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Military Contractors Who Comply with Elements of Government Contractor Defense are Immune from Products Liability Suits Stemming from Design Defects.

Matthew J. Sullivan

TORT LAW—Products Liability—Military Contractors Who Comply With Elements Of Government Contractor Defense Are Immune From Products Liability Suits Stemming From Design Defects.

Boyle v. United Technologies Corp.,
__ U.S. __, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988).

David A. Boyle was a co-pilot of a United States Marine helicopter which crashed into the Atlantic Ocean.[1] The crew of four, including Boyle, survived the impact of the crash.[2] Although three of the crew members were able to escape through their emergency escape exits, Boyle apparently could not escape and subsequently drowned.[3] Boyle's heirs, represented by Boyle's father, brought negligence and products liability actions against United Technologies, the parent company of the helicopter manufacturer, Sikorsky, in the United States District Court.[4] Boyle first alleged, under Virginia tort law, that Sikorsky defectively repaired the servomechanism (servo), causing the helicopter to crash.[5] Second, Boyle alleged that Sikorsky defectively

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1. Boyle v. United Technologies Corp., __ U.S __, __, 108 S. Ct. 2510, 2513, 101 L. Ed. 2d 442, 451 (1988). The helicopter was manufactured by the Sikorsky Division of United Technologies Corporation. *Id.* The helicopter crashed one and a half miles off the Virginia coast while engaged in a training operation. *Id.*

2. Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986), *vacated*, __ U.S. __, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988)(impact not cause of Boyle's death).

3. *Boyle*, __ U.S. at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 451. The plaintiff alleged that the design of the co-pilot's escape hatch system was defective because the hatch opened out against the water pressure on a submerged aircraft. *Id.* at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 452. Furthermore, the plaintiff alleged the design was defective because other equipment interfered with the co-pilot's access to the escape hatch release handle. *Id.* The plaintiff contended that the combined effects of these alleged design defects prevented Lt. Boyle from escaping. *Id.*

4. *Id.* at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 451. Delbert Boyle, father of the decedent, brought suit claiming that the defendant defectively repaired the servomechanism which caused the helicopter to go out of control. *Id.* at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 452. Furthermore, Boyle claimed that the escape hatch was defectively designed, which prevented the decedent from escaping. *Id.*

5. Boyle v. United Technologies Corp., __ U.S. __, __, 108 S. Ct. 2510, 2513, 101 L. Ed. 2d 442, 452 (1988). The servo is used to control the helicopter in the flight control system by overcoming the forces which could destroy the helicopter. *See* Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986)(servo similar to power steering), *vacated*, __ U.S. __, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988). A chip of wire, which was found in the pilot valve of the servo during a post accident inspection, prevented the servo from performing properly and caused the pilot to lose control of the helicopter. *Id.*

designed the co-pilot's escape hatch.[6] Based on these claims, the jury returned a verdict for the plaintiffs and awarded damages of $725,000.[7] Asserting the government contractor defense, Sikorsky moved for a judgment notwithstanding the verdict,[8] which was denied, and judgment was entered for Boyle.[9]

The federal appellate court reversed the decision of the district court based on the government contractor defense and a lack of evidence on the issue of negligent repair.[10] As a result, Boyle appealed to the United States

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6. *Boyle*, __ U.S. at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 452. The plaintiff claimed that the collective, a control stick located on the left side of the pilot and co-pilot that moves the helicopter up and down, interfered with access to the hatch when the collective was pulled "full up." *Boyle*, 792 F.2d at 414. Furthermore, the plaintiff also argued that the design was defective because the escape hatch opened outward, whereby water pressure on the partially submerged helicopter would prevent the hatch from being opened. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 452.

7. *Boyle*, __ U.S. at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 452.

8. *Boyle*, 792 F.2d at 414. Sikorsky contended that the government contractor defense protected it from liability for the mis-design of the hatch. *Id.* Sikorsky also contended that the plaintiffs failed to prove Sikorsky was responsible for the placement of the metal chip in the servo. *Id.*

9. *See id.* (district court denied Sikorsky's motion without formal opinion).

10. *Id.* at 416. The appellate court acknowledged the applicability of the government contractor defense to products liability cases in its decision of *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986), which was decided the same day. Boyle v. United Technologies Corp., __ U.S. __, __, 108 S. Ct. 2510, 2513, 101 L. Ed. 2d 442, 452 (1988). In adopting the government contractor defense, the appellate court stated that liability for design defects will be barred when "(1) the United States is immune from liability; (2) the United States has approved reasonably precise specifications for the equipment; (3) the equipment conformed to those specifications; and (4) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986), *vacated*, __ U.S. __, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988). The appellate court held that Sikorsky (United Technologies) had established compliance with the affirmative defense, which prevents liability for the "allegedly defective design of the escape hatch." *Id.* at 415. In regards to the second allegation, the appellate court held that there was insufficient evidence to prove Sikorsky caused the metal chip to become lodged in the pilot valve of the servo. *Id.* at 416. Evidence admitted in court indicated that the chip was made of carbon steel, whereas Sikorsky used exclusively stainless steel in the manufacture of its parts. *Id.* at 415. The evidence revealed that the servo was exposed to possible contamination on three different occasions. *Id.* at 414. The metal chip could have been introduced first when the helicopter was overhauled by Sikorsky, second when the Navy reworked it, and third when the marines repaired the hydraulic system and repacked the fittings. *Id.* In relation to establishing responsibility for the origin of the metal chip, testimony by one of Sikorsky's product safety managers established that no carbon steel was in Sikorsky's inventory. On the other hand, the plaintiffs contended that the carbon wire found was so common it would not normally be listed in an inventory. *Id.* at 415. Furthermore, an audit from the Navy yard that performed the rework indicated that the type and gauge of wire found in the servo was not used by the Navy shop. In trying to assign responsibility, the court noted under Virginia products liability law, liability is conditioned upon responsibility. *Id.*

Supreme Court, contending that federal statutory authority does not protect government contractors from liability for the defective design of their products.[11] Alternatively, Boyle argued that if such an immunity did exist, the court of appeals applied the wrong elements for establishing immunity.[12] Boyle also maintained that the appellate court should not have determined as a matter of law that Sikorsky established the elements of the immunity.[13] The United States Supreme Court granted certiorari to decide these issues.[14] Held—*Vacated and remanded.* Military contractors who comply with the elements of the government contractor defense are immune from products liability suits stemming from design defects.[15]

The court relied on *Logan v. Montgomery Ward*, 219 S.E.2d 685 (Vir. 1975), which states "[in Virginia] under either the warranty theory or the negligence theory the plaintiff must show . . . that the unreasonably dangerous condition existed when the goods left the defendant's hands." *Id.* at 687. The court held that the plaintiff failed to establish that Sikorsky was the negligent party because the wire chip could have been introduced at three different times. *See Boyle*, 792 F.2d at 415.

