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BOYLE V. UNITED TECHNOLOGIES CORP.: THE TURNING POINT FOR THE GOVERNMENT CONTRACTOR DEFENSE?

I. INTRODUCTION

In recent years, the development of strict products liability as a theory of recovery has eased the plaintiff's burden in proving injury from defective products.¹ However, one group of manufacturers—military contractors—has frequently escaped liability for the dangerous products it manufactures. When faced with a products liability suit, the military contractor raises the government contractor defense which “protects a government contractor from liability for acts done by him while complying with government specifications during . . . performance of a contract with the United States.”² If successful, the contractor is shielded from liability by sharing in the government's sovereign immunity.³

The government contractor defense protects military contractors from liability for injuries caused by equipment that the contractor manufactures according to specifications provided by the government.⁴ It is an affirmative defense which, when properly raised, provides a contractor with a complete defense to claims sounding in warranty, negligence, or strict tort liability.⁵ However, the government contractor defense is not available when the injuries in question are caused by manufacturing defects.⁶

1. Note, *McKay v. Rockwell International Corp.: No Compulsion Required For Government Contractor Defense*, 28 St. Louis U.L.J. 1061, 1061 (1984).

2. *Hubbs v. United Technologies*, 574 F. Supp. 96, 98 (E.D. Pa. 1983) (products liability action against manufacturer of helicopter control system that allegedly malfunctioned causing crash of Navy helicopter and death of three naval reservists).

3. See *infra* note 29 and accompanying text.

4. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). See *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 354 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985); *Hendrix v. Bell Helicopter Textron Inc.*, 634 F. Supp. 1551, 1555 (N.D. Tex. 1986).

5. *Tillett v. J.I. Case Co.*, 756 F.2d 591, 597 n.3 (7th Cir. 1985); *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir.), *petition for cert. filed* (1986); *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 253 (3d Cir. 1982) (defense also applicable to claims based on breach of warranty); *In re Air Crash Disaster at Mannheim Germany*, 769 F.2d 115, 120 n.8 (3d Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986), *reh'g denied*, 107 S. Ct. 1636 (1987) (defense applies to negligent design cases as well as strict liability cases).

6. *McKay*, 704 F.2d at 451. See *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961) (government contract defense does not protect contractors from their own improper, careless or negligent acts); *Brown*, 696 F.2d at 253 (defense not available if goods furnished to government were themselves defective); *Johnston v. United*

Originally, the defense was used only in public works projects.⁷ However, recently it has been applied to cases involving alleged design defects in military equipment.⁸ Today, the government contractor defense is used to shield government contractors from liability in a wide variety of circumstances. The defense has been raised in cases involving such diverse products as a Naval assault helicopter,⁹ an Army jeep,¹⁰ and a pizza maker.¹¹

On May 27, 1986, the United States Court of Appeals for the Fourth Circuit issued three opinions concerning the government contractor defense.¹² The decisions were significant for two reasons. First, they adopted the majority¹³ form of the defense as the rule for the Fourth Circuit.¹⁴ Second, and more important, one of these cases, *Boyle v. United Technologies Corp.*,¹⁵ has been granted certiorari by the United States Supreme Court.¹⁶ This grant of certiorari is of paramount importance because it raises issues of first impression before the Court and its decision may establish the form of the government contractor defense to be used in the future.¹⁷

States, 568 F. Supp. 351, 356 (D. Kan. 1983) (contractor should be held liable for his own negligence). See also Comment, *The Government Contract Defense: An Overview*, 27 How. L.J. 275, 295 (1984) (discussion of government contract defense and defectively manufactured products).

7. See *infra* notes 37-49 and accompanying text for a discussion of the development of the government contractor defense from public works cases.

8. See, e.g., *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (N.J. App. 1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

9. *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987) (alleged defective design of escape hatch in Marine CH-53 helicopter).

10. *Sanner*, 144 N.J. Super. 1, 364 A.2d 43 (action against jeep manufacturer for failing to install roll bar and seat belts).

11. *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (1980) (alleged defective design of dough mixer in which infant plaintiff's hand was caught).

12. *Tozer*, 792 F.2d 403; *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir.), *petition for cert. filed* (1986); *Boyle*, 792 F.2d 413.

13. *McKay*, 704 F.2d 444. In *McKay*, the Ninth Circuit promulgated what has now become the test used by a majority of the circuits in determining whether to grant immunity to a military contractor. Under this test, a contractor must affirmatively prove four requirements: 1) that the United States was immune from liability; 2) that the government set or approved reasonably precise specifications for the equipment; 3) that the equipment conformed to those specifications; and 4) that the manufacturer warned the government of any dangers the manufacturer had actual knowledge of. *Id.* at 451.

14. *Tozer*, 792 F.2d at 408.

15. 792 F.2d 413 (4th Cir. 1986).

16. 107 S. Ct. 872 (1987).

17. The importance of the Supreme Court's consideration of the defense was emphasized recently when it was referred to as the "billion-dollar question." L.A. Times, Jan. 4, 1988, part 1, at 1, col. 1.

Currently, the Second,¹⁸ Third,¹⁹ Fourth,²⁰ Fifth,²¹ Seventh²² and Ninth²³ Circuits have all adopted essentially the same form of the government contractor defense. As used, this defense is based principally on the Ninth Circuit's holding in *McKay v. Rockwell International Corp.*²⁴ Only the Eleventh Circuit radically departs from the majority rule.²⁵ The form of the defense which the Supreme Court adopts will, in all probability, be some amalgamation of these two interpretations.

Thus, the issue before the Supreme Court in *Boyle* is not whether a government contractor defense should exist, but rather what the dimensions of the defense should be.²⁶ The question is whether one of the two major constructions of the defense, the *McKay* or *Shaw* formulations, or some variation, should be adopted as the standard. A uniform standard is necessary so that military contractors can predict the scope of liability

18. See *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982). The district court in *In re Agent Orange* explicitly defined for the first time the elements of the government contractor defense. The court held that to avoid liability a contractor must prove three requirements: 1) that the government established the specifications for the product; 2) that the product complied with those specifications in all material respects; and 3) that the government knew as much as the contractor about the dangers of the product. *Id.* at 1055.

19. See *Koutsoubos*, 755 F.2d at 355 (recognizing *In re Agent Orange* three-part test and extending it to include holding in *McKay* that continuous back-and-forth discussions between government and contractor satisfy approval requirement).

20. See *Tozer*, 792 F.2d at 408 (adopting *McKay* four-part test).

21. See *Bynum v. FMC Corp.*, 770 F.2d 556, 566 (5th Cir. 1985) (adopting *McKay* four-part test and specifically recognizing that governmental compulsion was not a requirement for availability of the defense).

22. See *Tillett*, 756 F.2d at 597 (followed *McKay* and rejected governmental compulsion requirement).

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

24. *Id.*

25. *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *petition for cert. filed*, 106 S. Ct. 2243 (1986). The Eleventh Circuit's decision in *Shaw* established the minority form of the government contractor defense. Under this version of the defense, to avoid liability a military contractor must prove that it did not participate, or only minimally participated, in the design of the equipment; or, alternatively, that it warned the government of dangers in the design and informed the government of any alternative designs reasonably known to the contractor. *Id.* at 746.

26. As the Fifth Circuit pointed out, the "'government contractor defense' . . . has been adopted to some extent by almost every court, both state and federal, that has considered the matter." *Bynum*, 770 F.2d at 565. See, e.g., *In re Agent Orange*, 534 F. Supp. at 1055; *In re Air Crash Disaster*, 769 F.2d at 120; *Tozer*, 792 F.2d at 408; *Tillett*, 756 F.2d at 597; *Johnston*, 568 F. Supp. at 353; *Sanner*, 144 N.J. Super. at 8, 364 A.2d at 46; *Casabianca*, 104 Misc. 2d at 350, 428 N.Y.S.2d at 402; *Hendrix*, 634 F. Supp. at 1555. On the other hand, at least one authority has argued that the government contractor defense is unnecessary and against public policy. McCarthy & Mitzemacher, *If a Federal Government Military Contract Defense for Military Aircraft Manufacturers Is the Solution—What Is the Problem?*, in *THE GOVERNMENT CONTRACTOR DEFENSE: A FAIR DEFENSE OR THE CONTRACTOR'S SHIELD?* 51 (J. Madole ed. 1986).

to which they will be exposed. Also, the defense can be used as a way to reduce litigation.²⁷ If the government contractor defense was available in products liability actions, and not necessarily limited to military equipment, many suits would be resolved more quickly.²⁸

This Note will review the historical development of the government contractor defense from agency theory and the contract specification defense. Next, the Note will set forth the two main constructions of the defense, those of the Ninth and the Eleventh Circuits. It will then discuss the Fourth Circuit's application of the government contractor defense to the facts of *Boyle*. The reasoning and policy arguments behind each of the elements of the defense will also be explored. Finally, the Note will conclude with a proposed test for the availability of the government contractor defense.

