Boyle v. United Technologies Corp.: A Reasonably Precise Immunity - Specifying the Defense Contractor's Shield

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BOYLE v. UNITED TECHNOLOGIES CORP.: A REASONABLY PRECISE IMMUNITY—SPECIFYING THE DEFENSE CONTRACTOR’S SHIELD

INTRODUCTION

Military defense contractors produce numerous high-technology weapon systems that are on the “cutting edge” of technology. Servicemen who operate these advanced systems, such as high-performance aircraft, face increased—and unavoidable—risks. Even ordinary products like vehicles may be more hazardous to the user when they are designed to military specifications. In spite of their exposure to inherent danger, servicemen who operate military systems and use military products are relatively less protected than civilians by tort law against loss from injury caused by a manufacturer's design defect. In the private sector, manufacturers can be held accountable for design defects under the theory of products liability. Yet, military contractors have found sanctuary in a special defense—the government contractor defense—whose development has kept pace with the growth of products liability theory. The courts have defined the government contractor defense in fluid terms and have relied upon various policy rationales for doctrinal support in this rapidly evolving area of the law.


2. See, e.g., Bynum v. FMC Corp., 770 F.2d 556, 569 (5th Cir. 1985). The plaintiff was a serviceman injured by a rotating gun turret in a vehicular accident. The court stated that "[o]ften dangerous designs must be used in the military context to meet the exigencies of our national defense, and even military equipment that is relatively safe for every day use may have to be operated on occasion under dangerous conditions . . . ." Id.

3. Finn & Martin, Strict Liability in Military Aviation Cases—Should It Apply?, 48 J. Air L. & Com. 347 (1983). The terms “government contract defense” and “government contractor defense” are not interchangeable. The former describes an approach to immunity based on the contractor’s agency relation with the government, while the latter is a modern approach supported by various policy rationales. As applied, the latter depends primarily on the need to insulate the military procurement process from the harmful effects of liability judgments. See, e.g., Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986) (reasons for military contractor defense are constitutional separation of powers and protecting integrity of military procurement), cert. denied, 108 S. Ct. 2897 (1988). This Note discusses the genesis of the government contractor defense and its recognition in the courts; therefore it also explains the government contract defense as one of its precursors.

The United States Supreme Court addressed the issue of what standards should govern the government contractor defense in Boyle v. United Technologies Corp. Prior to Boyle, courts protected the government from claims by servicemen for injuries incident to service based on the government's sovereign immunity. The Supreme Court later extended the federal government's immunity from suits arising from injuries incident to service to protect the government against third party indemnity claims which arose from a serviceman's (or his representative's) suit against a contractor. Thus, the serviceman was barred from suing the government but could seek relief by suing the defense contractor; the contractor, however, was barred from suing the government for indemnity. The courts therefore began to recognize the contractors' need for a separate, principled defense that took into account the nature of defense contractors, military procurement, and risks.

In Boyle, the Supreme Court formally adopted the government contractor defense, which was originally derived from two broader defenses. The first defense to justify an extension of the government's immunity to contractors was based on an agency relationship between the contractor and the government. The second was grounded upon the contractor's compliance with contractual specifications and was rooted in negligence principles. In contrast to these precursors, the government contractor defense is based on policy determinations and, at least in Boyle, focuses on the important role played by the federal government in military procurement.

The precise question presented to the Court in Boyle was whether federal common law controlled the government contractor defense. The Court held that there existed uniquely federal interests sufficient to justify the displacement of state tort law and recognized, as a matter of federal common law, the Ninth Circuit's statement of the elements of the government contractor defense. The majority opinion relied upon the government's immunity to suit arising from the exercise of official or policy-making discretion. In particular, the Court held that the government's immunity under the discretionary function exception of the Federal Tort Claims Act

defined the scope of federal interests that warranted the displacement of state law. In determining whether federal common law controlled assertions of the government contractor defense, the Court resolved a split in the circuit courts of appeals over the elements of and reasons for the defense.

This Note discusses the roots and development of the government contractor defense, focusing upon the federal government's sovereign immunity and the earliest defenses available to government contractors. It also reviews the divergent formulations of the defense that existed among the federal circuit courts when the Supreme Court decided Boyle. The Note examines the majority and dissenting opinions in Boyle and analyzes whether the Court's decision was consistent with precedent on the key issue of governmental approval of contractors' designs. Finally, it considers whether Boyle recognized the Ninth Circuit's version of the defense to the exclusion of other versions and identifies particular issues relating to the defense which Boyle did not resolve.

I. BACKGROUND

In Boyle, the Supreme Court accepted the Ninth Circuit's formulation of the government contractor defense and expressly rejected the Eleventh Circuit's alternative formulation. The approved version of the defense depends upon government establishment or approval of specifications, and upon the contractor complying with those specifications and warning the government of known defects. In contrast, the rejected statement of the defense allowed a contractor to escape liability only if it met one of two tests with regard to design specifications: first, that the contractor played only a minimal role, if any, in the government's design decision; or second, that the contractor fully informed the government of risks and alternative designs and the government authorized the design notwithstanding the risks. In order to understand the two versions of the

11. 28 U.S.C. §§ 1346(b), 2671-2680 (1982). Generally, the statute waives the federal government's sovereign immunity for the torts of its employees, with certain exceptions. It grants the federal district courts jurisdiction over suits for damages "caused by the negligent or wrongful act or omission of any employee of the Government." Id. § 1346(b). See also infra notes 22-64 and accompanying text (discussion of courts' construction of the FTCA).

12. See, e.g., Bynum v. FMC Corp., 770 F.2d 556, 567-71 (5th Cir. 1985) (need to protect military decisions and discipline from judicial interference, as policy basis for Feres doctrine, sufficient reason to displace state law). See also infra notes 193-214 and accompanying text (discussion of the choice of law analysis).


14. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985), cert. denied, 108 S. Ct. 2896 (1988). When the Supreme Court decided Boyle, the petition for certiorari was still pending in Shaw, an action in which a Navy pilot's father alleged that the contractor had defectively designed an aircraft control system. The Eleventh Circuit articulated a test for the government contractor defense that was unique among courts that had decided the issue because it differed in both scope and underlying logic. Id. at 738.
defense discussed by the Court in Boyle, it is useful to trace the development of the government contractor defense to its origins. Its roots predate the rise of the product liability doctrine and instead stem from principles of governmental immunity, which bar suit brought under any theory, as well as concepts particularly applicable to negligence actions.

15. The Supreme Court did not expressly address two additional lines of cases that were in some respects different from both the Ninth and Eleventh Circuit decisions. The Agent Orange litigation produced its own version of the government contractor defense, quite apart from providing the impetus for decisions in other circuits. See In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y.), rev'd on other grounds, 635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981). See generally infra note 84 (history of Agent Orange litigation). Moreover, the Third Circuit cases represent a hybrid of the Agent Orange and Ninth Circuit approaches. See In re Air Crash Disaster at Mannheim, Germany on 9/11/82, 769 F.2d 115 (3d Cir. 1985), cert. denied, 474 U.S. 1082 (1986). For a discussion of these other approaches and their bearing upon the meaning of the Supreme Court's decision in Boyle, see infra notes 255-63 (Agent Orange approach) and notes 268-73 (Third Circuit approach) and accompanying text.

16. Products liability refers to the area of the law involving the liability of sellers of chattels to third persons with whom they are not in privity of contract. W. PROSSER, LAW OF TORTS 641 (4th ed. 1971). See Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). There are three theories of liability under which a products liability action may be brought: negligence, strict liability, or breach of warranty. R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1:2, at 7 (2d ed. 1974). Negligence actions have to some extent yielded to breach of warranty and strict liability actions, partly because the other theories do not require proof of specific negligence. Id. § 2:1, at 144. The theory of recovery in a breach of warranty action is contractual and does not depend on the negligence of the manufacturer or seller. The action may be limited, however, by a requirement of privity of contract with the defendant. Id. § 3:1, at 428.

Strict liability may be imposed on a seller or a manufacturer who places an article on the market, knowing that it is to be used without inspection for defects. Id. § 4:1, at 638. The elements of a strict liability action include proof that the product was defective and unreasonably dangerous, that a causal connection existed between the defect and the plaintiff's injuries, and that the defendant was connected with the product. Section 402A of the RESTATEMENT (SECOND) OF TORTS defines strict product liability as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.


The manufacturer may also have a duty to warn of risks or dangers in the use of the product. Id. at §§ 388-389. Failure to provide a warning may result in either negligence or a strict liability suit because the lack of warning constitutes a defect. R. HURSH & H. BAILEY, supra, § 2:1, at 144.
A. Historical Background—Sovereign Immunity and the FTCA

The doctrine of sovereign immunity bars suits against the government unless it has consented to be sued. In the doctrine's earliest form it meant "the King can do no wrong." The growth of governmental activity, particularly at the federal level, brought the realization that it was unfair to bar suits by individuals who had been injured by such activity. The only available avenue for relief was private legislation, an unwieldy and generally unsatisfactory approach. Congress therefore enacted the Federal Tort Claims Act, which waived the federal government's sovereign immunity but also provided for certain statutory exceptions to the waiver. By enacting the legislation, Congress expressed the federal government's consent to be sued for the negligence or other tortious conduct of its employees.

The FTCA retains the bar to suits by members of the armed forces for injuries sustained in wartime and to suits against officials acting in a policy-making or discretionary capacity. The judicial construction of each of these particular exceptions to the FTCA's waiver of immunity has played a significant role in the development of the government contractor defense. The government's immunity from suit for injuries sustained by members

20. See Dalehite, 346 U.S. at 24-25 ("[T]he private bill device was notoriously clumsy. Some simplified recovery procedure for the mass of claims was imperative.") (footnote omitted).
21. 28 U.S.C. §§ 1346(b), 2671-2680 (1982). Section 1346(b) waives sovereign immunity: [F]or 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.
23. Id. § 2680(j) (excludes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war").
24. Section 2680(a) provides that the FTCA's waiver of immunity does not apply to: Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id.
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of the armed forces incident to their service, known as the Feres doctrine, was crucial in the development of the government contractor defense. The government also retained immunity against actions that alleged negligence in the government's exercise of discretionary functions, and the policy goals of the government contractor defense were borrowed largely from this second type of retained immunity. In this section, the case law construing each of these FTCA exceptions will be discussed.

1. Feres-Stencil Doctrine

The FTCA abrogated only a portion of the federal government's sovereign immunity. For example, the Act retained the bar to suits by servicemen for injuries they sustained in wartime. The Supreme Court therefore encountered the question whether the FTCA permitted servicemen's suits under certain conditions. First, the Court held that a serviceman could bring a negligence action against the government if his injuries had not arisen incident to service. In Feres v. United States, however, the Court held that if a serviceman's death or injury arose out of or in the course of activity incident to service, the government's immunity remained intact. The Court reasoned, based on the FTCA's text, that Congress had intended to bar suits for injuries arising incident to service.

In Stencel Aero Engineering Corp. v. United States, the Court reiterated its support of Feres and applied its reasoning to contractors' third party

25. Feres v. United States, 340 U.S. 135 (1950). The action was brought for the wrongful death of an active duty serviceman. The plaintiff's decedent had been killed in a barracks fire allegedly caused by the Army's negligence. Id. at 137.


28. Brooks v. United States, 337 U.S. 49 (1949). The Court held that the FTCA did not bar a suit against the government by a serviceman who was injured in a collision with an Army vehicle on a public highway because his injuries were not incident to service. The Court expressly left open the issue of whether injuries incident to service were also within the FTCA's waiver of immunity. Id. at 52-53.

29. 340 U.S. 135 (1950). A significant question under the Feres doctrine is whether injuries arose from or incident to service. See generally I L. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies § 4, at 1-23 to 1-59 (1989 & Supp.) (discussing causes of action against government and cases considering whether particular injuries were from or incident to service).

The Feres doctrine has been severely criticized. See, e.g., Johnson v. United States, 749 F.2d 1530, 1535 (11th Cir. 1985) (Feres subjected to heavy criticism but, nevertheless, it is still the law), rev'd on other grounds, 481 U.S. 681 (1987).

30. Feres, 340 U.S. at 135. First, the FTCA provided for governmental liability in those situations where a private individual would have been liable. Since there was no parallel liability to that sought to be imposed on the military, the Court ruled that governmental immunity had not been abrogated. Id. at 141-42. Second, even though the FTCA looked to state law to determine liability, Congress did not intend that state law govern the "distinctly federal character" of the relationship between the federal government and members of the Armed Forces. Id. at 142-44. Finally, the fact that the Veterans' Benefits Act provided compensation within statutory limits precluded the extension of liability in tort. Id. at 144-45.

indemnity claims against the government. In Stencel, the Supreme Court held that Feres barred defense contractors' indemnity suits against the government. Although Stencel created problems for contractors who were sued by servicemen injured by defectively designed products, it is significant primarily because the Court relied on three principal arguments and reaffirmed the Feres doctrine.

The Court held that the logical bases of Feres were equally applicable to a third party indemnity action. First, the Court found the relationship between the government and defense contractors to be as federal in nature as the relationship between the government and servicemen. Thus, just as the liability of the government to a serviceman did not vary according to the fortuity of the place where the alleged negligence occurred, neither could the situs affect the government's liability to a contractor for precisely the same injury. Second, the Stencel Court reasoned that allowing the contractor to be indemnified by the federal government would in effect allow compensation to be paid to servicemen in excess of the statutory limits set by the Veterans' Benefits Act. In oft-quoted language, the Court refused "to judicially admit at the back door that which has been legislatively turned away at the front door." Third, the Court stated that the detrimental impact on military discipline would be the same in the contractor's suit for indemnity as in the suit by the serviceman barred under Feres. The same issues would be litigated, leading to second-guessing of military orders and requiring servicemen to testify against each other.

32. Id. at 672. A third party indemnity action arises when, for example, a manufacturer, which had been sued by a serviceman for the allegedly defective design of military equipment, sues the federal government for indemnity after settling the original claim with the serviceman. Id. at 668.

33. The plaintiff was a National Guardsman injured when he ejected from an aircraft and the system malfunctioned. Id. at 667.

34. As restated by the Stencel Court, the Feres doctrine was derived from the distinctively federal character of the relation between military personnel and the government, requiring that the government's liability not depend on the fortuity of the situs of the alleged wrong. Id. at 671. Further, Congress intended the no-fault compensation system provided for in the Veterans' Benefits Act, 38 U.S.C. § 321 (1982), to be an exclusive remedy. Stencel, 431 U.S. at 671. Finally, the Stencel Court restated the need to place military discipline and decisions beyond the reach of civilian courts. Id. (citing United States v. Brown, 348 U.S. 110, 112 (1954)); see also Chappell v. Wallace, 462 U.S. 296 (1983) (military discipline justifies invoking separation of powers doctrine to place military decisions beyond judicial review).

35. Stencel, 431 U.S. at 672.

36. Id.


38. Id. at 673 (quoting Laird v. Nelms, 406 U.S. 797, 802 (1972)). The "turned away" legislation referred to by the Court was the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1982).

The decision confirmed that a serviceman injured by an allegedly defective product would be barred by *Feres* from suing the government and would have to bring an action against the contractor; the contractor, however, would not be able to sue the government for indemnity.\(^{40}\) Thus, *Stencel* strongly encouraged recognition of a government contractor defense.

Notwithstanding heavy criticism from courts and commentators,\(^{41}\) the *Feres* doctrine has survived because the Court came to view it as necessary to protect military discipline and to insulate military decisions from review.\(^{42}\) The Court did not regard the scope of *Feres*' bar to servicemen's suits as fixed and revised the doctrine's underlying logic as circumstances required.\(^{43}\)

\(^{40}\) See Tobak, supra note 8, at 77 (contractor only defendant available to injured serviceman under *Feres*, but same doctrine precludes contractor's third party indemnity action).

\(^{41}\) See, e.g., United States v. Johnson, 481 U.S. 681, 700-01 (1987) (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received.") (quoting In re "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246 (E.D.N.Y.), aff'd, 818 F.2d 204 (2d Cir. 1987)). See also Bennett, supra note 21, at 400-02 (criticizing *Feres*); Rhodes, supra note 21, at 40-42 (same); Note, supra note 21, at 1102-09 (same).

