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Boyle v. United Technologies Corp.: New Ground for the Government Contractor Defense

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Boyle v. United Technologies Corp.: New Ground for the Government Contractor Defense

In the past decade manufacturers of military equipment have benefited from a defense premised on the "sharing" of the United States' immunity to suit.[1] This defense, which courts have given a variety of names,[2] developed in response to products liability claims challenging the design of equipment sold to the United States. The government contractor defense generally has protected military contractors by extending the United States' immunity to suit by members of the armed forces under the *Feres-Stencel* doctrine.[3]

Since 1983 a majority of circuit courts of appeals have recognized the government contractor defense based on *Feres-Stencel*. Despite this consensus, the circuits have disagreed about the exact elements of the defense and its application. In addition, the very reasoning behind the government contractor defense has been sharply criticized.[4] The Supreme Court recently entered the controversy surrounding government contractor liability in *Boyle v. United Technologies Corp.*[5] Although the Court upheld the government contractor defense, it rejected the *Feres-Stencel* doctrine as its basis. The Court relied instead on a broader category of sovereign immunity—the discretionary function exception to the Federal Tort Claims Act.[6]

This Note outlines the pre-*Boyle* status of the government contractor defense and analyzes the reasoning of the Supreme Court's decision. The Note argues that the transition to discretionary function immunity as the basis for insulating government contractors from liability provides the defense with logical consistency and strength. The Note concludes that the reasoning employed in *Boyle* will facilitate extending the government contractor defense to nonmilitary government contractors, and that the hardships worked by the defense result inevitably from its origin in discretionary function immunity.

David A. Boyle, a United States Marine Corps lieutenant and helicopter copilot, died on April 27, 1983, when his CH-53D helicopter crashed off the

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1. *See* Note, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity after* McKay v. Rockwell International Corp., 37 BAYLOR L. REV. 181 (1985) [hereinafter Note, *Sharing the Protective Cloak*]. Commentators have maintained steadfastly that the government contractor defense is actually a form of extended or "shared" sovereign immunity even though it operates as an affirmative defense. *E.g.*, Turner & Sutin, *The Government Contractor Defense: When Are Manufacturers of Military Equipment Shielded from Liability for Design Defects?*, 52 J. AIR L. & COM. 397 (1986); Note, *The Government Contract Defense in Product Liability Suits: Lethal Weapon for Non-Military Government Contractors*, 37 SYRACUSE L. REV. 1131 (1987) [hereinafter Note, *Lethal Weapon*].

2. *See, e.g.*, Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 (11th Cir. 1985) ("military contractor defense"), *cert. denied*, 108 S. Ct. 2896 (1988); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983) ("government contractor defense"), *cert. denied*, 464 U.S. 1043 (1984); *In re* "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1053 (E.D.N.Y. 1982) ("government contract defense").

3. For a discussion of the *Feres-Stencel* doctrine, see *infra* notes 37-42 and accompanying text.

4. *See Shaw*, 778 F.2d at 745; *infra* notes 67-72 and accompanying text.

5. 108 S. Ct. 2510 (1988).

6. *Id.* at 2517-18; *see infra* note 22 and accompanying text.

coast of Virginia during a training exercise.[7] Boyle and the helicopter's three other crew members survived the impact of the crash. The other three crew members reached safety through emergency exits; Boyle did not and drowned.[8] An investigation after the crash suggested that Boyle did not escape either because equipment obstructed access to the copilot's emergency escape handle, or because the hatch itself opened outward, rendering it useless in an ocean crash.[9]

Boyle's father brought a state wrongful death action against Sikorsky Division of United Technologies Corporation (Sikorosky), which manufactured the helicopter for the United States. Boyle sought to recover on theories of products liability[10] and negligent repair.[11] At trial in the Federal District Court for the Eastern District of Virginia the jury returned a general verdict in favor of Boyle and awarded him $725,000 in damages.[12] The United States Court of Appeals for the Fourth Circuit reversed, invoking the "military contractor defense"[13] it had announced the same day in *Tozer v. LTV Corp.*[14] In *Tozer* the Fourth Circuit adopted the formulation of the military contractor defense the Ninth Circuit had set forth in *McKay v. Rockwell International Corp.*[15] By adopting the *McKay* formulation, the Fourth Circuit joined the majority view of the defense.[16]

Boyle petitioned the Supreme Court for certiorari, challenging the authority of the court of appeals to recognize the defense in the absence of federal legislation,[17] the *McKay* formulation of the defense adopted in *Tozer*,[18] and the

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

8. *Id.*

9. The testimony of the surviving crew members indicated that the helicopter rolled to the copilot's side upon impact and began taking on water. Petition for Writ of Certiorari at 12, *Boyle* (No. 86-492).

10. Boyle alleged two design defects in support of his products liability claim: first, the flight control system lacked an override mechanism to contend with failure of the main system; and second, the outward action of the escape hatch rendered the craft uncrashworthy over water. *Id.* at 9-12.

11. The cause of the crash itself presumably was a metal chip that contaminated the servo, a part of the helicopter's automatic flight system. Boyle contended that this chip entered the system during repairs Sikorsky had performed for the United States. *Id.* at 5-8.

12. Boyle v. United Technologies Corp., 792 F.2d 413, 413 (4th Cir. 1986), *aff'd*, 108 S. Ct. 2510 (1988).

13. *Id.* at 416. The Fourth circuit reversed the district court's denial of Sikorsky's motion for J.N.O.V.

14. 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied*, 108 S. Ct 2897 (1988). The same day it decided *Boyle* and *Tozer*, the Fourth Circuit handed down Dowd v. Textron, Inc., 792 F.2d 409 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988), a third case involving the defense. In all three cases the court reversed a jury verdict in favor of the plaintiff on the basis of the newly announced defense.

15. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). For a discussion of *McKay*, see *infra* notes 25-54 and accompanying text.

16. *See* Bynum v. FMC Corp., 770 F.2d 556, 574 (5th Cir. 1985) (adopting a test substantially similar to *McKay*); *In re* Air Crash Disaster, 769 F.2d 115, 121-23 (3d Cir. 1985) (same), *cert. denied*, 474 U.S. 1082 (1986); Tillet v. J.I. Case Co., 756 F.2d 591, 600 (7th Cir. 1985) (adopting the *McKay* defense exactly); Koutsoubos v. Boeing Vertol, 755 F.2d 352, 355 (3rd Cir. 1985) (same), *cert. denied*, 474 U.S. 821 (1985). *But see* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 795 (11th Cir. 1985) (rejecting *McKay*), *cert. denied*, 108 S. Ct. 2896 (1988).

17. Reply Brief for Petitioner at 4-10, *Boyle* (No. 86-492).

18. *Id.* at 18-20.

application of the defense to the facts in *Boyle*.[19] Writing for the five-four majority, Justice Scalia affirmed the federal courts' power to preempt state tort law in the area of government procurement contracts.[20] The Court then adopted the critical elements of the *McKay* defense while rejecting its reasoning.[21] In its place the Court adopted a new justification for the defense based on the discretionary function exception to the Federal Tort Claims Act.[22]

Prior to the Supreme Court's decision in *Boyle* nearly every jurisdiction to consider the issue of government contractor liability had acknowledged some form of defense available to manufacturers of equipment designed by the government.[23] A majority of jurisdictions recognizing the defense followed the *McKay* formulation.[24].