II. DEVELOPMENT OF THE GOVERNMENT CONTRACTOR DEFENSE

A. *Origins of the Defense*

Traditionally, a contractor who strictly followed government design specifications could avoid liability for damages resulting from implementing those specifications by raising two defenses. The first traditional defense uses principles of agency law to shield a contractor from tort liability by sharing in the government's sovereign immunity.²⁹ If the defense is successfully raised, the same immunity that protects the government from private lawsuits will be extended to shield the government contractor from liability as well. Although this defense originated in public works cases, a number of courts subsequently extended the principle to products liability litigation.³⁰ This defense is only available when

27. Rivkin, *The Government Contract Defense: A Proposal For The Expeditious Resolution of Asbestos Litigation*, 17 THE FORUM 1225, 1226 (1982) (use of government contractor defense to speed asbestos litigation). The court in *In re Agent Orange*, 534 F. Supp. 1046, determined that product liability litigation should proceed in stages or phases. *Id.* at 1054 n.1. Certain legal issues such as the availability of the government contractor defense would be resolved in separate trials. The *In re Agent Orange* court proposed that the government contractor defense be raised in the first trial or phase. *Id.* Thus, if the defense is successfully raised, the action can be dismissed at an early stage, saving court time and costs. "The successful assertion of the defense will obviate the need for the extensive discovery procedures and complex, lengthy and duplicative trials which threaten to congest the court dockets for years to come." Rivkin, *supra*, at 1238.

28. Rivkin, *supra* note 27, at 1226.

29. Bynum v. FMC Corp., 770 F.2d 556, 564 (5th Cir. 1985).

30. See *Littlehale v. E.I. du Pont de Nemours & Co.*, 268 F. Supp. 791 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967) (civilian employee of Navy injured by blasting caps manufactured by defendant; in dicta court stated that manufacturer could escape liability if product was produced according to government specifications); *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (N.J. App. 1977), *cert.*

the government is the party writing the product's specifications.

The second traditional defense is the contract specification defense.³¹ This defense protects manufacturers who reasonably follow the specifications of a third party in producing a product that later proves to be dangerous.³² Unlike the agency defense, the availability of the contract specification defense is not dependent on the identity of the party making the specifications. The party making the product's specifications may be the government or any other third party.³³ The contract specification defense is grounded in principles of negligence and has not been extended to other theories of recovery.³⁴

In general, most authorities cite one or both of these principles as the origin of the present form of the government contractor defense.³⁵ However, neither of the traditional defenses alone survives today as a viable defense for the modern government contractor.³⁶ In order to provide a basis for an understanding of the present government contractor defense, the following sections briefly discuss the agency and contract specification defenses.

1. Agency theory

The government contractor defense had its genesis in actions against government contractors involved in public works projects.³⁷ This early version of the defense is based on elementary principles of agency.³⁸ The agency defense is best illustrated by the case of *Yearsley v. W.A. Ross*

denied, 75 N.J. 616, 384 A.2d 846 (1978) (manufacturer not liable for injuries caused by jeep it manufactured in conformance with government specifications which did not include seat belts or roll bar).

31. *Johnston v. United States*, 568 F. Supp. 351, 353 (D. Kan. 1983).

32. *Id.* at 354.

33. *Id.*

34. *Id.*

35. The government contractor defense "is essentially a judicial amalgamation of the two traditional defenses [contract specification and agency]." *Bynum*, 770 F.2d at 565; see *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir.), *petition for cert. filed* (1986) (original form of defense set forth in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940)); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 596 (7th Cir. 1985) (defense was derived from *Yearsley*); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984) (government contractor defense first articulated by Supreme Court in *Yearsley*); *Johnston v. United States*, 568 F. Supp. 351, 353 (D. Kan. 1983) (government contractor defense is "in reality an amalgam of two separate defenses [contract specification and agency] . . .").

36. "Neither defense, however, has retained its vitality in the context of a modern products liability action against a manufacturer of military equipment." *Bynum*, 770 F.2d at 563.

37. See, e.g., *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940) (damage resulting from erosion caused by contractor); *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1965) (damage caused by river dredging).

38. *Yearsley*, 309 U.S. at 21. "A person is subject to liability for the consequences of

*Construction Co.*³⁹

In *Yearsley*, a contractor under the direction and authority of the government was hired to make the Missouri River more navigable.⁴⁰ The contractor built dikes and used large boats with paddles and pumps to create artificial erosion.⁴¹ During the erosion process, ninety-five acres of the plaintiff's land were flooded.⁴² The plaintiff sued the contractor for damages. The Supreme Court held that "there is no ground for holding [the government's] agent liable [when he] is simply acting under . . . authority . . . validly conferred."⁴³ The Court asserted that "[t]he action of the agent is 'the act of the government.'"⁴⁴ Although not expressly stated, the Supreme Court implied that the contractor was permitted to share in the government's cloak of sovereign immunity.⁴⁵ Thus, under the holding of *Yearsley*, a public works contractor who is following directions given by the government can avoid tort liability for damages caused by the activity.⁴⁶ Of course, if the contractor fails to follow the government's particular specifications or commits an error in the manufacturing process he forfeits the defense.⁴⁷

The *Yearsley* defense is difficult to apply in the military contractor context because the defendant must prove that an agency relationship existed between the government and the contractor. "The difficulty of establishing a traditional agency relationship with the government makes the derivative sovereign immunity defense ill-suited to many manufacturers of military equipment."⁴⁸ Further, changes in the military procure-

another's conduct which results from his directions as he would be for his own personal conduct" RESTATEMENT (SECOND) OF AGENCY § 212 (1957).

39. 309 U.S. 18 (1940).

40. *Id.* at 19.

41. *Id.*

42. *Id.* at 20.

43. *Id.* at 22.

44. *Id.* (quoting *United States v. Lynah*, 188 U.S. 445, 465-66 (1903)).

45. *Bynum*, 770 F.2d at 564. "Based on the medieval notion that the king can do no wrong, sovereign immunity precludes a litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to the suit." *Principe Compania Naviera, S.A. v. Board of Comm'rs*, 333 F. Supp. 353, 355 (E.D. La. 1971) (emphasis added). Under this theory, a party who is subject to a court's jurisdiction may still escape tort liability by invoking the doctrine of sovereign immunity. *Id.* See also *Dawson v. Merit Sys. Protection Bd.*, 712 F.2d 264, 267 (7th Cir. 1983) ("As a general rule, the United States Government, as 'sovereign,' is liable to third parties only when the government expressly waives its sovereign immunity.").

46. Prior to the Federal Tort Claims Act, the only recourse an injured party would have in a case such as *Yearsley* would be against the federal government for the "taking" of property without just compensation. U.S. CONST. amend. V. See *infra* note 61 and accompanying text.

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

48. *Id.* For the *Yearsley* agency defense to be available, the government must have a prin-

ment process since the time of *Yearsley* and theories of products liability recovery have also rendered this defense unsuitable for military contractors.⁴⁹

2. Contract specification defense

Unlike the *Yearsley* agency defense, the contract specification defense applies to both private and government contractors.⁵⁰ The defense is available whenever products are manufactured according to the specifications supplied by a third party.⁵¹ Provided that the contractor adheres

principal/agent relationship with the military contractor. Comment, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity After McKay v. Rockwell Int'l Corp.*, 37 BAYLOR L. REV. 181, 222 nn.316, 318 (1985) [hereinafter *Sharing the Protective Cloak*].

An agency relationship arises when one party, the principal, authorizes another party, the agent, to be the principal's representative and to act in furtherance of the principal's interests and under his direction. R. KIMBROUGH, SUMMARY OF AMERICAN LAW § 1:1 (1974). The difficulty with proving agency in today's military procurement process is that many government contractors have merely a buyer/seller or independent contractor relationship with the government. *Sharing the Protective Cloak, supra*. Thus, the defense is unavailable to contractors who are unable to show the amount of governmental control necessary to establish agency. *Id.* See *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 1015 (5th Cir. 1969) (in action for injuries caused by grenade, court refused to find agency relationship and refused to extend sovereign immunity to contractor that produced grenades according to strict government specifications); Comment, *In Defense of The Government Contractor Defense*, 36 CATH. U.L. REV. 219, 228 (1986) (independent military contractors do not have agency relationship, military contractors cannot successfully raise *Yearsley* agency defense).

49. Amici Curiae Brief at 18, *Boyle v. United Technologies Corp.* (U.S. Oct., 1986) (No. 86-492) [hereinafter Amici Brief] (changes over last 30 years have rendered *Yearsley* defense inadequate to respond to present day problems). Recently, at least one commentator has urged a return to the agency concepts of *Yearsley*. See *Sharing the Protective Cloak, supra* note 48, at 219. The author proposed that the concept of sharing governmental immunity on the basis of agency be extended and refined to be more applicable in the military contractor context. *Id.* at 219-20. He argued that basing the defense on the principles of agency would eliminate the confusion surrounding the current form of the defense and provide a degree of uniformity among the various jurisdictions. *Id.* at 221.

50. *Johnston*, 568 F. Supp. at 354. "The contract specification defense applies to products manufactured to the order and specification of another, whether that other be the government or a private party." *Id.* See also *Littlehale*, 268 F. Supp. at 802 n.16 (defense is "equally applicable where a private party contracts for a product to be manufactured or building to be done").