\(^{42}\) The Supreme Court expanded its argument concerning military discipline in United States v. Brown, 348 U.S. 110 (1954), which involved alleged negligence on the part of the Veterans Administration. The argument was the one that the Court would later endorse as the primary support for *Feres*. See United States v. Shearer, 473 U.S. 52 (1985). *Brown* held that allowing military personnel to sue the government would be harmful to discipline. The Court noted the unique relationship between a soldier and those in command and stated that allowing suits arising from military orders or duty could lead to "extreme results." *Brown*, 348 U.S. at 112.

\(^{43}\) After first augmenting the support for the *Feres* doctrine, the Court then began to call the original logic of *Feres* into question. The first argument to be undermined was that the FTCA could not be construed to allow a suit which arose from governmental activity that lacked a private analogue. In Indian Towing Co. v. United States, 350 U.S. 61 (1955), which involved the Coast Guard's alleged negligent operation of a lighthouse, the Court held that the FTCA did not exclude liability for an activity unique to the government. "[W]e would be attributing bizarre motives to Congress were we to hold that it was predicking liability on such a completely fortuitous circumstance—the presence or absence of identical private activity." *Id.* at 67 (footnote omitted).

Then, the Court ruled that the FTCA did not preclude novel and unprecedented causes of action. In Rayonier Inc. v. United States, 352 U.S. 315 (1957), the court allowed an FTCA action for the alleged negligence of federal firefighters. The Court stated, "[i]t may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." *Id.* at 319. Thus, when the Court recognized the shift in the logic underlying the *Feres* doctrine in United States v. Muniz, 374 U.S. 150 (1963), it also set the stage for its recent express refashioning of the doctrine so as to make it serve the need for military discipline. See United States v. Shearer, 473 U.S. 52 (1985).

In *Muniz*, the Court held that claims brought by federal prisoners were not barred under the FTCA; "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline.'" *Muniz*, 374 U.S. at 162 (quoting United States v. Brown, 348 U.S. 110, 112 (1954)). As the impact on discipline was thought not to be significant even in the prison context, and because the lack of uniformity of recovery under state law was an insufficient reason to disallow all recovery, the Court held the action to be allowed under the FTCA. *Id.* at 161-62.
Most recently, the Court rewrote the logic underlying the *Feres* decision in *United States v. Shearer*. Although the Court held that the plaintiff's action was barred under the intentional tort exception to the FTCA, it nevertheless realigned the *Feres* doctrine so that it focused upon the need to uphold military discipline. Because the *Shearer* Court grounded *Feres*...
on a new policy rationale\(^4\) it had to restate the key inquiry that would be determinative of immunity. The question under *Feres* became whether the suit would involve judicial second-guessing of military decisions or impair military discipline.\(^4\) Thus, the reasons asserted earlier for the *Feres-Stencel* doctrine—the perceived need for uniformity in decisions concerning the rights of servicemen, and the exclusive remedy provisions of the Veterans' Benefits Act—are "no longer controlling."\(^4\)

The *Feres* doctrine has played a key role in the development of the government contractor defense. Its extension to defense contractors' indemnity actions drew attention to their liability to servicemen who could not sue the government. Moreover, as the doctrine came to represent the

judgments, subject always to civilian control of the Legislative and Executive Branches. Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (emphasis in original), quoted with approval in Chappell, 462 U.S. at 302. Thus, these factors and the fact that Congress had not provided a remedy for the alleged wrongs brought the case within the "special factors" that precluded recognizing a *Bivens*-type action. *Id.* at 304.


48. The Court stated that *Feres-Stencel* extended immunity to the type of case that involves sensitive military affairs and may potentially undercut military discipline and effectiveness. *Shearer*, 473 U.S. at 59.

49. *Id.* at 58 n.4. The Court, however, has not completely abandoned the other reasons supporting the *Feres* doctrine. See United States v. Johnson, 481 U.S. 681 (1987). The action arose when a Coast Guard helicopter, under radar control of the Federal Aviation Administration, crashed into a mountain and killed the pilot. The pilot's widow sued the government alleging negligence on the part of the FAA air traffic controllers. Johnson v. United States, 749 F.2d 1530, 1531 (11th Cir. 1985), aff'd on rehearing en banc, 779 F.2d 1492 (11th Cir. 1986) (per curiam), rev'd on other grounds, 481 U.S. 681 (1987). The Eleventh Circuit affirmed a judgment for the plaintiff against the government's *Feres*-based contention that the pilot's death occurred incident to active duty and that therefore the action for his death was barred. *Johnson*, 779 F.2d at 1494. The court reasoned that, after *Shearer*, the test for whether suit was barred in a fact pattern where the negligence alleged involved a civilian government employee and not a serviceman hinged on whether the action would impact detrimentally on military decisions and discipline. *Id.* Here, the court held there existed no nexus between the pilot's duty and the civilian employees. *Id.*

The Supreme Court reversed. The apparent shift in logic in *Shearer* notwithstanding, the Court reiterated the three *Feres* arguments restated by the Court in Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977). *Johnson*, 481 U.S. at 689-92. The Court's first argument emphasized the federal character of the soldier-government relationship which dictates that the government's liability not depend on the situs of the alleged wrong. *Id.* at 689. The Court also reasoned that the Veterans' Benefits Act was enacted in lieu of tort remedies and that governmental liability would have a detrimental impact upon military decisions and discipline. *Id.* at 690-92. Because the Court found a link between discipline and allowance of the action, liability was barred.

Justice Scalia submitted a forceful dissent joined by Justices Brennan, Marshall, and Stevens in which he refuted the *Feres* "rationales" as support for governmental immunity. *Id.* at 692 (Scalia, J., dissenting). The dissent objected that the text of the FTCA did not support the reasoning underlying *Feres* and indicated that if the respondent had advocated overruling *Feres*, only stare decisis would commend upholding the doctrine. *Id.* at 703. Thus, when Justice Scalia wrote the majority opinion in *Boyle*, it was necessary for him to define the predicate of contractor immunity without reference to *Feres*. 
courts' protective attitude toward military discipline, the policy basis underlying the government contractor defense began to emerge. Feres, however, shared its influential role in the courts' view of defense contractors' liability with a second exception to the FTCA's waiver of the federal government's sovereign immunity: the discretionary function exception.

2. Discretionary Function Exception

The government contractor defense is closely related to the government's immunity to suit for discretionary functions, which is preserved under the FTCA. The Supreme Court construed the discretionary function exception in the seminal case of Dalehite v. United States. In Dalehite, the plaintiffs' claims arose from an explosion of fertilizer that leveled an entire city. The Court recognized that the FTCA did not provide a precise definition of discretionary functions because the purpose of the FTCA was to protect executives or administrators who had acted according to their best judgment. Nevertheless, the Court held that the definition of discretionary functions or duties extended beyond decisions to undertake programs and included those decisions necessary to implement a program. The Court stated that the test to determine whether a government official had performed a discretionary function should focus on whether the decision at issue involved "planning" as opposed to merely "operational" choices.


52. The disaster occurred at Texas City, Texas and involved fertilizer which was made from war surplus compounds and was to be shipped to Europe as part of the United States' foreign aid program. The governmental decisions in question concerned the coating, packaging, and labeling of the fertilizer. Id. at 39-41.

53. Id. at 35. The Court also recognized, however, that "[w]here there is room for policy judgment and decision there is discretion." Id. at 36.

54. The "discretion of the executive or the administrator to act according to one's judgment of the best course [is] a concept of substantial historical ancestry in American law." Id. at 34 (footnote omitted).

55. The Court defined "implementing decisions" to include "determinations made by executives or administrators in establishing plans, specifications, or schedules of operations." Id. at 35-36 (footnote omitted).

56. Id. at 42 (discretion is lacking in operational choices). For example, in a case that also involved the earliest form of the government contractor defense, Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 826 (D. Conn. 1965), the court held that the government's decision concerning the means of carrying out its responsibility was clearly discretionary. The scope of governmental immunity for discretionary functions did not remain as broad as Dalehite might have allowed. Rayonier Inc. v. United States, 352 U.S. 315 (1957) (United States accountable for negligence of its firefighters notwithstanding lack of parallel private liability); Indian Towing Co. v. United States, 350 U.S. 61 (1955) (United States' liability not restricted to parallel liability of municipal bodies). Some courts have observed that virtually every decision
The most recent Supreme Court pronouncement on the scope of discretionary function immunity occurred in *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines).* The plaintiffs, who had been injured in aircraft fires, challenged the Federal Aviation Administration’s (“FAA”) programs of certification and inspection of air transport aircraft. In *Varig Airlines,* the Court redefined the scope of the immunity conferred by the statutory discretionary function exception. The Court determined that the test should focus on the actor’s conduct rather than the actor’s status. Therefore, if the acts comprising the basis of suit “are of the nature and quality that Congress sought to protect, then the discretionary function exception applied and the planning-operational distinction was immaterial. The Court stated that the FTCA’s legislative

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involves at least some element of discretion. See, e.g., Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967) (“Unless government officials (at no matter what echelon) make their choices by flipping coins, their acts involve discretion in making decisions.”), cert. denied, 389 U.S. 841 (1967).

Although courts have been inconsistent in deciding cases that have raised the question, discretionary decisions generally have been found where “policy” was involved. See, e.g., Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 255, 407 P.2d 440, 445 (1965) (setting forth factors pertinent to making planning-operational distinction).

The Fifth Circuit confronted the question of whether the discretionary function exception protected decisions relating to military procurement in *Moyer v. Martin Marietta Corp.,* 481 F.2d 585 (5th Cir. 1973). In that case, a test pilot, who was employed by a civilian contractor, was killed when an ejection seat fired while the aircraft was on the ground. The mishap was ultimately traced to a mechanic’s removal of what had been intended to be a permanently installed component of the ejection seat assembly. *Id.* at 588. The plaintiff sued both the mechanic’s employer and the federal government. The court recognized that aircraft design decisions are made at the planning level; nevertheless, the court held that the discretionary function exception did not immunize the decision to accept a negligently designed or constructed system. *Id.* at 598. See also *In re “Agent Orange” Prod. Liab. Litig.,* 818 F.2d 194, 200 (2d Cir. 1987) (court relied on Feres doctrine and discretionary function immunity in affirming dismissal of suit against United States by plaintiffs who had opted-out of class action).

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57. 467 U.S. 797 (1984). The Court considered the general scheme of the FAA regulations as well as the express statutory grant of discretionary authority to design an inspection program. *Id.* at 804-07, 814-21.

58. In the first of two consolidated suits, an aircraft caught fire, resulting in the deaths of 124 persons; the other action involved an aircraft heater alleged to have violated the FAA’s safety regulations. *Id.* at 800, 803.

The Court rejected the plaintiffs’ challenges to the FAA program. First, the agency delegated primary responsibility for determinations as to certificating aircraft at each of three stages (design, production, and airworthiness) to manufacturers. In so doing, the agency not only served its dual responsibilities of promoting and regulating civil aviation, but also acted pursuant to statutory authority. *Id.* at 816. Second, the agency program of spot-check inspections to monitor compliance with safety standards was similarly protected by statutory authority given to the FAA administrator. *Id.* at 819. Therefore, the judicial construction of the discretionary function exception that began in *Dalehite* placed the FAA’s program well inside the limits of functions or duties Congress sought to protect in section 2680(a). *Id.* at 820.

59. *Id.* at 813 (“[S]everal factors [are] useful in determining when the acts of a Government employee are protected from liability by § 2680(a).”).

60. *Id.*

61. *Id.* The shift from the planning-operational analysis has generally been recognized in the
history indicated that Congress sought to retain the government’s immunity from suit for the regulatory acts of federal agencies and intended to shield decisions, whether legislative or administrative, from being second-guessed through judicial review.

The government’s retained immunity from suit under the FTCA depends upon the Supreme Court’s interpretation of statutory provisions. Feres and Varig Airlines expanded the government’s retained immunity under the FTCA. A contractor who produces equipment to meet the needs of national defense, however, cannot count on any primary immunity to actions by servicemen alleging liability for defectively designed products. Nevertheless, the contractor may be protected from suit by an extension of the government’s immunity under certain circumstances, even though the contractor is not literally part of the sovereign state. In addition, by virtue of the government’s having determined the contract specifications, the contractor may have a second defense. Both of these defenses are discussed in the following section.

B. Precursors of the Government Contractor Defense

Government contractors sought to establish defenses to suits arising from their contractual work long before the modern defense began to develop.


62. Varig Airlines, 467 U.S. at 810.

63. The retention of immunity is designed to “protect the Government from liability that would seriously handicap efficient government operations.” Id. at 814 (quoting United States v. Muniz, 374 U.S. 150, 163 (1963)). Applied to the FAA’s conduct in issuing type certificates for the aircraft, section 2680(a) barred a negligence action. Varig Airlines, 467 U.S. at 816. Under a statutory grant of discretion, the FAA had exercised regulatory authority to determine how its regulations would be enforced. The Court held that it was within the agency’s discretion to balance its objectives against practical constraints. Id. at 820. Moreover, such an agency decision was immune to judicial “second-guessing.” Id. Cf. Westfall v. Erwin, 108 S. Ct. 580 (1988) (limiting immunity of officials for acts performed within scope of their duty grounded, in part, on protecting functions of government from restraint imposed by tort suits).

After the Supreme Court’s decision in Varig Airlines, a federal district court considered the government contractor defense in light of the discretionary function exception. Ramey v. Martin-Baker Aircraft Co., 656 F. Supp. 984 (D. Md. 1987), aff’d, 874 F.2d 946 (4th Cir. 1989). The court allowed the defense to apply against claims involving an allegedly defectively designed ejection seat in a full-scale development version of the U.S. Navy/McDonnell-Douglas F-18 fighter aircraft. Further, the court distinguished Moyer v. Martin Marietta Corp., 481 F.2d 585 (5th Cir. 1973), criticizing that earlier decision for its incorrect reading of Dalehite v. United States, 346 U.S. 15 (1953), and the discretionary function exception. Ramey, 656 F. Supp. at 992.
In particular, courts recognized that a contractor's status as a government agent precluded liability. Moreover, under certain principles of negligence, contractors avoided liability where the source of specifications was beyond their control.

1. Yearsley and the Government Contract Defense

The earliest defenses afforded to contractors were derived from a broad interpretation of the sovereign immunity doctrine. The Supreme Court first extended the federal government's immunity to a contractor in *Yearsley v. W.A. Ross Construction Co.* The defendant contracted to build dikes for the government, and its work caused flooding to plaintiff's land. The plaintiff sued the contractor under the fifth amendment, alleging that he had been deprived of his property without just compensation. The Supreme Court held that the contractor's authority had been conferred by Congress as a proper exercise of its constitutional power. Thus, the government's agent could not be held liable for actions taken pursuant to validly conferred authority.

The primary purpose served by the government contract defense is to prevent liability imposed on the contractor from subverting the government's immunity through the contractor passing its increased costs to the government. Moreover, the defense is available only to those contractors

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64. 309 U.S. 18 (1940).
65. *Id.* at 22 ("The action of the agent is the 'act of the government' ") (citing United States v. Lynah, 188 U.S. 445, 465 (1903)). The remedy for the alleged taking "exclude[d] liability of the Government's representatives lawfully acting on its behalf in relation to the taking." *Id.* at 22.

The defense is well-settled in cases involving defendants who were contractors for public works projects, generally under the label of the "government contract defense." See, e.g., Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963) (in action alleging waste and trespass caused by road construction, *Yearsley* established contractor immunity for performance "in conformity with the terms of [the contract]"); O'Grady v. City of Montpelier, 474 F. Supp. 186, 187-88 (D. Vt. 1979) (following *Yearsley*, contractor not liable for performing contract with government in accordance with specifications in inverse condemnation action arising from flooding caused by construction); Green v. ICI America, Inc., 362 F. Supp. 1263, 1266 (E.D. Tenn. 1973) (contractor shares sovereign immunity of government where orders of government were carried out in operation of Army ammunition plant). See generally Annotation, Right of Contractor with Federal, State or Local Public Body to Latter's Immunity From Tort Liability, 9 A.L.R.3d 382 (1966) (collecting cases following *Yearsley*).

