'd ever thought we
20 were on the hook, of course we would have been involved in
21 that settlement.

22 QUESTION: The reason would obviously be that
23 you think they have a tremendously good defense called the
24 Government contractor defense, and instead of you helping
25 them make it, where they're defendants with hundreds of

1 other companies and there are whole companies at stake,
2 \$40 billion, instead of saying to the judge, judge, we
3 think they're right, instead, I guess you were silent, or
4 maybe you said, judge, I think they're wrong -- I don't
5 know exactly what happened -- but they think that's very
6 unfair, and in the context of the whole contract, you
7 put -- you understand the argument.

8 MR. DuMONT: I think I understand the argument.
9 I believe the argument, as you put it, is an argument of
10 unfairness, and I believe that is not an argument that is
11 cognizable under --

12 QUESTION: Well, does the Government ordinarily
13 come in when a contractor is raising a Government
14 contractor defense in every court that he might raise it
15 and say, we support this defense?

16 MR. DuMONT: No, absolutely not, and when --

17 QUESTION: An indemnitor is not --

18 MR. DuMONT: -- the question got to this Court,
19 we participated in Boyle.

20 QUESTION: But indemnitors normally do. They're
21 given that opportunity. It's a normal thing, isn't it?

22 MR. DuMONT: An indemnitor normally knows that
23 it's on the hook and therefore it takes over the defense,
24 so that's not remarkable.

25 But the question here is not what does an

1 indemnitor do. The question is, were we an indemnitor,
2 and that is what petitioners sometimes seem to lose sight
3 of, and their -- our submission is that if you look at the
4 way Government contracts have always been interpreted, the
5 way Government indemnities have always been given and how
6 Congress has considered them, you will find no basis on
7 which to infer that the Government would have agreed to
8 this term.

9 Now, I think you can also look at that, if you
10 want to get back to the authorities, look at Spearin, look
11 at the cases that preceded Spearin, which were about --
12 well, there was another Brooklyn Navy Yard case. That
13 navy yard caused a lot of problems. There was an
14 excavation case with borings that were misrepresented in
15 the Government's specifications. There's a dam case where
16 they were going to construct a dam, and the Government
17 specifications said it's backed with soft material and it
18 turned out to be boulders and rocks. There's a stagecoach
19 case where there was mail delivery in New York and --

20 QUESTION: And you've left out the case where,
21 in fact, the product caused an explosion.

22 MR. DuMONT: That's not a Supreme Court case.
23 I'm talking about Supreme Court cases, cases that this
24 Court has dealt with, and in fact the case that Justice
25 Brandeis cited when he said it was okay to apply this term

1 in the Spearin contract was a case called Kellogg, which
2 was an implied warranty case, which had to do with a
3 bridge builder who built the foundations for a bridge, and
4 then he turned it over to a new contractor.

5 Well, it turned out the foundations weren't
6 correctly done, and the Court said, well, fine, as a
7 matter of standard contract law we infer that when you
8 built the foundations and turned them over for the purpose
9 of building a bridge on top of them you were warranting
10 that they were correctly made. Well, there's nothing
11 remarkable about that.

12 QUESTION: Is it your position -- I take it it's
13 the Government's position that if a high official in the
14 Government, say the Attorney General, had looked at this
15 litigation and said, this is terribly unfair to Thompson
16 and Hercules, go in and help them out, that you would have
17 had really -- you would have told the Attorney General,
18 look, we have no discretion, no authority to do that?
19 Would you have had any discretion to alleviate Hercules'
20 concern, Hercules' plight?

21 MR. DuMONT: Just filed a brief saying the
22 Government contractor defense should be recognized? I
23 assume we could have.

24 QUESTION: That would be about as far as you
25 could go, in your opinion?

1 MR. DuMONT: I assume we could have. We were
2 involved in the case, of course, because they had sued us,
3 tried to implead us --

4 QUESTION: Right.

5 MR. DuMONT: -- for indemnity and contribution,
6 which of course is the other aspect of the case.

7 QUESTION: But your view is that the most you
8 could have done was to have supported them with the
9 Government contractor defense?