51. *Johnston*, 568 F. Supp. at 354. A contractor cannot be held liable if he is merely following the plans, specifications, and directions given to him, since under those circumstances the responsibility is assumed by his employer. *Davis v. Henderlong Lumber Co.*, 221 F. Supp. 129, 134 (N.D. Ind. 1963) (following specifications of its employer, contractor held not liable for building chemical fume hood that caused injury); see also *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846 (11th Cir. 1985) (defendant manufactured animal vaccine according to strict government specifications; when vaccine caused injury, defendant was allowed to raise government contractor defense). This is the rule provided that the specifications contain no obviously dangerous defects that would cause a reasonable man not to follow them. *Davis*, 221 F. Supp. at 134.

to the specifications of its employer,

[t]he contractor is not subject to liability if the specified design or material turns out to be insufficient to make the chattel safe for use, unless it is so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe.⁵²

However, any special knowledge that the contractor possesses can, in certain circumstances, subject the contractor to a higher standard of care.⁵³

The rationale supporting this defense is that the average contractor cannot be expected to possess knowledge and expertise sufficient to allow it to review every design it is given.⁵⁴ Thus, a contractor, where it is reasonable, is allowed to rely on the superior knowledge and expertise of the party making the specifications.⁵⁵ The contract specification defense is based on the negligence concept of reasonable reliance.⁵⁶ Where it is

52. RESTATEMENT (SECOND) OF TORTS § 404 comment a (1965).

53. "[I]n those unexpected cases where the manufacturer has special knowledge or expertise, he may be held to as high a standard of care as the designer—or higher." *Johnston*, 568 F. Supp. at 354. Or, more directly, "[t]he standard of responsibility for the ordinary contractor is that usually possessed by persons in his place." *Person v. Cauldwell-Wingate Co.*, 187 F.2d 832, 835 (2d Cir.), cert. denied, 341 U.S. 936 (1951) (electrical contractor held to level of skill of others in his field).

As pointed out in the Restatement (Second) of Torts, an important factor in determining the standard of reasonable conduct for a party is the possession of superior knowledge or skill. "The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising . . . such superior . . . knowledge, intelligence, and judgment as the actor himself has." RESTATEMENT (SECOND) OF TORTS § 289 (1965); see also *id.* § 289 comment m (actor having superior knowledge must use that knowledge in a manner reasonable under the circumstances); *id.* § 389 comment e, illustration 1 (contractor who builds house from plans specifying obviously cheap and inferior materials is liable for injuries).

54. *Johnston*, 568 F. Supp. at 354. "[T]he contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer." RESTATEMENT (SECOND) OF TORTS § 404 comment a (1965). "[J]ust as a nurse or orderly will seldom be in a position to second guess a physician," a manufacturer should not be held to the same high standard of care as the designer of the product. *Johnston*, 568 F. Supp. at 354.

55. *Ryan v. Feeney & Sheehan Bldg. Co.*, 239 N.Y. 43, 45-46, 145 N.E. 321, 321-22 (1924). In that case, the government supplied specifications for a canopy that proved to be unsafe. *Id.* The court stated that "[a] builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow, unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury." *Id.* See also *Littlehale*, 268 F. Supp. at 802 n.16; Ausness, *Surrogate Immunity: The Government Contract Defense and Products Liability*, 47 OHIO ST. L.J. 985, 993 n.64 (1986).

56. A contractor should be able to reasonably rely on the superior skill or knowledge of the party making the specifications. See *Johnston*, 568 F. Supp. at 354; Ausness, *supra* note 55, at 993 n.64.

reasonable, a contractor will be allowed to rely on a third party's specifications for a product.

Although the reasonableness of the contractor's actions may be relevant in negligence cases, they would be irrelevant in a strict products liability action.⁵⁷ Since the majority of litigation involving military equipment is based on strict products liability, the availability of the contract specification defense for use by military contractors is very limited.⁵⁸

In sum, the *Yearsley* agency defense and the contract specification defense are limited in their applicability to modern products liability actions involving military contractors. Consequently, to protect government contractors from unfair liability, the courts developed the modern version of the government contractor defense.

B. *The Feres-Stencel Doctrine*

One of the primary rationales underlying the present day government contractor defense is the *Feres-Stencel* doctrine.⁵⁹ At the heart of this doctrine is the concept of sovereign immunity. Simply stated, sovereign immunity protects the federal government from suit unless the government has given its prior consent.⁶⁰ With the enactment of the Federal Tort Claims Act⁶¹ (FTCA), the government waived much of its immunity. The FTCA limited the government's sovereign immunity by subjecting the government to tort liability in the "same manner and to the same extent as a private individual under like circumstances."⁶² The FTCA, however, contains an exception for military personnel.⁶³ During

57. "Successful application of the contract specification defense depends . . . on the concepts of fault and negligence." *In Defense of The Government Contractor Defense*, *supra* note 48, at 228. Thus, the contract specification defense is not available in suits brought in strict liability against government contractors. *Id.*; see *Johnston*, 568 F. Supp. at 354; see also Note, *supra* note 1, at 1070.

58. *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 739 (11th Cir. 1985), *petition for cert. filed*, 106 S. Ct. 2243 (1986). See *In Defense of The Government Contractor Defense*, *supra* note 48, at 228.

59. "The reasons for applying the government contractor defense to suppliers of military equipment with design defects approved by the government parallel those supporting the *Feres-Stencel* doctrine[.]" *Hubbs v. United Technologies*, 574 F. Supp. 96, 98 (E.D. Pa. 1983); see also *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

60. *Principe Compania Naviera, S.A. v. Board of Comm'rs*, 333 F. Supp. 353, 355 (E.D. La. 1971).

61. 28 U.S.C. §§ 2671-2680 (1983).

62. *Id.* § 2671.

63. *Id.* § 2680(j). The provisions of the FTCA do not apply to "[a]ny claim arising out of the combatant activities of the military or naval forces . . . during time of war." *Id.*

time of war, a member of the armed forces cannot recover damages from the government under the FTCA.⁶⁴ In interpreting this exception, the courts developed the *Feres-Stencel* doctrine.⁶⁵ This doctrine provides the primary justification for the government contractor defense.⁶⁶

The *Feres-Stencel* doctrine developed from the holdings of two United States Supreme Court cases. In *Feres v. United States*,⁶⁷ the Supreme Court stated that the "[g]overnment is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."⁶⁸ The Court based its judgment on the rationales underlying the FTCA.⁶⁹

The Court cited three main rationales for its holding: (1) the "distinctively federal . . . character" of the relationship between the government and the members of its armed forces;⁷⁰ (2) the availability of an alternate compensation system,⁷¹ "which normally requires no litigation,

64. *Id.*

65. The *Feres-Stencel* doctrine developed from the holdings of two Supreme Court cases: *Feres v. United States*, 340 U.S. 135 (1950) and *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1976).

66. *Bynum v. FMC Corp.*, 770 F.2d 556, 560 (5th Cir. 1985); see also Note, Schoenborn v. Boeing Co.: *The Government Contractor Defense Becomes a "Windfall" for Military Contractors*, 40 U. MIAMI L. REV. 287, 291 (1985).

67. 340 U.S. 135 (1950). The *Feres* case was actually a consolidation of three cases. *Id.* at 136. The *Feres* case involved a negligence action brought against the United States. *Id.* at 136-37. Decedent, a member of the military on active duty, perished during a fire in his barracks. *Id.* The executrix of *Feres* alleged negligence for quartering decedent in a barracks having a defective heating plant. *Id.* at 137. Second, in the *Jefferson* case, the plaintiff, while in the Army, sued the Army for negligence in leaving a towel 30 inches long by 18 inches wide, marked "Medical Department U. S. Army," in his stomach during abdominal surgery. *Id.* Last, the plaintiff in the *Griggs* case alleged that decedent, while on active duty, died from negligent and unskilled medical treatment from Army surgeons. *Id.*

68. *Id.* at 146. After more than 30 years, the holding of *Feres* is still embraced by the Supreme Court. *United States v. Johnson*, 107 S. Ct. 2063 (1987) (military pilot killed in helicopter crash resulting from alleged negligence of civilian air traffic controller). "[T]he *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries. We decline to modify the doctrine at this late date." *Id.* at 2067.

69. *Feres*, 340 U.S. at 144.

70. *Id.* at 143. The Court explained that "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority." *Id.* at 143-44 (citation omitted). As a result, the Court concluded that "[i]t would hardly be a rational plan of providing for those disabled in service . . . to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." *Id.* at 143.

71. The alternate compensation system the Court was referring to was the Veterans' Benefits Act, 38 U.S.C. §§ 101-5228 (1983). The Veterans' Benefits Act (VBA) is a no-fault military compensation system which provides a "simple, certain, and uniform compensation for injuries or death of those in armed services." *Feres*, 340 U.S. at 144. Under the VBA, the surviving spouse or dependents of a veteran who died from injuries received while on active

[and] is not negligible or niggardly . . .";⁷² and (3) "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty"⁷³ The Court concluded that the government is not liable under the FTCA for injuries to servicemen when the injuries arise out of or are in the course of their military duties.⁷⁴

After *Feres*, members of the armed forces were barred from recovering in tort from the government.⁷⁵ As a result, servicemen began to bring tort actions against the military contractors who had manufactured the government-designed equipment that caused their injuries.⁷⁶ These manufacturers were often found liable even though they frequently had very little, if any, discretion in the design specifications that caused the injury.⁷⁷ "Thus, contractors found themselves paying for the government's design defects, particularly in strict liability jurisdictions where the presence of the military contractor's negligence was irrelevant."⁷⁸ If the holding in *Feres* was a heavy burden on government contractors, the decision in *Stencel Aero Engineering Corp. v. United States*⁷⁹ broke the

duty will be compensated at certain monthly rates specified in the VBA. 38 U.S.C. § 321 (1983).