66. For example, in Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965), the plaintiff's leasehold interest had been damaged by fumes from dredged material deposited by defendant on land owned by the defendant and the federal government pursuant to a contract. *Id.* at 825. The court followed *Yearsley* because the work had been performed under valid contractual authority and the contractor had merely done what it had been required to do. *Id.* at 827. Since the government had responsibility to take precautions regarding the fumes, the contractor could not be held liable for the government's omission. The court reasoned that imposing liability on the contractor would lead to increased contract prices and thereby subvert the discretionary
who perform as directed by the contract and without carelessness or negligence.\textsuperscript{67} It was this type of immunity that manufacturers of military equipment attempted to assert before the government contractor defense gained recognition.\textsuperscript{68} Yet, as it was analytically dependent upon the existence of an agency relation between the government and the contractor, the original government contract defense proved to be only marginally useful.\textsuperscript{69}

2. \textit{Contract Specifications Defense}

Government contractors sought to protect themselves from liability for work performed pursuant to their contracts by asserting a second defense that did not depend upon proof of an agency relationship between the

\textsuperscript{67} Id.
\textsuperscript{68} Military defense contractors turned to the government contract defense first recognized in \textit{Yearsley} notwithstanding its primary application to public works contractors. \textit{See supra} note 66.
\textsuperscript{69} \textit{See}, e.g., \textit{Bynum v. FMC Corp.}, 770 F.2d 556, 563-64 (5th Cir. 1985) (uncertain availability of \textit{Yearsley} defense makes it precarious for contractors).
government and the contractor: the contract specifications defense. The specifications defense applied to any contractor who had carefully followed specifications provided by another, whether that “other” was the government or a private party. Unless the specifications were so obviously defective and dangerous that no reasonable contractor would have carried them out, there would be no liability.70 The theory of the contract specifications defense has consistently been that there is no liability for performing a contract when another party determined the contract specifications.71 The reason underlying the defense is that the average contractor is not expected to possess the requisite knowledge or expertise to evaluate the government’s contract specifications. Contractors who possess special knowledge about a particular design, however, may be held to a higher standard of care.72

Because the contract specifications defense is based on negligence principles, it does not apply to strict liability or breach of warranty actions.73 Moreover, the defense applies only to contract specifications that are mandated by the government; because the military procurement process involves substantial interplay between the government and the manufacturer, military contractors may not easily apply the specifications defense in their industry.74 The contract specifications defense therefore proved inadequate to protect contractors from product liability actions, hastening the recognition of the government contractor defense.

C. The Government Contractor Defense

Courts first established the government contractor defense after recognizing that the Yearsley line of authority, the contract specifications de-

71. Ryan v. Feeney & Sheehan Bldg. Co., 239 N.Y. 43, 46, 145 N.E. 321, 321-22 (1924) (“a builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury”). Accord RESTATEMENT 2d Torts § 404 comment a (1965).
72. See, e.g., Bynum, 770 F.2d at 563 (“[S]pecial knowledge would in certain circumstances subject contractor to higher standard of care.”); Johnston v. United States, 568 F. Supp. 351, 354 (D. Kan. 1983) (where manufacturer has special knowledge, he may be held to standard of care as designer).
fense, and the discretionary function immunity all converged into a single doctrine applicable to military contractors defending against product liability suits. Thus, there was no liability for following the Army's specifications, even where the action was brought under a theory of strict liability rather than negligence. When courts derived the government contractor defense, they were concerned primarily with cases arising from injuries to members of the Armed Forces that were caused by military equipment. But the two forerunners of the government contractor defense—the government contract defense and the contract specifications defense—clearly were not limited to military procurement cases. Indeed, the modern defense extends to civilian procurement contracts. Thus, prior to Boyle v. United Technologies Corp., courts had reviewed the policy reasons for, and elements of, the immunity afforded government contractors, including military contractors, under the rubric of the "government contractor defense," supra note 4, at 195 (Sanner is typical of earliest decisions involving the government contractor defense).

75. See Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (1976), aff'd, 154 N.J. Super. 407, 381 A.2d 805 (1977), cert. denied, 75 N.J. 616, 384 A.2d 846 (1978). The action arose out of injuries sustained by a passenger in an army jeep when he was thrown from the vehicle in a mishap. The plaintiff alleged that the failure to include seat belts and a roll bar amounted to a defect in design. Id. See also Note, Sharing the Protective Cloak, supra note 4, at 195 (Sanner is typical of earliest decisions involving the government contractor defense).

76. In Sanner, the trial court relied on two principal reasons for recognizing the contractor's immunity. The jeep's manufacturer had strictly complied with the government's specifications and the discretionary nature of military design decisions were entitled to be protected from judicial review. Sanner, 144 N.J. Super. at 9, 364 A.2d at 46-47. The court recognized the specifications were intended "to assure finality of military decisions regarding the design and construction of military vehicles." Id.

77. Sanner v. Ford Motor Co., 154 N.J. Super. 407, 409-10, 381 A.2d 805, 806 (1977), cert. denied, 75 N.J. 616, 384 A.2d 846 (1978). The rise of the government contractor defense was given further impetus shortly after Sanner in Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (N.Y. Sup. Ct. 1980). In that case, the proprietor of a pizza shop had acquired a dough mixer originally built to army specifications for use in field kitchens during World War II. The owner's son injured his hand in the machine. The court held that the manufacturer was immune from suit because it had followed the government's specifications in time of war. Moreover, the court stated that a contractor could rely on specifications even if they were defective or dangerous. Id. at 350, 428 N.Y.S.2d at 402. Thus, the defense appeared broader in Casabianca, with the court describing it as a complete defense to any action.

78. See, e.g., Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986) (government contractor defense applied to military contractors to protect military decisions and procurement), cert. denied, 108 S. Ct. 2897 (1988).

79. See supra notes 64-69 and accompanying text.

80. See supra notes 70-74 and accompanying text.

81. See Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986) (government contractor defense absolved the government and contractor from liability arising from plaintiff's contracting a disease while participating in a government vaccination program); Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985) (government contractor defense extended to include government contracts generally, rather than limiting the defense to military matters).

82. 108 S. Ct. 2510 (1988). The cases in the courts of appeals that led to conflicting formulations were actions arising from defects in military equipment. See, e.g., Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986) (companion case to Boyle, referring specifically to the "military contractor defense"), cert. denied, 108 S. Ct. 2897 (1988).
contractor defense." This section discusses the various formulations of the government contractor defense that existed before Boyle. It begins with the initial statement of the government contractor defense and then follows it through changes made by the Ninth, Third, and Eleventh Circuits.

I. In re "Agent Orange" Product Liability Litigation

The government contractor defense was first formulated in In re "Agent Orange" Product Liability Litigation [hereinafter Agent Orange 1], where Boyle, however, expressly reviewed and settled the defense as applied to "Government contractors liable for design defects in military equipment." Boyle, 108 S. Ct. at 2518. In discussing the development of the government contractor defense and the resulting conflict in the circuits, this Note will use that term, and a narrower military or civilian context will be indicated where necessary. Quite apart from the matter of defining with sufficient clarity and predictability the term "military," cf. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983) (fighter aircraft's ejection seat obviously military equipment), cert. denied, 464 U.S. 1043 (1984), the Boyle Court's holding justifies extending the defense to civilian sector contractors; to the extent that the procurement decision involved a discretionary function, the contractor shares in the government's immunity. Boyle, 108 S. Ct. at 2517-18. In fact, Justice Brennan's dissenting opinion objected to what he read as a broad government contractor defense applicable to nonmilitary products and contractors, such as the NASA space shuttle and the postal service's mail cars. Id. at 2520 (Brennan, J., dissenting).

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The Agent Orange litigation arose when Vietnam veterans sought to prove that they had been injured by exposure to the Agent Orange herbicide, which contained traces of dioxin, an extremely toxic chemical. See Note, Agent Orange Products Liability Litigation, 1984 A.F. L. Rev. 97 (discussing chemical components and background of contractor defense). The case was heard by the District Court for the Eastern District of New York, which decided that the government contractor defense would be available, but denied defendants' motion for summary judgment. Agent Orange I, 506 F. Supp. at 792-97.


The district court then considered the government contractor defense when the defendants renewed their motions for summary judgment. In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1053-58 (E.D.N.Y. 1982) [hereinafter Agent Orange II]. The court was the first to define the elements of the government contractor defense. Id. at 1055. See infra notes 95-98 and accompanying text. In subsequent rulings, the court applied these elements of the defense, granted summary judgment to particular contractors, and ruled that the first two elements of the defense had been established with respect to those contractors remaining. In re "Agent Orange" Prod.
the use of defoliants during the Vietnam War led to a historic mass tort


The district court then approved the settlement of the class action proceeding. Agent Orange Settlement Opinion, 597 F. Supp. at 746. The settlement opinion also modified the government contractor defense to be applied to the remainder of the litigation. Id. at 843-50 (modifying contractors’ duty to warn government of risks of product); see also id. at 795-99 (knowledge of government was at least equal to that of contractors). See infra notes 130-31 and accompanying text for further discussion.

The district court next ruled on motions that started to bring the litigation to an end. See In re “Agent Orange” Prod. Liab. Litig., 611 F. Supp. 1223, 1263 (E.D.N.Y. 1985) [hereinafter Agent Orange Opt-Out Opinion], aff’d, 818 F.2d 187 (2d Cir. 1987), cert. denied, 108 S. Ct. 2898 (1988). The court granted summary judgment against plaintiffs who had opted out of the class action. Id. at 1264. Note that this was the only opinion in the litigation in which the government contractor defense as formulated in Agent Orange II and as modified in Agent Orange Settlement Opinion was applied to the facts.


Further rulings at this stage in the litigation by the Second Circuit included the following:

(1) approved the distribution of the settlement, in part, and remanded. See In re “Agent Orange” Prod. Liab. Litig., 818 F.2d 179, 184-85 (2d Cir. 1987);

(2) affirmed dismissal of a direct action against the government on Feres doctrine and discretionary function immunity grounds. See In re “Agent Orange” Prod. Liab. Litig. (Aguiar v. United States), 818 F.2d 194, 200 (2d Cir. 1987);

(3) affirmed summary judgment against veterans’ dependents’ direct action against government, on Feres and discretionary function immunity grounds. See In re “Agent Orange” Prod. Liab. Litig. (Adams v. United States), 818 F.2d 201, 202 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988);

(4) affirmed dismissal of a third party indemnity action against the government by the contractors. See In re “Agent Orange” Prod. Liab. Litig. (Dow Chem. Co. v. United States), 818 F.2d 204, 206-07 (2d Cir. 1987); and,


action. In that complex case, individual veterans of the Vietnam conflict brought actions against manufacturers of the Agent Orange defoliant, alleging that exposure had caused both present and unrealized harms. The district court stated and evaluated the policy reasons supporting the government contractor defense in ruling on the defendants' motions for summary judgment, which had asserted the defense. The court laid the groundwork for formulating the defense's elements by first stating that the defense would ensure fair treatment of defense contractors as well as protect the government from absorbing the costs of contractor liability.

The district court adopted a broad policy basis for the defense, an approach which directly facilitated its use by other courts. The court reasoned that the deterrent value of potential tort liability was lacking where a contractor had merely performed the government's plan. Moreover, imposing liability on the contractor would defeat the purpose of governmental immunity because increased costs would be passed on to the government. Finally, the Defense Production Act gave the government the power to compel production of war materiel, leaving the contractor to choose between suffering a statutory penalty for failing to supply a military item to the government and completing the contract but absorbing the cost of liability on its own.

Once the district court rooted the defense firmly in policy concerns and linked it to earlier concepts, the court formulated the elements of the defense, which provided the basis for later circuit court opinions and ultimately the Supreme Court's decision in Boyle v. United Technologies Corp. The government contractor defense forwarded by the court in

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85. Agent Orange I, 506 F. Supp. at 796. The court denied defendants' motion for summary judgment, but ruled that the defense would be available in later phases of the litigation. Judge Pratt denied defendants' motion because neither the elements of the defense nor the facts needed to establish it had been adequately presented. In particular, there were disputed factual contentions concerning the contractors' compliance with specifications and the state of knowledge on the part of both the contractors and the government about the risks of the product. Id.

86. Agent Orange II, 534 F. Supp. at 1055.

87. Agent Orange I, 506 F. Supp. at 793. The court reviewed the Yearsley defense and described the government contractor defense as an amalgam of the government contract defense and the contract specifications defense. Id. at 792-93. The court relied on the reasoning of Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965), namely that increased contractor costs resulting from liability would be transferred to the government. Agent Orange I, 506 F. Supp. at 793.

88. See McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983) (adopting and modifying elements of defense as stated in Agent Orange II), cert. denied, 464 U.S. 1053 (1984).

89. Agent Orange I, 506 F. Supp. at 793.

90. Id. at 794.


92. The government has the statutory authority to compel the production of necessary military items. Id. § 2071. The statute imposes penalties for not complying with orders to produce. Id. § 2073.


re "Agent Orange" Products Liability Litigation,95 [hereinafter Agent Orange II] required a contractor to prove three elements: that the government had established the product's specifications, that the product met the specifications in all material respects, and that the government was at least as well-informed as the defendant about the product's risks.96

In Agent Orange II, the key issue involved the contractors' and government's relative knowledge of risks.97 The chemical companies asserted they were immune from liability because the government's knowledge of the possible hazards in the use of Agent Orange had been at least equal to, if not greater than their own. The court, however, stated that the defense would not be available if the contractors knew of hazards that the government reasonably might have evaluated in deciding whether to use the product. Thus, the contractor's participation in determining specifications was relevant because it shed light on how much knowledge both the government and the contractors had possessed.98

The Agent Orange litigation represents both the rise and the development of the government contractor defense. First, because the district court articulated the underlying policy analysis and the elements of the defense.

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95. 534 F. Supp. 1046 (E.D.N.Y. 1982).
96. Agent Orange II, 534 F. Supp at 1055. The first two elements involve only minimal burdens of proof for the contractor. The first is satisfied upon the relatively pro forma showing that the product the contractor delivered to the government was the product specified under the contract. Id. at 1056. However, the court indicated that the defense would be considerably weaker if the contractor received only "performance" as opposed to "product" specifications. Id.

Thus, if the government's specifications gave the contractor only a sense of the mission the government sought to perform, the contractor would be deemed to be the source of the detailed specifications. So, the contractor's discretion, implicated in the design process, justifies holding the contractor liable for defects in the design. On the other hand, if the government approves a given design, its decision justifies extension of the government's immunity to the contractor; therefore, the issue of what kind of information underlies the contractor's development work becomes immaterial. After Boyle, a key question remains as to what constitutes sufficient governmental review of specifications. The Supreme Court's omission of the Third Circuit's decisions on this precise issue is noteworthy. See infra notes 268-73 and accompanying text.

97. Agent Orange II, 534 F. Supp. at 1055-58. The district court developed a more complete policy analysis in Agent Orange II than it had in its original opinion. The court ruled that the government contractor defense applied to actions brought under strict liability as well as negligence and breach of warranty theories; that military decisions on weapons production were beyond the reach of judicial review; and that the contractor's duty to warn the government of risks stemmed only from the knowledge that the contractor possessed and not from any obligation to conduct extra tests. Id.

Language in the opinion is consistent with an interpretation of the third element of the defense which requires the contractor to receive the equivalent of the government's informed consent regarding production of an item with disclosed risks. The court looked to information that "might have altered" or "might reasonably have affected the government's decision." Id. at 1057. Nevertheless, the view taken of the duty to warn element is that it concerns only the contractor's concealment of known risks or failure to disclose the same. See Bynum v. FMC Corp., 770 F.2d 556, 575 n.28 (5th Cir. 1985).

