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The Government Contractor Defense: A Weapon for Nonmilitary Government Contractors - Boyle v. United Technologies Corp.

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THE GOVERNMENT CONTRACTOR DEFENSE: A WEAPON FOR NONMILITARY GOVERNMENT CONTRACTORS?

Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988)

I. INTRODUCTION

In *Boyle v. United Technologies Corp.* [1] the United States Supreme Court for the first time recognized a government contractor defense that shields private contractors from state tort liability for design defects contained in government specifications. [2] The Court's underlying rationale for the defense indicates an application of the defense broader than has generally been recognized among the circuits. [3]

Part I of this casenote presents the facts and procedural history of *Boyle v. United Technologies Corp.* Part II provides a historical overview of the development of the government contractor defense, including the rationale on which lower federal courts have based the defense, and the three different formulations of the defense. Part III presents the reasoning underpinning the Court's recognition of the defense. Finally, Part IV analyzes the scope of the *Boyle* decision and examines issues left unresolved.

II. FACTS AND PROCEDURAL HISTORY

On April 27, 1983, David A. Boyle, a United States Marine helicopter copilot, was killed when the helicopter in which he was flying crashed into the Atlantic Ocean off the Virginia coast. [4] Boyle survived the impact of the crash, but he was unable to escape from the helicopter and drowned. [5] Boyle's father brought a diversity action against the Sikorsky Division of United Technologies Corporation (hereinafter "Sikorsky"), the manufacturer of the helicopter, [6] in Federal District Court for the Eastern District of Virginia. [7] The petitioner, alleging defective design of the helicopter's escape hatch, sued for tort liability

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1. 108 S. Ct. 2510 (1988).
2. *Id.* at 2518.
3. Ayer, *The Defense Defense*, 18 THE BRIEF 17 (1989) (Donald B. Ayer, as Deputy Solicitor General and Counselor to the Solicitor General until December 1988, argued *Boyle* for the United States.).
4. *Boyle*, 108 S. Ct. at 2513.
5. *Id.* All four crew members survived the impact of the crash; three of them escaped through emergency exits, but Boyle was unable to escape. Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986).
6. *Boyle*, 108 S. Ct. at 2513.
7. Petition for Writ of Certiorari at A-1, *Boyle*, 108 S. Ct. 2510. The district court decision was not reported.

under Virginia law.[8] The jury awarded the petitioner $725,000, and the district court denied Sikorsky's motion for judgment notwithstanding the verdict.[9]

The Court of Appeals for the Fourth Circuit reversed and remanded with directions that judgment be entered for Sikorsky.[10] The court held that Sikorsky could not be held liable for the allegedly defective design of the escape hatch because it was entitled to the "military contractor defense."[11]

The Supreme Court of the United States granted a writ of certiorari[12] in order to "decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect."[13] In affirming, the Court specifically adopted the formulation of the government contractor defense used by the Fourth Circuit below.[14]

III. BACKGROUND AND HISTORY

A. Government Agency Defense

The government contractor defense is widely considered by cases to have originated from the government agency defense applied in *Yearsley v. W. A. Ross Construction Co.*[15] In *Yearsley* the Supreme Court refused to hold a contractor liable for erosion of private riparian land caused by the construction of dikes pursuant to a contract with the federal government.[16] The Court reasoned that the contractor, having performed under authority validly conferred and having not exceeded his authority, was not liable because he was acting as an "agent or officer of the Government."[17] The Court thus determined that where such

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8. *Boyle*, 108 S. Ct. at 2513. The petitioner alleged that Sikorsky had defectively designed the copilot's emergency escape system because the escape hatch opened out instead of in, rendering the hatch ineffective in a submerged craft because of water pressure. *Id.*

9. *Id.* at 2513.

10. Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986).

11. *Id.* at 415.

12. Boyle v. United Technologies Corp., 479 U.S. 1029 (1987).

13. *Boyle*, 108 S. Ct. at 2513.

14. *Id.* at 2518.

15. 309 U.S. 18 (1940). *See* Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988) (citing *Yearsley*, government contractor defense shields a contractor from liability when acting under authority and direction of United States); Tillett v. J.I. Case Co., 756 F.2d 591, 596 (7th Cir. 1985) (government contractor defense derives from cases such as *Yearsley*); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984) (government contractor defense first articulated by the Supreme Court in *Yearsley*). One circuit has taken the view that the government contractor defense is an "amalgamation" of the contract specifications defense (based on common law tort principles) and the government agency defense. Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985). The Eleventh Circuit views the government agency defense as "analytically distinct" from the government contractor defense. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 739 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988). *See* Note, *The Government Contract Defense in Product Liability Suits: Lethal Weapon for Non-Military Government Contractors*, 37 SYRACUSE L. REV. 1131, 1133 (1987); Comment, *In Defense of the Government Contractor Defense*, 36 CATH. U.L. REV. 219, 228-30 (1986).

16. *Yearsley*, 309 U.S. at 20-21.

17. *Id.* at 21.

a contractor performed within the scope of validly conferred authority, he was allowed to share vicariously the government's sovereign immunity.[18] Since *Yearsley*, when contractors perform public works projects as agents or officers of the government according to government specifications, they are permitted to partake of the government's immunity in cases arising from the projects.[19] Applying the *Yearsley* defense[20] to an independent military contractor is problematic as one element of the defense, that the contractor has acted as an agent or officer of the government, is missing.[21] Independent military contractors thus are essentially foreclosed from asserting the *Yearsley* government agency defense.[22]

B. Sovereign Immunity and the Federal Tort Claims Act

The government contractor defense derives from and is partially justified by the doctrine of sovereign immunity.[23] This doctrine precludes suits brought against the government without its consent.[24] The doctrine derived from the notion that "the King could do no wrong" and was incorporated into American jurisprudence in the early nineteenth century.[25] In 1946 Congress enacted the Federal Tort Claims Act (FTCA)[26] in order to mitigate the harshness of sovereign immunity and to allow governmental consent to suit in limited situations.[27] The FTCA is only a partial waiver of sovereign immunity from tort claims. If the FTCA had completely waived sovereign immunity, the government contractor defense would have been negated, as there would have been no sovereign immunity for the government contractor to share.[28]

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18. *Bynum*, 770 F.2d at 564.

19. *Id. See, e.g.*, Myers v. United States, 323 F.2d 580 (9th Cir. 1963).

20. 309 U.S. at 20. "The *Yearsley* defense requires a contractor to prove that the government is immune from suit, that the contractor is an agent of the government rather than an independent contractor, and that the contractor acted within the scope of its [validly conferred] agency status." *See* Note, *supra* note 15, at 1133 n.15.

21. *Bynum*, 770 F.2d at 564. *See* Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010, 1014-15 (5th Cir. 1969) (court held that manufacturers of grenades and fuses made according to government specifications were independent contractors and not entitled to sovereign immunity).

22. *Bynum*, 770 F.2d at 564. *See* Comment, *supra* note 15, at 228.

23. Note, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. REV. 1025, 1048-49 (1982). *See McKay*, 704 F.2d at 448; *Bynum*, 770 F.2d at 560.

24. Feres v. United States, 340 U.S. 135, 139 (1950). *See* W. PROSSER & W. KEETON, THE LAW OF TORTS 1032 (5th ed. 1984) [hereinafter W. PROSSER].

25. W. PROSSER, *supra* note 24, at 1033.

26. *See* 28 U.S.C. §§ 1346(b), 2402, 2671-80 (1982).

27. Congress consented to liability for:

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1982).

28. Note, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity after* McKay v. Rockwell International Corp., 37 BAYLOR L. REV. 181, 185 n.23 (1985).