72. *Feres*, 340 U.S. at 145. The Court noted that the recoveries available through the VBA compared "extremely favorably" with those available through most worker's compensation statutes. *Id.* "Thus one classic rationale for tort liability—that of compensation of victims—is less compelling in this context." *Tozer v. LTV Corp.*, 792 F.2d 403, 407 (4th Cir.), *petition for cert. filed* (1986). In cases where the VBA does not provide full compensation, it must still be recognized that the compensation available from the VBA is "not reduced by the high transaction costs present in ordinary products liability litigation." *McKay*, 704 F.2d at 452 n.11.

73. *United States v. Brown*, 348 U.S. 110, 112 (1954) (explaining *Feres*); *see also Bynum*, 770 F.2d at 561. The Supreme Court recently affirmed this rationale and stated that "[e]ven if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." *United States v. Johnson*, 107 S. Ct. 2063, 2069 (1987). Further, "[s]uits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." *Id.*

74. *Feres*, 340 U.S. at 146.

75. *Id.*

76. *In Defense of The Government Contractor Defense*, *supra* note 48, at 226.

77. *See, e.g., Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985) (government specifications did not include roll over protection on front end loader); *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (N.J. App. 1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978) (government required jeeps manufactured without seatbelts).

78. *In Defense of The Government Contractor Defense*, *supra* note 48, at 226.

79. 431 U.S. 666 (1977). In *Stencel*, the plaintiff, a National Guard officer, was permanently injured when the ejection system in his F-100 fighter plane malfunctioned. *Id.* at 667.

proverbial camel's back.

Stencel marked the second step in the development of the *Feres-Stencel* doctrine. The case also illustrates the hardships that government contractors faced before the government contractor defense was formulated. The decision in *Stencel* broadened the scope of the government's immunity in actions involving members of the military. The holding barred contractors from seeking indemnity from the government for damages the contractor was required to pay to injured military servicemen.⁸⁰ This was true even when the injuries resulted from equipment the contractor manufactured in accordance with government specifications.⁸¹

The Court asserted that the rationales underlying *Feres* were equally applicable in actions where a third party was seeking indemnity from the government.⁸² Litigation involving an indemnity claim would take virtually the identical form as a direct action brought against the government by an injured serviceman.⁸³

Regardless of whether the action was direct or by a contractor seeking indemnity, "[t]he trial would . . . involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."⁸⁴ Thus, for essentially the same reasons used to bar direct actions against the government in *Feres*, third-party indemnity actions were also barred under *Stencel*.⁸⁵

Since *Stencel* was decided, the third rationale used by the *Feres* Court has become the principal justification for the *Feres-Stencel* doctrine.⁸⁶ Specifically, in justifying the *Feres-Stencel* doctrine the Supreme

Plaintiff brought a negligence action against *Stencel* the manufacturer and against the United States. *Id.* at 668. *Stencel* cross-claimed against the United States for indemnity, alleging that the government had set the ejection system's specifications. *Id.* The government moved for summary judgment arguing that the plaintiff could not recover under the FTCA for injuries sustained incident to military service. *Id.* The government cited *Feres* as barring not only direct actions against the government, but also indemnity actions. *Id.* at 669.

80. *Id.* at 673.

81. *Id.* at 673-74.

82. *Id.* at 674. The Court refused to "judicially admit at the back door that which has been legislatively turned away at the front door [through the FTCA]." *Id.* at 673.

83. *Id.* at 673.

84. *Id.*

85. *Id.*

86. *Bynum*, 770 F.2d at 562. The third rationale involved the peculiar relationship of the soldier to his superiors and the adverse effects of allowing judicial scrutiny of military decisions. See *supra* note 73 and accompanying text. Thus, the central question in applying the *Feres-Stencel* doctrine has become whether the action will require the courts to second-guess military decisions and whether maintaining the suit would impair military discipline. *Bynum*, 770 F.2d at 562. See *United States v. Shearer*, 473 U.S. 52, 57 (1985).

Court recently noted that the other factors discussed in *Feres* were no longer controlling.⁸⁷ In *United States v. Shearer*,⁸⁸ the Court held that the primary factors justifying the *Feres-Stencel* doctrine today are “whether the suit requires the civilian court to second-guess military decisions . . . and whether the suit might impair essential military discipline”⁸⁹

The *Feres-Stencel* doctrine provided the government with immunity from either a direct suit by a member of the military for service-related injuries, or an action for indemnity by a contractor to recover damages paid, resulting from those same injuries. To allow either type of action to proceed would require a civilian court to second-guess military decisions or to otherwise impair essential military discipline and effectiveness, which would be in direct conflict with the principles underlying the *Feres-Stencel* doctrine.⁹⁰

The *Feres-Stencel* doctrine presented an insurmountable obstacle for government contractors. A contractor who was required by law to adhere to specifications generated by the government would be held liable for injuries with no opportunity to seek indemnity from the government. As a result, military equipment manufacturers were restricted to the limited protections provided by the traditional agency and contract specification defenses.⁹¹

A new defense was needed because the traditional defenses of

87. *Shearer*, 473 U.S. at 58 n.4. However, the Supreme Court recently returned to emphasizing all three of the *Feres* rationales in its decision to uphold government immunity in *United States v. Johnson*, 107 S. Ct. at 2068.

88. 473 U.S. 52 (1985).

89. *Id.* at 57 (citation omitted). The Court went on to assert that:

[t]o permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct.

Id. at 58.

Further, the Supreme Court has consistently questioned its competency in areas dealing with military authority.

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (emphasis in original).

90. *Shearer*, 473 U.S. at 57.

91. See *supra* notes 38-59 and accompanying text for a discussion of the traditional agency and contract specification defenses.

agency and contract specification were no longer adequate for the problems that arise today involving government contractors.⁹² That defense is the judicially created government contractor defense.

C. *The Majority Rule: McKay v. Rockwell*

1. Majority opinion

In *McKay v. Rockwell*,⁹³ the Ninth Circuit established the test used by a majority of the federal circuits for determining the extent of a military contractor's liability. The majority in *McKay* held that "only under . . . limited circumstances . . . should a manufacturer be held strictly liable in tort for injuries to a serviceman on active duty caused by design defects in military equipment."⁹⁴ The Ninth Circuit reasoned that the same rationale used to justify the *Feres-Stencel* doctrine applied equally well to justify the government contractor defense.⁹⁵

The court cited four policies to justify the government contractor defense.⁹⁶ First, holding a military contractor liable without considering the extent of the government's involvement in the production of the equipment's design specifications would subvert the *Feres-Stencel* doctrine.⁹⁷ Government contractors would pass the costs of accidents on to the government through "cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts,

92. See *Bynum*, 770 F.2d at 563 (neither defense has retained its vitality); Amici Brief, *supra* note 49, at 18 (changes in tort law have rendered traditional defenses inadequate); *In Defense of The Government Contractor Defense*, *supra* note 48, at 227 (traditional defenses either ineffective or difficult to establish).

93. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). *McKay* involved an action brought by the widows of two Navy pilots who were killed in unrelated crashes of RA-5C jet aircraft. *Id.* at 446. The RA-5C jets are designed to be used as carrier-based supersonic reconnaissance aircraft. *Id.* Both pilots were killed because of defects in the aircraft's ejection system. *Id.* Rockwell was the manufacturer of both the RA-5C and its ejection system. *Id.* The plaintiffs sued Rockwell, seeking damages for the death of plaintiffs' decedents under theories of negligence, breach of warranty, and wrongful death. *Id.* at 447.

94. *Id.* at 447. The court was referring to the definition of strict liability as set forth in the Restatement Second of Torts:

- (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
- (2) The rule . . . 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.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

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

96. *Id.* at 449-50; see also *Hubbs v. United Technologies*, 574 F. Supp. 96, 98 (E.D. Pa. 1983).

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

or through higher prices in later equipment sales."⁹⁸ This pass-through of costs defeated the purpose of the government's immunity for injuries to members of the military.⁹⁹

Second, holding military contractors liable for design defects when the government specified or approved the design specifications would "thrust the judiciary into the making of military decisions."¹⁰⁰ The Ninth Circuit pointed out that courts are at the limits of their competence when deciding military matters and that necessarily, separation of powers becomes a valid concern.¹⁰¹

Third, in specifying the design of military equipment, the government is required by the "exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods."¹⁰² This continuing expansion of technology resulted in the manufacturer regularly being unable to negotiate with the government to minimize such risks.¹⁰³ Military contractors were thereby burdened with liability for risks the United States government chose to take. Thus, if the military designed a new piece of equipment that was inherently dangerous, the manufacturer would be exposed to liability, but the government would not.