98. Agent Orange II, 534 F. Supp. at 1056.
Second, and more importantly, the federal courts involved in the litigation applied and refined the defense as the litigation progressed.99


Although Agent Orange II gave the government contractor defense its start, the Ninth Circuit's decision in McKay v. Rockwell International Corp.100 represents the major formulation of the defense.101 The McKay defense differed from the Agent Orange II version in that it was limited to those situations in which the federal government would be immune from suit under the Feres doctrine.102 McKay thus was confined to suits brought against contractors by servicemen who would have been barred from suit against the federal government by the Feres doctrine.103

McKay arose from the deaths of two Navy pilots, allegedly caused by defectively designed ejection systems, in separate crashes of the same type of aircraft. The court analyzed the policy reasons for deriving a defense for military contractors out of the earlier, broader defenses,104 and justified granting immunity to government contractors on the strength of four

99. See In re "Agent Orange" Prod. Liab. Litig., 565 F. Supp. 1263 (E.D.N.Y. 1983). The court granted summary judgment to certain defendants and allowed the action to continue against the remaining defendants. Id. at 1270-74. But it held that those remaining defendants had established the first two elements of the defense. Id. at 1274. The court's review of the factual issues bearing upon the question whether the government knew as much or more than the defendants about hazards of the defoliant was exhaustive. Moreover, the court continued to frame its analysis in terms of "whether this knowledge, if disclosed to the government, might have made a difference in the government's decision-making process." Id. at 1270. Later opinions in the litigation relied on refinements in the defense made by various circuit courts of appeals after Agent Orange II. See infra notes 125-37 and accompanying text.


101. The case provided significant impetus to the development of the government contractor defense leading to Boyle. See Miller, Liability and Relief of Government Contractors for Injuries to Service Members, 104 Minn. L. Rev. 1 (1984).

102. The McKay version of the government contractor defense applied to strict liability claims asserted against "suppliers of military equipment." McKay, 704 F.2d at 449. Contractors could avoid liability under the McKay version of the defense if the following elements were proved: (1) the United States was immune from liability under the Feres-Stencel doctrine; (2) the United States established, or approved, reasonably precise specifications for the equipment; (3) the equipment conformed to the 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. Id. at 451. The court remanded the case to determine whether the government had set or approved the ejection system specifications. Id. at 453.

103. Id. at 451 (citing Feres v. United States, 340 U.S. 135 (1950)). The McKay court reasoned that because the government contractor defense was essentially an extension of the government's sovereign immunity, it applied only in actions where the government in fact was immune from suit. Id.

104. Id. at 448. The court noted the inadequacy of the immunity granted to contractors in cases following Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940), and of the contract specifications defense as applied to military contractors. McKay, 704 F.2d at 448.
arguments. First, because higher prices would result from contractor liability, the purposes of governmental immunity would be defeated.\textsuperscript{105} Second, contractor liability would harm the military by thrusting the judiciary into military decisions; second-guessing of military orders would adversely affect discipline and security.\textsuperscript{106} Third, liability would be unfair to contractors and would deter them from taking necessary risks. If contractors could not negotiate over specifications, terms, and prices, they would have to choose between refusing to produce an item required during wartime and incurring a penalty or producing the item at a cost insufficient to cover the cost of liability insurance.\textsuperscript{107} Finally, the defense would encourage contractors to work closely with the government in researching, developing, and testing new technology.\textsuperscript{108} Moreover, the court reviewed the policies underlying the products liability doctrine and found them to be wholly inapplicable to military procurement.\textsuperscript{109}

The \textit{McKAY} court limited the application of the government contractor defense by linking it to the \textit{Feres-Stencel} doctrine and tailoring the elements to serve the policy goals which it found sufficiently compelling to outweigh the goals of strict liability. In analyzing the nature of military procurement and the risks inherent in military systems, the court defined the context for debate over the merits of the defense. The \textit{McKAY} standard became the most widely adopted formulation of the defense, notwithstanding the Third and Eleventh Circuits' approaches. The Second,\textsuperscript{110} Fourth,\textsuperscript{111} Fifth,\textsuperscript{112} and Seventh\textsuperscript{113} Circuits each found \textit{McKAY} to be persuasive. For example, in \textit{Bynum v. FMC Corp.},\textsuperscript{114} the Fifth Circuit gave its approval to \textit{McKAY}'s

\begin{thebibliography}{99}
\bibitem{105} Id. at 449 (citing \textit{Stencel Aero Eng'g Corp. v. United States}, 431 U.S. 666, 673 (1977) (quoting \textit{Laird v. Nelms}, 406 U.S. 797 (1972))).
\bibitem{106} Id. at 449.
\bibitem{107} Id. at 449-50.
\bibitem{108} Id. at 450.
\bibitem{109} The court rejected four policy arguments it found supportive of products liability: enterprise liability, market deterrence, compensation, and implied representation of safety. \textit{Id.} at 451-53.
\bibitem{110} Judge Alarcon dissented, arguing that \textit{Feres-Stencel} should not be extended beyond the government so as to include contractors. \textit{Id.} at 456 (Alarcon, J., dissenting). The dissent also joined issue on cost increases because contractors already included the risk of liability in their prices. Finally, the dissent would have required a showing of compulsion regarding a design rather than merely governmental approval. \textit{Id.} at 457-59.
\bibitem{112} \textit{Tozer v. LTV Corp.}, 792 F.2d 403 (4th Cir. 1986), \textit{cert. denied}, 108 S. Ct. 2897 (1988).
\bibitem{113} \textit{Bynum v. FMC Corp.}, 770 F.2d 556 (5th Cir. 1985).
\bibitem{114} The Seventh Circuit, in dicta, followed \textit{McKAY} in \textit{Tillett v. J.I. Case Co.}, 756 F.2d 591 (7th Cir. 1985). This diversity action arose from an accident involving a front-end loader that rolled over and killed a serviceman. The primary issue before the court was whether the district court had correctly applied Wisconsin law. The court held that the plaintiff could not recover under Wisconsin law and addressed the government contractor defense issue only in the alternative. \textit{Id.} at 595-96.
\end{thebibliography}
treatment of policy concerns;\textsuperscript{115} nevertheless, it did not discuss precisely how much government involvement in generating specifications was required before the defense was available.\textsuperscript{116}

Moreover, three Fourth Circuit decisions (all announced on the same day) lent weight to McKay as the definitive version of the defense. The Fourth Circuit recognized the government contractor defense in \emph{Tozer v. LTV Corp.}\textsuperscript{117} and applied it in \emph{Dowd v. Textron}\textsuperscript{118} and \emph{Boyle v. United

against the manufacturer of a military vehicle for injuries he sustained in an accident allegedly caused by the vehicle's defective design. The decision is especially significant for its choice of law analysis.

\textsuperscript{115} Id. at 566. After reviewing the \textit{Feres-Stencel} doctrine and traditional defenses, the Bynum court discussed the policy reasons for the modern government contractor defense. Primary among them were the \textit{Feres-Stencel} goals of protecting military decisions and discipline, of avoiding second-guessing of military judgment, and separation of powers concerns. Id. at 560. It also reiterated the McKay court's other policy reasons. Id. at 565-66. Further, it reviewed the policies justifying strict liability for defective products and followed McKay's reasoning for rejecting them. Id. at 571.

\textsuperscript{116} The parties stipulated that the specifications were set by the federal government. \textit{Bynum}, 770 F.2d at 574 n.23. The court addressed the third element of the defense, which required the contractor to warn of known risks. "The primary purpose of this requirement is to enable the government to make determinations as to the design and use of military equipment based on all readily available information." Id. at 574. But the court rejected a standard that would have imposed a duty on the contractor to warn of dangers about which it knew or should have known. The court construed the third element of the test to require only that the contractor warn the government about dangers that the contractor recognized but that the government had not. \textit{Id.} at 571.

\textsuperscript{117} 792 F.2d 403 (4th Cir. 1986), cert. denied, 108 S. Ct. 2897 (1988). As the Supreme Court noted, the Fourth Circuit's analysis in \emph{Tozer} was carried forward into \emph{Boyle} and so \emph{Tozer}, although not before the Court for review, was nonetheless a part of the analytic context. \textit{See Boyle v. United Technologies Corp.}, 108 S. Ct. 2510, 2513 (1988).

The court of appeals reversed a jury verdict for plaintiffs. \textit{Tozer}, 792 F.2d at 409. The action was brought under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-768 (1982 & Supp. V 1987), on theories of negligence and strict liability for defective design and involved an allegation of design defects in the modification of a naval aircraft's external skin. \textit{Id.} at 404. The original panel, which covered bays containing equipment and systems, was one piece, necessitating that maintenance crews remove it to access any portion of the bays. At the Navy's request, LTV Corp., the builder of the A-7, designed a "buick hood" panel. The centerline part of the original panel was secured, and the two parts on either side of the aircraft were hinged along one end and fastened with a "camloc" along the other, allowing sufficient access. \textit{Id.}

The action arose when the camloc proved insufficient to secure the access panel, and it opened during flight, causing Lt. Cdmr. Tozer's aircraft to become uncontrollable and to crash. Plaintiff argued that the contractor's design was defective because the type of fasteners it selected were known to wear due to corrosion and to become loose from vibration during flight. \textit{Id.} at 404-05.

\textsuperscript{118} 792 F.2d 409 (4th Cir. 1986). The action arose from a helicopter mishap involving "mast-bumping," which had plagued the AH-1 and UH-1 helicopter types manufactured by the defendant. The problem occurred when the unstable rotor system forced its hub to "bump" the mast supporting it, almost invariably severing the rotor system with resultant catastrophic loss of the aircraft. The jury found in favor of the plaintiff, but the Fourth Circuit reversed, applying the military contractor defense. \textit{Id.} at 410. The court found several facts to be especially critical, mainly that the service knew for approximately twelve years that the problem existed but had rejected proposed solutions based on cost or loss of mission effectiveness and that the contractor had been as active as the Army in trying to resolve the problem. \textit{Id.} at 412.
Technologies. In Tozer, rather than reiterating the policy arguments in McKay, the court emphasized the constitutional separation of powers and the process of military procurement as separate bases for recognizing the defense. The Fourth Circuit also anticipated the Supreme Court's decision in Boyle by holding that the defense applied to actions alleging negligent design as well as to those involving strict liability and by noting that the defense might be governed by federal common law.

Although originally a springboard for the government contractor defense, the Agent Orange litigation ultimately followed McKay, but with some interpretation. When the issue of approval of the settlement of the litigation was before the district court, it read the government contractor defense as being established if the government knew at least as much about

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120. Tozer, 792 F.2d at 406. The court noted that the design at issue was a "purely military matter" that was not to be "second-guessed" by laymen: "[t]he judicial branch is by design the least involved in military matters." Id. at 405. The court viewed the tradeoff between safety and mission effectiveness as being beyond the competence of a lay jury but nonetheless inherent in technically sophisticated systems. Id. at 406. The court also stated that review of design decisions would have a detrimental impact on military discipline; moreover, injured servicemen were not left without a remedy under the Veterans' Benefits Act. Id. at 406-07. Finally, the court approvingly quoted language from McKay that suggested military pilots face peril as part of their duty. Id. at 407 (quoting McKay v. Rockwell Int'l Corp., 704 F.2d 444, 453 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984)).

Interestingly, after the NASA Space Shuttle Challenger disaster, the government moved to compensate a member of the Challenger crew who was on active duty status at the time of the tragedy in spite of the Feres doctrine. In response, one aerospace industry periodical commented editorially that the risks encountered by astronauts are not greater than those faced by military pilots. See Justice For All, AVIATION WEEK & SPACE TECH., July 4, 1988, at 7.

121. Tozer, 792 F.2d at 408. The court stated that if contractors were to be held liable they would not participate to the same extent in design efforts or research and development and that they would be forced to increase prices. Because of the need to encourage contractor participation, the court set the minimal level for government approval as "more than a rubber stamp." Id. However, the Third Circuit approval standard stems from a process not merely more than a rubber stamp, but affirmatively inclusive of the "back and forth" or "substantial review" involved in the Third Circuit's cases. See In re Air Crash Disaster at Mannheim, Germany on 9/11/82, 769 F.2d 115, 124 n.10 (3d Cir. 1985), cert. denied, 474 U.S. 1082 (1986).

122. Tozer v. LTV Corp., 792 F.2d 403, 409 (4th Cir. 1986), cert. denied, 108 S. Ct. 2897 (1988). The court concluded that the reasons for the defense concerned "the threat of liability for government-approved technology, not . . . the particular theory of liability." Id.

123. Id. at 409 n.3.


the dangers of Agent Orange as the defendants. Moreover, the court elevated the contractors' duty to warn the government above the McKay standard because the Agent Orange herbicide had been derived from civilian products, even though it was put to military uses. The district court then granted summary judgment against certain plaintiffs, applying both the

127. Agent Orange Settlement Opinion, 597 F. Supp. at 795-99. The court considered the government contractor defense as one of several possible bars to plaintiffs' recovery. The court held that the factual problems confronted by the plaintiffs justified approval of the settlement, in that the government clearly knew at least as much about the dangers of Agent Orange as the defendants. Id.
128. Id. at 849. The third element of the defense would require a contractor:
[T]o prove (1) that the government knew as much or more than [the] defendant knew or reasonably should have known about the dangers of [the product] or (2) even if the government had as much knowledge as [the] defendant should have had, it would have ordered production of [the product] in any event and would not have taken steps to reduce or eliminate the hazard. Id.

The court stated four lines of analysis to support its modified version of the government contractor defense. First, the court stated that the defense supplies a standard of conduct, rather than a particular defense to a specific theory of liability such as negligence or strict liability. Id. at 843. Second, contractors were compelled to produce Agent Orange under the Defense Production Act, which did not preclude contractor liability stemming from compliance. Id. at 845. Third, the court reiterated its analysis of the choice of law issue, concluding that federal interests required that the defense be controlled by federal law. Id. at 846-47.

The final portion of the analysis questioned whether a "knew or should have known" standard would be applied to the third element of the defense. The court looked to the nature of the contractors' product involvement, whereby they had taken two civilian chemical components and combined them to produce the herbicide. Thus the defendants could be held to have significant familiarity with the product. They were, however, compelled to produce the product which was then used in concentrations and under conditions over which they had no control. The higher duty to warn standard was aimed at balancing the contractors' years of experience against the context of wartime production and use. The standard ensured that where a "highly technical product with which a manufacturer has had years of experience and which allegedly caused damage unprecedented in its magnitude," the contractor would have reason to increase its knowledge. Id. at 849 (citation omitted).

129. Id. at 848. Because the contractors had learned about the product from their civilian experience, they were held to a "knew or should have known" standard under the duty to warn element of the defense. But the primary formulation of the defense, set forth in McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984), requires only that the contractor warn the government of known defects. The district court justified its elevated warning standard by describing the product intended to be governed by the McKay standard as one with a primarily military application. Agent Orange Settlement Opinion, 597 F. Supp. at 848. Other cases, the court said, had involved civilian products specifically modified for use by the military, with the modification resulting in injury. See, e.g., Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (N.Y. Sup. Ct. 1980) (injury resulting from use of a pizza mixer originally built to military specifications). Here, the contractors' years of experience were such as to justify a higher duty to warn. The court altered the standard in the context of legal barriers justifying approval of settlement of class actions. See In re Agent Orange Opt-Out Opinion, 611 F. Supp 1223 (E.D.N.Y. 1985), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied, 108 S. Ct. 2898 (1988).

government contractor defense and the discretionary function exception of the FTCA. The court’s ruling, which was based on the modified government contractor defense it had delineated previously, was the only opinion in the litigation that applied the defense to the facts, and it was affirmed by the Second Circuit. The court of appeals relied expressly on the "military contractor defense," and held that because the government’s knowledge was at least equal to that of the contractors, the defendants had warned the government adequately. The appellate court noted that absent proof that Agent Orange had caused injury, the contractors could not have breached a duty to inform the government of risks.

3. The Third Circuit’s Hybrid Approach

McKay has been widely cited as the seminal case on the government contractor defense, but nonetheless it has been open to differing interpretations. The Third Circuit merged the Agent Orange II and McKay analyses of the government contractor defense and focused on the contractor’s interaction with the government in generating specifications and

131. Agent Orange Opt-Out Opinion, 611 F. Supp. at 1263-64. The court concluded that the government, in its discretion, would have decided to use Agent Orange even if it had known more about the possible risks. The discretionary function exception of the FTCA protected the government’s balancing of risks and benefits. The court deemed the health risks to have been insufficient to bar use of defoliant to protect troops. Id. See also Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2518 (1988) (discretionary function exception key to Supreme Court’s analysis of government contractor defense).