C. *The* Feres-Stencel *Doctrine*

Proponents of the government contractor defense have reasoned that exposing such contractors to tort liability would undermine the rationale of government immunity[29] established in *Feres v. United States*[30] and *Stencel Aero Engineering Corp. v. United States.*[31] In *Feres* the Supreme Court held that the government is not liable under the FTCA[32] for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[33] The Court cited three reasons for construing the FTCA to preclude suits involving the injury or death of servicemen occurring during military service. First, the Court recognized that the relationship between the federal government and members of the armed forces is "distinctively federal in character"[34] and that "[n]o federal law recognizes a recovery such as claimants seek."[35] The Court recognized as well that the FTCA does not create new causes of action; rather, the statute permits suits against the government under certain limited circumstances when suit would be permitted against a private individual.[36] The Court thus concluded that because no analogous situation exists in the private sector the Act should not be construed "to visit the Government with novel and unprecedented liabilities."[37] The Court also noted that the government has provided for injured servicemen through the Veterans' Benefit Act.[38] The Court observed that "[t]he compensation system, which normally requires no litigation, is not negligible or niggardly . . . . The recoveries compare extremely favorably with those provided by most workmen's compensation statutes."[39]

The holding in *Feres* was subsequently extended in *Stencel*, in which the Court based its decision on the *Feres* rationale.[40] In *Stencel* a serviceman who was injured while attempting to eject from a fighter aircraft during a midair emergency brought suit against both the manufacturer and the United States.[41] The manufacturer cross-claimed against the government for indemnification.[42] The Court held that under the FTCA[43] the United States is not required to indem-

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29. Ramey v. Martin-Baker Aircraft Co., 656 F. Supp. 984, 989 (D. Md. 1987). *See also Bynum*, 770 F.2d at 560-62; *McKay*, 704 F.2d at 448; Note, *supra* note 15, at 1134.
30. 340 U.S. 135 (1950).
31. 431 U.S. 666 (1977).
32. 28 U.S.C. § 2674 (1948), *amended by* 28 U.S.C. § 2674 (1988).
33. *Feres*, 340 U.S. at 146.
34. *Id.* at 143.
35. *Id.* at 144.
36. *Id.* at 141.
37. *Id.* at 142.
38. 38 U.S.C. §§ 321, 331 (1982).
39. *Feres*, 340 U.S. at 145.
40. *Stencel*, 431 U.S. at 674.
41. *Id.* at 667.
42. *Id.* at 668.
43. 28 U.S.C. § 2674 (1948), *amended by* 28 U.S.C. § 2674 (1988).

nify a third party for damages paid by it to a serviceman for a service-related injury. [44]

The *Stencel* Court reviewed *Feres* and found that the rationale of *Feres* prohibited a third party from recovering in an indemnity action against the federal government. [45] The *Stencel* Court also noted that permitting such an indemnity claim would be essentially the same as allowing a direct action against the government. [46] The Court observed that "[t]he trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." [47] Since *Stencel*, prohibiting possible impairment of military discipline and effectiveness and discouraging the judiciary from second-guessing military decisions have become the primary rationales for what has become known as the *Feres-Stencel* doctrine. In *United States v. Shearer* [48] the Court stated that the other factors in *Feres* and *Stencel* were "no longer controlling" [49] and that the essential issue had become "whether the suit requires the civilian court to second-guess military decisions [citation omitted] and whether the suit might impair essential military discipline . . . ." [50]

The *Feres-Stencel* doctrine is generally recognized as being "the catalyst for the development of the modern government contractor defense." [51] *Feres* and *Stencel* present the policies and holdings by which government contractors have

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44. *Stencel*, 431 U.S. at 673.
45. *Id.* at 671-72.
46. *Id.* at 673.
47. *Id.*
48. 473 U.S. 52 (1985).
49. *Id.* at 58 n.4.
50. *Id.* at 57. *See* Chappell v. Wallace, 462 U.S. 296, 302 (1983) (military decisions are governed by civilian control of the legislative and executive branches, not the judicial branch). *See also* Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976), *aff'd per curiam*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978). In *Sanner* the New Jersey Superior Court held that a government contractor will not bear liability for which the government is responsible yet immune. *Id.* at 8-9, 364 A.2d at 46-47. A passenger in a jeep manufactured by Ford in accordance with United States Army specifications was thrown from the jeep and injured. *Id.* at 3, 364 A.2d at 43-44. The passenger sued Ford on a strict liability theory on the ground that the vehicle was defectively designed because it lacked seat belts and a roll bar. *Id.* at 5, 364 A.2d at 44-45. Ford claimed immunity from liability because it manufactured the jeep in conformance with government specifications, *id.* at 4-5, 364 A.2d at 44, and the court held that a manufacturer complying with government specifications is protected from liability. *Id.* at 8-9, 364 A.2d at 46-47. The court concluded that if contractors were held liable they would pass the cost of liability to the government through increased contract prices, subverting the government's immunity for discretionary functions under the FTCA. *Id.* at 9, 364 A.2d at 47. Deference toward the military decision making process was also a factor in extending immunity to the government contractor: "[t]o impose liability on a governmental contractor who strictly complies with the plans and specifications provided to it by the Army in a situation such as this would seriously impair the governments [sic] ability to formulate policy and make judgments pursuant to its war powers." *Id.* at 9, 364 A.2d at 47. The *Sanner* opinion thus acknowledged for the first time a separation of powers concern and a need to defer to military judgments concerning product safety. Although the *Sanner* court did not explicitly provide the necessary elements for successful assertion of the government contractor defense, the court apparently adopted a precursor of the defense. THE GOVERNMENT CONTRACTOR DEFENSE: A FAIR DEFENSE OR THE CONTRACTOR'S SHIELD? 8-9 J. Madole ed. (1986) [hereinafter THE GOVERNMENT CONTRACTOR DEFENSE]. *See* Note, *supra* note 15, at 1136; Note, *supra* note 23, at 1057-58.
51. THE GOVERNMENT CONTRACTOR DEFENSE, *supra* note 50, at 7.

come to derive protection from liability by sharing in the government's sovereign immunity. After the *Stencel* decision in 1971, the avenue of recovery for service-related injuries was against the military contractor. The development of the government contractor defense was in direct response to increased litigation for tort liability against manufacturers of military products. [52] The defense came into sharp judicial focus in the 1980s.

D. Three Formulations of the Government Contractor Defense

Prior to *Boyle v. United Technologies Corp.*, [53] courts had articulated three different tests under which a government contractor could successfully assert the defense. The tests were announced in *In re "Agent Orange" Product Liability Litigation*, [54] *McKay v. Rockwell International Corp.*, [55] and *Shaw v. Grumman Aerospace Corp.* [56]

The United States District Court for the Eastern District of New York first delineated the elements of the government contractor defense in *In re "Agent Orange" Product Liability Litigation (Agent Orange II).* [57] Vietnam Conflict veterans and members of their families claimed to have suffered injuries which resulted from the veterans' exposure to the chemical defoliant "Agent Orange." [58] The *Agent Orange II* court examined reasons for application of the government contractor defense in that case: "to permit the government to wage war in whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons." [59] The court reiterated the policy rationale set forth by earlier decisions that the judiciary should not try to "second guess" military decisions:

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52. THE GOVERNMENT CONTRACTOR DEFENSE, *supra* note 50, at viii.

53. 108 S. Ct. 2510 (1988).

54. 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied*, 465 U.S. 1067 (1984).

55. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

56. 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988).