The final policy supporting the government contractor defense is that the defense provides "incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment."¹⁰⁴ By conditioning the availability of the defense on full disclosure of all known risks, contractors will have an incentive to work closely with the government in the design and testing of equipment.¹⁰⁵

Therefore, the majority held that under the *Feres-Stencel* doctrine and the government contract defense, a military equipment manufacturer is not subject to liability for design defects under section 402A of the Restatement of Torts¹⁰⁶ where:

98. *Id.*

99. *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir.), *petition for cert. filed* (1986); *see also* *Tillett v. J.I. Case Co.*, 756 F.2d 591, 597 (7th Cir. 1985); *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965).

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

101. *Id.*; *see supra* note 90 and accompanying text.

102. *McKay*, 704 F.2d at 449-50; *see also Tozer*, 792 F.2d at 406 ("[w]hat would pose an unreasonable risk to the safety of civilians might be acceptable—or indeed necessary—in light of the military mission").

103. *McKay*, 704 F.2d at 450.

104. *Id.*

105. *Bynum v. FMC Corp.*, 770 F.2d 556, 566 (5th Cir. 1985).

106. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Recently, the four-prong test set

(1) the United States is immune from liability under *Feres* and *Stencel*,¹⁰⁷ (2) the supplier proves that the United States established, or approved,¹⁰⁸ reasonably precise specifications for the allegedly defective military equipment,¹⁰⁹ (3) the equipment conformed to those specifications,¹¹⁰ 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.¹¹¹

This is the formulation of the defense followed by six of the appellate circuits.¹¹²

The dissenting opinion in *McKay* discussed many of the objections opponents of the defense have raised.¹¹³ Judge Alarcon's dissent in *McKay* and the Eleventh Circuit's decision in *Shaw* are two of the major sources of opposition to the expansion of the defense.

2. Judge Alarcon's dissenting opinion

In his dissent, Judge Alarcon concluded that the *Feres-Stencel* doc-

forth in *McKay* has been applied in other actions besides strict products liability. "[T]he [*McKay*] court's reasoning applies equally well to design defect cases based on negligence and/or breach of warranty claims." *Tillett*, 756 F.2d at 597 n.3; see also *Tozer*, 792 F.2d at 408; *In re Air Crash Disaster at Mannheim Germany*, 769 F.2d 115, 120 n.8 (3d Cir. 1985), cert. denied, 474 U.S. 1082 (1986), reh'g denied, 107 S. Ct. 1636 (1987) (defense applies to negligence actions as well as strict liability); *Casabianca v. Casabianca*, 104 Misc. 2d 348, 350, 428 N.Y.S.2d 400, 402 (1980) (doctrine is as applicable to strict liability actions as it is to negligence actions).

107. This prong will be referred to as the "governmental immunity prong."

108. In *McKay*, the Ninth Circuit expanded the previous formulation of the defense set forth in *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982): In *In re Agent Orange*, the requirement was that the "government established the specifications." *Id.* The *McKay* court expanded the defense to include not only those situations where the government established the specifications, but also those situations where the government merely approved the specifications. *McKay*, 704 F.2d at 451.

109. This second requirement is referred to as the "approval prong."

110. This is known as the "conformance prong."

111. *McKay*, 704 F.2d at 451. This fourth requirement is the "duty to warn prong." This Note will refer to these requirements as the *McKay* four-prong test. Regardless, the government contractor defense does not relieve military equipment suppliers from liability for defects caused during the manufacture of the equipment. *Id.*

112. See *In re Agent Orange*, 534 F. Supp. at 1055 (E.D.N.Y.); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.), cert. denied, 474 U.S. 821 (1985); *Tozer*, 792 F.2d at 408 (4th Cir.); *Bynum v. FMC Corp.*, 770 F.2d 556, 566 (5th Cir. 1985); *Tillett*, 756 F.2d at 597 (7th Cir.); *McKay*, 704 F.2d at 451 (9th Cir.).

113. See, e.g., *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), petition for cert. filed, 106 S. Ct. 2243 (1986); *McCarthy & Mitzenmacher*, *supra* note 26, at 51; Note, *supra* note 66.

trine applied only to the liability of the United States.¹¹⁴ He was not persuaded by the majority's attempt to extend the doctrine to shield government contractors from liability.¹¹⁵ He argued that the *Feres-Stencel* doctrine only applied to legal actions directed specifically at the government and had no application to contractor liability.¹¹⁶ Because the plaintiffs in *McKay* did not file either a direct claim or a claim for indemnification against the United States, Judge Alarcon opined that the claims "reside[d] outside the previously defined area of concern expressed in *Feres-Stencel*"¹¹⁷

Judge Alarcon also rejected the majority's cost pass-through argument. He pointed out that barring indemnification is fair because the contractor "no doubt had sufficient notice so as to take this risk [i.e., being held liable without indemnification by the government] into account in negotiating its contract"¹¹⁸ The dissent argued that pass-through of costs would be minimized by the dynamics of the free market system.¹¹⁹

Finally, the dissent rejected the majority's four-prong test.¹²⁰ Judge Alarcon argued that the test would allow military contractors to easily shift responsibility to the government for the safety of the equipment the contractor designed.¹²¹ In his opinion, the contractor should be immune from liability only when an element of compulsion is present.¹²² Thus, only when the government compels a contractor to act should the de-

114. *McKay*, 704 F.2d at 456 (Alarcon, J., dissenting).

115. *Id.* (Alarcon, J., dissenting).

116. *Id.* (Alarcon, J., dissenting).

117. *Id.* (Alarcon, J., dissenting).

118. *Id.* at 457 (Alarcon, J., dissenting) (quoting *Stencel Aero Eng'g Co. v. United States*, 431 U.S. 666, 674 n.8 (1977)).

119. *Id.* (Alarcon, J., dissenting).

120. *Id.* at 458 (Alarcon, J., dissenting).

121. *Id.* (Alarcon, J., dissenting).

122. *Id.* (Alarcon, J., dissenting). "In those situations where compulsion exists . . . the contractor should be immune from suit." *Id.* (Alarcon, J., dissenting). During the early years of the defense, some courts held that compulsion had to be present for the defense to be available. Under this requirement, the government must in some way compel the contractor to manufacture the product. "It is elementary that *compulsion* must exist before the 'government contract defense' is available." *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961) (no compulsion where contractor had discretion in building cofferdam); see also *Sanner v. Ford Motor Co.*, 144 N.J. Super 1, 8-9, 364 A.2d 43, 46-47 (1976) (compulsion found where government contract specifically required manufacturer to exclude certain safety equipment in construction of jeep). Today, the compulsion requirement of the government contractor defense has been uniformly rejected by the courts. See *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 253-54 (3d Cir. 1982); Note, *supra* note 1. None of the modern definitions of the defense include compulsion. See *McKay*, 704 F.2d at 451; *Shaw*, 778 F.2d at 746; *In re Agent Orange*, 534 F. Supp. at 1055.

fense be available.¹²³

D. The Minority Rule: Shaw v. Grumman Aerospace Corp.

The Eleventh Circuit's opinion in *Shaw v. Grumman Aerospace Corp.*¹²⁴ embraced Judge Alarcon's *McKay* dissent and raised several new issues to oppose the government contractor defense. The *Shaw* court declined to accept the *McKay* court's formulation of the government contractor defense and instead chose to establish its own version of the defense.¹²⁵ Unlike the other jurisdictions that have recognized some form of the government contractor defense, the Eleventh Circuit did not base its construction on either the *Yearsley* agency defense or the contract specification defense.¹²⁶ Instead, the court cited traditional separation of powers doctrine¹²⁷ as compelling the defense.¹²⁸ The Eleventh Circuit quoted the district court in *In re Agent Orange*:

The purpose of a government contract defense . . . is to permit the government to wage war in whatever manner the govern-

123. The dissent specifically found that "inspection and approval do not constitute direction or compulsion." *McKay*, 704 F.2d at 460 (Alarcon, J., dissenting).

124. 778 F.2d 736 (11th Cir. 1985), *petition for cert. filed*, 106 S. Ct. 2243 (1986). At issue in *Shaw* was the death of a Navy serviceman. *Id.* at 738. Lt. Gary Shaw was killed when the aircraft he was piloting, a Grumman A-6 jet airplane, crashed into the Pacific Ocean only seconds after launching from the aircraft carrier *Constellation*. *Id.* Although the body and wreckage were not recovered, Navy investigators concluded that the most probable cause of the crash was the loss or failure of a bolt in the aircraft's "stabilizer actuation system" or "longitudinal flight control system." *Id.* A malfunction in either of these systems would result in the immediate loss of control of the aircraft. *Id.* The plaintiff, decedent's father, sued Grumman on theories of negligence, breach of warranty and strict products liability. *Id.*

125. *Id.* at 745-46.

126. *Id.* at 740; *see supra* notes 37-58 and accompanying text.

127. The Framers of our Constitution developed the doctrine of separation of powers to prevent a single branch of the government from wielding total power unchecked by other branches. *Buckley v. Valeo*, 424 U.S. 119, 123 (1976). "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 244 (J. Madison) (Bantam Classic ed. 1982). Although the Constitution does not contemplate three branches of government with precisely defined boundaries, one branch may not interfere with another's constitutionally enumerated powers. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 962 (1982) (Powell, J., dissenting). Courts do not hesitate to enforce this doctrine when "one branch has impaired or sought to assume a power central to another branch." *Id.*; *see Buckley*, 424 U.S. at 123.