10 MR. DuMONT: Well, I'm not sure -- aside from
11 volunteering to cover their losses, I don't know what
12 else --

13 QUESTION: Would you have the authority to do
14 that?

15 MR. DuMONT: I think we would not, without a
16 special -- without a special appropriation.

17 QUESTION: Well then, your position is the only
18 thing you could have done that you didn't do was to file a
19 helpful brief.

20 MR. DuMONT: That's correct.

21 QUESTION: And do I -- I take it that you have
22 candidly answered the question, could the manufacturers
23 have negotiated for a provision that said, defendant
24 indemnify, your answer says yes, they could have asked but
25 we wouldn't have given.

1 MR. DuMONT: I don't know what would have
2 happened if they had tried to invoke the executive order
3 that provides for indemnities in those kinds of
4 circumstances. I don't know whether it would have been
5 granted or not and, far as I know, they never asked for
6 that.

7 QUESTION: And how --

8 QUESTION: The question was at the time of the
9 contract, not --

10 MR. DuMONT: Well, I'm saying, at the time of
11 the contract, if we had come to them and said we're going
12 to -- we'd like you to do this contract -- now, of course,
13 we first went to Hercules and said we'd like bids, and
14 they bid competitively to get these contracts. Don't
15 forget that.

16 But in Thompson's case, we went to them and
17 said, we'd like you to make this. They said, we really
18 don't want to. We said, well, we really want you to, and
19 we're going to invoke our authority.

20 Now, they did negotiate the price term. They
21 came back to us and said, we can't make money at the price
22 you said you were willing to pay us, and so we adjusted
23 that.

24 If they had come back to us and said, we are
25 very concerned, we can't get insurance, we've gone to the

1 market, whatever they might have said, we need some
2 indemnity because the California courts are doing strange
3 things with tort law, we don't know what's going to happen
4 in products liability, I don't know what the Government
5 would have said, but as far as I know they never made that
6 request.

7 QUESTION: But if -- the Government could have
8 said, we won't give you that term, and you still have to
9 do the contract, which the law says --

10 MR. DuMONT: That's right.

11 QUESTION: -- we can compel you.

12 What about the -- if they had said, okay, we're
13 going to put into the price what it will cost us to insure
14 against this potential tort liability.

15 MR. DuMONT: It's completely clear that in cost-
16 plus contracts the Government does recognize those prices.
17 In these fixed-cost contracts, I'm not intimately familiar
18 with how those prices are fixed, but my understanding is
19 that that's a legitimate item of overhead. Your normal
20 products liability insurance, your litigation expenses
21 insurance is all part of your price.

22 If you say then well, we charge this price on
23 the market for this stuff, and we need to get some more
24 insurance, this is what we think our costs are going to
25 be, I don't see any reason why that wouldn't have been

1 taken into account.

2 Now, it is possible -- it is possible, I
3 suppose, the Government could have just adopted an
4 entirely unreasonable position and said, we want you to
5 make this stuff for us for \$5 a barrel and it costs you
6 \$50. I don't know what the answer would be on those facts
7 except that, again, if the Government starts ordering you
8 to do things, then we are very, very far away from
9 contracts to begin with, and implied-in-facts contracts.

10 If the Government is being perfidious, the last
11 thing it's going to do is start impliedly warranting that
12 it's going to hold you harmless from liability.

13 Now, if -- the court might choose to try to
14 impose that sort of liability, but that would be, I think,
15 quite clearly a policy decision to impose liability under
16 those circumstances.

17 QUESTION: You do concede, I take it, then, that
18 the court below was wrong in limiting your -- the
19 Government's authority to compel under 101 merely to
20 compel priority of performance as opposed to performance,
21 period.

22 MR. DuMONT: I believe our position is that we
23 had the authority to compel performance, and there's a
24 series of safeguards, I believe, in the regulations --

25 QUESTION: Yes.

1 MR. DuMONT: -- where you're supposed to go to
2 people who make it normally and if you can't find them you
3 can go to somebody else, that kind of thing, but
4 ultimately, bottom line, yes, we had the authority to, to
5 do that.