McKay arose out of the deaths of two Navy pilots in unrelated accidents involving RA-5C "Vigilante" airplanes manufactured by Rockwell International.[25] Autopsies of the two pilots suggested that injuries sustained during ejection caused their deaths.[26] The pilots' widows brought wrongful death actions premised on negligence, breach of warranty, and strict liability under the

19. *Id.* at 13-15. Although the Supreme Court in *Boyle* upheld the government contractor defense itself, it noted that the court of appeals' opinion did not clarify whether the court had determined that no reasonable jury could find for the defendant, or whether the court incorrectly had conducted its own evaluation of the evidence supporting the defense. The court therefore remanded the case for resolution of this point. *Boyle*, 108 S. Ct. at 2519.

20. *Id.* at 2513-15; *see infra* notes 77-108 and accompanying text. Chief Justice Rehnquist and Justices Kennedy, O'Connor, and White joined Justice Scalia's opinion. Justices Marshall and Blackmun joined the dissent filed by Justice Brennan. Justice Stevens filed a separate dissent. For a discussion of the dissents see *infra* notes 88, 96 & 128 and accompanying text.

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

22. *Id.* at 2518. The Federal Tort Claims Act waives the federal government's general sovereign immunity. The Act reserves specific exceptions to the consent to suit, including the exception for suits "based upon the performance . . . [of] a discretionary function." 28 U.S.C. § 2680(a) (1982). *See generally* Berkovitz v. United States, 108 S. Ct. 1954, 1958-60 (1988) (discussing scope of discretionary function exception); Indian Towing Co. v. United States, 350 U.S. 61, 64-69 (1955) (same); Dalehite v. United States, 346 U.S. 15, 26-36 (1953) (same).

23. *See, e.g.*, Tozer v. LTV Corp., 792 F.2d 403, 409 (4th Cir. 1986) (applying *McKay* defense), *cert. denied*, 107 S. Ct. 2897 (1988); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 745-46 (11th Cir. 1985) (setting forth a distinct form of the defense), *cert. denied*, 108 S. Ct. 2896 (1988); *In re* Air Crash Disaster, 769 F.2d 115, 122-23 (3d Cir. 1985) (applying a defense substantially similar to *McKay*), *cert. denied*, 474 U.S. 1092 (1986); Tillet v. J.I Case Co., 756 F.2d 591, 600 (7th Cir. 1985) (applying *McKay* defense); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983) (setting forth government contractor defense), *cert. denied*, 464 U.S. 1043 (1984); Johnston v. United States, 568 F. Supp. 351, 356 (D. Kan. 1983) (acknowledging a defense but upholding liability); *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 737, 792-94 (E.D.N.Y. 1979) (same), *rev'd*, 685 F.2d 987 (2d Cir. 1980) *cert. denied*, 454 U.S. 1128 (1981); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 8-9, 364 A.2d 43, 46-47 (App. Div. 1976) (articulating a defense), *aff'd*, 154 N.J. Super. 407 (App. Div. 1977), *certification denied*, 75 N.J. 616, 384 A.2d 846 (1978). *But see* Challoner v. Day & Zimmermann, Inc., 512 F.2d 77, 83 (5th Cir.) (refusing to recognize a defense), *vacated on other grounds*, 423 U.S. 3 (1973).

24. *See supra* note 23. For a discussion of the development of the government contractor defense before *McKay*, see Note, *Sharing the Protective Cloak*, *supra* note 1, at 183-98; Note, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. REV. 1025, 1032-64 (1982) [hereinafter Note, *Liability of a Manufacturer*]; Note, McKay v. Rockwell International Corp.: No Compulsion Required For Government Contractor Defense, 28 ST. LOUIS U.L.J. 1061, 1069-73 (1984) [hereinafter Note, *No Compulsion Required*]; Note, *Lethal Weapon*, *supra* note 1, at 1133-43.

25. *McKay*, 704 F.2d at 446.

26. *Id.*

Death on the High Seas Act.[27] The trial court imposed liability for the design of the ejection system and awarded plaintiffs modest damages.[28] The United States Court of Appeals for the Ninth Circuit reversed, adopting the "government contractor defense."[29]

The *McKay* court cited *Yearsley v. Ross Construction Co.*[30] as the source of the defense.[31] In *Yearsley* the Supreme Court announced the existence of a government contractor defense in cases involving public works projects.[32] *McKay* combined the *Yearsley* defense with the generic contract specification defense[33] to create a new defense specific to military equipment contractors.[34]

The defense announced in *McKay* provides that a manufacturer shall not be liable for product design when it can demonstrate that

> (1) the United States is immune from liability under *Feres* and *Stencel* [immunity requirement], (2) . . . the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment [approval requirement], (3) the equipment conformed to those specifications [conformity requirement], 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 [disclosure requirement].[35]

These four elements reflect the *McKay* court's primary justification for the defense the *Feres-Stencel* doctrine.[36]

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27. 46 U.S.C. §§ 761-68 (1982) (granting federal jurisdiction for claims arising out of deaths that occur more than one marine league from United States territory).

28. *McKay*, 704 F.2d at 447.

29. *Id.* at 455. The court remanded the case for a determination of the defense's application to the facts. Judge Alarcon dissented, questioning strongly the reasons for the decision. He reasoned that manufacturers with good safety records would obtain liability insurance at a lower rate than their competitors with worse records. Lower liability insurance costs would lead to lower bids, which the government could then pursue. *Id.* at 456-64 (Alarcon, J., dissenting); *see* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741-43 (11th Cir. 1985) (reiterating bases for the *McKay* dissent), *cert. denied*, 108 S. Ct. 2896 (1988).

30. 309 U.S. 18 (1940).

31. *McKay*, 704 F.2d at 448.

32. *Yearsley*, 309 U.S. at 23. *Yearsley* involved the erosion of private property caused by dikes the defendant constructed for the United States. The property owner sought to recover under the takings clause of the fifth amendment. The Court imposed no liability on the ground that the defendant had constructed the dikes according to government plans. The *Yearsley* defense was subsequently used in similar public works cases. *See, e.g.*, Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963) (road construction); Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14, 15-17 (9th Cir. 1961) (dam construction); O'Grady v. City of Montpelier, 474 F. Supp. 186, 187-88 (D. Vt. 1979) (road construction); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965) (river dredging).

33. The contract specification defense bars manufacturer liability for the negligent design of a product when the manufacturer complied with specifications supplied by a party with superior knowledge in the field. *See* Note, *Liability of a Manufacturer*, *supra* note 24, at 1032-55 (comparing contract specification defense with government contractor defense); Note, *No Compulsion Required*, *supra* note 24, at 1069-73 (same).