11. *Boyle*, __ U.S. at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 452. The petitioner complained that in the absence of a federal statute the judiciary should not recognize any form of the government contractor defense. *Id.*

12. *Id.* The appellate court applied the elements of the government contractor defense that it had previously adopted in *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986). *Id.* Boyle asserted that the test used in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985), should be applied in the event that the Court concurred with the existence of a common-law government contractor defense. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 458. The *Shaw* defense requires only that the contractor comply with one of two elements. *See Shaw*, 778 F.2d at 746. The first element of the *Shaw* test is based on the contractor's level of participation, preventing liability if the contractor did not provide any input or provided a minimum amount of input into the design of the product. *Id.* The second element requires the contractor to notify the government of any reasonably known defects, and to establish that the government authorized production of the product with the knowledge that the design was defective. *Id.*

13. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 452 (Boyle contended remand required for jury to decide if affirmative defense proven). The appellate court apparently concluded sua sponte that Sikorsky had complied with the government contractor defense. *See Boyle*, 792 F.2d at 415 (court stated Sikorsky proved compliance with government contractor defense). The court relied on evidence of the joint preparation of specifications by Sikorsky and the Navy. *Id.* at 414. Furthermore, prior to production, the Navy authorized and approved a complete cockpit mock-up, including the location of the collective and escape hatches. The court also decided that evidence of discussions between Sikorsky and Naval personnel regarding the helicopter design was sufficient to prove military approval of the overall design. Boyle also alleged that because the elements of the government contractor defense utilized by the appellate court were not the same as the elements used by the district court, a jury should have decided whether the defense was proved in accordance with the seventh amendment right to trial by jury. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2519, 101 L. Ed. 2d at 459.

14. Boyle v. United Technologies Corp., __ U.S. __, 107 S. Ct. 872, 93 L. Ed. 2d 827 (1987).

15. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 458 (preempting Virginia

The supremacy clause of the United States Constitution provides for displacement of state authority by federal authority.[16] Justification for displacement of state law by federal law exists when a conflict exists between state and federal law,[17] when a state is involved in matters normally left to federal control,[18] and where federal interests necessarily supersede state interests in the same area.[19] An additional justification for displacement of state law exists when a "uniquely federal interest" is involved.[20] Displace-

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tort law because conflicts with federal policy and adopting last three elements of government contractor defense as defined by *McKay*).

16. *See* U.S. CONST. art. VI, cl. 2. Article six, clause two of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.; *see also* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982)(supremacy clause provides authority to pre-empt state law); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963)(supremacy clause authorizes displacement when there is congressional intent to displace or subject matter normally regulated by federal government); Hines v. Davidowitz, 312 U.S. 52, 63 (1941)(article six provides basis for displacing Pennsylvania immigration act as being inferior to federal act).

17. *See Florida Lime & Avocado Growers*, 373 U.S. at 142 (California statute regulating minimum avocado maturity for sale conflicted with Federal Agricultural Marketing Agreement Act of 1937 which specified when avocados are mature). When state law is in conflict with federal law, the state law must yield when Congress has indicated such a law must be preempted, or where the subject matter requires pre-emption as the only solution. *Id.*; *see also Hines*, 312 U.S. at 66-67 (Pennsylvania Alien Registration Act conflicted with provisions in Federal Alien Registration Act resulting in permanent enjoinment of enforcement of state act). The Court explained that a state may not pass legislation that conflicts with provisions of a federal law because to do so frustrates the intent of Congress in legislating. *Id.* at 67.

18. *See Hines*, 312 U.S. at 63 (states may not interfere with powers granted by Constitution). In discussing the issue of immigration, the Court stated that the federal government represents the interests of all of the states. *Id.* Therefore, federal control cannot be disrupted. *Id.*; *see also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-30 (1947)(federal domain controlled by Congress if it elects to do so).

19. *See de la Cuesta*, 458 U.S. at 168-70 (state banking provision preempted by Federal Home Loan Bank Board regulation). A California statute prevented the use of a due-on-sale clause to accelerate loan payments because it would hinder alienation of property. *Id.* at 149. The Federal Home Loan Bank Board regulation allowed the use of due-on-sale clauses by federal savings and loan institutions. *Id.* at 146-47. The Court stated that Congress intended to ensure the stability of financial institutions by allowing them to accelerate payments. *Id.* at 168-69. The ability to accelerate payments would be an incentive for the savings and loans to continue to loan money for the purchase of property. *Id.* Thus, the state interest in enhancing alienation of property must yield to the federal interest in stability of financial institutions. *Id.* at 170.

20. *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)(uniquely federal interest justifies creation of federal common law which can displace conflicting state law). Uniquely federal interests include "the rights and obligations of the United States, inter-

ment of state law can even occur in the absence of congressional action, allowing the application of judge-made common law.[21] The prerequisites for applying federal common law are that a federal interest must be at stake and a conflict between the federal interest and state law must be presented.[22] Once the state law has been displaced in an area that Congress has not addressed, the Court has the ability to apply relevant common-law rules such as the government contractor defense.[23]

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state and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases." *Id.* at 641. However, the Supreme Court has stated "there is no federal general common law" in the absence of constitutional provisions or congressional act. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). The Court eventually created two limited situations wherein it could generate federal common law. *Texas Indus.*, 451 U.S. at 640. Application of federal common law is permitted when a "uniquely federal interest" requires protection or when Congress has authorized the Court to create substantive law. *See id.* The areas of "uniquely federal interest" are exclusively within the federal domain because the rights of the sovereign are "intimately involved," or the "interstate or international nature of the controversy" are unsuited for application of state law. *Id.*; *see also* Banco Nat'l de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)(creation of federal common law permissible for "unique federal interest"); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943)(financial obligations of United States uniquely federal).

21. *Clearfield*, 318 U.S. at 367. *Clearfield* held that where Congress has not acted, the federal courts may "fashion the governing rule of law according to their own standards." *Id.*; *see also* United States v. Kimbell Foods, Inc., 440 U.S. 713, 727 (1979)(*Clearfield* permits federal judge-made law in absence of previous congressional action). Though recognizing the ability to create federal common law, the *Kimbell* Court declined to adopt a uniform federal rule governing lien priorities on funds from federal lending programs. *Id.* at 729. Instead, the Court adopted state law which regulated lien priorities. *Id.*

22. Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)(land lease dispute requiring decision whether to create federal common law or apply state law). The question of whether to apply state law or federal common law depends on the relationship between the federal interest and the state law, and is a question for the court. *Kimbell*, 440 U.S. at 728. The state law must yield if it interferes with federal interests. *Id.* However, state law may be applied in situations where there is slight cause for a nationwide rule of law. *Id.*; *see* Miree v. DeKalb County, 433 U.S. 25, 32-33 (1977)(plaintiff contended federal law should apply in third party breach of contract claim). The *Miree* Court rejected as too speculative the plaintiff's contentions that application of federal law would protect the Treasury and the governmental interest in regulating air travel. *Id.* at 29-33.

23. *See Clearfield*, 318 U.S. at 367 (federal court may form substantive rule when Congress has not acted). The courts have created the government contractor defense in the absence of congressional action. *See* Bynum v. FMC Corp., 770 F.2d 556, 568-70 (5th Cir. 1985)(military design decisions are uniquely federal interest justifying creation of affirmative defense). In *Bynum*, a National Guard soldier, was injured when the vehicle in which he was riding crashed. *Id.* at 558. The defendant manufactured the vehicle for the United States Army. *Id.* The court stated that the government has a unique interest in the design of equipment provided to the military. *Id.* at 569. Furthermore, the court stated the purpose of the government contractor defense is to allow the government to conduct its warfare in whatever manner it deems necessary. *Id.* Because of this unique federal interest, the court displaced state tort law and adopted the government contractor defense. *Id.* at 571-74.