In *Boyle*, the court was impairing the legislature's constitutionally mandated power to raise and support armies by questioning the legislature's decisions relating to military equipment and thus impairing the legislature's authority to support the military. U.S. CONST. art. I, § 8, cls. 11-13. Just as courts have held that the President may not exercise legislative authority belonging to the Congress, the judiciary cannot seek to infringe the exclusive powers of the Congress. *Buckley*, 424 U.S. at 123.

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

ment 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.¹²⁹

The court relied solely on the concept of separation of powers to justify the defense.¹³⁰

In reaching its decision, the Eleventh Circuit reviewed the four policies the Ninth Circuit raised in support of the government contractor defense.¹³¹ The first rationale provided that holding a government contractor liable without regard to the government's involvement in the design process would subvert the *Feres-Stencel* doctrine.¹³² Under this reasoning, contractors would arguably pass through the costs of liability insurance and the costs of litigation to the government by way of increased contract prices.¹³³ The government in effect would be indemnifying the military contractor in direct opposition to the holding in *Stencel Aero Engineering Co. v. United States*.¹³⁴ The *Shaw* court rejected this reasoning by stating that it "will not recognize a military contractor defense simply to shield . . . contractors—and (only arguably) the government—from the cost of liability for defectively designed products."¹³⁵

The *Shaw* court next reviewed the second rationale cited in *McKay*. This rationale addressed the problem of "thrust[ing] the judiciary into the making of military decisions."¹³⁶ Citing *United States v. Shearer*,¹³⁷

129. *Id.* at 740 (quoting *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982)). Additionally, the Eleventh Circuit stated that the government contract defense is not limited only to those times when war is being waged. *Id.* The "country need not be in combat for the defense to obtain." *Id.*

130. "[W]hen a knowing and purposeful decision to employ [a] product[] is made by the military, the judiciary may not question it." *Id.* at 741 (footnote omitted).

131. *Id.*

132. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); see *supra* notes 59-92 and accompanying text for a discussion of the *Feres-Stencel* doctrine.

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

134. *Id.* The Supreme Court in *Stencel* held that the FTCA bars a third-party from suing the United States for indemnity. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977).

135. *Shaw*, 778 F.2d at 742. The court reasoned that competition in the defense market would deter contractors from passing the costs of liability onto the government. See *McKay*, 704 F.2d at 457 (Alarcon, J., dissenting).

136. *McKay*, 704 F.2d at 449. See *supra* note 89 and accompanying text.

the Eleventh Circuit held that the most important factor in determining the availability of the government contractor defense was "whether the suit requires the [civilian] court to second-guess military decisions."¹³⁸ The *Shaw* court stated that this second-guessing goes to the heart of classic separation of powers concerns.¹³⁹ The military must be given freedom to make decisions concerning the risks it is willing to take of accidents and injuries when it designs military equipment.¹⁴⁰ The court pointed out that these decisions are to be made "without judicial interference."¹⁴¹ The Eleventh Circuit based its version of the government contractor defense on this reasoning.¹⁴²

The *McKay* court's third rationale determined that holding contractors liable would impede the country's ability to "push technology towards its limits."¹⁴³ The Ninth Circuit realized that an unavoidable side effect of pushing technology to its limits is that of incurring risks in excess of those acceptable for ordinary consumers.¹⁴⁴ However, the Eleventh Circuit found that military risk taking was fully protected under its separation of powers theory and that there was no need to include it as a separate rationale.¹⁴⁵

Next, the *Shaw* court considered the Ninth Circuit's final rationale¹⁴⁶ of encouraging the government and its suppliers to work closely together and thereby allow easier allocation of responsibility for design decisions.¹⁴⁷ The Eleventh Circuit refused to consider this rationale and

137. 473 U.S. 52, 58 (1984). See *supra* notes 86-89 and accompanying text for discussion of *Shearer*.

138. *Shaw*, 778 F.2d at 742 (quoting *United States v. Shearer*, 473 U.S. 52, 57 (1985)). The Eleventh Circuit adopted the *Feres-Stencel* doctrine in so far as it was restated and limited in *Shearer*. *Shaw*, 778 F.2d at 742. *Shearer* held that the most important questions were whether the suit would require civilian courts to second-guess military decisions and whether the suit would impair military discipline. *Shearer*, 473 U.S. at 57. Thus, the Eleventh Circuit adopted the first factor stated in *Shearer*, that the suit must require the court to second-guess military decisions, but rejected the second *Shearer* factor of "whether the suit might impair essential military discipline." *Shaw*, 778 F.2d at 742. The Eleventh Circuit asserted that "we think the likelihood of any profound disruption of discipline is negligible from testimony in suits against military contractors, we decline to rest either recognition or rejection of the defense on this frail support." *Id.* at 743.

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

140. *Id.*

141. *Id.*

142. *Id.*

143. *McKay*, 704 F.2d at 450.

144. *Id.* See *supra* notes 102-03 and accompanying text.

145. *Shaw*, 778 F.2d at 743. "To adopt the new technology argument . . . is not only to be redundant, but also to invite unproductive quibbling over whether or not a particular product is actually on the cutting edge." *Id.*

146. See *supra* notes 104-05 and accompanying text.

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

referred to the Ninth Circuit's reasoning as "inscrutable."¹⁴⁸ Rather, the court stated that a close working relationship between the contractor and the government would make identification of the responsible party more difficult.¹⁴⁹

In summary, the Eleventh Circuit recognized the availability of a government contractor defense based solely on "the theory that the constitutional separation of powers compels the judiciary to defer to a military decision to use a weapon or weapons system . . . designed by an independent contractor, despite its risks to servicemen."¹⁵⁰ Under this circuit's version of the defense, a government contractor can avoid liability only if it affirmatively proves:

(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 contractor to proceed with the dangerous design.¹⁵¹

The Eleventh Circuit's decision in *Shaw* is one of the strongest statements to date against the expansion of the government contractor defense. During a time when other circuits are rapidly expanding the circumstances under which the defense is available, the Eleventh Circuit is urging restraint.¹⁵² The vitality of the expansionist views of the other circuits, as well as the conservative ideals of the Eleventh Circuit, will be a crucial conflict that the Supreme Court must address when it decides the *Boyle* case.

With the background of the defense complete, the sections that follow will discuss the government contract defense as it was applied in the *Boyle* case. The discussion will conclude with a critical examination of the Fourth Circuit's application of the four-prong government contractor defense.

III. STATEMENT OF THE CASE

At issue in *Boyle v. United Technologies Corp.*¹⁵³ was the death of a

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 746 (emphasis in original).

152. See *infra* notes 254-64 and accompanying text for discussion of expansions of the defense in the various circuits.

153. 792 F.2d 413 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987).

Marine serviceman who died in the course of his military duties.¹⁵⁴ On April 27, 1983, during joint Navy-Marine training exercises, a Marine helicopter¹⁵⁵ and its four crew members crashed into the Atlantic Ocean off the coast of Virginia Beach, Virginia.¹⁵⁶ Three of the crewmen escaped safely through the aircraft's emergency exits.¹⁵⁷ Although uninjured by the crash, the co-pilot, Lt. David Boyle, drowned allegedly because his escape hatch did not function properly.¹⁵⁸

The helicopter was manufactured by Sikorsky Aircraft, a division of United Technologies Corporation (Sikorsky).¹⁵⁹ The plaintiff, Delbert Boyle (Boyle), father of the decedent, sued Sikorsky in the United States District Court for the Eastern District of Virginia.¹⁶⁰ The plaintiff alleged negligence and breach of warranty in the design of the co-pilot's emergency escape hatch and also in the rework of the helicopter's control system.¹⁶¹

At trial, the plaintiff asserted that Sikorsky performed faulty repairs on the helicopter's pilot valve.¹⁶² Plaintiff argued that Sikorsky inadvertently allowed a small wire chip to enter the pilot valve¹⁶³ which caused the servomechanism to malfunction.¹⁶⁴ As a result, the pilot was unable to control the aircraft and the helicopter crashed into the ocean.¹⁶⁵

Boyle also argued that the co-pilot's emergency escape hatch was defectively designed by Sikorsky.¹⁶⁶ The plaintiff alleged that when the co-pilot's collective¹⁶⁷ was in the full up position, it blocked the co-pilot's egress through the emergency escape hatch.¹⁶⁸

154. *Id.* at 414.

155. The helicopter was a Sikorsky CH-53D. The CH-53D is a large assault helicopter designed for heavy use in transporting equipment and support personnel in amphibious assault operations. Respondent's Brief at 1-2, Boyle v. United Technologies Corp. (U.S. Oct., 1986) (No. 86-492) [hereinafter Respondent's Brief].

156. Boyle, 792 F.2d at 414.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 413.

161. *Id.* at 413-14.

162. *Id.* at 414.