34. *McKay*, 704 F.2d at 448-49; *see* Tillet v. J.I. Case Co., 756 F.2d 591, 596-97 (7th Cir. 1985) (discussion of the overlapping between the government contractor defense and the contract specification defense in *McKay*); Bynum v. FMC Corp., 770 F.2d 556, 564-67 (5th Cir. 1985) (same).

35. *McKay*, 704 F.2d at 451.

36. *Id.* at 448-49.

In *Feres v. United States*[37] the Supreme Court held that the Federal Tort Claims Act did not waive the federal government's sovereign immunity with regard to injuries suffered by United States military personnel in the course of service.[38] The *Feres* Court justified this limited immunity by the unique relationship between the government and members of its armed forces.[39]

Stencel Aero Engineering Corp. v. United States[40] extended *Feres* to insulate the government from indemnification of military equipment manufacturers for their liability to members of the United States armed forces. The *Stencel* Court reasoned that indemnification of manufacturers would counteract the government's immunity from direct liability to military personnel.[41] The Court also stressed the need to maintain military discipline and to prevent judicial "second-guessing [of] military orders"[42] as justifications for the government's immunity.

The *McKay* court noted several *Feres-Stencel* rationales supporting the government contractor defense. The most important of these rationales was the separation of powers concern stressed in *Stencel*—prevention of judicial interference in military affairs.[43]

The *McKay* court also cited *Stencel*'s reasoning in favor of extending *Feres* as support for the government contractor defense. Like indemnification of military equipment manufacturers, argued the court, government contractor liability ultimately would result in the government's bearing the costs prohibited by *Feres*.[44] Government contractors would "pass-through" the costs of liability in their initial contract price by including the cost of liability insurance.[45] This

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37. 340 U.S. 135 (1950).

38. *Id.* at 146. Under the doctrine of sovereign immunity, the federal government cannot be sued without the consent of Congress. *See* Note, *Rethinking Sovereign Immunity After* Bivens, 57 N.Y.U. L. REV. 597, 599 (1982). Congress granted such consent subject to several important exceptions in the Federal Tort Claims Act. *See* 28 U.S.C. § 2680(a) (1982).

The principle of governmental or sovereign immunity derives from the misunderstood English maxim, "The King can do no wrong." *See generally* Note, *supra*, at 601-22 (discussing the history of sovereign immunity). The United States Supreme Court adopted the concept in the nineteenth century. *See* Gibbons v. United States, 75 U.S. (8 Wall.) 269, 274-76 (1868). In Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964), the court summarized the reasons for the defense as follows:

> If a King, or a city council, is to do the job of governing well, then there is something to be said for withholding the threat of answerability in damages for at least some of the actions and decisions which governing necessarily entails. He who rules must make choices among competing courses of action and in the face of conflicting considerations of policy. The capacity and incentive to govern effective are arguably not enhanced by the prospect of being sued by those citizens who may be adversely affected by the choice eventually made. Thus it has been thought wise to sweep this restrictive cloud from the horizon and to let those responsible for the conduct of public affairs calculate their courses of action free of this intimidating influence.

Id. at 154.

39. *Feres*, 340 U.S. at 143.

40. 431 U.S. 666 (1977).

41. *Id.* at 673.

42. *Id.*

43. McKay v. Rockwell Int'l Corp., 444, 449-50 (9th Cir. 1983) ("[T]o hold military suppliers liable for defective designs where the United States set or approved design specifications would thrust the judiciary into the making of military decisions."), *cert. denied*, 464 U.S. 1043 (1984).

44. *Id.* at 449.

45. *Id.*

result would undermine the *Feres* immunity; therefore the court adopted the government contractor defense to protect the interests underlying *Feres* and *Stencel*.[46]

McKay identified several justifications for the government contractor defense in addition to furthering *Feres-Stencel*. These justifications grow out of the military's special need to accelerate the development of new technology in the interest of national defense.[47] This need requires the government to incur risks that would be unacceptable in the consumer market. The *McKay* court argued that when the government actively assumes such risks through contract specifications, it would be unfair to hold the manufacturer liable for defects or dangers in the design.[48] Furthermore, the existence of a defense premised on cooperation with military experts would encourage military contractors to work closely with the government to develop new equipment.[49]

Having justified the government contractor defense, the *McKay* court set forth the defense's four elements intended to isolate cases implicating the defense's *Feres-Stencel* basis.[50] The *McKay* court expressly rejected other cases that required the contractor to demonstrate government compulsion regarding the dangerous aspect of the design.[51] Instead, the court required only government "approval" of "reasonably precise specifications" to raise the defense.[52] The *McKay* court specifically excepted from the operation of the defense cases involving "defects in the manufacture" of equipment.[53] This exception merely reiterated the requirement that the equipment conform to government specifications, because manufacturing defects *by definition* constitute nonconformance with the design.

The Ninth Circuit did not have to resolve a preemption issue to decide *McKay* because of its earlier decision that the Death on the High Seas Act pro-

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46. *Id.*

47. *Id.* at 449-50.

48. *Id.* at 450.

49. *Id.* This reasoning was criticized in Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988). The court in *Shaw* commented,

> We find the last *McKay* rationale—the notion that the military contractor defense encourages the military and its suppliers to work closely together, thereby making it easier to discover who is responsible for product design—somewhat inscrutable. Indeed, on the contrary, our experience is that the more closely the contractor and the military work together, the more difficult it is to determine exactly who made the design decisions.

Id. at 743.

50. *McKay*, 704 F.2d at 451; *see supra* text accompanying note 35 (enumerating the four elements of the government contractor defense).

51. *McKay*, 704 F.2d at 450-51. The compulsion requirement was set forth in Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14, 16 (9th Cir. 1961) and O'Keefe v. Boeing Co., 335 F. Supp. 1104, 1124 (S.D.N.Y. 1971); *see also* Brown v. Caterpillar Tractor Co., 696 F.2d 246, 253-54 (3d Cir. 1982) (requiring that contractor must "execute the government specifications carefully"); Johnston v. United States, 568 F. Supp. 351, 356 (D. Kan. 1983) (requiring that the government specifications expressly call for the injury-causing feature of the product for the defense to operate); Note, *No Compulsion Required*, *supra* note 24 (discussing generally *McKay* and the compulsion requirement).

52. *McKay*, 704 F.2d at 451.

53. *Id.*

vides an exclusive remedy displacing state law.[54] To insulate government contractors, however the defense would have to apply to claims premised on state tort law. A later case before the United States Court of Appeals for the Fifth Circuit, *Bynum v. FMC Corp.*,[55] resolved the preemption issue.