The government contractor defense has been considered by the lower courts to be a combination of two separate defenses.[24] The first is the well-settled contract specification defense whereby a contractor is protected from liability when the specifications supplied by the client were properly followed.[25] The second defense is the doctrine of shared sovereign immunity whereby the contractor is shielded from liability based on public policy concerns.[26]

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24. *Bynum*, 770 F.2d at 563-64. In its analysis of the origins of the defense, the *Bynum* court noted that two traditional defenses, the contract specifications defense and shared sovereign immunity, have been applied in suits on government contracts. *Id.* By combining the protection of both defenses, the military contractors urged acceptance of a government contractor defense. *Id.* at 565; Tillet v. J.I. Case Co., 756 F.2d 591, 596 (7th Cir. 1985)(government contractor defense based on shared sovereign immunity and contract specifications defense); *cf.* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 (11th Cir. 1985)(disagreeing with the factors relied on by previous courts as basis for defense). The *Shaw* court contended the defense is not a combination of the contract specification defense and sovereign immunity. *Id.* Rather, the *Shaw* court contended that separation of powers requires the application of the defense. *Id.* The court reasoned that the government should be permitted to wage or prepare for war without interference from the judiciary. *Id.* Moreover, any equipment design decisions should be left to the branches of government subject to civilian control. *Id.* at 741.

25. *See Bynum*, 770 F.2d at 563 (contractor should not be required to reevaluate owner's design specifications). The contract specification defense, developed from basic tort principles, provides for protection from liability when a contractor performs work in compliance with specifications supplied to him by his client. The defense is applicable if the contractor was not negligent in failing to realize the specifications were defective and were likely to produce a product that would cause injury. The basis for the defense is that a contractor should not have to re-analyze the specifications since the design professional who developed the specifications is held to a higher standard of care than the contractor. *Id.* The contractor, however, will be subject to liability if he has superior knowledge in the specific area addressed by the specifications. *Id.*

26. *See* Note, *Government Contractor Defense: Sharing the Protective Cloak of Sovereign Immunity after* McKay v. Rockwell International Corp., 37 BAYLOR L. REV. 181, 194 (1985)(noting that cases recognizing government contractor defense relied in part on public policy considerations). Sovereign immunity is developed from the ancient belief "that the king can do no wrong." Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 31 (1926)(sixteenth century common law created fallacy that King ruled by divine right and was immune from adverse actions); 1 W. BLACKSTONE, COMMENTARIES *237. American courts adopted sovereign immunity in the early part of the nineteenth century by preventing suits against the federal government. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821)(noting in dicta federal government immune from suit); *see also* Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907)(reasoning for sovereign immunity). Justice Holmes noted that "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Id.* Once adopted, the immunity developed to the point that various government officials shared in the protection given the government. *See* Gregoire v. Biddle, 177 F.2d 579, 580-81 (2d Cir. 1949)(federal officials share in sovereign immunity); *see also* Parker, *The King Does No Wrong — Liability for Misadministration*, 5 VAND. L. REV. 167, 167-68 (1952)(government not liable for acts of its officials). The govern-

Jurisdictions which apply the government contractor defense do not completely concur as to its origin.[27] Many courts explain that the Supreme Court first noted in *Yearsley v. W.A. Ross Construction Co.*[28] that a contractor is protected from liability when working pursuant to a government contract under the direction of federal officials.[29] Since the *Yearsley* decision, the government contractor defense has been utilized primarily in public works contract cases.[30] The courts have reasoned that, based on public policy, government contractors can rely on the defense so long as they comply

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ment contractors relied on the principle that a contractor, performing work for the government according to the government's specifications and under the scope of government control, was immune from liability, provided the work was not performed in a negligent manner. *See* Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 19-20 (1940)(contractor as agent of government not liable when work authorized and overseen by government officials); Evans v. Massman Constr. Co., 122 S.W.2d 924, 931 (Mo. 1938)(contractor under orders of United States engineers not liable for government mistakes in construction documents or directions given by government officials); *see also* Tucker, *The Government Contractor Defense in Products Liability Cases*, 34 NAVAL L. REV. 157, 158 (1985)(public contractors working on projects for government and relying on government supplied construction documents shielded from liability).

27. *See* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741 (11th Cir. 1985)(*Shaw* court disagreed with origins of defense expounded in *McKay* and *Bynum*). Specifically, the *Shaw* court rejected the popular belief that the defense was a combination of the contract specification defense and sovereign immunity. *Id.* at 740. Instead, the court decided to develop its own formulation based on a separation of powers theory. *Id.*; *cf. Bynum*, 770 F.2d at 563 (origins in contract specification defense and immunity); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983)(origins of defense from contract specifications defense and immunity); Johnston v. United States, 568 F. Supp. 351, 353-56 (D. Kan. 1983)(government contractor defense amalgam of contract specifications defense and shared sovereign immunity).

28. 309 U.S. 18 (1940). *Yearsley* involved a contract for the construction of dikes on the Mississippi river. *Id.* at 19. During construction, part of the plaintiff's property was eroded away due to the construction method used by the contractor. The contractor based his defense on the premise that he was performing a government contract under the direction of the United States Chief of Engineers. The Court recognized the contractor as an agent of the government who was performing work under government authority. *Id.* Based on the agency relationship, the Court summarized there was no basis for subjecting the contractor to liability if the contractor was acting for the government. *Id.* at 23.

29. *See* Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986)(citing *Yearsley* as origin of government contractor defense); Bynum v. FMC Corp., 770 F.2d 556, 564 (5th Cir. 1985)(*Yearsley* basis for protecting contractors from liability under government contract); Tillet v. J.I. Case Co., 756 F.2d 591, 596 (7th Cir. 1985)(*Yearsley* genesis for government contractor defense); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985)(common-law defense to liability for government contractors based on *Yearsley*); *McKay*, 704 F.2d at 448 (government contractor protected from liability when following government specifications and orders first noted in *Yearsley*).

30. *See Bynum*, 770 F.2d at 564 (noting reliance on *Yearsley* in public contractor cases); *see also* Tucker, *The Government Contractor Defense in Products Liability Cases*, 34 NAVAL L. REV. 157, 157 (1985)(subsequent to *Yearsley* defense used when public work performed for both federal and state authorities).

with the plans and specifications issued by the governmental authority.[31] The government contractor defense continued to be applied in various jurisdictions over the next two decades with little overlap into other areas of law.[32]

The government contractor defense was next applied in products liability cases.[33] Under strict products liability law, a manufacturer who places a defective product into the stream of commerce is strictly liable for injuries resulting from that defective product.[34] In a products liability cause of action, the government contractor defense has only been accepted by the courts in cases involving military related products.[35] At least four versions

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31. *See Bynum*, 770 F.2d at 563 (reasoning cost impact on government is public policy concern); *see also* Tucker, *The Government Contractor Defense in Products Liability Cases*, 34 NAVAL L. REV. 157, 158 (1985)(public policy dictates contractor performing according to government-supplied construction documents should share in sovereign immunity).

32. *See* Note, *The Government Contractor Defense: Should Manufacturer Discretion Preclude its Availability?*, 37 ME. L. REV. 187, 188 (1985)(noting that not until twenty-six years after *Yearsley* did a case recognize possible application of government contractor defense to products liability).