6 Now, we've talked about why it's unreasonable as
7 a regular contract matter to imply this, and you've talked
8 a little bit in colloquys with my colleague, developed a
9 little bit why it's unnecessary. There is this Government
10 contractor defense that does, in fact, provide a
11 contractor in the -- in petitioners' situation as
12 petitioners allege it to be with a defense to tort
13 liability, so in fact they are not left holding the bag,
14 and if the Court is concerned about the overall fairness
15 of the legal framework, I think there is no real warrant
16 for that concern precisely because of that defense.

17 QUESTION: What was your interpretation, I'm
18 sorry, on 707? You agree that the first -- 2071(a) says
19 the Government can say to Mr. Smith, Mr. Smith, you must
20 produce Agent Orange, right?

21 MR. DuMONT: That's right.

22 QUESTION: And when it says, no person shall be
23 held liable for damages resulting indirectly from
24 compliance, directly or indirectly, is that meant to
25 insulate the contractor for damages that flow from Agent

1 Orange being unreasonably dangerous, or something like
2 that?

3 MR. DuMONT: Our position has been that it is
4 not, and that's the position that we've taken --

5 QUESTION: In other words, your position is that
6 all that means is the only immunity it gives is immunity
7 from some other person who had a different contract with
8 the same producer saying you shouldn't have bumped the
9 Government's contract ahead of mine, and nothing more?

10 MR. DuMONT: It certainly provides that, and
11 there may be some penumbral scope to it.

12 I think our fundamental position is, you have to
13 look very carefully at what Congress had in mind when it
14 did that, and there's no indication that what they had in
15 mind was giving a complete hold harmless -- well,
16 certainly not hold harmless, but a complete shield for any
17 kind of liability that might come up. After all --

18 QUESTION: So if, in fact, the Government
19 ordered a person to produce something which was an
20 explosive and it blew up the factory, and it hurt passers-
21 by, the Government would -- they would be liable, the
22 Government wouldn't be liable. Is that the view?

23 MR. DuMONT: Well, again, I don't want to
24 pretermite inquiry into the scope of section 707 as a
25 shield provision, but our general position --

1 QUESTION: But you're saying the Government
2 contractor defense makes it unnecessary, basically.

3 MR. DuMONT: Our general position is that 707 --

4 QUESTION: All right, but the Government
5 contractor defense, in your view, where there's an
6 explosion because of the Government specifications means
7 that the contractor cannot recover from the Government for
8 passers-by who are injured.

9 MR. DuMONT: Well, it certainly falls -- if the
10 passers-by are prevented from the Government -- by the
11 Government contractor defense, if it turns out that there
12 was some --

13 QUESTION: Yes.

14 MR. DuMONT: -- specific thing about the way we
15 told them to make it --

16 QUESTION: Yes.

17 MR. DuMONT: And the other --

18 QUESTION: Superior knowledge.

19 MR. DuMONT: And the other criteria are met --

20 QUESTION: Yes.

21 MR. DuMONT: -- then they are insulated from
22 liability and we are insulated from liability, because we
23 can't be sued in the first place because, if that's the
24 ground of tort liability, then it comes within the
25 discretionary function exemption.

1 Now, I think that points out -- I'm sorry.
2 Well, I think that points out why -- the fundamental
3 difference between the Government contractor defense and
4 petitioner's theory as a sensible way of resolving this
5 problem, because the Government contractor defense in
6 those circumstances prevents liability on the part of the
7 manufacturer if it's really something that should have
8 been the Government's responsibility, but it also saves to
9 the Government its immunity from that suit, so neither
10 party is liable and a loss lies where it falls, which is
11 the result of the tort immunity.

12 Now, under petitioner's theory, on the contrary,
13 what you get is a direct pass-through. The passer-by does
14 recover from the manufacturer, and the manufacturer then
15 recovers from the Government, so the Government -- so the
16 manufacturer is now protected, but the public policy
17 underpinnings for the Government contractor defense have
18 now been vitiated, because the Government ends up paying
19 the substantive liability, and as Justice Scalia pointed
20 out, under any circumstances the attorney's fees for
21 defense of the tort action, so --

22 QUESTION: I guess I wasn't paying attention a
23 moment ago. You're saying now that the defense under 707
24 is narrower than the scope of the compulsion under 101,
25 but the slack is made, the difference is made up by the

1 Government contractor defense, so that if you combine 707
2 and the Government contractor defense, there will be a
3 complete defense to whatever was compelled under 101, is
4 that your position?