57. 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied*, 465 U.S. 1067 (1984) (*Agent Orange II*). Also relevant is In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980), *rev'd*, 635 F.2d 987, *cert. denied*, 465 U.S. 1067 (1984) (*Agent Orange I*).

58. *Agent Orange I*, 506 F. Supp. at 768. In this case the plaintiffs sued the manufacturers of Agent Orange, asserting various theories of liability. *Id.* at 769. The defendants asserted the government contractor defense, claiming they had manufactured Agent Orange in strict compliance with government specifications and the specifications contained no obvious defects. *Id.* at 795. The court recognized the existence of the government contractor defense based on policy considerations. The court stressed the limited role courts should play in reviewing military decisions:

> If claims for injuries sustained by members of the armed forces in the execution of military orders were subjected to the scrutiny of courts of justice, then the civil courts would be required to examine and pass upon the propriety of military decisions. The security and common defense of the country would quickly disintegrate under such meddling.

Id. at 771. The court also pointed to the lack of discretion by the contractor who is compelled to follow government specifications and should in fairness share vicariously in the government's immunity from liability: "[T]ort liability principles properly seek to impose liability on the wrongdoer whose act or omission caused the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government." *Id.* at 793.

59. 534 F. Supp. at 1054 n.1.

> Courts should not require suppliers of ordnance to question the military's needs or specifications for weapons during wartime. Whether to use a particular weapon that creates a risk to third parties, whether the risk could be avoided at additional cost, whether the weapon could be made safer if a longer manufacturing time were allowed, indeed, whether the weapon involves any risk at all, are all proper concerns of the military which selects, buys and uses the weapon. But they are not sources of liability which should be thrust upon a supplier, nor are they decisions that are properly made by a court. [60]

The court noted, however, that public policy requires that such military decisions be based on any pertinent information known to the supplier; in other words, the supplier has a duty to apprise the military of any known hazards in order to insulate itself from liability for damages resulting from a product supplied to the military in compliance with government specifications. [61] The court cited that the reason for the supplier's duty to inform the military of known risks was "to provide the military with at least an opportunity fairly to balance the weapon's risks and benefits." [62]

The *Agent Orange II* court set forth three elements of the government contractor defense that the defendant must establish in order to be insulated from liability:

> 1. That the government established the specifications for [the ordnance];
> 2. That the [ordnance] manufactured by the defendant met the government's specifications in all material respects; and
> 3. That the government knew as much as or more than the defendant about the hazards to people that accompanied use of [the ordnance]. [63]

The court thus determined that the defense would defeat liability if the manufacturer could prove the government established the design, the manufacturer complied with the design, and the manufacturer apprised the government of known dangers in the design. [64]

It is unclear exactly what the court meant by the requirement that the government "establish" the specifications. The court rejected the plaintiff's argument that under the defense the defendants must prove that they had "neither direct nor indirect responsibility" for preparing the design specifications. [65] The court did not state the amount of responsibility the manufacturer would be allowed in order to fulfill this element of the defense; however, the court did state that the only necessity for this element of the defense is "for [the] defendant to prove

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60. *Id.* at 1054.
61. *Id.* at 1055.
62. *Id.*
63. *Id.*
64. *Id.* It is worth noting that the court expressly stated that the establishment by the defendant of the elements of the government contractor defense would defeat an action under any theory of recovery, whether negligence, strict liability, or breach of warranty. *Id.* at 1055-56.
65. *Id.* at 1056.

that the product it supplied was a particular product specified by the government."[66] Implicit in the opinion is the possibility that the defense might bar a government contractor's liability for a design defect where the contractor participated in the preparation of the specifications and the government "approved" them.

In *McKay v. Rockwell International Corp.*,[67] the United States Court of Appeals for the Ninth Circuit refined *Agent Orange II*'s three-part test for application of the government contractor defense and added the requirement that the contractor would be immune from liability only if the government would also be immune under the *Feres-Stencel* doctrine.[68] The court held that, under the *Feres-Stencel* doctrine and the government contractor rule, a supplier of military equipment is immune from liability for a design defect where:

> (1) the United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.[69]

The *McKay* court clearly stated that it is permissible for the government to approve, as well as to establish, design specifications in order for the contractor to satisfy the second element of the defense. This broadens this element as stated in *Agent Orange II*[70] and specifically allows the contractor more participation in the design process in order to successfully assert the government contractor defense.

The *McKay* court delineated the rationale for applying the defense, emphasizing that the application of the government contractor defense to suppliers of military equipment approved by the government was supported by the same rationale supporting the *Feres-Stencel* doctrine.[71] Permitting claims against

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66. *Id.*

67. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

68. *Id.* at 451.

69. *Id.* The court noted the imprecision of the term "military equipment" but declined to engage in judicial line-drawing. The court did go so far as to state that the line lay between an ordinary consumer product purchased by the armed forces, such as a can of beans (which does not fall within the term), and the escape system of a Navy RA-5C reconnaissance aircraft (which does fall within the term). *Id.* The court noted as well that the rule it formulated relieves suppliers of military equipment of liability for design defects—not for defective manufacture. *Id.*

70. 534 F. Supp. at 1055.

71. 704 F.2d at 449. The court determined that:

> holding the supplier liable in government contractor cases without regard to the extent of government involvement in fixing the product's design and specifications would subvert the *Feres-Stencel* rule since military suppliers, despite the government's immunity, would pass the cost of accidents off to the United States through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales.

Id. *See* Comment, *supra* note 15, at 234.

government contractors for damages resulting from design defects approved by the government would undermine the *Feres-Stencel* governmental immunity by allowing suppliers to pass on the costs of liability indirectly to the United States through higher contract prices. [72]

Citing separation of powers concerns, the court then reasoned that to hold a military contractor liable for a design defect which the government established or approved would "thrust the judiciary into the making of military decisions." [73] A trial for a design defect approved by the government would involve second guessing the military and would possibly affect military discipline, [74] as well as national security. [75]

The court noted that the development of military equipment requires pushing technology to its limits, incurring risks that would be unacceptable in consumer goods. [76] The final reason observed by the court for providing for the government contractor defense is that the defense provides incentives for suppliers of military equipment to cooperate with military authorities in developing and testing the equipment. [77]

In 1985 the Eleventh Circuit articulated a third formulation of the government contractor defense in *Shaw v. Grumman Aerospace Corp.* [78] In so doing, the court adopted the term "military contractor defense" rather than "government contractor defense," asserting that the former term is more descriptive and precise. [79] Although the court recognized *McKay* [80] as expressing the leading version of the military contractor defense, [81] the court rejected the *McKay* formulation [82] as well as its rationale for the defense. [83] The Eleventh Circuit

72. *Id.* The court cited to *Stencel*, 432 U.S. at 673 (quoting from Laird v. Nelms, 406 U.S. 797, 802 (1972)) ("To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result.").

73. *Id.* at 449.

74. *Stencel*, 431 U.S. at 673.

75. *McKay*, 704 F.2d at 449.

76. *Id.* at 449-50.

77. *Id.* at 450. The dissenting opinion in *McKay* criticized the majority for using the *Feres-Stencel* doctrine and the government contractor defense to protect Rockwell from liability. 704 F.2d at 456 (Alarcon, J., dissenting). The dissent asserted that the doctrine is concerned only with government, not contractor, liability. *Id.* The dissent noted that the plaintiffs in *McKay* filed neither a direct claim nor an indirect claim for indemnification against the government, thus placing their claims outside the rationale of the *Feres-Stencel* doctrine. *Id.* The dissent also asserted that the pass-through rationale for the defense denies the realities of the free-market system. *Id.* at 457-58. Because contractors incorporate the potential costs of liability into the final contract price, this rationale for the defense is invalid.