133. Agent Orange Opt-Out Opinion, 611 F. Supp. at 1263. The court found that the government knew as much, if not more than the contractors about the risks involved in the use of the herbicide. Id. The court also relied on two alternative dispositive grounds: plaintiffs could neither prove that Agent Orange had caused any particular harm nor trace alleged injuries to Agent Orange produced by a particular defendant. Id. at 1260-63. Other than granting the summary judgment against the opt-out plaintiffs, the district court’s contemporaneous decisions did not depend on the government contractor defense.


135. Id. In Tozer, the Fourth Circuit applied the government contractor defense particularly to military contractors, Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986), cert. denied, 108 S. Ct. 2897 (1988), and that focus led to the recognition of a "military" as opposed to "government" contractor defense. Following Tozer, the Second Circuit grounded the military contractor defense on its concern for the separation of powers and military procurement. In re “Agent Orange” Prod. Liab. Litig., 818 F.2d at 191.

136. Id. at 193-94.

137. Id. at 192-93. The court’s post hoc analysis is unique among cases involving the government contractor defense. Its argument stated that because there was no proof that Agent Orange posed any hazard, the contractors could not have had any duty to warn the government. Id. at 193. The Second Circuit, however, left open the question of whether the modified defense should have been recognized at all because it held that the contractors had established the defense under either standard. Id. at 192.

138. See supra notes 100-37 and accompanying text.
the process by which those specifications received the government's approval. Although the formulation of the defense in McKay was clearly linked to the Feres doctrine, that limiting element did not resolve interpretive questions about the other elements. To the Third Circuit, the most critical question focused on the impact a contractor's participation in creating specifications would have on its assertion of the defense.

Even if a contractor's participation in the design process did not preclude assertion of the defense, the contractor might lose the defense if it had developed the specifications and the government had approved them after only pro forma review. The Third Circuit addressed this scenario in Koutsoubos v. Boeing Vertol. There, the issue concerned whether the

139. Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982). The Third Circuit expressed its approval of the Agent Orange II test as a matter of Pennsylvania law in a diversity action. Plaintiff was a serviceman who had been injured while operating a bulldozer manufactured by defendant. Id. at 247. The district court had granted the defendant summary judgment on the grounds that compliance with specifications precluded liability for design defects. Brown v. Caterpillar Tractor Co., 554 F. Supp. 1269, 1271 (W.D. Pa. 1981), aff'd, 696 F.2d 246 (3d Cir. 1982). The court of appeals reversed, noting in dicta that if it had been able to restate the test for the government contractor defense it would have required a showing that the contractor had been compelled to produce the required showing that the contractor had been compelled to produce the government's design. Brown, 696 F.2d at 254 & n.17.


Because the defendant had not shown that the government had provided detailed, rather than performance specifications, it had not foreclosed a factual dispute as to whether the government had established the specifications. The court read this first element to require only that "the product . . . supplied was a particular product specified by the government." Id. at 99 (quoting Agent Orange II, 534 F. Supp. at 1056). That burden, in the district court's view, was synonymous with the McKay version of the first element—that the government established or approved reasonably precise specifications. Id. The court also quoted McKay for its Feres doctrine analysis to justify the defense. Id. at 98.

141. See id. at 100. The district court followed the Agent Orange II reasoning that contractor participation in creating the specifications would not make the defense unavailable. Id. Rather, interplay between the government and a contractor affected the relative level of both participants' knowledge, which constitutes the third element of the defense. Id.

142. See, e.g., Koutsoubos v. Boeing Vertol, 755 F.2d 352, 355 (3d Cir. 1984) ("[I]f any involvement by the contractor would defeat the defense, there would be no incentive for contractors to work closely with the military; on the other hand, where there is no government participation in the preparation of specifications the rationales for the defense do not apply.") (emphasis in original), cert. denied, 474 U.S. 821 (1985).

143. 755 F.2d 352 (3d Cir. 1984), cert. denied, 474 U.S. 821 (1985). Because the action was brought under the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1982 & Supp. V 1987), federal law applied. The Third Circuit noted both the Agent Orange II and McKay approaches and followed the former, for actions involving products that had been developed specially for the military. Koutsoubos, 755 F.2d at 355.
district court had correctly ruled that contractual specifications, either established or approved by the government, satisfied the defense's first element. In affirming the court below, the Third Circuit held that the defense set forth in *Agent Orange II* allowed government approval of specifications developed by a contractor, notwithstanding that the government had not controlled or compelled the design. Yet, because mere government approval was insufficient to set up the "established or approved" element, the scope of the requisite government approval remained unsettled.

The Third Circuit focused on contractor participation in interpreting the *Agent Orange II* standard in *In re Air Crash Disaster at Mannheim Germany on 9/11/82* [hereinafter *Air Crash at Mannheim*]. The Army had supplied the contractor with performance specifications and subsequently approved the contractor's detailed design. The trial court certified to the Third Circuit the question, under Pennsylvania law, of its extent to which contractor participation in developing a design that later received government approval precluded the contractor's assertion of the defense.


146. *Id.* The Third Circuit relied on the finding below that the Navy and the contractor had engaged in a "continuous back-and-forth" discussion, with the Navy having final authority. Because there was adequate Navy participation to show that the government had established the specifications, the court affirmed judgment for the defendant. *Id.* at 355.

147. *Id.* ("Where there is no government participation in the preparation of specifications the rationales for the defense do not apply."). See *Price v. Tempo, Inc.*, 603 F. Supp. 1359 (E.D. Pa. 1985). A municipal firefighter sued the manufacturer of protective clothing and gloves which had failed to prevent him from suffering burns. *Id.* at 1360. The defendant moved for summary judgment, relying on the government contractor defense. *Id.* The court held that the contractor had failed to establish that the detailed specifications had "originated with the government." *Id.* at 1363. The court relied on *Koutsoubos*, which held that government approval, by itself, did not show that the government had established specifications, and held that the government must play a significant role in establishing the specifications. *Id.* For a discussion of cases where the government contractor defense was asserted against claims involving allegedly defective civilian products, see infra notes 288-93 and accompanying text.

148. 769 F.2d 115 (3d Cir. 1985) [hereinafter *Air Crash at Mannheim*], cert. denied, 474 U.S. 1082 (1986). Plaintiffs were British, French, and German parachutists killed in the crash of a U.S. Army CH-47C helicopter that had been manufactured by Boeing's Vertol Division in Pennsylvania. *Id.* at 118. The actions were brought on state law negligence, breach of warranty and strict liability theories. *Id.* at 119.


150. *Air Crash at Mannheim*, 769 F.2d at 120. The Third Circuit's review was limited to the certified issue of the applicability of the government contractor defense under Pennsylvania law. *Id.* at 120 & nn.6-7.
The Third Circuit followed its decision in *Koutsoubos*, which was grounded on approval of specifications after continuous negotiations between the government and the contractor. The first element of the defense was met if the government established specifications or if the government's review of the design specifications was substantial, but not if that review was merely a rubber stamp. Thus, the hybrid of *Agent Orange II* and *McKay* examines the government's asserted review of a proposed design more closely before finding that the government established or approved the specifications.

4. Shaw v. Grumman Aerospace Corp.

The Eleventh Circuit employed a different analytic focus and arrived at a substantially different formulation of the government contractor defense in *Shaw v. Grumman Aerospace Corp.* The court emphasized the constitutional separation of powers in support of the defense. Deriving a test that would match this interest, the court ruled that the defense requires the contractor to avoid participation in the government's design process or to fulfill a duty to warn the government and to proceed only after receiving

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151. *Id.* at 122-23. Because the court described the inquiry as testing whether the government had truly participated in the development of the specifications, the holding in *Air Crash at Mannheim* is part of the *Agent Orange II* line of cases. Nevertheless, the Third Circuit cited *McKay* in support of its analysis, noting that the Ninth Circuit had remanded the issue of whether the government had "set or approved reasonably-detailed specifications." *Id.* at 122 n.9 (quoting *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 453 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984)).

152. *Id.* at 122-23. The court ruled that the government's review had been sufficient to constitute approval of the contractor's design. The court based its ruling on contract clauses which incorporated the specifications and controlled any proposed engineering changes, and on tests which the Army had performed. *Id.* at 123-24.

153. 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988). The district court ruled that the government contractor defense did not protect Grumman from liability because the design factors at issue were less dependent on military expertise than the design in *McKay* had been and because the contractor had exercised broad discretion over the design. *Shaw v. Grumman Aerospace Corp.*, 593 F. Supp. 1066, 1074 (S.D. Fla. 1984), *aff'd*, 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988).

Interestingly, the Supreme Court opted to deny certiorari rather than vacating and remanding *Shaw* for reconsideration in light of *Boyle*, which held that federal law displaced state law in cases involving the government contractor defense and military equipment. *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2518 (1988). *Shaw* was brought as a federal cause of action under the Death on the High Seas Act. *Shaw*, 593 F. Supp. at 1067. Therefore, a possible explanation is that the Court intended that the government contractor defense formulated in *Boyle* apply to actions arising under federal as well as state law.

154. *Shaw*, 778 F.2d at 743. The court acknowledged that the military contractor defense shielded from judicial scrutiny "military risk taking—where it involves products supplied by contractors—"under the theory of separation of powers, "provided only that [the risk-taking] is knowing and useful." *Id.*
the government’s informed approval. Thus, the defense would apply only where the design decision for which liability is sought to be imposed was truly a governmental decision. The Eleventh Circuit did not find the Ninth Circuit’s policy reasons articulated in McKay to conclusively establish the government contractor defense. First, the court read the Feres-Stencel doctrine more narrowly, rejecting the argument that contractors would simply pass the cost of liability on to the government. Second, the court relied instead on the Supreme Court’s then most recent statement in United States v. Shearer that the policy goals of Feres were to protect military decisions and discipline. The court gave little weight to the remaining McKay policy arguments. The effect of liability on contractors’ ability to take risks and to participate in the design process was, in the Shaw court’s view, insufficient to justify the defense. Although the Boyle Court rejected Shaw’s statement of the defense’s elements, the Eleventh Circuit’s approach to the defense’s policy goals did gain at least implicit approval.

By the time the Supreme Court decided Boyle, five different versions of the government contractor defense had emerged: the initial statement of the elements in Agent Orange I, the widely followed McKay formulation, the Third Circuit’s decisions keyed to the process by which specifications were established or approved, the Eleventh Circuit’s focus on the separation of powers, and the modified In re “Agent Orange” Products Liability Litigation defense that imposed a more stringent warning duty upon the contractor. Before considering the Supreme Court’s de-

155. Id. at 746. The defense would bar suit only if the contractor could prove: (1) its role in designing the defective equipment was minimal or (2) it timely warned the government of the risks of the design and informed it of reasonably known design alternatives, and the government, “although forewarned, clearly authorized the contractor to proceed with the dangerous design.” Id. The court delineated between two types of specifications, the first comprising precise details of a particular product and the other stating performance or mission goals. Id. at 745. Contractors would be liable only for designs involving the first type of specifications. Id.

156. Id. at 746.
157. Id. at 741-42.
159. Shaw, 778 F.2d at 742 (citing United States v. Shearer, 473 U.S. 52 (1985)).
160. Id. at 743.
161. Id.
165. See Air Crash at Mannheim, 769 F.2d 115 (3d Cir. 1985), cert. denied, 474 U.S. 1082 (1986).
cision on the defense itself, this Note next turns to a brief discussion of the choice of law principles that formed the context for Boyle v. United Technologies Corp.\textsuperscript{168}

D. Choice of Law

Regardless of the elements necessary to establish the government contractor defense, the defense itself raises choice of law issues. Recently, courts have paid significant attention to whether federal or state law controls the issues of the government contractor defense. A choice of law issue is presented because the relationship between the government and members of the military implicates federal interests; tort claims, however, are governed by state law.\textsuperscript{169} It is therefore necessary to consider the principles that control the preemption of state law and the application of federal common law.

Since Justice Brandies wrote that "[t]here is no federal general common law,"\textsuperscript{170} there have nonetheless been areas where federal common law has applied.\textsuperscript{171} These areas are not limited to those where the Constitution or a federal statute govern. Nevertheless, absent important federal interests, the federal courts lack authority to create federal common law in diversity actions. In contrast, where the action is brought pursuant to a federal statute, such as the Death on the High Seas Act ("DOHSA"),\textsuperscript{172} the statute confers jurisdiction and the applicable law is federal.\textsuperscript{173} Therefore, with respect to the government contractor defense, the issue is whether particular federal interests justify the displacement of state law with federal common law.

F.2d 145 (2d Cir. 1987), cert. denied, 108 S. Ct. 695 (1988). There were two modifications to the contractor's burden in establishing the defense. First, the contractor's knowledge was to be measured by an objective standard, which required that the government's knowledge at least be equal to that which the contractor should reasonably have possessed. \textit{Id}. In the alternative, the contractor could show that even with the requisite knowledge, the government would have ordered production without trying to reduce its risks. \textit{Id}.


169. See 28 U.S.C. § 1346(b) (1982). Under the FTCA, in instances where the government has consented to be sued, "the law of the place where the act or omission occurred" applies to the action. \textit{Id}.


171. See, \textit{e.g.}, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal government's rights and duties with respect to its commercial paper are matters controlled by federal, not state law). \textit{But see Bank of America Nat'l Trust & Sav. Ass'n v. Parnell}, 352 U.S. 29, 33 (1956) ("litigation [was] purely between private parties and [did] not touch the rights and duties of the United States").


173. If there is no federal statutory provision covering an issue, the choice of law question is whether federal law controls (and is applicable in all courts, both state and federal), or whether state law controls (which under the \textit{Erie} doctrine is applicable in all courts as well). See \textsc{R. Weinstein, Commentary On The Choice Of Law} 614 (2d ed. 1983).
The standard for determining whether federal law controls a particular issue depends on finding sufficient federal interest in reaching uniform national results under a federal rule. Where the interests of the United States are directly involved in the litigation, for example, the need for uniformity mandates the application of federal rules of decision. The Supreme Court has held, however, that absent congressional authority to create substantive law, federal common law applies to only a few narrow areas. The federal government's interest in its rights and obligations under its contracts is one area that the Supreme Court has recognized as satisfying the test for preemption of state law. In short, the test to determine whether state law is preempted considers the federal interest in a particular area together with the conflict between federal interests and state law.

The Agent Orange litigation played an early role in resolving whether state or federal law applies to the government contractor defense. In reversing the district court's ruling that federal law applied to the plaintiffs' claims, the Second Circuit left open the question of which law governed the defense. The Second Circuit's holding that federal law was inappli-

174. Id.
175. Id.
176. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (federal common law applies to "the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.").
178. Miree v. DeKalb County, 433 U.S. 25, 31 (1977). The Court stated:

   In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.

Id. (emphasis added by Miree Court) (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)).

The Second Circuit extrapolated the test into the following elements: '(1) the existence of a substantial federal interest in the outcome of a litigation; (2) the effect on this federal interest should state law be applied; and (3) the effect on state interests should state law be displaced by federal common law.' In re "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 990 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981). Accord Bynum v. FMC Corp., 770 F.2d 556, 568 (5th Cir. 1985). However, the court emphasized that in considering the first factor (the federal interest), the government must be a party to the suit and must have an interest (1) in uniform rules governing its rights and (2) in the substantive contents of those uniform rules. See In re "Agent Orange" Prod. Liab. Litig., 635 F.2d at 993.

179. See In re Diamond Shamrock Chems. Co., 725 F.2d 858, 861 n.2 (Second Circuit earlier reached the issue of whether federal interest was present only for purpose of establishing subject matter jurisdiction, so question of federal interest in government contractor defense reserved) (citing In re "Agent Orange" Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981)), cert. denied, 465 U.S. 1067 (1984). The district court ruled that federal law applied to the plaintiffs' claims for purposes of establishing federal jurisdiction. The court held that although the federal government was not a party to the action, the preemption test set forth in Miree was satisfied. See Agent Orange I, 506 F. Supp. 762, 744 (E.D.N.Y.), rev'd, on other
cable to the plaintiffs’ claims did not compel the choice of state law. On remand, the district court subsequently relied instead on a national consensus law that it believed the states would have chosen to apply.180 The district court found that the government contractor defense implicated significant federal interests,181 notwithstanding the federal interest in compensation for injured servicemen.