33. *See* Littlehale v. E.I. duPont deNemours & Co., 268 F. Supp. 791, 803 (S.D.N.Y. 1966)(plaintiff injured when blasting caps exploded prematurely). In deciding a products liability action involving defective marketing, the *Littlehale* court noted that the government contractor defense may have merit; however, the court based its decision on a different defense. *Id. See generally* Zollers, *Rethinking the Government Contractor Defense*, 24 AM. BUS. L.J. 405, 406 (1986)(noting scope of defense focused on military goods and recognizing viability in products liability cases); Turner & Sutin, *The Government Contractor Defense: When Are Manufacturers of Military Equipment Shielded from Liability for Design Defects?*, 52 J. AIR L. & COM. 397, 402 (1986)(courts began applying defense to products liability cases in mid-1960s).

34. Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 900 (Cal. 1962). Justice Traynor of the California Supreme Court concluded that a manufacturer who places a product into the stream of commerce, knowing the consumer will not inspect it for defects, will be strictly liable if the defect causes injury. *Id.* The imposition of strict liability will occur regardless of the existence of express or implied warranties. *Id.* at 901; *see also* RESTATEMENT (SECOND) OF TORTS § 402A (1965). The Restatement states:

> (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, or to his property, 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.
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> (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.

Id. But see 2 AMERICAN LAW OF PRODUCTS LIABILITY § 16.22 (3d ed. 1987)(Virginia did not adopt § 402A).

35. *See* Turner & Sutin, *The Government Contractor Defense: When Are Manufacturers of Military Equipment Shielded from Liability for Design Defects?*, 52 J. AIR L. & COM. 397, 405 (1986)(products liability cases applying government contractor defense all involved contracts for military equipment); *see also* Tucker, *The Government Contractor Defense in Prod-*

of the government contractor defense were defined by case law.[36] A problem quickly arose because numerous courts accepted various forms of the defense as an appropriate bar to liability.[37] The majority of jurisdictions that recognized the government contractor defense applied the elements of the defense as defined by *McKay v. Rockwell International Corp.*[38] The *McKay* analysis, the most popular version of the government contractor defense, was defined by a four-pronged test.[39] A second version of the defense was utilized by the second circuit in its decision of *In re Agent Orange.*[40] A hybrid of the *Agent Orange* elements and the *McKay* elements created a third version of the government contractor defense in *Koutsoubos v. Boeing*

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ucts Liability Cases, 34 NAVAL L. REV. 157, 159 (1985)(noting absence of products liability cases relying on government contractor defense in any sector other than military might be attributable to dangerous nature of military actions).

36. *See* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983)(government contractor defense protects manufacturer from liability stemming from defectively designed pilot ejection system); *In re* Agent Orange Prod. Liab. Litig., 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982)(government contractor defense protects chemical manufacturer from defective design liability). Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985)(government contractor defense applies to suit involving defective plane design).

37. *See* Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986)(applying *McKay* formulation); Dowd v. Textron, Inc., 792 F.2d 409, 411 (4th Cir. 1986)(applying *McKay* formulation); Bynum v. FMC Corp., 770 F.2d 556, 566-67 (5th Cir. 1985)(applying *McKay* formulation); Tillet v. J.I. Case Co., 756 F.2d 591, 600 (7th Cir. 1985)(applying *McKay* formulation); *Shaw*, 778 F.2d at 746 (applying *Shaw* formulation); *McKay*, 704 F.2d at 451 (creating *McKay* formulation); Brown v. Caterpillar Tractor Co., 696 F.2d 246, 254 (3rd Cir. 1982)(following *Valley Forge Gardens, Inc.* which held contractor performing government contract with government supplied specifications not liable provided no negligence of tortious conduct); *In re Agent Orange*, 534 F. Supp. at 1055 (creating *Agent Orange* formulation).

38. *See Dowd*, 792 F.2d at 411 (applying *McKay* formulation); *Tozer*, 792 F.2d at 408 (applying *McKay* formulation); *Bynum*, 770 F.2d at 557 (applying *McKay* formulation); *Tillet*, 756 F.2d at 600 (applying *McKay* formulation); *McKay*, 704 F.2d at 451 (creating *McKay* formulation).

39. *See McKay*, 704 F.2d at 451 (government contractor defense protects manufacturer from liability stemming from defectively designed pilot ejection system). The government contractor defense as formulated by the *McKay* court states a manufacturer is immune from liability for defective design when: "(1) the United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States." *Id.*

40. *See In re* Agent Orange Prod. Liab. Litig., 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982)(government contractor defense protects chemical manufacturer from defective design liability). The formulation of the defense drafted by the *Agent Orange* court states a defendant must prove: "(1) that the government established the specifications [for the product]; (2) that the [product] manufactured by the defendant met the government's specifications in all material respects; and (3) that the government knew as much as or more than the defendant about the hazards to people that accompanied use of [the product]." *Id.*

Vertol, Division of Boeing Co.[41] The *Koutsoubos* court modified the first prong of the *Agent Orange* test so that government approval of specifications would establish compliance with the first prong.[42] A fourth version was expounded by the eleventh circuit in *Shaw v. Grumman Aerospace Corp.*,[43] where the court held a contractor could rely on the affirmative defense when it satisfied one of two stringent elements in the test.[44] Therefore, in the absence of legislation, a uniform application of the defense was nonexistent and the opposing parties began to urge the courts to either disregard the defense or adopt a version most favorable to their respective interests.[45]

In *Boyle v. United Technologies Corp.*,[46] the United States Supreme Court held that defective design of military equipment will not result in liability under state law when "the United States approved reasonably precise specifications; the equipment conformed to those specifications; and the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[47] The Court noted that since no legislation authorized the extension of governmental immunity to contracting entities,[48] and because Boyle brought suit under Vir-

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41. *See* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 744 (11th Cir. 1985)(recognizing *Koutsoubos* created hybrid between *McKay* and *Agent Orange*).

42. *See* Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 355 (3d Cir. 1985)(wrongful death action due to military helicopter crash). Although the *Koutsoubos* court intended to apply the *Agent Orange* test, the language in the opinion indicates adoption of the first element of the McKay test. *Shaw*, 778 F.2d at 744.

43. 778 F.2d 736, 746 (11th Cir. 1985).

44. *See Shaw*, 778 F.2d at 746 (defective design in military plane results in fourth version of government contractor defense). The elements established by the *Shaw* court provided an affirmative defense if the contractor establishes (1) it provided only minimum input or was entirely excluded from the design of the defective part or product; or (2) the contractor provided the military adequate warning of the hazardous device, gave notice of other designs possible, and the military rejected the alternative design, requiring the contractor to continue with the hazardous design. *Id.* at 746. The contractor was only required to establish one of the two elements to invoke the defense. *Id.*

45. *See* Dowd v. Textron, Inc., 792 F.2d 409, 411 (4th Cir. 1986)(plaintiff contended formulations of government contractor defense vary with theory of liability); Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986)(reversing district court which held defense not applicable to negligence theory); Tillet v. J.I. Case Co., 756 F.2d 591, 600 (7th Cir. 1985)(recognizing jurisdictions have adopted various forms of government contractor defense).

46. __ U.S. __, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988).