The dissent especially criticized the majority for allowing the defense for any contractor who secures the government's *approval* for the design. *Id.* at 458. The dissent concluded that the defense should require government *compulsion* to allow a contractor to share the government's immunity because it is only in that situation that "the contractor's behavior [will] be the result of governmental discretion and direction." *Id.* at 459. *See* Note, *Sovereign Immunity—The Government Contractor Defense: Preserving the Government's Discretionary Design Function*, 57 TEMP. L.Q. 697, 704 (1984).

78. 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988).

79. 778 F.2d at 739 n.3.

80. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

81. *Shaw*, 778 F.2d at 741.

82. *Id.* at 745.

83. *Id.* at 741-43.

rejected the pass-through rationale as irrelevant, citing the *McKay* dissent.[84] The court noted that since *United States v. Shearer*[85] the "limitation of government liability rationale behind the *Feres-Stencel* doctrine appears . . . to be 'no longer controlling.'"[86] The court stated that it would "not recognize a military contractor defense simply to shield such contractors—and (only arguably) the government—from the cost of liability for defectively designed products."[87] The *Shaw* court flatly stated that the defense is based solely on the constitutional separation of powers: "[T]he military must be free to decide that the risk of accident or injury to servicemen from a design defect in the equipment it orders is a risk that it is willing to take—without judicial interference. This is the basis for the military contractor defense in this Circuit."[88]

The court emphatically stated that it was formulating a "*narrow* exception to the product liability law that governs all other product designers."[89] The court recognized "a military contractor defense . . . based exclusively on the theory that the constitutional separation of powers compels the judiciary to defer to a military decision to use a weapon or weapons system (or a part thereof) designed by an independent contractor, despite its risks to servicemen."[90]

The *Shaw* court reviewed the two major formulations of the defense—*McKay*[91] and *Agent Orange II*[92]—and found them both unsatisfactory.[93] The court's central concern in formulating its standard was "whether or not the military actually made a decision to use a product that it knew to be dangerous to servicemen."[94] The court emphasized that the defense required that the design represent a judgment by the military—not by the supplier. The court thus pronounced a version of the government contractor defense that would bar a claim against a government contractor for an allegedly defective design.[95] The first part of the test allows the contractor to participate in the design process, but the participation must be "so minimal as to excuse it from proving the second

84. *Id.* at 742. *See McKay*, 704 F.2d at 457 (Alarcon, J., dissenting).

85. 473 U.S. 52 (1985).

86. *Shaw*, 778 F.2d at 742 (quoting United States v. Shearer, 473 U.S. 52, 58 n.4 (1985)).

87. *Id.*

88. *Id.* The court noted that this rationale reflects the justification discussed in *Feres* concerning whether the court would be required to second-guess military decisions. *Id.*

89. *Id.* at 741.

90. *Id.* at 743.

91. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

92. 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied*, 465 U.S. 1067 (1984).

93. *Shaw*, 778 F.2d at 745.

94. *Id.* The *Shaw* court cited approvingly that "no separation of powers concern arises unless the design in question represents a judgment by the military" (quoting In re Air Crash Disaster at Mannheim Germany, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986)). *Id.*

95. *Id.* at 745-46 (emphasis in original). To escape liability, the court stated that a contractor must affirmatively prove:

> (1) that it did not participate, or participated only minimally, in the design of these products or parts of products shown to be defective; *or* (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.

Id. at 746.

part of the test."[96] Element two requires the contractor to warn the military of the product's risks and to inform the military of design alternatives which are known or reasonably should have been known by the contractor.[97] Element two requires as well a showing that the military "clearly authorized the contractor to proceed with the dangerous design."[98] The salient feature of this test is whether the military, armed with clear knowledge of inherent defects in the design, nonetheless authorized the contractor to proceed.[99]

The elements of the government contractor defense enunciated by the Ninth Circuit in *McKay* have been adopted by courts in other circuits.[100] In *Bynum v. FMC Corp.*[101] the Fifth Circuit adopted the *McKay* enunciation of the government contractor defense.[102] The *Bynum* court determined that the primary justification for the defense is the same as that applying to the *Feres-Stencel* doctrine: "members of the armed services should not be able to challenge the decisions and actions of military authorities by thrusting the judiciary into the role of adjudicating what are essentially military matters."[103] The Seventh Circuit in *Tillett* considered the *Agent Orange II* formulation of the government contractor defense and rejected it in favor of the *McKay* formulation because the inclusion of *Feres-Stencel* immunity for the government as an element of the defense "better reflects the influences of *Feres-Stencel* immunity upon the relationship between the Government and its contractors."[104] The court refused to require the contractor to prove that the government compelled it to fulfill the military equipment contract in order to successfully assert the defense.[105] In *Tozer* the Fourth Circuit adopted the *McKay* formulation of the defense,[106] citing as primary justifications for the defense separation of powers considerations and protection of the "process of military procurement."[107] The court stated that withholding judicial judgment on military matters is not only a constitutional separation of powers issue but also it is a matter of sound policy that

96. *Id.* at 746.

97. *Id.*

98. *Id.*

99. *Id.* The court stressed that authorization must be more than "rubber-stamp" approval. *Id.*

100. *See* Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985). In Koutsoubos v. Boeing Vertol, the Third Circuit purported to adopt the *Agent Orange II* test, stating that in *McKay* the Ninth Circuit "rephrased" the *Agent Orange* test. 755 F.2d 352, 355 (3d Cir. 1985), *cert. denied*, 474 U.S. 821 (1985). *See Bynum*, 770 F.2d at 567 n.14.

101. 770 F.2d 556 (5th Cir. 1985).

102. *Id.* at 567.

103. *Id.* at 569. The court further concluded that not only is control of military matters by the legislative and executive branches of the federal government a separation of powers issue, but it is as well a matter exclusively within the ambit of the federal government, implicating "uniquely federal interests." *Id.*

104. 756 F.2d at 598 n.4.

105. *Id.* at 597.

106. 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988).

107. *Id.* at 405. Barring recovery in such actions would not leave servicemen or their survivors without any relief as the Veterans' Benefits Act provides a remedy in many such circumstances. The court thus noted that "one classic rationale for tort liability—that of compensation of victims—is less compelling in this context." *Id.* at 407.

decisions on issues of "common survival and defense" be made by those branches with expertise, knowledge, and accountability. [108] The court expressed its concern about "altering the nature of the procurement process": "we anticipate that in the absence of the [government contractor] defense, there would be a decrease in contractor participation in design, an increase in the cost of military weaponry and equipment, and diminished efforts in contractor research and development." [109]

Those circuits that have considered the government contractor defense have adopted a version of it. [110] With the exception of the Eleventh Circuit's differing formulation of the defense in *Shaw*, *McKay* has provided the leading enunciation of the defense. Courts have articulated differing policy justifications and rationales which undergird the defense. [111] In light of the rationale on which the Supreme Court rested the government contractor defense in *Boyle*, it is important to note that most courts which had previously recognized the govern-

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108. *Id.* at 405.

109. *Id.* at 407. The court recognized that in order for military technology to continue to advance contractor participation in the design process is essential. The continuous "back-and-forth" between the military and the contractor is an important part of the process. *Id.* (quoting *Koutsoubos*, 755 F.2d at 355). If governmental approval of the design consists of more than rubber stamping, then the defense is available to the contractor. *Id.* at 407-08.