5 MR. DuMONT: I think that's probably right. We
6 have --

7 QUESTION: No, is that your position?

8 MR. DuMONT: Not in those terms, no.

9 QUESTION: Would you explain it to me again,
10 then, because I guess I'm --

11 MR. DuMONT: Our position has been that they're
12 simply separate inquiries. 707 provides a shield of some
13 scope for actions taken under compulsion under the DPA.
14 Now --

15 QUESTION: But not everything that is compelled
16 will be subject to that shield.

17 MR. DuMONT: We think that's right.

18 QUESTION: Okay. Now, what about the
19 difference?

20 MR. DuMONT: There need be no provision for the
21 difference, but in fact, I think it's probably right to
22 say that because of the --

23 QUESTION: There need be in the sense that it's
24 a tough world, and that's the way it goes.

25 MR. DuMONT: That's right. The absence of

1 any --

2 QUESTION: Okay.

3 MR. DuMONT: -- gap filler would not be a reason
4 for inferring an indemnity on the part of the Government
5 in the contract.

6 QUESTION: But there is at least a partial gap-
7 filler, right?

8 MR. DuMONT: There may be.

9 QUESTION: That's the Government contractor
10 defense.

11 MR. DuMONT: The Government contractor defense
12 would presumably cover most of those things.

13 QUESTION: But it may not be a complete gap-
14 filler.

15 MR. DuMONT: It may not be.

16 QUESTION: And one reason why it is not is that
17 the conditions for applying 707 and the conditions for
18 Government contractor defense are not the same.

19 MR. DuMONT: That's correct.

20 QUESTION: You might -- okay.

21 MR. DuMONT: That's correct, right.

22 QUESTION: Now -- well, no, never mind.

23 MR. DuMONT: Well, I think we've really covered
24 the basic heads here, but

25 QUESTION: About the Government contractor

1 defense, would you please remind me of how that played
2 out? Judge Pratt said, I accept that defense, and then
3 there were some proceedings before Judge Weinstein where I
4 understand the Government didn't simply stand aside, but
5 it argued affirmatively against the Government contractor
6 defense.

7 MR. DuMONT: It's important to understand the
8 sequence here. Judge Pratt rendered summary judgment. He
9 withheld the final judgment in order to give the
10 defendants the benefit of certifying the class before he
11 entered it.

12 As it turned out, he then relinquished control
13 of the case. Judge Weinstein took over, and he simply
14 revoked the prior summary judgment.

15 Now, as far as I understand it, he did not
16 question the availability of the defense, he questioned
17 whether it could be established without trial, so he
18 revoked the summary judgment.

19 Now, he then -- eventually the parties settled.
20 That case went away.

21 Now, he -- Judge Weinstein at the same time, you
22 have to understand, had revoked the summary judgment that
23 had been granted to the Government on grounds of Feres and
24 the discretionary function exception, so he was bringing
25 everyone back in and saying, I'm going to send you to

1 trial and we're going to find out what happened here, and
2 then we'll sort out the legal issues after the trial.

3 Now, after the settlement, and after that
4 litigation was effectively over, there was opt-out
5 litigation of the people who opted out of the class, and
6 they brought -- their proceedings were continuing, and
7 those proceedings, at the behest of the manufacturers,
8 including Thompson and Hercules, Judge Weinstein also went
9 back on his ruling on the third party liability claim as
10 to certain people who were not servicemen but were
11 relatives of servicemen.

12 So in that context, we filed a motion saying,
13 listen, if you are talking about a group of plaintiffs,
14 and you're telling us that the Government is not immune as
15 a matter of tort law, then there's no reason for the
16 Government contractor defense. You've kicked out the
17 props on which the Government contractor defense rests.

18 And so if you're going to do that to us, then it
19 seems like you shouldn't have the Government contractor
20 defense for them. That's section 1 of our submission.