Bynum involved a products liability suit brought under Mississippi law by a member of the state's National Guard.[56] The district court granted summary judgment for FMC based on its conclusion that Mississippi would accept the government contractor defense.[57] On appeal the Fifth Circuit declined to review the district court's state law decision. Instead, it adopted the *McKay* government contractor defense as a matter of federal law that preempted state tort law.[58] The *Bynum* court's reasoning in favor of preemption substantially paralleled the *McKay* court's *Feres-Stencel* basis for the defense itself.[59]

The *Bynum* court began with the threshold question in any nonstatutory preemption inquiry—whether the case involves a "uniquely federal" interest.[60] The court pointed to the *Feres* underpinnings of the *McKay* defense to demonstrate the defense's connection to a strong federal interest.[61] Noting that the primary goal of the government contractor defense is to avoid judicial interference in military decision making, the *Bynum* court argued that the same concern mandated federal preemption of state products liability law in suits against government contractors:

> The plenary control of military judgments by the legislative and executive branches of the federal government, however, is more than a separation of powers concern. The composition, training, equipping and management of our military is a matter exclusively within the rights and duties of the federal government and, as a result, any interference with federal authority over national defense and military affairs implicates uniquely federal interests of the most basic sort.[62]

Although the *Bynum* court stated that protection of the federal government's exclusive authority in military matters in and of itself warranted displacing state law,[63] the court went on to examine the effect of preemption on state

54. Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77, 80 (9th Cir. 1983) (preemption of state wrongful death claim necessary to achieve uniformity). The federal courts are divided on whether the Death on the High Seas Act displaces state tort law. *See* Comment, *Admiralty: Conflict of Law on the High Seas—The States and Death on the High Seas Act*, 59 TULANE L. REV. 1487, 1494-1512 (1985).

55. 770 F.2d 556 (5th Cir. 1985).

56. Plaintiff sustained severe injuries during a training exercise at Fort Stewart, Georgia, when the M-548 cargo carrier in which he was riding swerved off a bridge into a creek. *Id.* at 558.

57. *Id.* at 560.

58. *Id.* at 566.

59. *See id.* at 560-63; *McKay*, 704 F.2d at 448-51.

60. *See Bynum*, 770 F.2d at 568; *see also* Texas Indus., Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 640 (1981) (uniquely federal interest in antitrust enforcement); Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1323 (5th Cir. 1985) (en banc) (no uniquely federal interest in asbestos litigation).

61. *Bynum*, 770 F.2d at 569. The Supreme Court rejected *Feres-Stencel* as the basis for preemption in *Boyle*. See discussion *infra* notes 77-86 and accompanying text.

62. *Bynum*, 770 F.2d at 569.

63. *Id.*

interests. The *Bynum* court first pointed out that a majority of courts to consider the issue had adopted the government contractor defense as state law.[64] The court then reviewed the arguments favoring strict products liability and found them lacking in the nonconsumer context of government procurement contracts.[65] For these reasons the court concluded that state interests would not suffer from preemption by the government contractor defense.[66]

Not every court to consider the government contractor defense has accepted *McKay* and *Bynum*. In *Shaw v. Grumman Aerospace Corp.*,[67] the United States Court of Appeals for the Eleventh Circuit strongly criticized both decisions. *Shaw* rejected *McKay*'s pass-through cost rationale on the ground that competitive bidding would prevent such costs from reaching the government.[68] Even if such costs did reach the government, argued the *Shaw* court, pass-through of the cost of liability insurance represents a more favorable method of cost transfer than indemnification. The court concluded that the cost dispersing effect of liability insurance renders *McKay*'s analogy to *Stencel* inaccurate.[69]

The *Shaw* court also noted that *McKay*'s position on pass-through costs was inconsistent with regard to costs of liability resulting from defects in manufacture.[70] To reflect *Feres-Stencel* accurately, the defense should apply whenever the government enjoys immunity. Under the *McKay* rule a United States serviceman injured as a result of a mistake in *manufacture* could recover from

64. *Id.* at 571 (citing Tillet v. J.I. Case Co., 756 F.2d 591, 599-600 (7th Cir. 1985); Brown v. Caterpillar Tractor Co., 696 F.2d 246, 249-54 (3d Cir. 1982); Hunt v. Blasius, 55 Ill. App. 3d 14, 21, 370 N.E.2d 617, 622 (1977), *aff'd*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 5, 364 A.2d 43, 46 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407 (App. Div. 1977), *certification denied*, 75 N.J. 616, 384 A.2d 846 (1978); Casabianca v. Casabianca, 104 Misc. 2d 348, 350, 428 N.Y.S.2d 400, 402 (N.Y. Sup. Ct. 1980)).

65. *Id.* The *Bynum* court listed four principal reasons for strict products liability: theories of enterprise liability, market deterrence, compensation, and implied representation of safety. The court dismissed the first two reasons as inapplicable because of the "inelastic" market for military hardware and the government's interest in acquiring a specific piece of equipment at a reasonable price. Compensating an injured serviceman does not require strict liability because the Veteran's Benefits Act already provides guaranteed recovery. Finally, theories of warranty do not apply. According to the court, military servicemen, unlike normal consumers using commercial goods, do not have an expectation of safety with regard to the equipment they use. *Id.* at 371-72.

The *McKay* court engaged in a similar analysis in considering the government contractor defense's application to federal claims. *See McKay*, 704 F.2d at 451-53.

66. Judge Pratt reached a similar conclusion in *In re* "Agent Orange" Product Liability Litigation, 506 F. Supp. 737, 746 (E.D.N.Y. 1979), *rev'd*, 635 F.2d 987 (2d Cir. 1980). *"Agent Orange"* concerned a class action suit brought on behalf of Vietnam veterans against manufacturers of Agent Orange, a chemical defoliant containing dioxin. Judge Pratt found the following federal interests implicated in the suit: the government's relationship with and responsibility toward its soldiers, the government's future relations with contractors, and the large number of veterans potentially included in the class. *Id.* at 746-47. *See* How-Downing, *The Agent Orange Litigation: Should Federal Common Law Have Been Applied?*, 10 ECOLOGY L.Q. 611 (1983); Comment, *In re* "Agent Orange" Product Liability Litigation: *Limiting the Use of Federal Common Law as the Basis for Federal Question Jurisdiction in Private Litigation*, 48 BROOKLYN L. REV. 1027 (1982); Note, *The Pratt-Weinstein Approach to Mass Tort Litigation*, 52 BROOKLYN L. REV. 455, 463-69 (1986).

67. 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988).

68. *Id.* at 742. In this context the *Shaw* opinion echoed the criticisms of the dissent in *McKay*. *See supra* note 29 (discussing the *McKay* dissent).

69. *Shaw*, 778 F.2d at 742.

70. *Id.* at 742, n.10.

the equipment supplier.[71] *Feres*, on the other hand, bars recovery by military personnel against the government regardless of whether a design defect or defective manufacture caused the injury. Thus, the *McKay* test only partially succeeds in preventing the pass-through of costs not permissible against the government directly under *Feres*.[72]

Having rejected *McKay*'s reasons for the government contractor defense, the *Shaw* court relied exclusively on separation of powers to tailor its version of the defense.[73] In accordance with this narrower basis, *Shaw* argued for a greater degree of required government involvement in the equipment specifications greater than "approval" as permitted under *McKay* and subsequent cases.[74] The court in *Shaw* sought to ensure that the government, not the contractor, was primarily responsible for the design in every stage of development.[75]

The *Shaw* court also advocated a strict disclosure standard. The court contended that manufacturers ought to be held to the standard of reasonable knowledge within the field with regard to both risks and alternative designs in order to promote informed military decision making.[76] The *Shaw* court therefore developed a restricted form of the government contractor defense to correspond to its narrower justification for the defense.