The Second Circuit reversed and held that there was no identifiable federal interest threatened by the application of state law. In re “Agent Orange” Prod. Liab. Litig., 635 F.2d 987, 993 (2d Cir. 1980). Furthermore, it distinguished actions in which the United States was itself a party and therefore had interests in uniformity for its own sake, see, e.g., Bank of Am. Nat’l Trust & Sav. Ass’n v. Parnell, 352 U.S. 29, 32-34 (1956) (issue of whether government bonds were “overdue” in private litigation a matter of federal law; issue of defendant’s good faith in taking title a matter of local law), as well as in the substantive content of the uniform rules, see, e.g., United States v. Standard Oil Co., 332 U.S. 301, 305 (1947) (relationship between government and members of Armed Forces is distinctively federal in character; Supreme Court recognized need for uniformity but did not impose substantive liability sought by United States). In re Agent Orange, 635 F.2d at 993.

Here, the federal government had interests in both the welfare of its veterans and its relations with defense contractors. Id. at 994. But neither of these interests were content-neutral, and the court held that it was unable to identify a federal policy that reconciled them. Id. at 994-95. Congressional inaction in articulating an “identifiable” policy with respect to the claims asserted at the district court level was the Second Circuit’s reason for ruling that the lower court lacked subject matter jurisdiction. Id. at 995.

180. The Second Circuit had held that federal law did not apply to the plaintiffs’ claims and that therefore jurisdiction was based only on diversity of citizenship. Id. at 993. Nevertheless, the choice of federal law to apply to the issue of the government contractor defense was expressly left open. See In re Diamond Shamrock, 725 F.2d at 861 n.2.

The district court reviewed two issues, beginning with whether the government contractor defense applied to actions in strict liability; the court held the defense to be so applicable. In re “Agent Orange” Prod. Liab. Litig., 580 F. Supp. 690, 701-02 (E.D.N.Y. 1984). Second, the court looked to specific interests of the federal government sufficient to preempt rules of state law. Id. at 703-04. One such interest was the need for uniformity in the law applicable to the government contractor defense. Id.

Although the Supreme Court deemed it unnecessary in Boyle to cite earlier determinations concerning the applicability of federal law to issues of the government contractor defense, the district court opinion would have provided strong support for the Court’s analysis. The district court distinguished prior rulings on the government contractor defense under state law on the basis that those decisions either involved nonmilitary products used by civilians many years after their production for the government or manufacturing defects in airplanes and explosives—the type of defects frequently regulated by state law. Id. at 712. Moreover, the government contractor defense cannot be established where the defect was one of manufacture rather than design. See McKay v. Rockwell Int’l Corp., 704 F.2d 444, 451 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984).

181. Nevertheless, when the Third Circuit considered the choice of law issue with respect to the government contractor defense, it held that the logical underpinnings of the Feres-Stencel doctrine were insufficient to cause state law to be displaced. Brown v. Caterpillar Tractor Co., 696 F.2d 246, 248-49 (3d Cir. 1982). The court of appeals reasoned that while the fortiety of where an alleged tort occurred could not affect the liability of the government, manufacturers were presently liable under differing state standards of liability. Id. at 248-49. The court did not find any threat to military discipline in a suit against a contractor as such actions would not
Courts confronted the question of whether state or federal law applied to the government contractor defense in light of the Ninth Circuit's decision in *McKay v. Rockwell International Corp.* The Fifth Circuit correctly anticipated the Supreme Court's choice of law analysis in *Boyle*, specifically noting that the *McKay* standard "substantially reflects the pertinent federal interests." Further, in *McLaughlin v. Sikorsky Aircraft*, the California Court of Appeal stated that because the relation between the government and servicemen is defined and governed by federal sources of authority, the law governing interference with that relationship must also be federal. The court held that the three requisites for the displacement of state law were satisfied.

In its relatively brief appearance as a matter of decisional law, the government contractor defense raised two issues sufficiently significant for Supreme Court review. The Court had to decide not only which formulation of the defense to endorse, but had to do so in the context of applying federal common law to state causes of action.
II. Boyle v. United Technologies Corp.

A. Facts

During a training mission off the Virginia coast, the Marine Corps helicopter in which Lt. Boyle was the copilot crashed after an apparent control system malfunction. The three other crew members escaped underwater after impact, but Lt. Boyle was unable to do so.\(^{187}\) Lt. Boyle’s father filed suit against the helicopter’s manufacturer, alleging that the crew compartment was defectively designed in that the copilot’s access to the escape hatch handle was blocked. Further, plaintiff alleged that the hatch had been defectively designed because it opened outward and against water pressure when submerged.\(^{188}\) The jury awarded the plaintiff damages, and the defendant manufacturer appealed.

The Fourth Circuit reversed, relying on the strength of the “military contractor defense” it had recognized earlier that day in \(\text{Tozer v. LTV Corp.}\)^{189} Applying the defense in Boyle, the Fourth Circuit emphasized two arguments. First, the contractor and the government had exchanged sufficient information “to establish government approval of the design in question.”\(^{190}\) Further, because the Navy inspected a mock-up of the cockpit, the defendant showed that the Navy had approved reasonably precise specifications.\(^{191}\) Plaintiff sought review in the Supreme Court, which granted certiorari.\(^{192}\)

B. Majority Opinion

1. Choice of Law

A major part of the Court’s opinion deals with whether federal common law displaces state law with respect to the military contractor defense. In reaching an affirmative answer, Justice Scalia’s opinion for the 5-4 majority first stated the basic preemption principle:\(^{193}\) state law cannot be displaced

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\(^{187}\) Boyle, 108 S. Ct. at 2513.

\(^{188}\) Id. The jury awarded the plaintiff damages based on this claim, but not on his claim that the defendant had caused the mishap through negligent repair of the aircraft’s flight control system.

\(^{189}\) 792 F.2d 403 (4th Cir. 1986), cert. denied, 108 S. Ct. 2897 (1988). Tozer focused on the constitutional separation of powers and the need to protect the integrity of military procurement as reasons for the government contractor defense. See supra notes 117 and 120-23 and accompanying text.


\(^{191}\) Id.


\(^{193}\) Boyle, 108 S. Ct. at 2513-14. For a discussion of these choice of law principles, see supra notes 169-86 and accompanying text.
absent a clear statutory prescription or a direct conflict between state and federal law.\textsuperscript{194}

In the first portion of its preemption analysis, the Court looked to uniquely federal interests that might justify the application of federal common law.\textsuperscript{195} The majority provided two analogues to the federal interest asserted in \textit{Boyle}:\textsuperscript{196} the obligations and rights of the United States under contract,\textsuperscript{197} and the immunity of federal officials for actions taken in the course of their duty.\textsuperscript{198} Justice Scalia relied on \textit{Yearsley v. W. A. Ross Construction Co.},\textsuperscript{199} to support the argument that military procurement contracts implicate uniquely federal interests.\textsuperscript{200} The Court majority found no reason to distinguish between performance and procurement contracts. Although the United States was not a party to a suit in which the contractor defense had been invoked, the Court still found critical interests were implicated: the federal treasury, as well as procurement itself.\textsuperscript{201}

The next portion of the preemption analysis was concerned with defining the requisite conflict with state law. Beyond the presence of uniquely federal interests, the displacement of state law also requires a conflict between state and federal law.\textsuperscript{202} To show what level of conflict would support preemption of state law, the Court drew a continuum along which it identified three types of cases. First, if the subject of the suit involved the enforcement of the contractual duty itself, state law would control the case.\textsuperscript{203} Second, an intermediate situation would involve a state law duty to include a certain safety feature which was not required by the contract

\begin{itemize}
\item 194. \textit{Boyle}, 108 S. Ct. at 2513-14.
\item 195. \textit{Id.}
\item 196. The federal interest at stake in \textit{Boyle} involved military procurement. \textit{Id.} at 2514.
\item 197. \textit{Id.} This federal interest was recognized, according to the majority, in United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973).
\item 198. \textit{Boyle}, 108 S. Ct. at 2514 (citing \textit{Westfall v. Erwin}, 108 S. Ct. 580 (1988)). This second interest provoked an exchange with the dissenting Justices, who claimed that the majority was extending either the interest underlying the immunity or the immunity itself. \textit{Compare id.} at 2514 n.1 (Court merely drew analogy to official immunity) \textit{with id.} at 2524 (Brennan, J., dissenting) (majority opinion extended the immunity itself to contractors).
\item 199. 309 U.S. 18 (1940) (origin of "government contract defense").
\item 201. \textit{Id.} at 2515 ("The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price."). \textit{Accord} \textit{Dolphin Gardens, Inc. v. United States}, 243 F. Supp. 824 (D. Conn. 1965) (contractors' cost increases will be passed on to government). The Court thus distinguished the result in \textit{Miree v. DeKalb County}, 433 U.S. 25 (1977), in which the federal interest was too insignificant to justify federal preemption. \textit{Boyle}, 108 S. Ct. at 2515.
\item 203. \textit{Id.} at 2516. \textit{See also} \textit{Miree v. DeKalb County}, 433 U.S. 25 (1977) (third party beneficiary of contract with government sought to enforce contractual duty of person contracting with government).
\end{itemize}
but also not contrary to the government specifications. State law would govern this type of case as well. 204

Boyle exemplified the third type of case: the duty sought to be imposed was in fact directly contrary to the defendant's contract with the government. But, the Court stated, Boyle still might not have involved sufficient conflict with federal law, if the government had failed to show that it had a significant interest in the feature in question. 205 To the extent that the government had merely received what it had ordered, the federal interest was too insignificant to justify the preemption of state law. 206 In sum, the government's interest in procurement contracts conflicted with state law for preemption purposes only where the state law duty was contrary to the contract and where the government showed that it had an interest in the particular feature or item. 207

In the third section of the preemption analysis, the Court articulated the principle that limits and defines the scope of conflict between federal and state law. Although recognizing that the circuit courts relied on Feres as the source of the "significant conflict" necessary to preempt state law, 208 the Court nevertheless rejected Feres for choice of law purposes and relied on logic, rather than precedent, to find that the doctrine produced unduly broad results. 209 Likewise, the Feres doctrine produced results that were

204. The Court hypothesized a government order for an air conditioner based on performance specifications "but not the precise manner of construction." Boyle, 108 S. Ct. at 2516. This example concerns performance specifications, generally insufficient to establish the defense in any event. See Agent Orange II, 534 F. Supp. 1046, 1056 (E.D.N.Y. 1982).

205. The Court was referring to the escape-hatch that the plaintiff claimed was necessary as opposed to the type shown by specifications. The majority opinion provided an example which involved an order for a stock helicopter that happens to have a certain type of hatch. The Court stated that "it is impossible" to find a significant government interest in that feature. Boyle, 108 S. Ct. at 2516.

206. The Court stated that any other result would be unreasonable based on a comparison to the standard products liability doctrine. Id.

207. Id. at 2516.

208. Id. at 2517. Yet the Fifth, Seventh, and Ninth Circuits had discussed Feres in terms of the policies underlying the defense, such as preventing contractors from transferring costs to the government, and not to support federal preemption of state law. Id.

Only one of the four opinions cited by the majority discussed the Feres-Stencel doctrine as part of a preemption analysis. Compare Bynum v. FMC Corp., 770 F.2d 556, 565-66 (5th Cir. 1985) (Feres as federal interest justifying displacement of state law) with Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986) (reason to adopt defense was to prevent cost increases from affecting procurement), cert. denied, 108 S. Ct. 2897 (1988) and Tillet v. J.I. Case Co., 756 F.2d 591, 596-97 (7th Cir. 1985) (reasons for extending Feres immunity to contractors) and McKay v. Rockwell Intl Corp., 704 F.2d 444, 449 (9th Cir. 1983) (reasons supporting defense parallel policies supporting Feres), cert. denied, 464 U.S. 1043 (1984). While the policies supporting the government contractor defense, and the federal interest underlying preemption of state law may be very similar, the decisions prior to Boyle, except for Bynum, were not primarily concerned with the choice of law issue.

209. The majority illustrated its belief that Feres would produce results which were too broad. For example, the Court found that a serviceman not only would be prohibited from suing the
overly narrow in that it would not prevent civilians from suing the government for allegedly harmful noise from jet fighter engines. In this hypothetical, the Court stated that the subject should not be regulated by state law. Therefore, the majority rejected Feres as a principle defining the conflict between the federal interest in procurement contracts and state law.\textsuperscript{210} Instead, the Court found that the discretionary function exception of the FTCA\textsuperscript{211} limits and defines the scope of significant conflict between the federal government's interest in procurement and state law. The Boyle majority viewed design choices as "assuredly" discretionary functions.\textsuperscript{212} The design process required engineering analysis and the balancing of several factors, particularly safety against mission effectiveness.\textsuperscript{213} Any second-guessing of these choices would subvert the purpose of the discretionary function exception because contractors would pass on to the government the costs of liability or insurance.\textsuperscript{214}

To summarize the Court's choice of law analysis, Boyle concluded that federal law governed the issues of the government contractor defense after conducting a three-part analysis. The federal government had unique interests in contracts for procurement of military equipment. Where the contractor's duty to the government was contrary to the burdens sought to be imposed under state law (in Boyle, state tort law), federal common law displaced the state law. Finally, the discretionary function exception, rather than the Feres doctrine, provided the analytic key to finding the precise conflict in a particular controversy.

2. Elements of the Government Contractor Defense

The Boyle Court adopted the Ninth Circuit's formulation of the government contractor defense.\textsuperscript{215} The Court linked the first two elements, that the government established or approved reasonably precise specifications and that the product complied with the specifications, to the assurance that a discretionary function had actually been involved.\textsuperscript{216} The third

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\item government for injuries suffered, but also would be prohibited from suing a manufacturer of equipment that was purchased solely from the manufacturer's stock and was not specially ordered. The Court intended this example to show an insufficient predicate for federal preemption of state law. Boyle, 108 S. Ct. at 2517.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} 28 U.S.C. \textsection 2680(a) (1982).
\item \textsuperscript{212} Boyle, 108 S. Ct. at 2517.
\item \textsuperscript{213} \textit{Id.} (discretion involved in design of military equipment "includ[es] specifically the trade-off between greater safety and greater combat effectiveness").
\item \textsuperscript{214} \textit{Id.} at 2518.
\item \textsuperscript{215} Boyle, 108 S. Ct. at 2518 (citing with approval McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984)). The Court did change the McKay test to the extent of deleting the requirement that the government be immune from suit under the Feres doctrine in order for the government contractor defense to apply.
\item \textsuperscript{216} Boyle, 108 S. Ct. at 2518. The majority related the specification elements to assurance that the particular feature was reviewed by a government officer and not merely by the contractor.
\end{itemize}
element, that the contractor informed the government of risks known to
the contractor but not to the government, provided incentives for contrac-
tors to identify risks. The Court sought to avoid impeding discretionary
functions by disrupting the flow of information needed by decisionmak-
ers. The Court vacated the judgment of the Fourth Circuit and remanded
the case, because it was unclear whether the court of appeals held that no
reasonable jury could have found against the contractor, or instead, it had
weighed the facts on its own, upon applying a different test for the defense
than that employed by the district court.

C. Dissenting Opinions

Justice Brennan filed a dissenting opinion in which he attempted to refute
sequentially each of the majority's arguments. The dissent stated nar-
rower preemption principles than those relied upon by the majority and
argued against the displacement of state law, taking issue with the premises
of the majority's preemption analysis.

The dissent argued that the federal government's interest in procurement
contracts was not comparable to the other recognized interests underlying
preemption of state law. According to the dissent, the federal govern-
ment's interest in its contractual rights and obligations did not support
preemption because the relationship at issue in Boyle was too far removed
from the government's contract. The dissent also took issue with the
analogy that the majority sought to draw between the federal interest
underlying the immunity of officials for actions taken in the course of
their duty and the government contractor defense. Justice Brennan vigor-
ously disputed extending either the immunity or the interest underlying it
beyond a narrow class of officials. In his view, the federal interest in
procurement contracts was not of the same character as those interests
which had supported the application of federal common law in other areas.