21 Now, section 2 of our submission is several
22 reasons -- and it's in the Joint Appendix. I commend it
23 to you -- several reasons why there might be factual
24 issues about the applicability of the Government
25 contractor defense, but no court in that action, either

1 Judge Pratt, Judge Weinstein, or the Second Circuit, ever
2 suggested that there was doubt about the availability of a
3 Government contractor defense if you established the
4 factual prerequisites for its application, and I think
5 that's quite important.

6 Just to sum up, again, we think that it's
7 unreasonable as a matter of contract law to think that the
8 Government would have agreed to this kind of indemnity.
9 It is unnecessary if a Feres justification is required
10 because of the existence of the Government contractor
11 defense and perhaps Section 707, and it would be quite
12 unwise, because it would gut the Government's immunities
13 in a way that this Court specifically rejected in
14 interpreting the Government contractor defense itself.

15 Thank you.

16 QUESTION: Thank you, Mr. DuMont.

17 Mr. Phillips, you have 3 minutes remaining.

18 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

19 ON BEHALF OF THE PETITIONERS

20 MR. PHILLIPS: Thank you, Mr. Chief Justice.

21 Let me begin with Judge Plager's dissenting
22 opinion in the court below that the law affords
23 substantially more justice than the majority below
24 conceded.

25 The United States at the podium here today did

1 not defend the court of appeal's decision on causation,
2 and essentially did not defend the court of appeal's
3 interpretation of the Defense Production Act.

4 On that basis alone, you ought to vacate and
5 send it back to allow us an opportunity to demonstrate the
6 precise contours and the nature of the relationship
7 between the indemnification and breach of warranty claims
8 that we think this Court has already acknowledged and
9 recognized can be readily implied in the ordinary
10 contracts, and that ought to be applied --

11 QUESTION: Mr. Phillips, that argument, if this
12 were a court of error correction, if this were a court of
13 appeals and errors, that might be a very sympathetic
14 argument, but in terms of the question on which we granted
15 certiorari, the law that we are making not for this
16 peculiar case, but for the class of cases, how does
17 that --

18 MR. PHILLIPS: Justice Ginsburg, I would answer
19 that by reference to Justice Breyer's question, when he
20 said that people who deal in Government contracts, and I'm
21 not one of them, look at things like Spearin claims and
22 Helene Curtis claims and other claims, and the truth is,
23 what this Court ought to hold in the context of this case
24 is that this is a Hercules and Thompson claim, where you
25 have compulsion, and specifications, and superior

1 knowledge all combined in one. It is perfectly fair and
2 just to imply within the contours of that contract that
3 there will be an indemnification.

4 QUESTION: I take it it isn't that you're asking
5 that you'd like us to hold that, but I take it that
6 technically you'd say the question is whether the Fed
7 Circuit should have an opportunity to ask the district
8 court to find the facts so that one can decide whether or
9 not that should be so.

10 MR. PHILLIPS: I think, though, the Court could
11 hold that if the facts are as I've described them to
12 you --

13 QUESTION: But I don't know --

14 MR. PHILLIPS: -- and you have to assume that
15 for summary judgment --

16 QUESTION: All right.

17 MR. PHILLIPS: -- I understand that, but the
18 rule of law ought to be one in which we have an
19 opportunity to recover, and that the remedy that the
20 Government offers us, the Government contract defense as
21 our sole opportunity to protect ourselves, was revealed as
22 plainly in this case as it can be revealed is inadequate.

23 There are gaps. It doesn't cover everything,
24 and in a situation where you have an innocent party and a
25 controlling party and an indemnification arrangement on a

1 Government contract or any other contract, the appropriate
2 course is to find that the innocent party is indemnified
3 and to hold the Government liable.

4 Under that theory of law, which I think applies
5 here, I'd ask the Court to reverse and send it back for
6 further proceedings.

7 Thank you, Your Honors.

8 CHIEF JUSTICE REHNQUIST: Thank you,
9 Mr. Phillips.

10 The case is submitted.

11 (Whereupon, at 1:59 p.m., the case in the above-
12 entitled matter was submitted.)

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CERTIFICATION

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

HERCULES, INCORPORATED, ET AL., Petitioners
v. UNITED STATES

CASE NO: 94-818

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

BY Don Mani Federico

(REPORTER)