Shaw, *Bynum*, and *McKay* framed the issues for Supreme Court review of the government contractor defense. These issues presented in *Boyle* were: whether the government contractor defense preempts state tort law, the bases for the defense, the requisite level of government involvement in design, and the standard for contractor disclosure of risks under the defense. The Court resolved the first two issues but left some ambiguity about the remaining two. In addition, the decision redirected the focus of the defense away from furthering *Feres-Stencel* to protecting governmental discretionary functions. This new ba-

71. *See McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 453 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

72. The Supreme Court implicitly agreed with this criticism in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2517 (1988). In *Boyle* the Court called the test elements for the defense in *McKay* "inexplicable" if *Feres* serves as the justification of the defense. *Id.*

73. *Shaw*, 778 F.2d at 743.

74. *Id.* at 745-46; *cf.* Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986) (same), *cert. denied*, 108 S. Ct. 2897 (1988); Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985) (same); Koutsoubos v. Boeing Vertol, 755 F.2d 352, 355 (3d Cir.) (requiring that the government "establish" design specifications but construing establishment of design to include approval of design), *cert. denied*, 474 U.S. 821 (1985); *McKay*, 704 F.2d at 451 (requiring government approval of design). *But see* Schoenborn v. Boeing Co., 586 F. Supp. 711, 718 (E.D. Pa. 1984) (rejecting the lenient "approval" standard), *rev'd*, 769 F.2d 115 (1985), *cert. denied*, 474 U.S. 1082 (1986). For a discussion of the merits of the "approval" standard versus the "establishment" standard, see Turner & Sutin, *supra* note 1, at 397; Note, *Sharing the Protective Cloak*, *supra* note 1, at 200-01.

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

76. *Id.* at 745. The *Shaw* version of the government contractor defense specifically would require a manufacturer to prove one of two alternatives:

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

Shaw, 778 F.2d at 746.

sis for the defense extends its scope and increases the likelihood of further extending the defense by analogy.

The *Boyle* majority first upheld the Fourth Circuit's holding that the government contractor defense preempts state tort law.[77] The Court concluded that the government contractor defense encompasses issues of "uniquely federal" concern that warrant preemption even in the absence of express legislation.[78] The *Boyle* Court, however, did not identify *Feres* and *Stencel* as the implicated federal interests. Instead, the Court based its decision on two traditional areas of preemption: the rights of the United States under its contracts and the liability of federal employees for actions taken in the course of their employment.

First, the Court noted that federal law exclusively governs the rights and obligations of the United States under its contracts.[79] Conceding that *Boyle* involved the tort liability of a government contractor to a third party, the Court maintained that the case nevertheless implicated the government's rights under its contracts.[80] Pointing to the now defunct requirement of privity to recover against the manufacturer of a product,[81] the Court emphasized the relationship between the contract and liability—performance of the contract gives rise to tort liability.[82]

The *Boyle* Court also drew a parallel between government contractor liability and the civil liability of federal employees for actions taken in the course of their official duties. The Court concluded that although the defendant in *Boyle* was a private contractor rather than a federal official, the case involved "the same interest in getting the Government's work done."[83] Citing *Yearsley*, the public works case relied upon in *McKay*,[84] the Court commented that *Yearsley* had come close to holding that a contractor is entitled to the immunity enjoyed by federal employees.[85] The Court found no reason to distinguish between performance contracts and procurement contracts and concluded that the logic employed in *Yearsley* applied in *Boyle* as well.[86]

The Court next argued that *Boyle* and suits like it potentially implicate important federal interests embodied in the terms of its procurement contracts. Contractor liability to third persons would directly affect the government's ability to dictate the terms of future contracts: "[E]ither the contractor will decline to manufacture the design specified by the Government, or it will raise its price.

77. *Boyle*, 108 S. Ct. at 2513-15.

78. *Id.* at 2515-16.

79. *Id.* at 2514.

80. *Id.*

81. Virginia required privity between the plaintiff and the seller to recover in a design defect suit until 1962. *Id.* (citing General Bronze Corp. v. Kostopolus, 203 Va. 66, 69-70, 122 S.E.2d 548, 551 (1961)). The state legislature officially eliminated this requirement in 1965. *See* VA. CODE ANN. § 8.2-318 (1965).

82. *Boyle*, 108 S. Ct. at 2514.

83. *Id.* at 2515.

84. *See supra* notes 30-32 and accompanying text.

85. *Boyle*, 108 S. Ct. at 2514-15.

86. *Id.*

Either way, the interests of the United States will be directly affected."[87] The Court concluded that government contractor liability constitutes an area of uniquely federal interest by virtue of its proximity to other areas of federal concern and its capacity to affect the terms of government contracts.[88] For this reason, *Boyle* fell within the narrow category of cases that call for federal common law.

The Court next had to determine whether the government contractor area requires displacement of state law because some of its prior decisions had incorporated state law as the federal common law.[89] To resolve this question the Court examined whether the case presented a "significant conflict" between a federal policy and the operation of state law in the area of uniquely federal interest.[90] The Court stated the standard principle that preemption may occur only to the extent that applying state law would frustrate an important federal concern.[91] In the area of procurement contracts, the *Boyle* Court recognized that state tort law would not always conflict with federal interests and that the government contractor defense would preempt only in cases of "significant conflict."[92]

To illustrate the varying degrees to which state tort law might conflict with the federal interest embodied in government contracts, the Court posited three fact scenarios. At the low end of the conflict spectrum were the facts of *Miree v.*

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87. *Id.* at 2515.

88. Justice Brennan criticized the majority's approach to the issue of a "uniquely federal" interest, particularly the analogy to the government's rights and obligations under its contracts. The dissent stressed that the dispute in *Boyle* did not involve the United States, but rather two private parties. For this reason the dissent found the analogy to the government's contract liability inapposite. *Id.* (Brennan, J., dissenting). In a separate dissent Justice Stevens criticized the majority for "lawmaking" beyond the scope of judicial authority. *Id.* at 2528 (Stevens, J., dissenting). Stating that the creation of new policy should be left to Congress, Stevens argued,

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

Id.

89. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-30 (1978) (adopting state law as the federal rule of law determining the priority of federal and private liens); United States v. Little Lake Misere Land Co., 412 U.S. 580, 594 (1973) (refusing to apply state law affecting mineral rights in land acquired by the United States). The majority commented that the possible distinction between displacing state law and displacing federal incorporation of state law made no practical difference in *Boyle*, if it ever does. *Boyle*, 108 S. Ct. at 2515 n.3.

90. *Boyle*, 108 S. Ct. at 2515 (citing Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1969)).

91. *Boyle*, 108 S. Ct. at 2515-16. Justice Scalia briefly explicated the requirement that a conflict exist for preemption to occur. The degree of conflict required depends on whether or not the suit involves an area in which states traditionally govern. "[T]he fact that the area in question *is* one of uniquely federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." *Id.* The degree of conflict then determines the degree of preemption. "[W]here the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules." *Id.* at 2516 (citing Clearfield Trust Co. v. United States, 318 U.S. 362 (1943)). In other cases state law is superseded only to the extent that it frustrates federal policy.