47. *Id.* at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 458. The Court applied its own hybrid of the *McKay* elements, reasoning that the first two prongs guarantee the defense is only applicable when a government official approved the design of the element. *Id.* The Court determined that the third prong provides incentive for the contractor to reveal any possible flaws of the product. *Id.*

48. *Id.* at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 452. Boyle argued that without statutory authority, the judiciary should not recognize the existence of the government contractor defense. *Id.*

ginia tort law, it could not apply federal common law without displacing existing state law.[49] Recognizing that a conflict between federal interests and state law is required for displacement, the majority justified the displacement based on precedent involving "uniquely federal interests."[50] The Court recognized that the facts of *Boyle* were not completely similar to the traditional areas in which the federal government has a unique interest.[51] Despite this fact, the majority found that the interests of the federal government would be impacted by the case's outcome because of its interest in supply and manufacture of parts and equipment.[52]

Having established the necessary governmental interest in the outcome, the Court noted that a significant conflict between a federal policy or interest and state law was still required to displace Virginia tort law.[53] The majority decided that the basis of the conflict could be found within the language of a

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49. *Id.* at __, 108 S. Ct. at 2514-18, 101 L. Ed. 2d at 453-58. The Court rejected Boyle's contention that the common-law government contractor's defense should not be applied in the absence of congressional action. *Id.* at __, 108 S. Ct. at 2513, 101 L. Ed. 2d at 452; *see also* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). In *Jones*, the Court stated that it must determine whether the state provisions hindered the accomplishment of congressional objectives. *Id.* at 526. In order to make this decision, the Court stated it must necessarily review the "relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Id.*

50. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2514, 101 L. Ed. 2d at 453 (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981))(impact of liability on federal procurement contracts is uniquely federal). The majority relied on the *Texas Industries* reasoning that when an area of "uniquely federal interest" also involves state law, the state law is displaced to a necessary extent by federal common law. *Id.* at __, 108 S. Ct. at 2514, 101 L. Ed. 2d at 452-53. The majority noted "uniquely federal interests" justifying displacement have existed in two areas. *Id.* at __, 108 S. Ct. at 2514, 101 L. Ed. 2d at 453. First, justification exists when the contractual rights and obligations of the United States are involved. *Id.* Second, courts may displace state law in situations wherein the actions of federal officials in the scope of their duty would lead to liability. *Id.* (liability of federal officials matter of federal law).

51. Boyle v. United Technologies Corp., __ U.S. __, __, 108 S. Ct. 2510, 2514-15, 101 L. Ed. 2d 442, 453-54 (1988). Even though the United States was not a party, the defendant's liability arose from its performance of the government contract. Thus, the Court reasoned that the suit bordered on the federal interest in obligations arising under one of its contracts. *Id.*

52. *Id.* at __, 108 S. Ct. at 2515, 101 L. Ed. 2d at 454. The Court distinguished precedent, wherein although a federal interest was present the Court declined to displace state law, because the result of displacement was too speculative to justify application of federal law. *Id.* The Court, however, concluded that if government contractors are held liable, will escalate prices to cover their risk or will refuse to produce products specified by the United States. *Id.*

53. *Id.* at __, 108 S. Ct. at 2515, 101 L. Ed. 2d at 454-55. The Court stated that mere existence of a "unique federal interest" would not justify displacement without a significant conflict. *Id.* The Court reasoned that the significant conflict was necessary in order to avoid expansion of the pre-emption doctrine and to clarify previous decisions that implied a "uniquely federal interest" would automatically justify displacement. *Id.* at __ n.3, 108 S. Ct. at 2515 n.3, 101 L. Ed. 2d at 454-55 n.3.

provision of the Federal Tort Claims Act (FTCA),[54] which provides that discretionary functions of the government are within the exceptions that prohibit suit under the act.[55] Specifically, the Court recognized that the design of military equipment was a discretionary function of the United States

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54. *Id.* at __, 108 S. Ct. at 2517, 101 L. Ed. 2d at 457. The FTCA, enacted in 1946, provides government consent to suit in certain situations in an "effort to mitigate unjust consequences of sovereign immunity from suit." *See* Feres v. United States, 340 U.S. 135, 139 (1950). The purpose of the act was to provide an injured plaintiff with a method of relief in a claim against the government. *Id.* at 140. *Feres* involved a series of actions brought by the plaintiffs against the United States for negligence of the government and its personnel. *Id.* at 137. One suit alleged negligence in placing the decedent, a soldier, in a barracks with a defective heating plant, which caused a fire that burned him to death. The second suit involved the negligence of an Army surgeon who left a towel inside the patient after an operation. The third suit involved negligent medical treatment by an army surgeon which resulted in the death of the patient. *Id.* The common denominator in all of the suits was the injury to a member of the armed services. *Id.* Relying on the federal government's sovereign immunity, the court held that a member of the armed services was precluded from bringing suit against the government when the "injuries arise out of or are in the course of activity incident to service." *Id.* at 146. The *Feres* doctrine is often combined with the doctrine established by *Stencel Aero Engineering Corp. v. United States*, which held that when a member of the armed services is injured, third parties are also precluded from bringing suit against the Government. *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 674 (1977). The combination of the holdings of these two cases creates the *Feres-Stencel* doctrine. *See* Bynum v. FMC Corp. 770 F.2d 556, 560 (5th Cir. 1985). The majority rejected as insufficient the conflict relied on by previous courts between the *Feres* doctrine and military contractor liability. *Boyle*, __U.S. at __, 108 S. Ct. at 2517, 101 L. Ed. 2d at 456. The reasoning of the lower courts was that the cost of any contractor liability would be reflected in future purchases by the government. *See* Tozer v. LTV Corp., 792 F.2d 403, 407 (4th Cir. 1986). As a result, the purpose of protecting the government with immunity through the *Feres* doctrine would be defeated by higher prices if military contractors were held liable for their design defects. *Id.* at 407; *see also Bynum*, 770 F.2d at 572 (contractor liability would defeat purpose of *Feres* doctrine); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983)(*Feres* source of conflict to displace state law). In *Boyle*, the Court considered the *Feres* doctrine to be "too broad and in some respects too narrow." *See Boyle*, __ U.S. at __, 108 S. Ct. at 2517, 101 L. Ed. 2d at 456. The *Feres* doctrine applies to military personnel who are injured in a service-related activity. *Feres*, 340 U.S. at 146. *Feres* precludes military personnel from holding the United States liable under the Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 1491, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680, for injuries incurred during a military related activity. *See id.* The *Boyle* majority determined that the *Feres* doctrine, precluding suit when an item purchased by the government caused an injury to service personnel, was too broad because blanket immunity would result, even in situations involving purchase of standard equipment. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2517, 101 L. Ed. 2d at 456-57. On the other hand, the majority also concluded that the application of *Feres* would be too narrow because it would not preclude suits for injuries to civilians. *Id.*