163. The chip of wire could have been introduced into the pilot valve at one of three times: during an overhaul that Sikorsky performed in late 1981 to early 1982; during Navy reworking in 1982; or during maintenance of the hydraulic system by the Marine Corp. *Id.*

164. *Id.* The servomechanism is analogous to the power steering in an automobile. It assists the pilot in flying the aircraft. *Id.*

165. *Id.*

166. *Id.*

167. The collective is one of the aircraft's control sticks. *Id.* Both the pilot and the co-pilot in the CH-53D have a collective. *Id.*

168. *Id.*

The jury returned a general verdict for the plaintiff and awarded him \$725,000.¹⁶⁹ Sikorsky, arguing that it was shielded from liability for design defects by the government contractor defense, moved for a judgment notwithstanding the verdict.¹⁷⁰ The district court denied the motion, and Sikorsky appealed.¹⁷¹

On appeal, the Fourth Circuit reversed the trial court and remanded with directions to enter judgment for the defendant.¹⁷² Unlike the district court, the Fourth Circuit ruled that the government contractor defense did apply in this case.¹⁷³ The Fourth Circuit reversed because the government contractor defense precluded liability for the design defect, and because there was insufficient evidence to prove Sikorsky was the party that introduced the wire chip into the pilot valve.¹⁷⁴

IV. REASONING OF THE COURT

The Fourth Circuit had to resolve two issues.¹⁷⁵ The first was whether Sikorsky could raise the government contractor defense to shield itself from liability for the design of the escape hatch system.¹⁷⁶ The second was whether Sikorsky was responsible for the metal chip that was found in the helicopter's servomechanism.¹⁷⁷

In deciding the first issue, the court relied on the four-prong test set forth in *Tozer v. LTV Corp.*¹⁷⁸ Under the *Tozer* analysis, the court found that a government contractor can avoid tort liability for a design defect that causes injury if the contractor can prove that:

- 1) the United States is immune from liability;
- 2) the United States approved reasonably precise specifications for the equipment;
- 3) the equipment conformed to those specifications; and
- 4) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987).

176. *Id.* at 414.

177. *Id.* at 415.

178. *Id.* at 414. Although the court in essence used the same test as set forth in *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984), the court cited the prior Fourth Circuit decision of *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir.), *petition for cert. filed* (1986) as the source of the test. *Boyle*, 792 F.2d at 414.

the United States.¹⁷⁹

The Fourth Circuit then applied the test to the facts of *Boyle*. The court did not explicitly consider the first prong of the test, but instead went directly into a discussion of the second and third prongs.¹⁸⁰

To show the government's involvement in, and approval of, the helicopter's specifications, one of Sikorsky's managers testified concerning the extensive back-and-forth discussions between the Navy and Sikorsky.¹⁸¹ The court held that these discussions between Sikorsky and the government, combined with the government's approval of a mock-up of a functional cockpit, satisfied the second and third prongs of the test.¹⁸² It held that the Navy had approved reasonably detailed specifications of the escape hatch and that the equipment conformed to those specifications.¹⁸³

The fourth prong of the test was not addressed since the issue of Sikorsky's duty to warn was never raised.¹⁸⁴ The plaintiff failed to produce any evidence that Sikorsky possessed knowledge of dangers that the Navy did not.¹⁸⁵ Thus, the court concluded that Sikorsky had satisfied the requirements of the government contractor defense, and therefore could incur no liability for the allegedly defective escape hatch design.¹⁸⁶

The second issue of the wire chip was not addressed by the court because the plaintiff could do no more than speculate as to how the metal chip was introduced into the pilot valve.¹⁸⁷ As a result, the court concluded that it "need not consider in this case the applicability of the military contractor defense to questions of manufacture and overhaul, because Sikorsky's liability can in no event be established."¹⁸⁸

179. *Boyle*, 792 F.2d at 414.

180. *Id.* The court probably did not consider the first prong because the decedent was a member of the military and died in the line of duty. Under these facts, the United States would clearly be immune from liability. See *supra* note 63 and accompanying text. Thus, the first prong of the *McKay* test was satisfied.

181. *Boyle*, 792 F.2d at 414.

182. *Id.* In reaching its holding, the Fourth Circuit referred to its prior decision in *Tozer*, 792 F.2d at 407, where it held that "this type of [back-and-forth] exchange of information will normally suffice to establish government approval of the design in question." *Boyle*, 792 F.2d at 414.

183. *Boyle*, 792 F.2d at 414-15.

184. *Id.* at 415.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

V. ANALYSIS

A. *The Boyle Court's Application of The Four-Prong Test*

The facts of *Boyle v. United Technologies Corp.*¹⁸⁹ are precisely those that the court in *McKay v. Rockwell International Corp.*¹⁹⁰ visualized as properly justifying a contractor's sharing of governmental immunity. Thus, the Fourth Circuit correctly allowed Sikorsky to raise the defense.¹⁹¹ If the court had held the defense inapplicable, the underlying policies of the defense would have been subverted.

1. Policy reasons for the government contractor defense

First, barring the defense in *Boyle* would force Sikorsky to pass the compensation costs onto the government. Sikorsky could pass these costs on by invoking cost overrun provisions in current contracts, by presenting higher bids on future equipment or by including liability insurance in subsequent price estimates.¹⁹² Actions like these would result in passing through the costs of the injury to the government which is exactly the situation the *Feres-Stencel* doctrine was established to prevent.¹⁹³

189. 792 F.2d 413 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987).

190. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

191. The Fourth Circuit in *Tozer v. LTV Corp.*, 792 F.2d 403, 406-08 (4th Cir. 1986), *petition for cert. filed* (1986), essentially adopted the reasoning underlying the government contractor defense put forth by the Ninth Circuit in *McKay*, 704 F.2d at 449-50. *See supra* notes 96-105 and accompanying text.

192. *See, e.g., Tozer*, 792 F.2d at 408; *McKay*, 704 F.2d at 449.

193. *See supra* note 81 and accompanying text. The pass-through of costs argument is, today, the least persuasive of all the rationales offered to support the government contractor defense. *See Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 741-42 (11th Cir. 1985), *petition for cert. filed*, 106 S. Ct. 2243 (1986). Under the pass-through of costs argument, if a contractor is allowed to pass the costs of injuries onto the government, the contractor is in effect getting indemnified by the government. Recovering from the government for indemnity is specifically barred. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1976).

Today, most contracts between government contractors and the military probably already include adjustments for the cost of potential tort liability. Ausness, *supra* note 55, at 1008. In fact, the Supreme Court in *Stencel* explicitly recognized this practice. 431 U.S. at 674 n.8. "The *Stencel* opinion's failure to condemn this practice reflects the [Supreme] Court's appreciation for the realities which control in a free market system." *McKay*, 704 F.2d at 457 (Alarcon, J., dissenting). As Judge Alarcon pointed out in his dissent in *McKay*, manufacturers with good safety records will be able to obtain liability insurance at lower rates than "less careful suppliers." *Id.* (Alarcon, J., dissenting). The cost savings to these contractors will enable them to make lower bids. *Id.* (Alarcon, J., dissenting). Since the military is free to choose the lowest bid, the result will be lower overall costs and greater contractor interest in safety. *Id.* (Alarcon, J., dissenting). In sum, "there is no doubt that some of these liability costs will find their way into overall bid costs, this is to a certain extent inevitable. The free market system, however, insures that this cost transfer will be minimized." *Id.* (Alarcon, J.,

If the court in *Boyle* had held the defense inapplicable, it would have "thrust the judiciary into the making of military decisions."¹⁹⁴ The court would have been required to review the specifications of the CH-53 helicopter and determine whether the design was unreasonably dangerous. However, "[w]hat would pose an unreasonable risk to the safety of civilians might be acceptable—or indeed necessary—in light of the military mission of the aircraft."¹⁹⁵ Thus, the court would be forced to evaluate the adequacy of the escape system in light of the Navy's mission for the CH-53. But, this review of military decision-making smacks of the constitutional separation of powers problems that courts have refused to consider since the time of *Feres v. United States*.¹⁹⁶

Further, barring the government contractor defense would shift the Navy's risks of pushing technology towards its limits from the govern-

dissenting). For these reasons, the cost pass-through rationale alone does not justify a rule that grants military contractors immunity from liability for design defects.

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

195. *Tozer*, 792 F.2d at 406. As the Fifth Circuit concluded, "it is the needs of national defense, not accident costs, that must be the ultimate standard by which the purchase of military equipment is measured." *Bynum v. FMC Corp.*, 770 F.2d 556, 575 (5th Cir. 1985). The military must be free to establish the specifications for military equipment in light of the mission the equipment is to be used for, not for the products safe use. *Id.*

196. 340 U.S. 135 (1950). See *United States v. Brown*, 348 U.S. 110, 112 (1954) (explaining *Feres*). The decisions after *McKay* have confirmed that today the primary rationale underlying the government contractor defense is the constitutional separation of powers doctrine. Pomerance, *McKay v. Rockwell Revisited: The Future of The Government Contractor Defense*, 20 BEVERLY HILLS B.J. 217, 219 (1986). Appellate courts that have recognized the government contractor defense have almost uniformly held the most important justification of the defense is separation of powers concerns. See *Tozer*, 792 F.2d at 405; *Bynum*, 770 F.2d at 565; *In re Air Crash Disaster at Mannheim Germany*, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986), *reh'g denied*, 107 S. Ct. 1636 (1987). In particular, the Eleventh Circuit has held the "military contractor defense in this Circuit [is] based exclusively on the theory . . . [of] constitutional separation of powers . . ." *Shaw*, 778 F.2d at 743. The Eleventh Circuit went on to point out that separation of powers "compels the judiciary to defer to a military decision to use a weapon or weapons system . . . designed by an independent contractor, despite its risks to servicemen." *Id.* at 743.