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

DeKalb County.[93] In *Miree* the Court allowed a suit by private citizens against the county as third party beneficiaries to the federal government's contract with the county.[94] The state law allowing the suit did not conflict with the government's interests embodied in the contract because the claim attacked the county's failure to perform adequately under the contract's terms.[95] The interests of the citizens as third party beneficiaries actually coincided with the federal interests involved. Preemption therefore was unnecessary.[96]

The *Boyle* Court proposed a hypothetical middle ground case in which federal and state interests would not coincide, but also would not conflict. This situation involved the federal government's purchase of an air conditioning unit of a specific cooling capacity.[97] State statutes requiring the inclusion of certain safety features in air conditioners would not conflict with the supplier's contractual duty to supply the government with a unit of the specified cooling capacity. In this case the Court said "[t]he contractor could comply with both its contractual obligations and the state prescribed duty of care. No one suggests that state law would generally be pre-empted in this context."[98]

Finally, the Court set forth as an example of direct conflict between state law and federal interests the facts of *Boyle* itself. The Court summarized the conflict:

> Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).[99]

The Court explained that the specifications provided the basis for finding a strong federal interest in the design of the escape hatch.[100] No federal interest would exist if a government employee merely ordered a helicopter by model number from the seller's stock; in such a case preemption would not occur.[101]

Having demonstrated the potential for "significant conflict" with federal policy posed by suits like *Boyle*, the Court turned to finding a principle to iden-

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93. 433 U.S. 25 (1977).

94. *Id.* at 28-30.

95. *Boyle*, 108 S. Ct. at 2516. In *Miree* the county contracted with the Federal Aviation Administration (FAA) to restrict the use of land adjacent to an airport to activities that were compatible with the airport's operation. *Miree*, 433 U.S. at 27. Using the land as a garbage dump allegedly attracted swarms of birds, which caused a plane to crash. *Id.* The suit concerned whether the county had breached its contractual duty by operating a garbage dump.

96. Justice Brennan's dissent in *Boyle* proposed a different interpretation of *Miree*. Summarizing the holding of the case, he stated, "[W]e held that state law should govern the claim because 'only the rights of private litigants are at issue here,' and the claim against the county 'will have *no direct effect upon the United States or its Treasury*.' " *Boyle*, 108 S. Ct. at 2522 (Brennan, J., dissenting) (quoting *Miree*, 433 U.S. at 29, 30).

97. *Boyle*, 108 S. Ct. at 2516.

98. *Id.*

99. *Id.*

100. *Id* at 2515-16.

101. *Id.* at 2516.

tify those cases in which state law would conflict with federal policy. The *Bynum* court relied on *Feres-Stencel* as the federal policy jeopardized in suits against military suppliers.[102] The *Boyle* majority eschewed this reasoning, commenting, "[T]he *Feres* doctrine, in its application to the present problem, logically produces results that are in some respects too broad and in some respects too narrow."[103] A *Feres*-based defense would produce overbroad results because consistency would require such a defense to bar all suits brought by United States servicemen. At the same time the defense would not prevent civilians from challenging the design features of equipment that the military had deemed most important and thus would produce overly narrow results.[104]

Boyle identified a more appropriate measure of the federal interest embodied in government procurement contracts in the discretionary function exception to the Federal Tort Claims Act.[105] This exception reserves from the general consent to suit contained in the Act any claim based on the performance of a discretionary function by a federal agency or official. The *Boyle* Court characterized the selection of the design for military equipment as a discretionary function within the meaning of the Act and established the discretionary function exception as the federal policy dictating the boundaries of preemption.[106]

Protecting the immunity afforded the government to perform a discretionary function mandates preemption of state product liability law in the context of government procurement contracts, the *Boyle* court concluded. Government contractor liability for government-specified designs would result in pass-through costs to the government, thereby undermining its immunity.[107] As the Court stated, "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."[108]

The final issue addressed by the *Boyle* Court was the appropriate formulation of the defense necessary to protect the exercise of governmental discretion involved in military procurement contracts. The Court adopted substantially the same test promulgated in *McKay*:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers

102. See *supra* notes 60-62 and acccompanying text.

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

104. *Id.*

105. *Id.*

106. *Id.* at 2517-18.

107. *Id.* at 2518. The majority appropriated the *McKay* court's cost pass-through reasoning to support its discretionary function-based defense. Allowing contractor liability for defects in manufacture is not inconsistent with the cost pass-through rationale as it was under the *McKay* test. *See supra* text accompanying notes 68-69. Mismanufacture of a product ordered by the government clearly frustrates the exercise of discretion made in selecting the design of the product. Thus, contractor liability for defects in manufacture of a product does not conflict with the purposes of the defense announced in *Boyle*.

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

in the use of the equipment that were known to the supplier but not to the United States.[109]

According to Justice Scalia, the first two elements of this test serve to ensure that the design feature exists as a result of the government's exercise of its discretion.[110] The third element counters the disincentive to disclose dangers created by the defense. Because disclosure might disrupt the contract but nondisclosure would have no effect in the absence of the third test element, the disclosure requirement is necessary to induce openness by the contractor.[111]

Boyle is unlikely to produce substantially different results than the *McKay* defense in most cases. The decision, however, will result in greater consistency of outcome across jurisdictions. As a consequence of its resolution of the state-federal law conflict in favor of preemption, the defense now has binding effect in both state and federal courts.

Boyle does represent a significant transition in other regards. Although the Supreme Court adopted the substance of the *McKay* defense, it rejected almost entirely the reasoning of the *McKay* court in creating the defense.[112] Because of the change in focus from the *Feres* doctrine to the discretionary function exception, the government contractor defense now has greater logical consistency and strength.

By establishing the government contractor defense as a direct corollary to the discretionary function exception, the *Boyle* Court tightened the connection between the consequences of the defense and its policy basis. If the defendant's contract with the government provides the source of the guarded federal interest, then the defense logically should relate directly to the contract. It makes little sense to distinguish the contractor's liability for the same equipment based on the relationship between the plaintiff and the government. *Boyle* supplies consistency of reasoning and result by conditioning liability on the defendant's relationship with the government rather than the fortuity of the plaintiff's status as military personnel or civilian.

Deriving the government contractor defense from *Feres-Stencel* produced inconsistencies that are eliminated by realigning the defense according to the discretionary function exception. *Feres-Stencel* immunity overlaps with discretionary function immunity; in many cases either alone would protect the government from suit. *Feres-Stencel*, however, specifically reflects the principle that the relationship between the government and a member of the armed forces is " 'distinctively federal in character.' "[113] The reasons to protect this distinctive

109. *Id.* This formulation differs slightly from the three elements, in addition to governmental immunity under *Feres-Stencel*, set out in *McKay*. *McKay* used the language "established or approved reasonably precise specifications" and required disclosure of "patent errors in design" as well as dangers not known to the government. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); *see supra* text accompanying note 35 (enumerating the four elements of the *McKay* test).