110. The Second, Third, Fourth, Fifth, Seventh, and Ninth Circuits have adopted an essentially uniform formula for application of the government contractor defense. *See* In re "Agent Orange" Product Liability Litigation, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2898 (1988); Dowd v. Textron, Inc., 792 F.2d 409 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988); Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985); Brown v. Caterpillar Tractor Co., 741 F.2d 656 (3d Cir. 1984); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). In Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988), the Eleventh Circuit adopted a different formulation of the defense. *See supra* notes 78-99 and accompanying text.

111. *See, e.g.*, Tozer v. LTV Corp., 792 F.2d 403, 405-07 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988) (court's decision rested on fairness, need to encourage contractor participation, avoidance of pass-through costs, and, particularly, separation of power considerations); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 742-43 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988) (court's formulation of the defense rested on separation of powers concerns and the inappropriateness of the judiciary second-guessing military decisions); Bynum v. FMC Corp., 770 F.2d 556, 565-66 (5th Cir. 1985) (court's rationale based on need to protect military decisionmaking, avoidance of pass-through costs, incentives for contractor to work closely with the military, and fairness); Tillett v. J.I. Case Co., 756 F.2d 591, 599 (7th Cir. 1985) (rationale for defense includes fairness, separation of powers concerns, contractor compulsion, and incentives for contractor to work closely with the military); Koutsoubos v. Boeing Vertol, 755 F.2d 352, 355 (3d Cir. 1985), *cert. denied*, 474 U.S. 821 (1985) (rationale that justified application of the defense was incentives for contractors to work closely with the military); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449-51 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984) (justifications for the defense included avoidance of pass-through costs to the government, separation of powers concerns, and the providing of incentives for manufacturers to work closely with military officials).

ment contractor defense had based their rationale on reasons paralleling those supporting the *Feres-Stencel* doctrine.[112]

IV. INSTANT CASE

Writing for the majority,[113] Justice Scalia stated that *Boyle* required the Court "to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect."[114] The Court patently refuted the petitioner's contention that "there is no justification in federal law for shielding government contractors from liability for design defects in military equipment."[115] The Court acknowledged that no specific legislation immunizes government contractors from liability for design defects[116] but concluded that federal common law preempts conflicting state law in order to protect "uniquely federal interests."[117] While the instant case involves liability of a third party, rather than an obligation to the United States under its contract, this liability arises out of the performance of a federal contract, the interpretation of which clearly implicates "uniquely federal interests."[118]

The Court noted that another area of federal concern is the civil liability of

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112. For example, the *McKay* court determined that holding a military supplier liable would thwart the policy behind the *Feres-Stencel* doctrine because suppliers would pass additional costs on to the government through cost overrun provisions. *McKay*, 704 F.2d at 449. Forcing the judiciary to review military decisions would implicate separation of powers concerns. *Id.* The *McKay* court noted that the military must be allowed to take risks in designing military equipment to continue advancing technologically. *Id.* at 449-50. Finally, the court observed that recognizing the defense would encourage contractors to work closely with military officials. *Id.* at 450. The *Bynum* court asserted that the most important policy reason for recognizing the defense is "that a trial between a serviceman and a military contractor in which government specifications are at issue would inevitably implicate the same concerns that underlie the . . . *Feres* and *Stencel* decisions." 770 F.2d at 565. The *Tillett* court adopted the reasons stated in *McKay* "for extending the umbrella of *Feres-Stencel* immunity to government contractors." 756 F.2d at 597.

113. *Boyle*, 108 S. Ct. 2510, 2512 (1988). Scalia, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, O'Connor, and Kennedy, JJ., joined. *Id.* Brennan, J., filed a dissenting opinion in which Marshall and Blackmun, JJ., joined. *Id.* Stevens, J., also filed a dissenting opinion. *Id.*

114. *Id.* at 2513.

115. *Id.*

116. *Id.*

117. *Id.* at 2514. The Court has held that some areas are "so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Id.* In a dissenting opinion, Justice Brennan emphasized that Congress has remained silent in this area and has failed to pass legislation granting such immunity, despite repeated attempts by government contractors. 108 S. Ct. at 2519-20. Justice Brennan objected to the Court's judicial legislation and disagreed with the propriety of imposing preemption under the facts of this case. *Id.* at 2520 (Brennan, J., dissenting). Justice Brennan feared the expansion of immunity well beyond the range of military equipment, allowing suits by civilians to be barred. *Id.*

118. *Id.*

federal officials acting in the course of their duties.[119] Although the instant case involves an independent contractor performing under a procurement contract rather than a federal official performing his duties, the same interest in completing government work is implicated.[120] The Court concluded that federal common law should govern civil liabilities arising out of performance of federal procurement contracts.[121]

Even though the present dispute was between private parties, the Court stated that the federal government's interest in procuring equipment was nonetheless implicated.[122] The Court distinguished *Miree v. DeKalb County*[123] in which case the federal interest was too remote to justify applying federal law.[124] Conversely, the Court stated that imposing liability on government contractors would affect government contracts' terms: the interests of the federal government would be implicated either by the contractor refusing to manufacture the government-specified design or by the contractor raising its price.[125]

The Court held procurement of equipment by the United States to be an area of uniquely federal interest; however, Justice Scalia noted that state law will be displaced only where a significant conflict exists between a "'federal policy or interest and the [operation] of state law'"[126] or when applying state law would "'frustrate specific objectives'" of federal legislation.[127]

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119. *Id.* The dissent objected to extending immunity from suit to "nongovernment employees whose authority to act is independent of any source of federal law" and who are as removed from the workings of the federal government as are government contractors. 108 S. Ct. at 2524 (Brennan, J., dissenting). The narrowness of the federal interest and the immunity is deliberate. A federal officer, Brennan noted, exercises statutory authority; and interfering with the exercise of discretion would subvert congressional will. On the other hand, "a Government contractor acts independently of any congressional enactment." *Id.* Justice Brennan summed up this contention by asserting that the "justifications for official immunity do not support an extension to the Government contractors. . . ." *Id.* at 2525.

120. *Id.* at 2514. Responding to the dissent, *id.* at 2519, the Court emphasized that it was not suggesting that the immunity enjoyed by federal officials might be extended to nongovernment employees, such as government contractors. *Id.* at 2514 n.1. The discussion, the Court stated, was included to indicate that the liability of independent contractors performing work for the government is an area of uniquely federal interest. *Id.*

121. *Id.* at 2514. In support of this proposition, the Court cited its holding in Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940). (*See supra* notes 15-19 and accompanying text.) The Court determined that there was no distinction between the federal interest justifying *Yearsley* and barring liability in procurement contracts. *Id.* at 2515. Dissenting, Justice Brennan contended that the Court incorrectly extended *Yearsley* beyond the "takings context." 108 S. Ct. at 2525 (Brennan, J., dissenting). Unlike Sikorsky in the instant case, the contractor in *Yearsley* was following, not formulating, government specifications. Even, however, had Sikorsky manufactured the helicopter in strict compliance with the government's specifications, the analogy with the contractor in *Yearsley* would be defective since *Yearsley* depended upon an agency relationship with the government which was never alleged nor established in the instant case. *Id. See Yearsley*, 309 U.S. at 22.

122. *Boyle*, 108 S. Ct. at 2515.

123. 433 U.S. 25 (1977). In *Miree*, involving whether private parties could sue as third-party beneficiaries to an agreement between a municipality and the FAA, the Court held that "state law was not displaced because 'the operations of the United States in connection with FAA grants such as these . . . would [not] be burdened' by allowing state law to determine whether third-party beneficiaries could sue . . . ." *Boyle*, 108 S. Ct. at 2515 (quoting *Miree*, 433 U.S. at 30).

124. *Boyle*, 108 S. Ct. at 2515.