55. 28 U.S.C. § 2680(a) (1976). The majority relied on 28 U.S.C. § 2680(a) of the FTCA wherein consent to suit is withheld when a claim involves a "discretionary function or duty on the part of a Federal agency or an employee of the Government." *Boyle*, __ U.S. at __, 108 S. Ct. at 2517, 101 L. Ed. 2d at 457. The Court considered the design selection of military products to be within the meaning of this provision. *Id.*

government; therefore, state law that imputed liability against military contractors conflicted with this discretionary function.[56] Furthermore, the majority argued that application of state tort law would generate an adverse result because the Treasury of the United States would suffer from the added liability costs that the contractors would include in future equipment prices.[57] The Court reasoned that this is the precise scenario which the exceptions to the FTCA are designed to avoid.[58] Based on this "significant conflict," the majority justified displacement of state tort law.[59]

Having justified the displacement of state tort law, the Court next addressed the composition of the government contractor defense.[60] The majority adopted a modified version of the *McKay* test and elucidated the limiting factors for the government contractor defense as being: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[61] The Court concluded that this formulation accomplished all of the government's goals by protecting government interests and providing incentives for contractor design participation.[62]

Finally, the majority addressed the petitioner's remaining argument that the seventh amendment right to a jury trial required a remand because the

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56. Boyle v. United Technologies Corp., __ U.S. __, __, 108 S. Ct. 2510, 2517, 101 L. Ed. 2d 442, 457 (1988). The Court reasoned that the analysis and research involved in creating effective combat equipment was a military matter. *Id.* Moreover, the negative effects of contractor liability would adversely impact and conflict with the necessary military discretion of weapon development. *Id.*

57. *Id.* at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 457-58.

58. *Id.* at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 457.

59. *Id.* at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 458. The majority decided that state law must be displaced when it creates liability for defective design of military products manufactured by government contractors. *Id.*

60. *See id.* (state tort law conflicted with federal interest in military design discretion and subject to displacement by government contractor defense).

61. *Id.* The Court rejected the petitioner's contention that the appropriate formulation of the government contractor defense should follow the *Shaw* elements. *Id.* The majority reasoned that not only would federal interests thereby be ignored, but the *Shaw* elements are self-defeating because the contractor is liable unless it notifies the government of design defects. The majority, addressing the *Shaw* formulation urged by the petitioner, rejected it as being a deterrent to contractor participation and incapable of protecting the federal interest in military equipment design discretion. The majority concluded that the *Shaw* test ignores the discretionary function because the ultimate design may be based on strict military performance requirements regardless of who originated the design. *Id.* Furthermore, the Court decided that the wording of the *Shaw* test implies that the contractor is responsible for identifying all design defects which would seriously impede voluntary design assistance by the contractors. *Id.*

62. *Id.* The Court reasoned that the protection afforded to the contractor ensures an active exchange of information and preserves the discretionary function provision of the FTCA. *Id.*

elements of the government contractor defense relied on by the appellate court were different from the elements used by the district court.[63] The Court noted that, because the judge is permitted to hold as a matter of law that the evidence establishes compliance with all elements of the defense, judgment may be entered for the contractor.[64] However, the majority was concerned that the appellate judge decided sua sponte that the elements of the government contractor defense had been proved by United Technologies.[65] As a result, the Court vacated the decision of the court of appeals and remanded solely for clarification of this issue.[66]

Justice Brennan, joined by Justices Marshall and Blackmun, dissented on the basis that the Court was shedding its robes and acting on an issue best suited for Congress.[67] Justice Brennan argued that state law should ordinarily not be displaced when the issue was not addressed by the Constitution or when the legislature has remained silent.[68] Justice Brennan contended that the independent contractor has no right to share in an immunity that protects only federal officers.[69] Justice Brennan also found a problem in the majority's application of *Yearsley* because, unlike *Yearsley*, the respondent

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63. *Id.* at __, 108 S. Ct. at 2519, 101 L. Ed. 2d at 459. The district court applied the *Agent Orange* test and the appellate court applied the *McKay* test. *Id.* Boyle contended that the determination of the factual issues was within the province of the jury, and the court of appeals improperly decided sua sponte that the affirmative defense was proved. *Id.*

64. *Id.* The majority rejected plaintiff's contention that the defendant did not object to the district court's formulation of the government contractor defense and allowed the jury verdict to stand. *Id.*

65. *Id.* The majority could not ascertain from the appellate court's wording whether the court had decided sua sponte that the contractor satisfied all elements of the defense, or if the court decided as a matter of law that the elements were satisfied. *Id.* The majority stated that if the appellate court had acted on its own, reversible error occurred. However, if it decided that "no reasonable jury could find, under the principles it had announced and on the basis of the evidence presented, that the government contractor defense was inapplicable," no error occurred. *Id.*

66. *Id.* (remanded to Court of Appeals).

67. *Id.* at __, 108 S. Ct. at 2519-20, 101 L. Ed. 2d at 460 (Brennan, J., dissenting). Justice Brennan noted that a number of Congressional bills regarding the government contractor defense had been proposed, yet none were passed. *Id.* Because Congress had not passed any legislation on this subject, Justice Brennan argued that the judiciary should not act in the place of legislators by creating substantive tort law. *Id.*

68. *Id.* at __, 108 S. Ct. at 2521, 101 L. Ed. 2d at 461 (Brennan, J., dissenting). Relying on *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. __, __, 108 S. Ct. 1350, 1353, 99 L. Ed. 2d 582, 590 (1988), Justice Brennan stated "federal common law cannot supersede state law in vacuo out of no more than an idiosyncratic determination by five Justices that a particular area is uniquely federal" since there is no textual provision of the Constitution or federal statutory authority to support it. *Id.*

69. *Id.* at __, 108 S. Ct. at 2524, 101 L. Ed. 2d at 465 (Brennan, J., dissenting). Justice Brennan contended that historically only government officials have been protected by sovereign immunity and that there is no reason to expand the immunity to government contractors. *Id.*

actually formulated the plans and finalized specifications.[70] In addition, Justice Brennan argued that mere speculation regarding a massive adverse drainage of the United States Treasury resulting from exorbitant price increases by contractors is simply not a proper basis for the majority's decision.[71]

Justice Stevens also dissented, contending that the Court should not act as legislators.[72] Justice Stevens explained that, in the present situation, Congress should explore the conflict between the rights of an individual and the goals of the government because that branch is best equipped to investigate the available options.[73]

The problems in *Boyle* arise because the United States Supreme Court legislatively altered tort law and gave a cloak of immunity to government contractors whose products are defectively designed.[74] First, the displacement of state tort law, so that this broadening of immunity could be implemented, does not clarify a confusing area of law.[75] Second, the majority created a formulation of the defense that is quite liberal in its requirements, yet arguably narrow in its application.[76] Finally, the Court should have allowed Congress to legislate a more equitable affirmative defense in military products liability cases.[77]

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70. *Id.* at __, 108 S. Ct. at 2525, 101 L. Ed. 2d at 466-67 (Brennan, J., dissenting). Justice Brennan distinguished *Yearsley* from the present case by noting that *Yearsley* involved a contractor who followed government specifications, whereas the defendant in *Boyle* actually developed the final documents. *Id.* Justice Brennan also explained that, unlike *Boyle*, *Yearsley* involved a fifth amendment takings clause question which automatically provides a manner of financial reparation. *Id.*

71. *Id.* at __, 108 S. Ct. at 2528, 101 L. Ed. 2d at 470 (Brennan, J., dissenting). Justice Brennan maintained that Congress has control of federal financial disbursements and the Court should not encroach upon this legislative power. *Id.* Moreover, Justice Brennan stated that if he were a legislator, he would not vote for legislation which isolates mega-corporations from financial liability for their errors. *Id.*