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

111. *Id.*

112. *See id.*

113. Feres v. United States, 340 U.S. 135, 143 (1950) (quoting United States v. Standard Oil Co., 332 U.S. 301, 305 (1947)).

relationship are cast as a particularized statement of the discretionary function exception: in military matters the federal government requires latitude to employ specialized expertise and to exercise decision-making power without impediment.[114] The specific nature of *Feres-Stencel* strained the application of the derived government contractor defense when courts attempted to identify aspects of military discipline and order implicated in suits against equipment manufacturers.[115] Associating the defense with the more general principles of discretionary function immunity alleviates this strain by establishing that government policy making in general, not military decision making in particular, warrants protection of government contractors.

The *Boyle* Court's new justification for the government contractor defense also gives the defense new strength. In recent years the *Feres* doctrine has fallen into disfavor and its justifications have been narrowed to two concerns not even identified in *Feres* itself: military discipline and separation of powers.[116] In practical terms the erosion of the *Feres* doctrine necessitated removing the government contractor defense to the higher ground of discretionary function immunity.

Although the majority in *Boyle* fully explicated the change in derivation of the government contractor defense, the opinion did not address the effect, if any, this change will have on application of the actual elements of the defense. The Court purported merely to accept the defense as formulated in *McKay*, without attempting to clarify either the requisite degree of government involvement in the design of the equipment or the standard of disclosure of risks imposed on the contractor.[117] Some guidance exists in the majority's statement that the approval element isolates cases involving the performance of a discretionary function, and the disclosure requirement discourages contractor secrecy.[118]

The language of the *McKay* test adopted in *Boyle* clearly indicates that gov-

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114. Bynum v. FMC Corp., 770 F.2d 556, 569 (1985). Discussing the relationship between the special needs of the military and the government contractor defense, the *Bynum* court made the following comments:

> The purpose of a government contract defense . . . is to permit the government to wage war in whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon are uniquely questions for the military and should be exempt from review by civilian courts.

Id. at 569 (quoting *In re* "Agent Orange" Prod. Liab. Litig., 534 F. Supp 1046, 1054 n.1 (E.D.N.Y. 1982).

115. *See, e.g., Bynum*, 770 F.2d at 565 (arguing that suits alleging defects in military equipment "take identical form" whether the government or the contractor is the defendant); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983) (arguing that allowing members of the armed forces to testify regarding military decisions jeopardizes military discipline and national security), *cert. denied*, 464 U.S. 1043 (1984). *But see* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 742-43 (11th Cir. 1985) (rejecting the notion that civil suits against equipment manufacturers potentially affect military discipline), *cert. denied*, 108 S. Ct. 2896 (1988).

116. *See* United States v. Shearer, 473 U.S. 52, 57 (1985) (reassessing the *Feres-Stencel* doctrine and concluding that a civil court is required to second-guess military discipline); *Shaw*, 778 F.2d at 742-43 (interpreting the second-guessing factor in *Shearer* as a "classic separation of powers theory").

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

118. *Id.*

ernment approval of contractor-developed designs can insulate the contractor from liability for design defects.[119] Approval may not constitute the performance of a discretionary function in every situation, however.[120] As the *Boyle* opinion expressly states, ordering a piece of equipment by model number from the manufacturer's stock does not give rise to the defense.[121] Something between mere technical approval and actual development of the design by the government is necessary to satisfy the first element of the defense. The standard must be developed by reference to the discretionary function exemption itself. Each case will require a determination whether the alleged "approval" constitutes the performance of a discretionary function.[122] Only in those cases in which the government actually played a discretionary role should the defense succeed.[123]

The degree of disclosure required of the contractor continues to be ambiguous after *Boyle*. In *McKay* the ambiguity arose out of the twofold requirement that the contractor warn the government about all "patent errors in the government's specifications [and] about dangers involved in the use of the equipment that were known to the supplier but not to the United States."[124] The *Boyle* Court omitted the first half of this requirement, which suggests that it intended a straightforward actual knowledge standard.[125] One can argue, however, that a reasonable knowledge standard better promotes the interests of the defense.

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119. The *Boyle* Court did not clarify the phrase "reasonably precise specifications" in the approval element of the defense. *See* Smith v. Xerox Corp., 866 F.2d 135 (5th Cir. 1989). In *Smith* the Fifth Circuit resorted to pre-*Boyle* cases to determine the meaning of this standard. *Id.* The government in *Smith* had submitted environmental specifications for a weapon simulator used in military training exercises. *Id.* at 138. At trial Xerox did not produce the drawings it had made based on the government's specifications but did submit its contract which referred to government approved specifications. *Id.* On this evidence and the testimony of a government employee that the government reviewed the plans offered by Xerox, the court held that the government had in fact "approved reasonably precise specifications." *Id.*

In Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989), the court concluded that the "reasonably precise specifications" standard ensures actual government discretion in approving a design. The court implied that a high standard of detail and specificity of design comported with the discretionary function justification for the government contractor defense. *Id.* at 1481. Commenting on the relationship between the specification requirement and the exercise of government discretion, the *Trevino* court stated, "If the government approved imprecise or general guidelines, then discretion over important design choices would be left to the government contractor." *Id.*

120. *See Trevino*, 865 F.2d at 1479.

121. *Id.* at 2516.

122. For an interpretation of the meaning of "discretionary function" under the Federal Tort Claims Act, see cases cited *supra* note 22.

123. The Fifth Circuit held that government approval must amount to an exercise of discretion to satisfy the *Boyle* government contractor defense in *Trevino*. The *Trevino* court found the strict approval standard consistent with the basis of the government contractor defense in the discretionary function exception to the Federal Tort Claims Act. *Trevino*, 865 F.2d at 1481. In addition, the court examined the elements of the defense as a whole. From this examination the court concluded that the reasonably precise specification requirement and the contractor disclosure requirement contemplate active government evaluation. *Id.* at 1480-81. The court then affirmed the trial court's determination that the mere signature by a government employee of each page of contractor designs did not fulfill the government contractor defense's approval requirement. *Id.* at 1486.

124. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (1983), *cert. denied*, 464 U.S. 1043 (1984).

125. *See Trevino*, 865 F.2d at 1487 ("After *Boyle* a government contractor is only responsible for warning the government of dangers about which it has actual knowledge.").

Holding the manufacturer to a reasonable knowledge standard with regard to risks and alternatives would ensure not only more informed government decisions but more *specific* decisions. The conclusion that the government chose a particular aspect of a detailed design follows most easily in cases in which the government rejected an alternative proposed by the manufacturer. Moreover, the actual knowledge standard encourages contractors to avoid knowledge of risks and discourages thorough safety testing. This is particularly true in a bid situation, where price competition creates further incentive to sidestep testing in order to keep the bid low.

The actual knowledge standard, however, does enable the government to limit the costs or time necessary to develop a particular piece of equipment by forgoing extensive testing. Such a cost-benefit choice is an exercise of discretion that warrants insulation of the contractor under the government contractor defense.[126] The actual knowledge standard allows the government to dictate the amount of testing done by the manufacturer without exposing the manufacturer to liability for less than reasonable knowledge in the field. In addition, the actual knowledge standard accurately reflects the purpose of the disclosure requirement stated in *Boyle*: countering the incentive to withhold known risks in order to obtain or preserve the contract.