125. *Id.*

126. *Id.* (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1966)).

127. *Id.* (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)).

In the present case, federal and state interests conflicted, giving rise to a need for preemption. The Court stated:

> Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications). [128]

The situations in which a significant conflict existed between state law and federal policy would be limited. For instance, the federal government would have no significant interest in a defective escape-hatch in a helicopter which it ordered out of stock; and a manufacturer of such a helicopter could not be shielded from liability. [129]

Surprisingly, the Court did not agree that the *Feres* doctrine alone supported the defense. Justice Scalia concluded that applying the doctrine to the present case could produce either too broad or too narrow a result. [130] Too broad a result could occur in applying *Feres* when injuries were sustained by a defective helicopter purchased from stock: "[s]ince *Feres* prohibits all service-related tort claims against the Government, a contractor defense that rests upon it should prohibit *all* service-related tort claims against the manufacturer—making inexplicable the three limiting criteria for contractor immunity . . . that the Court of Appeals adopted." [131] Too narrow a result could also be produced: since the *Feres* doctrine applies only to service-related injuries, the defense could not be invoked to prevent a civilian's suit in cases where it could be invoked in a suit brought by a member of the armed forces. [132]

The Court used the FTCA's "discretionary function" exception [133] as the standard for establishing the contours of significant conflict between state law and federal interests. [134] Thus, preemption was appropriate because the design of military equipment involves a discretionary function. Choosing designs involves the balancing of technical, military, and social considerations, "including specifically the trade-off between greater safety and greater combat effectiveness." [135] To permit judicial second guessing of these decisions would subvert the rationale behind the FTCA exemption. [136] The Court observed as well that

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128. *Boyle*, 108 S. Ct. at 2516. The Court noted that in *Miree* there was no attempt to impose on the person contracting with the government "a duty contrary to the duty imposed by the Government contract." *Id.*

129. *Id.*

130. *Id.* at 2517. *See supra* notes 30-51 and accompanying text.

131. *Id.* (emphasis added).

132. *Id.*

133. The FTCA exempted from consent to suit "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1982). *See supra* notes 26 & 27 and accompanying text.

134. *Boyle*, 108 S. Ct. at 2517.

135. *Id.*

136. *Id.* at 2517-18.

the financial burden of government contractors would ultimately be passed on to the government.[137]

Justice Brennan, dissenting, objected to the Court's invoking the discretionary function exception to the FTCA,[138] stating that retaining immunity for the government's discretionary acts does not imply a defense for contractors who participate in those acts, even though the financial burden might be passed on to the federal government.[139] No more reason exists for federal common law to bar a claim against contractors now that the government is liable for some torts than when it was liable for none.[140] Justice Brennan concluded this observation by declaring the statute "inapplicable": "[t]he discretionary function exception does not support an immunity for the discretionary acts of Government *contractors* . . . ."[141]

After basing its holding on "significant conflict with federal policy," the Court adopted the version of the government contractor defense articulated by the Fourth Circuit below.[142] The Court stated:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[143]

The first two elements ensure that the design was considered by a government official, thereby placing it within the ambit of the discretionary function, and not just by the contractor. The third element is necessary to ensure that the manufacturer will convey all relevant knowledge concerning the product's design to the government officials so that they can more effectively carry out their discretionary functions.[144]

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137. *Id.* at 2518. The dissent rejected this assertion by the majority. *Id.* at 2524. Justice Brennan particularly objected to what he perceived as the majority's justification for the defense: not overburdening the national purse. *Id.* at 2528. He stated that "[w]e are judges not legislators" and if Congress did not deem it wise or necessary to shield government contractors from tort liability for design defects then it was not the place of the judiciary to create a defense. *Id.*

In a brief dissenting opinion, Justice Stevens likewise concluded that the instant case involved policy selection " 'more appropriately [sic] for those who write the laws, rather than for those who interpret them.' " *Id.* at 2529 (quoting United States v. Gillam, 247 U.S. 507, 513 (1954)) (Stevens, J., dissenting). Justice Stevens stated that:

> [w]hen the novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual—whether in the social welfare context, the civil service context, or the military procurement context—I feel very deeply that we should defer to the expertise of the Congress.

Id. at 2528.

138. 28 U.S.C. § 2680(a) (1982).

139. *Boyle*, 108 S. Ct. at 2526.

140. *Id.* at 2527.

141. *Id.*

142. *Id.* at 2518. The Court also noted that this was the version of the defense adopted by the Ninth Circuit in *McKay*. *Id.* *See supra* notes 69 & 70 and accompanying text.

143. *Id.*

144. *Id.*

The Court noted that it did consider the alternative version of the government contractor defense adopted by the Eleventh Circuit in *Shaw*.[145] The Court rejected this version because it did not "protect the federal interest embodied in the 'discretionary function' exemption."[146] The design which is finally chosen may reflect a policy judgment by the government, whether or not the contractor rather than officials developed the design.[147] It is not sound policy, the Court observed, to deter active contractor participation in the design process.[148]

V. ANALYSIS AND CONCLUSION

In *Boyle v. United Technologies Corp.*, the Supreme Court firmly established the validity of the government contractor defense in American jurisprudence. Although the Court adopted the *McKay* formulation of the defense, it expressly rejected the *Feres* rationale as the policy infrastructure of the defense.[149] The Court relied on the "discretionary function" exception to the FTCA as the theoretical and statutory underpinning for the defense.[150] The Court's reliance on the discretionary function exception suggests that the defense may be raised whenever a contractor's liability is predicated on a defective product design that the government approved within its discretionary function. This decision will have a significant effect on the reasoning of courts and upon their determinations in subsequent decisions. In applying the rationale of the discretionary function exception rather than that of *Feres*, "the Court laid the foundation for applying the defense in a broad range" of circumstances.[151] Although the Court's discussion on public policy considerations of the defense was limited, it did cite two. First, selecting designs for military equipment to be used by the armed forces is a discretionary function which involves a balancing of a number of factors; and second guessing of these judgments should be avoided.[152] Second, absent the defense, judgments against government contractors would be passed on to the government itself through increased contract prices,

145. *See supra* notes 91-99 and accompanying text.
146. *Boyle*, 108 S. Ct. at 2518.
147. *Id.*
148. *Id.*
149. *See supra* notes 130-32 and accompanying text.
150. *See supra* notes 133-37 and accompanying text.
151. Ayer, *supra* note 3, at 36. One commentator stated that protection of governmental decisionmaking is the government contractor defense's true rationale and, therefore, the discretionary function exception is a more appropriate rationale for the defense than the *Feres* doctrine. Ausness, *Surrogate Immunity: The Government Contract Defense and Products Liability*, 36 DEF. L.J. 537, 574-75 (1987), *reprinted from* 47 OHIO ST. L.J. 985 (1986). The *Feres* doctrine protects not only discretionary decisions by the military but also protects nonmilitary decisions from judicial review. The government contractor defense "is concerned with conscious risk allocation decisions" and "not with risks created through negligence . . . ." *Id.* at 574.
152. *Boyle*, 108 S. Ct. at 2517-18. Although the Court does not so state, this assertion implies a recognition of a separation of powers issue discussed by a number of lower courts. *See, e.g., Bynum*, 770 F.2d at 565; *Tillett*, 756 F.2d at 597; *Shaw*, 778 F.2d at 742; *McKay*, 704 F.2d at 449.

undermining the government's immunity under the discretionary function exception.[153]

In adopting the Fourth Circuit's version of the defense,[154] the Court stated that the first two elements of the defense test fulfill the policy considerations of the discretionary function—that is to say, they ensure that the design feature was "considered" by a government officer and not just by the contractor.[155] The choice of the word "considered" is unfortunate because it does not indicate what in fact should underlie the first element of the defense: governmental *responsibility* for "approval" of the ultimate design specifications. The third element of the defense ensures that the government is apprised of all relevant information in order to make highly informed judgments when balancing the factors that will place final responsibility on the government, not the manufacturer. If the government does not possess at least the same amount of knowledge concerning possible hazards of a particular design as the manufacturer, then the manufacturer should not be allowed to partake of the government's immunity to shield itself from tort liability.[156] The keys to successful assertion of the defense are governmental *responsibility* and governmental *knowledge*. If the government is responsible for final approval of the design specifications and the government is fully informed of all the contractor's knowledge, that is, if the government is the entity weighing the risks and benefits, then the government is responsible; and the government contractor defense should shield a government contractor from liabilities for injuries resulting from a defective design if the government itself would be immune from liability.