72. *Id.* (Stevens, J., dissenting). Justice Stevens contended that Congress is the proper branch to work out the issues involved because an important area of tort law is involved. *Id.*

73. *Id.* at __, 108 S. Ct. at 2528-29, 101 L. Ed. 2d at 470-71 (Stevens, J., dissenting). Justice Stevens explained that the judiciary does not have the expertise or resources available to investigate all of the implications of the government contractor defense. *Id.*

74. *See id.* at __, 108 S. Ct. at 2520, 101 L. Ed. 2d at 460 (Brennan, J., dissenting) (compliance with government contractor defense prevents manufacturer liability for design defects). Justice Brennan argued that the government contractor defense will apply to a broad array of cases involving any item the government purchases after reviewing specifications. *Id.*

75. *See id.* at __, 108 S. Ct. at 2520-23, 101 L. Ed. 2d at 461-65 (Brennan, J., dissenting). Justice Brennan contested the manner in which case law was applied by the majority in its justification for preemption. *Id.*

76. *See id.* at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 458. The majority's formulation of the defense is less restrictive than the formulation in the *McKay* test because it only requires approval by a government official to establish compliance with the first prong. *Id.*

77. *Id.* at __, 108 S. Ct. at 2528, 101 L. Ed. 2d at 470 (Brennan, J., dissenting). Justice

The majority struggled to apply precedent in order to justify displacement of state law. Prior decisions did not provide a clear example which would permit displacement of a tort action between two private parties involving a product manufactured under a government contract.[78] If the federal government was directly involved as a party, there would be a stronger argument allowing the Court to apply federal common law.[79] The *Boyle* case, however, involved two private parties without third party liability by the government.[80] As a result, the majority speculated that the impact of liability would be distilled back to the United States in the form of increased costs and refusals by manufacturers to produce products for the federal government.[81]

The majority relied on *McKay v. Rockwell International Corp.*[82] in its

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Brennan contended that Congress had reviewed numerous proposed acts regarding limitations of liability for Government contractors and had never passed any of the acts. *Id.* at __, 108 S. Ct. at 2520, 101 L. Ed. 2d at 460 (Brennan, J., dissenting). Justice Brennan concluded that the Court did not support its basis for creating a common-law affirmative defense. *Id.* at __, 108 S. Ct. at 2528, 101 L. Ed. 2d at 470 (Brennan, J., dissenting).

78. *See id.* at __, 108 S. Ct. at 2520-25, 101 L. Ed. 2d at 460-66 (Brennan, J., dissenting) (no precedent permits displacement of state law when government interest in procurement is collateral to dispute between parties). Justice Brennan did not approve of the Court's inconsistent displacement of state law with federal common law. *Id.* at __, 108 S. Ct. at 2521-22, 101 L. Ed. 2d at 461-62 (Brennan, J., dissenting).

79. *See* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943)(federal law should apply in suit involving rights and obligations of federal government on its contracts); United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973)(rights on federal government transactions are federal in nature allowing formation and application of federal common law).

80. *See* Boyle v. United Technologies Corp., __ U.S. __, __, 108 S. Ct. 2510, 2515, 101 L. Ed. 2d 442, 454 (1988)(estate of deceased suing manufacturer of helicopter). While noting the involvement of private parties, the Court relied on precedent wherein state law was applied because the Court could not justify pre-emption. *See* Miree v. DeKalb County, 433 U.S. 25, 27 (1977)(suit involving private parties wherein Court refused to displace state law because United States would not be directly affected by claim); Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 30 (1956)(suit involving conversion of bank bonds). The *Parnell* Court recognized the suit as being between two private parties and rejected the contention that the bonds issued by the United States should be governed by federal law. *Id.* at 33. The Court reasoned that application of state law would not disrupt the government's ability to issue commercial paper. *Id.*

81. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2528, 101 L. Ed. 2d at 470 (Brennan, J., dissenting) (Court provided no statistical data or precedent to establish forecasted results likely to occur); *accord* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 457 (9th Cir. 1983)(Alarcon, J., dissenting). In his dissent, Judge Alarcon editorial realized that the free market system will act as a buffer between contractor liability and any price increase to the government. *Id.* The contractor will be discouraged from increasing his price because of the risk that a competitor, who produces a safe products will be able to provide a lower bid. *Id.* Moreover, Judge Alarcon noted that most government contracts already have insurance and liability costs built into contract prices. *Id.*

82. 704 F.2d 444 (9th Cir. 1983).

brief discussion of the government contractor defense.[83] Comparing the wording of the *McKay* formulation with the *Boyle* formulation, the latter is worded liberally in favor of the contractor.[84] The majority discarded, as being too broad and too narrow, the first element of the *McKay* test, which provides the significant conflict to displace state law.[85] Instead, to justify displacement of state law, the Court used the significant conflict between the "discretionary function" exception to the FTCA and the federal interest in procurement of military equipment.[86] Regarding the construction of the test, the majority provided an unavailing first element by requiring that the defendant merely establish approval of "reasonably precise specifications."[87]

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83. *Boyle*, __ U.S. at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 458. Justice Scalia analyzes the effect of the defense in terms of locating a suitable conflict to justify displacement of state law. *Id.* The elements of the defense were drafted to further the discretionary function of the military and provide incentive to the contractors to notify the government of dangerous or defective designs. *Id.*

84. *Compare* Boyle v. United Technologies Corp., __ U.S. __, __, 108 S. Ct. 2510, 2518, 101 L. Ed. 2d 442, 458 (1988)(adopting language similar to *McKay* but deleting limitation to suits under *Feres-Stencel* doctrine and deleting requirement of notification of patent errors) *with* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983)(*Feres-Stencel* must apply in order for defense to apply). The *McKay* formulation provides contractor immunity when the *Feres-Stencel* doctrine applies, the contractor proves that the specifications were approved or established by the government, the equipment satisfies the requirements of the specifications, and the contractor warns the government of risks not known to the government or of patent errors in the specifications. *Id.*

85. *Boyle*, __ U.S. at __, 108 S. Ct. at 2517, 101 L. Ed. 2d at 456-57. The first element of the *McKay* formulation provided the conflict and regarded the government's immunity under the *Feres-Stencel* doctrine. *See McKay*, 704 F.2d at 451. Justice Scalia considered the *Feres-Stencel* doctrine as too broad in that it pertains to all military suits and would provide a conflict to allow displacement of state law even if the item purchased was standard equipment or purchased from a manufacturer's stock. *Boyle*, __ U.S. at __, 108 S. Ct. at 2517, 101 L. Ed. 2d at 456-57. Likewise, the doctrine is too narrow because it does not apply to civilian plaintiffs injured by military products. *Id.*

86. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 457-58. The Court stated that the conflict between contractor liability and the discretionary function in the FTCA would be significant in "some circumstances." *Id.* This language requires the defendant manufacturer to establish the significant conflict if he intends to rely on the government contractor defense. *Id.* As a result, the manufacturer would need to prove that interference with a military design decision is involved. *Id.* at __, 108 S. Ct. at 2517, 101 L. Ed. 2d at 457.