The dissent attempted to distinguish Yearsley and its interpretation by
the majority by arguing that it applied only in the fifth amendment takings
context. The dissent also argued that Yearsley held that a contractor who

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217. Id.
218. Id. at 2519. Petitioner had raised a seventh amendment jury trial claim, arguing that his
right had been denied because the court of appeal had indeed weighed the facts.
219. Id. at 2519 (Brennan, J., dissenting). Justices Marshall and Blackmun joined the dissent.
Justice Stevens added a brief dissenting opinion in which he argued that the Court had failed to
"defer to the expertise of Congress." Id. at 2528 (Stevens, J., dissenting).
220. Id. at 2522 (Brennan, J., dissenting).
221. Id. at 2523. The dissent read Miree v. DeKalb County, 433 U.S. 25 (1977), as showing
that the relationship in Boyle between the contractor and a third party was insufficient as a reason
to displace state law. Boyle, 108 S. Ct. at 2523 (Brennan, J., dissenting).
222. Id. at 2523-25 (Brennan, J., dissenting).
223. Id. at 2525 (Brennan, J., dissenting) (citing Yearsley v. W.A. Ross Constr. Co., 309 U.S.
18, 21 (1940)).
followed government specifications shared in sovereign immunity only if the contractor served as the government's agent.\textsuperscript{224} Boyle, however, involved a contractor who had participated in formulating specifications.\textsuperscript{225}

In addition to arguing that the federal interests at stake in Boyle were insufficient to justify displacement of state law, Justice Brennan disagreed with the majority's position that the FTCA's discretionary function exception defined the conflict between state and federal law.\textsuperscript{226} The dissent argued that the prospect of cost increases being transferred to the government was inadequate to justify displacing state law.\textsuperscript{227} Because there was no need to protect the government from contractors' cost increases before some of the government's immunity was waived under the FTCA,\textsuperscript{228} there was no need to do so in Boyle. Arguing that Boyle would have been decided differently if it had been brought as a federal wrongful death cause of action under DOHSA, the dissent rejected the FTCA as an expression of federal interest. Instead, the dissent considered the statutory cause of action as the better indicator of Congress' view of the government's asserted need for protection from liability.\textsuperscript{229}

In expressing the view that the Court had taken upon itself a decision more properly for Congress to make, the dissent also disagreed with an underlying assumption of the government contractor defense. The dissenters argued that if the defense was adopted to prevent the government's costs from increasing, the matter was within Congress' exclusive province. But the dissent did not accept the premise that tort liability would increase the government's financial burden.\textsuperscript{230}

III. Analysis

The Supreme Court confronted three issues in Boyle: whether federal common law displaced state tort law and governed the government con-
tractor defense; whether the *Feres* doctrine or the FTCA's discretionary function exception defined the conflict between state and federal law for preemption purposes; and whether the Court should adopt the *McKay* formulation of the defense's elements as a matter of federal common law. With respect to the first two issues concerning the choice of law and scope of conflict between federal and state law, the Court's analysis was generally consistent with precedent. But with respect to explaining the elements of the defense, the Court gave mixed signals as to its view of the issues.

### A. Choice of Law

*Boyle* is significant not only because the Supreme Court adopted *McKay*'s elements of the government contractor defense, but because it held that the defense is governed by federal common law. Most courts that addressed the contractor defense issue prior to *Boyle* reached the same result. For example, the Fifth Circuit's choice of law analysis in *Bynum v FMC Corp.*, which held that uniquely federal interests justified displacing state law, matched the Supreme Court's analysis in *Boyle*. Even the dissent's argument in *Boyle*, that the case might have been decided differently had it been brought under DOHSA, failed to show any inconsistency in the Court's choice of law holding.

231. Id. at 2518.


233. A difference between the Fifth Circuit's decision in *Bynum* and the Supreme Court's approach in *Boyle* is that the Fifth Circuit based its ruling, that the government contractor defense implicates unique federal interests, upon the policy goals of the *Feres-Stencel* doctrine, namely preventing second-guessing of military decisions and protecting military discipline. *Bynum*, 770 F.2d at 570. The court analyzed the impact of federal law upon state law in terms of the policy reasons justifying strict liability, which it took to be the state's interest. In contrast, the *Boyle* Court focused on the federal interest in procurement of military equipment.

234. See *Boyle*, 108 S. Ct. at 2527 & n.7 (Brennan, J., dissenting) (arguing that under DOHSA, federal interest directs that liability be allowed against contractor).

235. DOHSA, 46 U.S.C. § 761 (1982 & Supp. V 1987). The majority refused to join issue with the dissent over the question of whether the outcome of the case would be different if the suit had been brought under the statute. *Boyle*, 108 S. Ct. at 2518 n.5. Analysis shows that the federal interests that justify the defense are consistent with those interests which underlay the statutory cause of action. It is therefore unlikely that *Boyle*—as a DOHSA suit—would have produced a different choice of law holding.

First, because DOHSA actions are brought in admiralty, federal law would apply of its own force. The policy reasons for the defense—for example, the need to prevent contractors' costs from being passed on to the government or the need to insulate military decisions from second-guessing—are equally applicable to such actions. In fact, the government contractor defense gained recognition in DOHSA actions. See *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984). *Accord Boyle*, 108 S. Ct. at 2527 n.7 (Brennan, J., dissenting).

Second, the fact that *Boyle* itself could not have been brought under DOHSA does not change
The policy reasons that support the defense and the interests of the federal government warranting the preemption of state law are at least closely related, if not identical.\textsuperscript{236} The Boyle Court’s choice of law analysis of the defense, which relied heavily on the need for the defense to prevent adverse cost impact upon the government from contractor liability, thus reiterated in part the Ninth Circuit’s reasoning in McKay.\textsuperscript{237} Indeed, the district court’s rulings in the later stages of the Agent Orange litigation
anticipated the result in Boyle by linking the federal interests that made the defense attractive as a matter of policy to the decision to apply federal common law to the issues of the defense.238

Boyle's holding that state law is displaced does not weaken the policy basis of the government contractor defense. As one court has pointed out, earlier decisions holding state law to control the government contractor defense were reached in contexts distinct from current military procurement.239 Thus, approval of the Ninth Circuit's policy approach to the defense240 was an implicit part of the Boyle majority's focus upon the reasons for displacing state law.

B. Shift to FTCA and Discretionary Function Immunity

Until Boyle, the elements of the government contractor defense were linked to the Feres-Stencil doctrine, which barred actions against the government brought by servicemen injured incident to service as well as contractors' third party indemnity claims.241 Yet, the Court's decision to base the government contractor defense on discretionary function immunity did no violence to precedent. First, concern for protecting military judgments and decisions from judicial second-guessing is a key reason justifying the Feres-Stencil doctrine.242 That concern, albeit applied more generally, is similar to the concern the Court recently recognized as underlying the immunity for discretionary functions.243 Moreover, at least where a court insists that government approval of a design follow substantial government


239. See, e.g., In re "Agent Orange" Prod. Liab. Litig., 580 F. Supp. at 712. The court distinguished earlier government contractor defense cases as having involved items built to specifications some time previous and then later causing injury to civilians. Id. Further, the court argued that the kinds of defects in other cases applying the defense as a matter of state law concerned manufacturing defects of the type routinely regulated by state law. Id.

240. In McKay, the Ninth Circuit developed four policy arguments. See McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449-50 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984). By adopting the McKay elements of the defense, the Supreme Court at least implicitly approved the Ninth Circuit's reasoning.

241. Boyle, 108 S. Ct. at 2517. The shift from Feres to discretionary function immunity does result in one significant change in the scope of the government contractor defense. Feres-type actions, by definition, involve plaintiffs who could not have brought an action against the government because of their military status. But under an FTCA-discretionary function exception approach, the government contractor defense bars a suit by a civilian against a contractor even though Feres would not have barred his suit against the government.


243. United States v. Varig Airlines, 467 U.S. 797, 814 (1983) ("Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort.").
review of specifications, the type of decision involved clearly depends upon the exercise of official discretion.\textsuperscript{244}

Nevertheless, Boyle separated the government contractor defense from the Feres-Stencel doctrine,\textsuperscript{245} which guards the government's retained immunity where military discipline is concerned. In contrast to the relatively static need for discipline and the relation of a soldier to the government, the discretionary function exception protects the government's ability to respond to changing priorities.\textsuperscript{246} Some of Feres' supporting logic was held not to be applicable to the contractor defense.\textsuperscript{247} The Boyle Court's shift

\textsuperscript{244} See, e.g., Boyle, 108 S. Ct. at 2517 (1988) (design of military equipment is "assuredly a discretionary function"). The district court for the state of Maryland anticipated the holding in Boyle. In Ramey v. Martin-Baker Aircraft Co., 656 F. Supp. 984 (D. Md. 1987), aff'd, 874 F.2d 946 (4th Cir. 1989), a civilian aircraft mechanic brought suit for injuries arising out of the accidental firing of an aircraft ejection seat. The court noted the standard policy arguments in support of the government contractor defense. But it atypically emphasized both Feres and discretionary function immunity as interests sought to be protected by the government contractor defense. Id. at 989 (citing Dalehite v. United States, 346 U.S. 15, 34-36 (1953) and United States v. Varig Airlines, 467 U.S. 797 (1984)).

As the district court indicated, the cost pass-through argument is as applicable to discretionary function immunity as it is to the Feres doctrine. Ramey, 656 F. Supp. at 989 ("To impose liability on the contractor under such circumstances would render the Government's immunity for the consequences of acts in the performance of a 'discretionary function' meaningless, for if the contractor was liable, contract prices to the Government would be increased."). See also Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43, 47 (1976), aff'd, 154 N.J. Super 407, 381 A.2d 805 (1977), cert. denied, 75 N.J. 616, 384 A.2d 846 (1978) (defense procurement carried out through government's war powers presumably of constitutional origin and therefore government "must be given wide latitude in its decision-making process").

Although not a part of the district court's analysis in Ramey, the fact that the aircraft was a full-scale development (pre-production) version of a high-performance fighter lent credence to earlier statements that the expectation of safety is less when technologically sophisticated military hardware is involved. See, e.g., McKay v. Rockwell Int'l Corp., 704 F.2d 444, 453 (9th Cir. 1983) (military pilots' sense of duty and mission takes account of inherently risky nature of military aviation, particularly fighter aircraft), cert. denied, 464 U.S. 1043 (1984).

\textsuperscript{245} Boyle, 108 S. Ct. at 2517. Feres immunity was only an element of the McKay defense; it was a necessary but not a sufficient condition. McKay, 704 F.2d at 453. Feres-Stencel provided a source of policy arguments in favor of the defense, such as the dilemma created by Stencel, which denied indemnity to the contractor, but which also reaffirmed the federal government's immunity from suit by an injured serviceman. See Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 669-74 (1977). Although the majority opinion in Boyle argued that Feres had been a part of several courts' preemption analysis, it was by far more important as support for the policy underlying the government contractor defense. See also United States v. Johnson, 481 U.S. 676, 692 (1987) (Scalia, J., dissenting). A reading of Justice Scalia's dissent in Johnson reveals that the shift away from the Feres doctrine in his opinion for the Court in Boyle was not unexpected. In his dissent in Johnson, he indicated that he believed Feres was wrongly decided and could be overruled. Id. at 692-700.

\textsuperscript{246} See, e.g., Varig Airlines, 467 U.S. at 816-20 (1984) (FAA's engineering and inspection programs account for primary safety responsibility resting in hands of aircraft manufacturers, not the federal government).

\textsuperscript{247} The Court did carry forward the point that allowing suit would tend to subvert the government's immunity (in this case, because of increased prices). Boyle, 108 S. Ct. at 2517. The
away from Feres does more than weaken the validity of that doctrine. It indicates that the purposes of governmental immunity are more significant than a mere extension of the sovereign’s immunity and instead are linked to "getting the Government’s work done." 248

C. Elements of the Defense

The Court’s choice of law holding and its reliance on discretionary function immunity were generally consistent with precedent. But the Court’s statement of the elements of the government contractor defense proceeded under some changed assumptions. The focal point of the majority opinion was the Ninth Circuit formulation of the defense adopted in McKay v. Rockwell International Corp., which was keyed to government establishment or approval of reasonably precise specifications. 249 Despite the ease with which the McKay standard gained acceptance in federal courts, 250 it emerged from Boyle appearing to offer defense contractors a different cloak of immunity. The Court’s analysis increased the relevance of the government’s review process as well as the level of contractor knowledge relied upon in the design process.

The first element of the defense requires that the government established or approved reasonably precise specifications. It should be noted that the Court limited the scope of this element by providing two counter-examples
to the situation that was presented in Boyle, both involving specifications that had not been the subject of government review. In both examples, the majority unequivocally stated that federal interests would be insufficient to justify the preemption of state tort law. This approach is narrower than the Agent Orange II approach, which placed little emphasis on the establishment of specifications, as well as the McKay defense, which required only the establishment or approval of reasonably precise specifications.

The Court expressly grounded the government’s establishment or approval of specifications as the defense’s first element upon the need to assure immunity for discretionary functions. To ensure that the defense

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251. Boyle, 108 S. Ct. at 2516. The first hypothetical example involved an air conditioner for which the government had not specified a certain safety feature. Since the duty to supply the air conditioner as specified would not conflict with a state law duty of care to include the safety feature, the Court stated, federal law would clearly not preempt state law. Id. The other hypothetical concerned a stock model helicopter ordered by number and without meaningful review of the specifications. The Court indicated that the government’s interest was not implicated merely in its getting what it ordered. Id.

The latter example may have a significant bearing upon the question of how much government review of specifications is necessary before a bona fide “approval” can be said to have been given. The example expressly admits of a complete lack of review of specifications, since the order was for an inventory item and was placed by model number alone.

252. Boyle, 108 S. Ct. at 2516. An issue that arises is whether the validity of the government’s establishment or approval of specifications depends on the contractor’s warning of known dangers (the third element). See Wilson v. Boeing, 655 F. Supp. 766, 773 (E.D. Pa. 1987) (approval of specifications valid independent of contractor’s discharge of duty to warn). A similar issue is raised by developments in the Pentagon concerning bribery and other illegal activities in connection with competition for procurement contracts. Contractors, acting through consultants, obtained advance and in some instances classified information concerning specifications of competitively bid procurement contracts. See Federal Investigators Pursue Dozens of Defense Contractors, Aviation Week & Space Tech., June 27, 1988, at 16-22. Even apart from the criminal conduct, the alleged illegal activity raises the issue that the government’s approval, and certainly its discretion, were short-circuited by contractors possessing information concerning the proposals of competitors or other classified data.


253. See Agent Orange II, 534 F. Supp. 1046, 1056 (E.D.N.Y. 1982) (first element met where the product supplied was the product specified by the government; burden described as minimal).


255. Boyle, 108 S. Ct. at 2518. Because the Court has held that the nature of the conduct
would be available only where the government's approval had involved the exercise of discretion, the Court required a level of governmental review materially higher than merely a rubber stamp. The Third Circuit cases, particularly Air Crash at Mannheim, focused on defining the requisite intensity of review leading to approval, but Boyle did not. The Court's use of ambiguous language—a government officer must have "considered" a proposed design—indicates that it did not invalidate the Third Circuit's inquiry into governmental review. Moreover, the link that the majority opinion drew between minimally acceptable governmental design review and the underlying policy of insulating discretionary decisions indicates that scrutiny of the review and approval process is an integral part of the defense.

The third element of the defense, requiring the contractor to warn the government of latent dangers or risks, also relates to the design process in which specifications are generated. The original Agent Orange II defense compared the degrees of knowledge of the government and contractor, but McKay required the contractor to act to inform the government. The problem with Boyle, however, is that the Court provided little if any guidance as to how its decision relates to the contractor's elevated duty to

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256. The Boyle Court stated: "[t]he first two of these [elements] assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—i.e. they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself." Boyle, 108 S. Ct. at 2518. Thus, the Court stated that weighing several factors necessarily involves discretion, particularly where there is a trade-off between safety and efficiency. Id.