Opponents of the defense assert that allowing a government contractor to escape liability for a defective design which it participated in formulating undermines one of the major policy considerations of the tort system—the compensation of innocent victims for their injuries.[157] One possible solution to this problem is for Congress to legislate an exception to the FTCA so that the government, on which responsibility for the defective design rests, can be sued for compensation. This solution is highly problematic, however, because it would not only undermine the discretionary function exception on which the Court based its holding in *Boyle*; but it would also subject the government to financial liability for exercising that discretionary function, involving the judiciary in second-guessing those decisions. Another possible solution is "direct reimbursement to innocent parties through specific legislative relief" for compensation for certain injuries.[158] Another possibility is to hold the government contractor to a more stringent duty of warning the government of potential design risks. The third

153. *Boyle*, 108 S. Ct. at 2517-18.

154. *See supra* notes 142-44 and accompanying text.

155. *Boyle*, 108 S. Ct. at 2518.

156. *See* Note, *supra* note 23, at 1073-79.

157. *See Boyle*, 108 S. Ct. at 2524 (Brennan, J., dissenting). *See also Shaw*, 778 F.2d at 741.

158. Comment, *The Government Contract Defense in Products Liability Cases*, 34 NAVAL L. REV. 157, 183 (1985).

element of the defense formulation could be modified to apply a higher duty of care to the contractor: "(3) the supplier warned the United States about the dangers in the use of the equipment that were known [*,or should have been known,*] to the supplier but not to the United States." In other words, a government contractor might have—or should have—superior knowledge to that of the government in its industry; and, it could be held to a more exacting duty in order to be shielded from liability by the defense.[159] The Court responded to this possibility when it rejected the *Shaw* formulation of the defense: "[w]hile this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the federal interest embodied in the 'discretionary function' exemption."[160] The defense is not formulated to protect the contractor from its negligence; it is, rather, designed to protect governmental decisionmaking from unwarranted judicial interference.

In his dissent Justice Brennan noted a potential problem with the Court's formulation of the defense: a government contractor can share the government's immunity from liability if it obtained approval of "reasonably precise specifications."[161] Courts deciding subsequent cases must decide on a case-by-case basis what is a "reasonably precise" specification. The problem, however, is with ensuring that the approval is more than a rubberstamping by the government of specifications handed to it by the contractor.[162] Justice Brennan addressed this issue, objecting to approval of "reasonably precise specifications" by a government official—an approval which might be "no more than a rubberstamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them."[163] The Court indirectly responded to this objection by stating that the first element of

159. The elements of the defense should foster the "continuous back-and-forth" between the government and the contractor. *Koutsoubos*, 755 F.2d at 355. This would not only pool the skills of government and contractor experts but it would also allow the government to have the full knowledge to weigh risks and benefits of a design judgment.

160. *Boyle*, 108 S. Ct. at 2518.

161. *Id.* at 2519 (Brennan, J., dissenting).

162. *Id.* One commentator suggests that "[a]s long as government officials have made a meaningful decision to approve a particular product design," then whether the design was entirely the work of the contractor is immaterial if the government decisionmakers were apprised of the design risks. Ausness, *supra* note 151, at 591. If the purpose of the defense is to protect governmental discretionary decisionmaking, then the origin of the design is not an issue: the issue is whether the government, with knowledge of the risks inherent in the design, nonetheless approved the specific design. In so approving, the government, through a discretionary decision, immunized itself from liability. The contractor, who is not responsible for that design decision, however defective, should not be held liable for a decision that ultimately rested with the government.

See Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989). In this case the Fifth Circuit addressed the question of what constitutes "approval" under the first element of the *Boyle* defense. The court concluded that the discretionary function exception underpinning the defense requires that the governmental act involve the use of "policy judgment"—not just some element of choice. *Id.* at 1480. The court held that "approval" under the *Boyle* defense requires more than a rubber stamp. "When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion. A rubber stamp is not a discretionary function; therefore, a rubber stamp is not 'approval.'" *Id.*

163. *Boyle*, 108 S. Ct. at 2519.

the defense assures that "the design feature in question was *considered* by a Government officer . . . ."[164] In this context the word "considered" indicates the Court's concern that there be meaningful and thoughtful weighing of the risks and benefits inherent in a particular design, not just blind approval.

The elements of the defense adopted by the Supreme Court preclude successful assertion of the defense if a contractor is sued having fulfilled performance specifications as opposed to design specifications.[165] For example, if a manufacturer contracts with the government to build a particular size submarine that will travel at a certain speed, then liability for design defects should fall on the responsible party, the manufacturer. The contractor should not be granted governmental immunity because the government merely approved the product, not the defective design specifications. "The defense is not intended to protect contractors from their negligence."[166] If, however, the contractor were responsible for working up the design specifications in the first place and established that the government, with full knowledge of the risks inherent in the design, approved those specifications, then the defense should be available to the contractor. Under such circumstances, even though the contractor was originally responsible for the design, the government was ultimately responsible for making the final design judgments.[167]

The *Boyle* decision resolved the question concerning whether a government contractor may successfully assert the defense against a civilian—not just against a member of the armed forces.[168] The Court rejected the *Feres* doctrine as the source of the rationale for the government contractor defense since "that doctrine covers only service-related injuries, and not injuries caused by the military to civilians . . . ."[169] By justifying the defense through the discretionary function exception of the FTCA, the Court has opened the door to barring claims

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164. *Id.* at 2518 (emphasis added).

165. Otherwise, allowing the contractor to share in the government's immunity under the discretionary function exception would make no sense. If the contractor were responsible for the defective design specifications, then no federal interest would be implicated; and, under *Boyle*, the contractor would have no governmental immunity under the discretionary function exception by which it could shield itself from liability. *Boyle*, 108 S. Ct. at 2517-18.

166. Schwartz, *The Government Contractor Defense After* Boyle, 24 TRIAL 88, 92 (1988). The purpose of the defense is to shield a governmental contractor from liability when it follows government-approved specifications. If the government is responsible for the final design decision, then the contractor should not be held responsible for that design.

167. *Boyle*, 108 S. Ct. at 2518.

168. *See* Ramey v. Martin-Baker Aircraft Co., 656 F. Supp. 984 (D. Md. 1987). In *Ramey* the court stated that, as "the most salient justification for the defense is governmental immunity," the government contractor defense could bar claims against military contractors for alleged design defects brought by civilian plaintiffs. *Id.* at 991. *See also infra* note 176.