The *Boyle* Court's commentary when choosing the *McKay* formulation of the government contractor defense over the narrower formulation in *Shaw* reveals a negative aspect of the new focus announced in *Boyle*. Regarding the *Shaw* rule the Court stated, "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' exemption."[127] Thus, the Court conceded that the new government contractor defense has less to do with theories of liability than with the practical concerns of governmental immunity. Theories of tort liability generally correspond to notions of fairness, whereas governmental immunity precludes liability for the sake of pragmatism, disregarding the equities of a given case. The discretionary function exception protects the government's cost-benefit decisions and allows the government to act in the interest of society. As a result, the exception often allows society to enjoy the benefits of the government's choices while imposing hardships or costs on an individual victim. As a child of the discretionary function exception, the government contractor defense inherits this disassociation from considerations of fairness.

Despite its aggravation of the hardships created by the discretionary function exception, the government contractor defense is valid in light of the former doctrine. Some form of defense for the contractor who acts on the government's judgment is necessary both out of fairness to the manufacturer and as a means of protecting the government's immunity. The harsh results of the government contractor defense on the individual did not originate with *Boyle*. The govern-

126. *Cf.* United States v. Varig Airlines, 467 U.S. 797, 814-20 (1984) (FAA's decision to allow airlines to self-police safety by spotchecking planes constitutes performance of a discretionary function).

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

ment contractor defense based on *Feres-Stencel* produced similar results in more limited circumstances. The most important question after *Boyle*, therefore, is the scope of the defense in light of its new justification in discretionary function immunity.

The new premise of the defense provides greater potential for application outside the field of military contracts than did the *McKay* defense. As Justice Brennan argued in his dissent in *Boyle*,

> The contractor may invoke the defense in suits brought not only by military personnel like Lt. Boyle, or Government employees, but by anyone injured by a Government contractor's negligent design, including, for example, the children who might have died had respondent's helicopter crashed on the beach. It applies even if the Government has not intentionally sacrificed safety for other interests like speed or efficiency, and, indeed, even if the equipment is not of a type that is typically considered dangerous . . . . [T]he defense is invocable regardless of how blatant or easily remedied the defect, so long as the contractor missed it and the specifications approved by the Government, however unreasonably dangerous, were "reasonably precise."[128]

The precise wording of the majority's opinion suggests that Justice Brennan's assessment of the "breathtakingly sweeping"[129] scope of the defense is an exaggeration. Justice Scalia tailored the scope of the majority opinion to the circumstances of the case, stating at the outset, "This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect."[130] The elements of the defense likewise apply specifically to a manufacturer of military equipment for the government.[131]

Although the exact elements of the *Boyle* test apply only in the context of military suppliers, Justice Brennan is correct in that the decision provides ample leeway for extension by analogy.[132] Both the preemption argument and the discussion of the federal policy embodied in the discretionary function exception

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128. *Id.* at 2520 (Brennan, J., dissenting).

129. *Id.* (Brennan, J., dissenting).

130. *Id.* at 2513. The formulation of the Boyle defense also indicates that the government contractor defense continues to apply only to design defects and does not preclude liability for defects in manufacture. *See* McGonigal v. Gearhart Indus., Inc., 851 F.2d 774, 777 (5th Cir. 1988) ("[I]t remains the law of this Circuit that military contractor immunity does not apply in cases of defective manufacture.").

131. *Boyle*, 108 S. Ct. at 2518. Justice Scalia introduced the elements of the defense with a limitation to the facts of the case: "Liability for design defects in military equipment can not be imposed, pursuant to state law, when . . . ." *Id.*

132. After Boyle the government contractor defense applies to civilian as well as military plaintiffs. Garner v. Santoro, 865 F.2d 629, 637 (5th Cir. 1989). In *Garner* a civilian employed by a shipyard to paint Navy destroyers brought suit against the manufacturer of the epoxy paint used in his job. *Id.* at 631. The court held that the paint manufacturer was entitled to the government contractor defense despite the plaintiff's nonmilitary status. *Id.* at 637. The *Garner* court also noted the government contractor defense's potential applicability to manufacturers of nonmilitary equipment. *Id.* Avoiding the issue, the court stated, "At present we do not decide whether the government contractor defense applies to any specific product but only state that paint which is used on Navy Iran destroyers specifically because of its anti-corrosive qualities fits within the parameters of military equipment." *Id.* at 637-38.

exceed the requirements of the facts of the case. In addition the shift from *Feres-Stencel* indicates that special deference to military decisions no longer governs the defense's application. Governmental decision making in general now determines the potential scope of the defense.[133]

The broad interest identified in *Boyle* as "uniquely federal" in character—the interest in "getting the government's work done"[134]—is implicated in many government contracts that are not specifically military in character. A government contractor's liability to third persons potentially implicates both the government's rights under its contracts and its ability to accomplish specific ends. When such liability runs contrary to an identifiable federal policy, preemption will occur. The federal policy protected in *Boyle*, the discretionary function exception, may apply to a great many contexts. Whether the government contracts for the operation of a nuclear power plant, the disposal of toxic waste, or the construction of a highway, *Boyle*'s government contractor defense can affect the contractor's potential liability. The specific elements of the *Boyle* test will not relate to every situation, but by analogy some form of government contractor defense could apply.

Boyle provides guidance for the identification of nonmilitary cases in which government contractor liability would directly jeopardize the performance of a discretionary function. Justice Scalia's delineation of *Boyle*'s conflict between the state-imposed duty of care and the duty to supply a helicopter with the escape hatch described in the contract specifications[135] indicates that specific conflict is necessary for the defense to operate. Thus, *Boyle* restricts application of the government contractor defense to cases in which a similarly specific conflict is involved. This strict conflict requirement is the only significant limitation on the defense put forth in *Boyle*, but it should suffice to prevent the unlimited contractor immunity predicted by the dissent.

Boyle v. United Technologies Corp. lays the foundation for further development of the government contractor defense. Not only does the decision lend Supreme Court certification to a doctrine already enjoying widespread acceptance, *Boyle* fortifies the defense through its reliance on discretionary function immunity. The defense now combines the capacity to preempt state tort law with a category of sovereign immunity that is unlikely to suffer attrition due to judicial or legislative disfavor.

Future decisions interpreting *Boyle* ultimately will determine what balance the government contractor defense strikes between protecting governmental decisions and compensating personal losses. If this balance proves inequitable, the Court may have to modify the defense to reduce its emphasis on the interests of the government. For the present, *Boyle* significantly clarifies and aligns the origins, purposes, and application of the government contractor defense.

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133. *See* Trevino v. General Dynamics Corp., 865 F.2d 1474, 1479 (1989).
134. *Boyle*, 108 S. Ct. at 2514.
135. *Id.* at 2516. *See supra* notes 93-101 and accompanying text.