257. See supra notes 138-52 and accompanying text.

258. Boyle, 108 S. Ct. at 2518 (government officer must have "considered" a contractor's specifications).

259. But Boyle does not expressly define what constitutes a government officer's "consider[ing]" a design. See also infra notes 264-67 (discussion of cases on the approval element).

inform the government of risks under the modified defense set forth in Agent Orange Settlement Opinion. In that case, the district court imposed on contractors a greater burden, one heavily influenced by a contractor's expertise, and elevated the contractors' duty to warn based on the technical nature of the product and the fact that the contractors had years of experience with the basic components of the herbicide from civilian production. The district court contemplated that the contractors could have had information that, had it been divulged, might have influenced the government's decisions concerning the use of Agent Orange. Boyle's reliance on the discretionary nature of military design choices implicates the same concerns because the government's review of contractor specifications presupposes that the contractor has applied its expertise to the fullest extent.

Arguably, Boyle rejected the modified defense that emerged from Agent Orange Settlement Opinion, because that defense imposed on contractors a duty to warn that is higher than the McKay standard. Indeed, the majority opinion summarily rejected the Eleventh Circuit formulation of the defense that placed a significantly heavier duty to warn of defects on the contractor. But the modified formulation of the defense may not be

261. The Supreme Court did not rely on any of the Agent Orange litigation as authority for its opinion in Boyle. But see Bynum v. FMC Corp., 770 F.2d 557, 567 n.14, 576 n.29 (5th Cir. 1985) (rejecting modified Agent Orange warning element that was based on a "knew or should have known" standard).

262. See In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 187, 192 (2d Cir. 1987), cert. denied, 108 S. Ct. 2898 (1988). In affirming the district court's grant of summary judgment against the opt-out plaintiffs, the Second Circuit held that under either formulation of the test, the plaintiffs could not overcome the defense. The court declined to discuss which version of the defense applied, relying instead on its rulings that the government's knowledge was at least equal to that of the contractor's and that the lack of any evidence of causality rendered the alleged failure to warn of defects meaningless. Id.

263. Agent Orange Settlement Opinion, 597 F. Supp. 740, 849 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 108 S. Ct. 695 (1988). The modified test would be satisfied if the government's knowledge was at least equal to that of the contractor, or if the government would have ordered production notwithstanding knowledge equal to what "defendant should have had." Id.

264. In contrast, the majority of courts before Boyle required disclosure only of known risks. See Bynum, 770 F.2d at 575-76 n.28.

265. The Eleventh Circuit's Shaw test requires the contractor to warn of defects and alternatives, and further requires that the government expressly accept the risk. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (1985), cert. denied, 108 S. Ct. 2896 (1988). Note that the modified Agent Orange defense resembles the Shaw formulation, particularly with regard to the second clause:

(1) that the government knew as much as or more than [the] defendant knew or reasonably should have known about the dangers of Agent Orange or (2) even if the government had as much knowledge as [the] defendant should have had, it would have ordered production of Agent Orange in any event and would not have taken steps to reduce or eliminate the hazard.

Agent Orange Settlement Opinion, 597 F. Supp. at 849. Even before the Settlement Opinion
so easily explained away. The district court's arguments in Agent Orange Settlement Opinion266 relate quite closely to the Boyle Court's focus upon discretionary functions, in particular the scrutiny of the review process the Court implicitly sanctioned. Because the Boyle Court fashioned a defense that seeks to protect discretionary functions, the modified standard's broader scope of the contractor's duty to warn the government would still appear to be valid.267 The defense depends upon the discretionary review of specifications, and it would not serve that process to allow highly experienced defense contractors to deny the government the benefit of their expertise.

IV. IMPACT

After Boyle, three issues remain open. First, the Court did not clearly determine the status of the Third Circuit's approval standard, inasmuch as it ignored that line of cases. Second, although the Eleventh Circuit intended its formulation of the defense to serve some of the same policy goals as the approach of the Boyle Court, the question remains whether the Court's holding deprives the Eleventh Circuit test of all validity. Third, the decision may encourage the courts to apply the defense to actions brought against contractors in the civilian sector.

A. The Third Circuit

The government contractor defense requires that the defendant show that the contract specifications were established or approved by the government. In Air Crash at Mannheim, the Third Circuit adopted an approach which considers the roles of both the contractor and the government.268 Under this approach, contractor participation in design does not bar the assertion of the defense; for the government's part, its approval must

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266. Agent Orange Settlement Opinion, 597 F. Supp. at 849. The reason for modifying the standard was to prevent encouraging contractors to know as little as possible.

267. The modified defense in the Settlement Opinion is stated in the alternative. Id. at 849. Even if the second clause, which is similar to the Eleventh Circuit defense that was rejected in Boyle, is invalid, then reasoning supporting a "knew or should have known" standard for warnings may nevertheless be valid. There is nothing in Boyle that directly negates the district court's reasoning that the higher standard for warnings is needed to balance the fact of compelled wartime production against contractor experience from the civilian sector. Id.

268. Air Crash at Mannheim, 769 F.2d 115 (3d Cir. 1985), cert. denied, 474 U.S. 1082 (1986). The Third Circuit held that participation by itself did not block the contractor from asserting the defense; nevertheless the court construed the first element to require that the government have participated substantially in setting the specifications for the defense to apply. Id. at 122.
follow substantial review of specifications in order to set up the defense, "mere approval" being insufficient.269

Boyle does not directly address the Third Circuit's line of cases interpreting the first element of the defense.270 The Court's only statement regarding approval of specifications was too general to be instructive.271 Nor did the Court advance reasons why McKay provides a better approach to cases where the level of government review of specifications is at issue.272 Nevertheless, the Court's holding that the FTCA's discretionary function exception defines the scope of federal interest for preemption purposes is

269. Koutsoubos v. Boeing Vertol, 755 F.2d 352 (3d Cir. 1984), cert. denied, 474 U.S. 821 (1985). The greater scrutiny that the Third Circuit gives to the first element of the defense does not appear to be losing any of its impetus. In Powell v. Boeing Vertol Co., No. 84-5503 (E.D. Pa. Dec. 4, 1986) (WESTLAW, DCT database), the action arose out of a military helicopter crash. The apparent cause was pilot error, leading the plaintiff to allege that aural warnings should have been part of the radar altimeter avionic equipment. In granting the defendant's motion for summary judgment, the court applied the Koutsoubos test and found it satisfied because the contract language alone showed that the government had approved the specifications. Id.

270. The Court did not discuss or even cite the Third Circuit cases, which interpret the Agent Orange II defense. These decisions considered the logic of McKay, and did not rely upon the Feres doctrine either for policy or preemption purposes. Not only is it apparent that Boyle did not overrule them, but the Court's holding that discretionary function immunity underlies the federal interest in the government contractor defense supports the Third Circuit's logic. In fact, in rejecting the Shaw test, the Court stated that the discretionary function rationale could apply to designs even when "the contractor rather than" the government developed them. Boyle v. United Technologies, Corp., 108 S. Ct. 2510, 2518 (1988) (emphasis added).

271. The first two elements of the defense "assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself." Id. at 2518. This language, however, does not define what level of review preceding approval is a requisite of the defense.

272. In Trevino v. General Dynamics Corp., 626 F. Supp. 1330 (E.D. Tex. 1986), the court resolved the issue of the military contractor defense against the contractor. In that case, the defendant was under contract with the United States Navy to perform certain modification work to a nuclear submarine. Id. at 1332. Five Navy divers were killed in an airlock which failed to protect them against decompression. The specifications in the contract were quite general thus, whether the government approved the detailed specifications developed by the contractor was a key issue. Id. at 1336. After reviewing the Third Circuit cases, the court ruled that mere approval of the design was insufficient and emphatically concluded that General Dynamics had been responsible for the design defects in question. Id. at 1337.

The court called into question one of the assumptions of the military contractor defense: that issues of design are necessarily beyond judicial review.

Public policy, however, does not require any judicial restraint in this case simply because this Court is not reviewing military decisions relating to the armed forces. The Plaintiffs are not challenging a military decision concerning military operations. The issue is a design decision concerning design defects in the diving hangar aboard the [submarine] made by General Dynamics designers. This was purely a non-military decision requiring no military expertise. Nor was there a conscious decision on the part of the military to accept a known hazard because of military considerations. Id. at 1334. Quite apart from its renewal of the basic Feres logic that military decisions are not reviewable, Boyle's rejection of the Eleventh Circuit test does not necessarily resolve the approval issue. The Third Circuit has emphasized how much review; the Eleventh, what is reviewed.
strongly indicative of an implied endorsement of the Third Circuit. Because discretionary functions are determined by review of the nature of the conduct involved, the approach in *Air Crash at Mannheim* that depends upon substantial review of specifications appears to be consistent with *Boyle*.

**B. Eleventh Circuit**

In *Boyle*, the Court rejected the Eleventh Circuit formulation of the government contractor defense because the court of appeals had not designed it to protect discretionary functions. In *Shaw*, the Eleventh Circuit adopted a defense with two prongs, either of which would have immunized the contractor from suit. Essentially, the defense required that the contractor have participated only minimally in the design process, or that the government gave its express approval to the design after the contractor's disclosure of risks. The Court's criticisms of the *Shaw* defense, however, do not completely account for the concerns raised in the Eleventh Circuit's decision.

The Court's first criticism was apparently directed at *Shaw*'s first prong, which would have been satisfied only if the contractor participated no more than minimally in the design process. It is clear, as the Court stated, that even government design choices that accept specifications developed by a contractor are discretionary decisions. If the government contractor defense is to protect discretionary decisionmaking regardless of the level of contractor participation in the design process, then the key to the defense is the extent of governmental review of contractor proposals. Discretion cannot be protected where it has not in fact been exercised. The Third Circuit approach provides the advantage of specifying the level of contractor participation that the defense will protect. In contrast, *Boyle* leaves it up to the courts to construe whether the government adequately

273. United States v. Varig Airlines, 467 U.S. 797 (1984). The Court stated in *Boyle* that it sought to "protect discretionary functions" by assuring that contractors not withhold "information highly relevant to the discretionary decision." *Boyle*, 108 S. Ct. at 2518. *Boyle* therefore protects federal interests where the approval standard in *Air Crash at Mannheim* necessarily would have to be satisfied, if the government did base its review upon highly relevant information.


276. *Shaw*, 778 F.2d at 746.


278. See, e.g., *Shaw* v. Grumman Aerospace Corp., 778 F.2d 736, 746 n.18. (11th Cir. 1985) ("Where the expertise of the contractor is superior, the military may simply be working in the dark."), *cert. denied*, 108 S. Ct. 2896 (1988).

evaluated the contractor's proposal. Contractors, no matter how intensive their research and development, will assert that their proposals received substantial review prior to approval.

The Court also criticized the second prong of the Eleventh Circuit's Shaw defense which required that the contractor inform the government of risks and then proceed only after receiving the government's express and knowing approval. This scenario clearly falls within the discretionary function exception as defined in United States v. Varig Airlines. But the Court rejected this prong of Shaw as well, stating that it deters participation because the contractor must have identified all design defects to establish the defense. Nevertheless, under Boyle highly knowledgeable defense contractors may still have an increased duty to disclose risks.

In approving the McKay formulation, the Court's key concern was to protect the government's discretionary choices and the contractor input which informs those choices. While Boyle recognized that the contractor's expertise is important in military procurement, the Court did not discuss whether increased participation in design or experience with the type of product in question should trigger a higher duty to warn. The modified defense that arose from the Agent Orange litigation, in fact, applies where the contractor had years of experience with a highly technical product. In that situation, the contractor participation sought to be protected in Boyle may well have occurred during the contractor's prior experience. Failing to impose a higher duty to warn on such a contractor thus can have the perverse result of encouraging the government, in the interest of being fully informed, of contracting with less technically sophisticated manufacturers.

280. Shaw, 778 F.2d at 746.
281. 467 U.S. 797, 813 (1984). The Court did not suggest otherwise, and instead based its criticism on protection of contractor incentives to contribute to the design process. Interestingly, however, the contractor's duty to inform the government would not necessarily be identical to its duty under the contract, but neither would it necessarily be contrary—a situation the court earlier had stated was insufficient to justify preemption of state law. Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2516 (1988).
282. Id. at 2518 ("While 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' exception.").
283. Boyle explained the warning, or third element as encouraging the contractor to divulge "knowledge of risks," and to provide "information highly relevant to the discretionary decision." Id. at 2518.
284. Agent Orange Settlement Opinion, 597 F. Supp. 740, 849 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 108 S. Ct. 695 (1988). The defense in this form was not linked to the contractor's "years of experience" deriving from civilian production, although the court did contrast the case to actions involving primarily military products, or civilian products modified for military use. The court instead described technical expertise with the components of the Agent Orange herbicide acquired during civilian production. Cf. Bynum v. FMC Corp., 770 F.2d 556, 567 n.14, 576 n.29 (5th Cir. 1985) (not rejecting modified defense, but finding it inapplicable, because Army lab had designed vehicle in question).
Like the Shaw rule that the Court rejected, the Agent Orange Settlement Opinion modified defense was stated in the alternative. Either the contractor could prove that the government knew as much or more about risks of the product as the contractor knew or should have known, or the contractor could establish that even if the government had equal knowledge, it nevertheless would have ordered production.285 Thus, the Court’s criticism that the Shaw test puts contractors unduly at risk286 does not necessarily apply to those contractors possessing a high degree of technical knowledge. The Shaw rule works no greater hardship on such contractors than the “knew or should have known” standard.

Both Shaw and the defense in Agent Orange Settlement Opinion apply to situations where the government makes a clear choice to proceed once informed of risks.287 Particularly in the procurement of technically complex equipment, the government contractor defense can best protect the federal interest in discretionary choices if the government can rely on contractors who share in the benefit of their knowledge. The Supreme Court did reject the Shaw formulation, but because the Court did not refer to the modified defense, the courts will continue to be confronted with the argument that a more stringent warning standard should be imposed upon contractors.

C. Civilian Contractors

Early cases applying the government contractor defense arose in the civilian sector;288 those decisions were based on extending the precursors of the defense to government contracting. McKay, however, dealt with military equipment, both in reasoning and in formulation of defense.289 Moreover, Boyle clearly was concerned principally with military procurement.290 Because the defense developed in the context of military procure-

285. Agent Orange Settlement Opinion, 597 F. Supp. at 849. The contractor would still be required to prove the first two elements of the defense; only the third was modified.
287. Compare Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985) (second part of second prong requiring government ordering production after contractor’s disclosure of risk), cert. denied, 108 S. Ct. 2896 (1988) with Agent Orange Settlement Opinion, 597 F. Supp. at 849 (modified third element of defense; second alternative provides that even with knowledge equal to that of contractors, the government would have ordered production).
ment, it is not surprising that the applicability of the defense to civilian contractors has been unclear. 291

The question remains whether Boyle's focus on military procurement will narrow the defense and preclude its continuing assertion by civilian contractors. Courts have applied the various formulations of the defense to claims arising in the civilian sector, 292 and more recent cases have found that in material respects the civilian context also justifies allowing the contractor to establish the defense. 293 Because the Court's approach in Boyle was to relate the elements of the defense to the need to protect discretionary functions, it therefore appears that the defense will continue to apply to civilian contractors as well.

V. Conclusion

Boyle is more significant than a decision which merely selected a particular formulation of the government contractor defense from among the various statements of the defense available in the circuit courts of appeals. The Supreme Court held that the federal interest in procurement of military equipment justifies displacement of state law in favor of federal common law. The Court based the scope of federal preemption on discretionary function immunity under the FTCA, rather than on the Feres doctrine. The elements of the defense, taken from the Ninth Circuit's decision in McKay, are keyed to government establishment or approval of reasonably precise specifications once the contractor has divulged information about risks otherwise unknown to the government.

Yet Boyle does not answer in detail the question of what the government must do to adopt as its own a set of specifications developed by a contractor. Further, it does not relate the McKay defense to the modified formulation that developed in the federal courts in Agent Orange Settlement Opinion. While it settled broader principles, Boyle leaves it to lower courts to interpret the requisites for establishing the elements of the defense. Whether contractors are better protected if they seek detailed or cursory review of their proposals, submitted upon complete or lesser disclosure of risks, is a matter that awaits decisions applying the defense.

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292. E.g., Price v. Tempo, Inc., 603 F. Supp. 1359, 1364 (E.D. Pa. 1985) (insufficient showing pursuant to Third Circuit approach that government's knowledge equal or superior to defendants' concerning risks of firefighters' gear reason to deny summary judgment to defendant).

293. Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985) (government contractor defense not limited to military). See also Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986) (application to civilian relationships well-established).