169. *Boyle*, 108 S. Ct. at 2517. *See* Secrest & Torpey, *Government Contractor Defense—Absolute Immunity for the Product Maker*, 12 AM. J. TRIAL ADVOC. 1, 15 (1988) (By eliminating the *Feres* doctrine from the *McKay* test, the Supreme Court expanded the government contractor defense to include civilians as well as military personnel.).

of civilians as well as servicemen through the defense.[170] The Court stated, "we think that the character of the jet engines the Government orders for its fighter planes [which produce high noise levels] cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the armed services."[171] Under this logic, notwithstanding that the majority's example is relatively innocuous, the dissent's concern is justified: the contractor could invoke the defense to avoid liability by anyone injured by a defective design, such as children who might be killed if a defectively designed aircraft crashed.[172]

An issue left unresolved by the case is whether the defense applies to cases involving military as well as nonmilitary equipment.[173] The Supreme Court did not directly address this issue; and the lower courts, generally unwilling to broaden the scope of the defense, have avoided the issue with varying degrees of adroitness.[174] The dissent's assertion that the defense sweepingly applies to military and nonmilitary equipment is somewhat justified. By rejecting the *Feres* doctrine and applying the discretionary function exception as the rationale for the defense, the Court suggested that the defense will indeed apply to nonmilitary equipment. On the other hand, the language used by the Court suggests application of the defense only to defectively designed *military equipment.*[175] In setting forth its formulation of the defense, the Court stated that, when the three elements are established, liability cannot be imposed "for design defects in military equipment."[176] Lower courts faced with this issue will be forced to apply the "discretionary function exception" rationale from *Boyle*, which would allow the defense to apply to nonmilitary products.[177] Even though the defense has gener-

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170. *See* Secrest & Torpey, *supra* note 169, at 18 ("[W]ith the dramatic expansion of the government contractor defense by the United States Supreme Court, contractors can now use the defense in cases involving civilian plaintiffs as well as military plaintiffs.").

171. *Boyle*, 108 S. Ct. at 2517. The Fifth Circuit, citing this language from *Boyle* and the Court's reliance on *Yearsley*, stated that a plaintiff's civilian status would not automatically prohibit assertion of the government contractor defense. Garner v. Santoro, 865 F.2d 629, 637 (5th Cir. 1989).

172. *Id.* at 2520.

173. "It is unclear what role, if any, the unique and critical nature of the weapons procurement process plays in the Court's holding in *Boyle*." Ayer, *supra* note 3, at 36.

174. *See, e.g., Bynum*, 770 F.2d at 565-71 (defense only applies to military equipment); *Shaw*, 778 F.2d at 740 (court declines to address whether the defense applies to *any* product supplied to the military); *Tillett*, 756 F.2d at 598 (government contractor defense applies to all "military equipment," including pizza machines, jeeps, tractors, and front-end loaders); *McKay*, 704 F.2d at 451 (line of distinction between military and nonmilitary equipment falls somewhere between a can of beans and the escape system of a Navy RA-5C reconnaissance aircraft).

175. *Boyle*, 108 S. Ct. at 2513, 2517, 2518. *See* Ramey v. Martin-Baker Aircraft Co., 874 F.2d 946, 949 (4th Cir. 1989)(court refers to the *military* contractor defense, in apparent disregard of the *Boyle* analysis).

176. *Id.* at 2518.

177. *See* Garner v. Santoro, 865 F.2d 629, 637-38 (5th Cir. 1989)(court declined to decide whether government contractor defense applies to any specific product because the product in question, paint used on Navy destroyers, was deemed military equipment); Trevino v. General Dynamics Corp., 865 F.2d 1474, 1479 (5th Cir. 1989) (deference to the discretionary function of the government determines the parameters of the defense).

ally been applied in a military context, the door has been opened for nonmilitary contractors to assert it.[178]

The government contractor defense is designed to bar claims against government contractors when the government is ultimately responsible for the allegedly defective design of a product. The justification, *Boyle* concludes, for relieving the contractor from liability is to ensure that the government's discretionary function is not hampered in the procurement of products where it designs or approves such designs of the contracted manufacturers.[179] The defense should be used only in rare circumstances when the government clearly has ultimate responsibility for the design and full knowledge of risks inherent in the design which are known by the contractor. It is beyond the scope of this casenote to explore the important question as to whether the government itself should be completely shielded from liability in such circumstances. Although a completely onerous burden of proof should not be placed on the contractor seeking vicarious sovereign immunity, the elements of the defense should place a stringent burden on the contractor for successful assertion of the defense. This would not impose an unfair burden on the government contractors and would lessen the general unfairness to innocent plaintiffs who might otherwise be denied recovery. Future cases will help resolve the issues surrounding the defense which the Supreme Court left unanswered in *Boyle*. What is patently clear is that by

178. A few pre-*Boyle* courts have applied the government contractor defense in the context of nonmilitary products. In Burgess v. Colorado Serum Co., 772 F.2d 844 (11th Cir. 1985), a veterinarian sued a manufacturer of an animal vaccine, alleging he suffered injuries as a result of the manufacturer's failure to warn of dangers to humans from accidental injection. The manufacturer produced the vaccine for the government in strict compliance with detailed government specifications, including the particular language on the label of the vaccine. *Id.* at 845. Noting that the government contractor defense was a favorite shield of military contractors, the court concluded that the history and rationale of the defense do not limit assertion of the defense solely by military contractors. "If a contractor has acted in the sovereign's stead and can prove the elements of the defense, then he should not be denied the extension of sovereign immunity that is the government contract defense." *Id.* at 846. The Eleventh Circuit's conclusion in *Burgess* comports with the rationale of the *Boyle* decision.

In Price v. Tempo, Inc., 603 F. Supp. 1359, 1360 (E.D. Pa. 1985), the manufacturer of firefighting equipment raised the defense in a suit brought by a fireman who was injured. The manufacturers invoked the government contractor defense, contending that they were shielded from liability because the products "conformed to specifications established by the City of Philadelphia." *Id.* The plaintiff argued that the policies justifying the government contractor defense applied only to contracts for military equipment. *Id.* at 1361 n.3. Adopting the *Agent Orange* formulation of the defense, the court concluded that the defense is based on the policies underlying sovereign immunity, permitting application of the defense in nonmilitary contexts. *Id.* at 1361-62 n.3. Although the court did not allude to the discretionary function exception, its rationale for the availability of the defense for nonmilitary government contractors parallels the *Boyle* Court's protection of governmental decisionmaking from unnecessary judicial interference.

Several commentators have noted that *Boyle* paved the way for subsequent decisions to apply the defense in nonmilitary situations. *See* Note, Boyle v. United Technologies Corp.: *New Ground for the Government Contractor Defense*, 67 N.C.L. REV. 1172, 1189-90 (1989) (reasoning used in *Boyle* will encourage extension of the defense to nonmilitary government contractors); Note, *The Government Contract Defense After* Boyle v. United Technologies Corp., 41 BAYLOR L. REV. 291, 308-15 (1989) (correct applications of the defense in nonmilitary contexts); Note, *United States Supreme Court Launches Government Contractor Defense Into Orbit*, 28 WASHBURN L.J. 327 (1988) (government contractor defense "eventually may provide a cloak of governmental immunity to nonmilitary government contractors"). *See also* Ausness, *supra* note 151, at 579-81; Secrest, *supra* note 169, at 18.

179. *Boyle*, 108 S. Ct. at 2518.

relying on the discretionary function exception to the FTCA as the rationale for the defense, the Court has cracked open the door for lower courts to apply the defense in circumstances broader than those involving military contractors. [180] In so resolving these issues, courts should balance the need to protect government contractors from liability for defective designs for which they are not responsible with the need to compensate innocent victims for their injuries.

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180. Ayer, *supra* note 3, at 37.