87. *Id.* at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 458 (first element requires federal approval of reasonably preuse specifications). The *Shaw* court did not concur with the *McKay* element which refers to specifications requiring the supplier prove the government provided or accepted reasonably precise specifications. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 745 (11th Cir. 1985). *Shaw* properly questioned the various forms of specifications by noting that specifications can be drafted in forms ranging from general to specific, depending on the type of item specified. The problem lies in the dichotomy of the role of the supplier. If the military provides the design, the contractor is solely a manufacturer and "liable only for manufacturing defects;" whereas, if the contractor provides the design to the military, the contractor is the designer/manufacturer with liability for design and manufacturing. *Id.* Thus, the *Shaw*

The last element excluded reference to contractors' responsibility for notification of patent errors in the government specifications, thus alleviating an additional burden for the contractor.[88] By constructing an affirmative defense that can be readily established by defense contractors, the Court effectively barred any plaintiff from recovering for design defects in military products.[89]

The dissent complained that the holding of the Court operates as a universal affirmative defense for any government contractor.[90] However, the majority opinion explicitly stated its holding applies only to military equipment, thus rendering the dissent's fears unfounded.[91] By specifically referring to military equipment, the majority prevents application of the government contractor defense to most contractors providing services.[92] Yet some situations exist wherein a provider of services may be able to rely on the government contractor defense, such as engineers or consultants strictly providing design services on military equipment projects.[93] In terms of application to products liability cases, the affirmative defense is narrow in that it does not apply to cases involving marketing or manufacturing defects.[94] An addi-

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court formulated its defense to apply only in situations where the contractor did not design the product or provided minimal design input to the government. *Id.* at 746.

88. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 458 (unlike *McKay*, Boyle does not require notice of obvious errors in government specifications); Bynum v. FMC Corp., 770 F.2d 556, 575-76, n.28 (5th Cir. 1985)(interpreting importance of requiring notification of "patent" or "known defects"); *see also* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983). The *McKay* court determined that notification of "known" defects would enable the United States to perform a risk/benefit analysis in its project decisions. *Id.*

89. *See* Boyle v. United Technologies Corp., __ U.S. __, __, 108 S. Ct. 2510, 2517, 101 L. Ed. 2d 442, 456-57 (1988)(majority drafted defense to preclude suits by both civilians and military personnel when injury occurs by a defectively designed military product). *Id.*

90. *Id.* at __, 108 S. Ct. at 2520, 101 L. Ed. 2d at 459-60 (Brennan, J., dissenting). Justice Brennan considered the majority's holding as being overbroad. *Id.* In his dissent, Justice Brennan interpreted the defense as applying to all contractors, not merely military contractors. *Id.* Thus, Justice Brennan was concerned that the Government contractor defense would not only be used in cases such as injury to the public at large, but also in cases involving government building contractors and any other entity that contracts with the Government. *Id.*

91. *Id.* at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 458. The majority distinctly stated in its formation of the affirmative defense that there can be no liability for defectively designed military equipment when the contractor proves all of the elements of the Government contractor defense. *Id.*

92. *See id.* at __, 108 S. Ct. at 2518, 101 L. Ed. 2d at 458 (majority discusses only producers and suppliers of goods).

93. *See* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 745 (11th Cir. 1985)(*Shaw* court recognized specifications and designs often provided by various sources including outside consulting firms who are not manufacturers).

94. *See* Boyle v. United Technologies Corp., __ U.S. __, __, 108 S. Ct. 2510, 2518, 101 L. Ed. 2d 442, 458 (1988)(court specifically limits government contractor defense to defective design of military equipment).

tional problem is that "military equipment" is a broad category and has been interpreted to include items such as jeeps,[95] chemical defoliants,[96] construction machinery,[97] aircraft,[98] and even a pizza dough machine.[99] As a result, the Court has defined an affirmative defense that appears to apply to a limited number of situations, yet in reality may be applied to a broad range of cases.[100]

Certain situations will justify protecting industry from design defect liability, such as where the contractor is compelled by government officials to design a component in order to successfully comply with strict performance criteria.[101] Another instance which justifies contractor immunity is design of equipment during times of war, when the ability to test and retest various designs is not available.[102] No doubt, the military needs the latitude to demand that a proposed weapon perform in a certain manner so that our armed forces have a greater chance of success.[103] However, the legislative branch is best equipped to analyze all of these situations when drafting legislation.[104]

By creating an affirmative defense that will be implemented by courts

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95. *See* Sanner v. Ford Motor Co., 364 A.2d 43, 46 (N.J. 1976)(government contractor defense applied to defective jeep design).

96. *See In re* Agent Orange Prod. Liab. Litig., 580 F. Supp. 690, 713 (E.D.N.Y. 1984)(products liability suit involving herbicide used by military).

97. *See* Tillet v. J.I. Case Co., 756 F.2d 591, 593 (7th Cir. 1985)(soldier killed while operating front end loader); Brown v. Caterpillar Tractor Co., 696 F.2d 246, 247 (3d Cir. 1982)(soldier injured while operating bulldozer).

98. *See* Tozer v. LTV Corp., 792 F.2d 403, 404 (4th Cir. 1986)(Navy pilot killed when reconnaissance plane crashed); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 353 (3d Cir. 1985)(helicopter crashed killing Navy crewman).

99. *See* Casabianca v. Casabianca, 428 N.Y.S.2d 400, 401 (Sup. Ct. 1980)(dough mixer manufactured for Army).

100. *See* Boyle v. United Technologies Corp., __ U.S. __, __, 101 S. Ct. 2510, 2520, 101 L. Ed. 2d 442, 460 (1988)(Brennan, J., dissenting) (Justice Brennan considered defense as applying to any item government has "made-to-order").

101. *See* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 458 (9th Cir. 1983)(Alarcon, J., dissenting). The dissent in *McKay* acknowledged that if the government compelled a contractor or manufacturer to produce a product that is defective, the contractor should be immune from suit. *Id.*

102. *See In re* Agent Orange Prod. Liab. Litig., 534 F. Supp. 1046, 1054 (E.D.N.Y. 1982)(military should not be questioned on design during times of war).

103. *See* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 (11th Cir. 1985)(objective of waging war is to win). The *Shaw* court recognized that the purpose of the government contractor defense is to allow the government to prepare for, and conduct, a war without interference. *Id.* According to the court, the interference would stem from contractors declining to produce equipment if expose to liability. *Id.*

104. *See Boyle*, __ U.S. at __, 108 S. Ct. at 2528, 101 L. Ed. 2d at 471 (Stevens, J., dissenting) (only Congress has ability to completely address as large a segment of government activity as military procurement).

throughout the nation, the Court has indeed discarded its robes and usurped the role of the legislature. Under the *Boyle* decision, the government contractor has a nationwide cloak of protection in design defect cases. Yet, will the government and its citizens reap financial rewards by lower bids on government projects? If the Court's decision was designed to protect both the United States Treasury and the discretion of the military in providing adequate tools of defense, an affirmative defense may be applicable, but with a different goal. Granted, when dealing with the subject of military equipment, there will be situations when a contractor deserves immunity. These situations include instances when dangerous design is compelled by the military in order to meet performance requirements and also during periods when emergency design and production are required, such as war. In its decision to create a far reaching affirmative defense, the Court has overlooked a number of scenarios that only Congress has the tools to investigate.

Matthew J. Sullivan