Considerations regarding military decisions as to the design and specification of weapons systems "are uniquely questions for the military and should be exempt from review of civilian courts." *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982). For if the judiciary is allowed to scrutinize military decisions, can it be long before the courts will be ordering the recall of military equipment? Moreover, "what would have been the effect of a judicial order prohibiting the armed forces from deploying Agent Orange in Vietnam because of the danger it presented to servicemen in the field?" *Sharing the Protective Cloak*, *supra* note 48, at 187-88. These questions go to the heart of separation of powers concerns and it is for these reasons that the defense was formulated. See *supra* note 127 and accompanying text for discussion of separation of powers concerns. After all, the true purpose of the government contractor defense "is to permit the government to wage war in whatever manner the government deems advisable . . ." *In re Agent Orange*, 534 F. Supp. at 1054 n.1.

ment to Sikorsky.¹⁹⁷ The military, in designing equipment to perform a particular mission, may be willing to accept risks that ordinary consumers might consider to be unacceptable.¹⁹⁸ Since manufacturers of military equipment are regularly unable to negotiate with the government to minimize such risks, an unfair burden is placed on the contractor.¹⁹⁹ Sikorsky would bear the onus of the risks the Navy was willing to take in designing the CH-53 to perform its mission, even though such risks may be well beyond those acceptable in civilian products.

Finally, without the government contract defense, fewer "incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment"²⁰⁰ would exist. In the *Boyle* case, Sikorsky would have less incentive to continue the back-and-forth dialogue it had established with the Navy, and as a result, a "valuable part of . . . [the procurement] process" would be lost.²⁰¹ As the Fourth Circuit pointed out, "if military technology is to continue to incorporate the advances of science, it needs the uninhibited assistance of private contractors."²⁰² Consequently, dialogue between the government and its contractors must be encouraged.

All of the essential underlying rationales of the government contractor defense were fulfilled in *Boyle*. Conferring immunity in such a case protected vital government interests. Consequently, allowing Sikorsky to raise the defense ensured that the policies advanced by the separation of powers and sovereign immunity doctrines are not undermined by lawsuits like the instant case.

2. Applying the *McKay* four-part test

The question now turns to whether all the elements of the government contractor defense were satisfied in *Boyle*.

a. governmental immunity prong

The first prong of the *McKay* test requires, as a preliminary matter, that the United States be immune from liability.²⁰³ The Fourth Circuit did not discuss this prong in the *Boyle* opinion. However, it is evident from the facts that the prong is satisfied. The United States' sovereign

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

198. *Id.* at 450.

199. *Id.*

200. *Id.*

201. *Tozer*, 792 F.2d at 407.

202. *Id.*

203. *Boyle*, 792 F.2d at 414. The four prong test cited by the court in *Boyle* is essentially the test set forth in *McKay*, 704 F.2d at 451.

immunity is not waived unless the action is authorized under the FTCA.²⁰⁴ The FTCA contains an exception for military personnel that prohibits members of the military from recovering under the act for injuries sustained in the line of duty.²⁰⁵ This exception, combined with the holding of *Feres v. United States*,²⁰⁶ precludes a member of the armed forces from bringing suit against the government for tortious conduct.²⁰⁷

In the *Boyle* case, Lt. Boyle was a member of the United States Marines who died in the line of duty. Thus, a suit against the United States would be barred by the FTCA because the government did not waive its immunity for such actions.²⁰⁸ As a result, the United States is immune from liability and the first prong of the test is satisfied.

b. approval prong

The second prong requires the government to have "approved reasonably precise specifications for the equipment."²⁰⁹ To satisfy this prong, the *McKay* court required either that the United States had set the specifications for the equipment or approved the contractor's final, reasonably detailed specifications "by examining and agreeing to a detailed description of the workings of the system."²¹⁰ According to *McKay*, the specifications provided by the United States had to be more than mere general outlines of the equipment's performance.²¹¹

The degree of government involvement necessary to satisfy this element of the defense is an area of conflict among the federal circuit courts of appeals.²¹² The reasoning underlying this prong of the government contractor defense is to ensure that the government is sufficiently involved in the design process so as to justify conferring immunity on the contractor.

In finding this prong satisfied, the Fourth Circuit pointed to the "back-and-forth discussions between Sikorsky and the Navy" in preparing the design specifications for the CH-53 helicopter.²¹³ The court stated it had previously held that "this type of exchange of information

204. See *supra* notes 61-64 and accompanying text.

205. 28 U.S.C. § 2680(j) (1983).

206. 340 U.S. 135 (1950). See *supra* note 68 and accompanying text.

207. See *supra* notes 63-69 and accompanying text for discussion of government immunity from suit by members of the military.

208. 28 U.S.C. § 2680(j).

209. *Boyle*, 792 F.2d at 414.

210. *McKay*, 704 F.2d at 453.

211. *Id.*

212. See *infra* notes 251-63 and accompanying text.

213. *Boyle*, 792 F.2d at 414.

. . . [would] suffice to establish government approval of the design in question."²¹⁴ In addition, the court pointed out that Sikorsky built a mock-up of the helicopter's cockpit with all the instruments and controls, "including the collective and the emergency escape hatch."²¹⁵ Since the mock-up was inspected and approved by the Navy, the court's conclusion that the second prong was satisfied is even more persuasive.²¹⁶

Critics of the liberal construction of the defense adopted in some jurisdictions will argue that merely developing a dialogue with the government falls short of the *McKay* court's requirements for the approval prong. However, if the back-and-forth dialogue between the government and the military contractor is continuous and consists of more than a "mere rubber stamp"²¹⁷ by the government, the approval requirement is held satisfied.²¹⁸ This back-and-forth contact is recognized as a valuable part of the defense procurement process and should be encouraged by making the government contract defense available to manufacturers that work closely with the government. Since the key requirement of this prong is government involvement in the design process, a continuous back-and-forth discussion of design specifications between the government and the contractor would satisfy the requirement.

The Fourth Circuit has not made an undue expansion of the second prong of the defense in allowing the dialogue between Sikorsky and the government to satisfy the approval prong. Rather, the court has framed the approval requirement in terms of the realities of the government procurement process.²¹⁹ By endorsing this construction of the second prong of the test, the Fourth Circuit furthers one of the fundamental rationales underlying the existence of the government contractor defense. Allowing the defense "provides incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment."²²⁰ Thus, the approval prong of the *Mc-*

214. *Id.* The Fourth Circuit was referring to the holding in *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985), where the Third Circuit held that a "continuous back-and-forth" discussion between the military and the contractor would satisfy the government participation requirement. *Koutsoubos*, 755 F.2d at 355.

215. *Boyle*, 792 F.2d at 414.

216. *Id.* In *In re Air Crash Disaster*, 769 F.2d at 123, government inspection and approval of mock-ups and prototypes was held to satisfy the government approval prong of the government contractor defense. *Id.*

217. *In re Air Crash Disaster*, 769 F.2d at 122.

218. See *Tozer*, 792 F.2d at 407-08; *In re Air Crash Disaster*, 769 F.2d at 122; *Koutsoubos*, 755 F.2d at 355.

219. For a discussion of the steps involved in the procurement process for the design of a major weapons system see, *Amici Brief*, *supra* note 49, at 6.

220. *McKay*, 704 F.2d at 450. See *supra* notes 104-05 and accompanying text.

Kay test is properly satisfied.

c. conformance prong

The third prong of the *McKay* test requires that the equipment conform to specifications the government has established or approved.²²¹ This prong of the test is very straightforward and has not been the subject of any substantial conflict between the circuits. As the *McKay* court indicated, if the manufacturer deviated from the equipment's design specifications, the third prong of the test will not be satisfied.²²² Since the equipment does not conform to the government specifications, the defense does not apply. An injury caused by a deviation from the manufacturing specifications, as opposed to an injury resulting from a defect in the equipment's design, will not confer immunity on a contractor.²²³ "To hold otherwise would remove the incentive from manufacturers to use all cost-justified means to conform to government specifications in the manufacture of military equipment."²²⁴ In an action for a manufacturing defect, no policy decision of the government is called into question. Thus, no issue arises that would require a "civilian court to second-guess [a] military decision[] . . .,"²²⁵ and therefore no need to invoke the government contractor defense.

In *Boyle*, the Navy worked closely with Sikorsky with continuous back-and-forth discussions. Moreover, the Navy approved a fully equipped mock-up of the cockpit. If the Navy found that Sikorsky had not complied with the helicopter's specifications, the Navy surely would have objected. Since the plaintiff failed to introduce any evidence of Sikorsky's deviation from the specifications, the Fourth Circuit was correct in holding that the defendant had met its burden of proof for the third prong of the defense.²²⁶

d. duty to warn prong

The final element of the defense requires the contractor to warn the government of dangers in the operation of the equipment that are known to the contractor but not to the government.²²⁷ This prong of the defense has been subject to several different interpretations by the various cir-

221. *Boyle*, 792 F.2d at 414.

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

223. *Id.*; see *Bynum*, 770 F.2d at 574.

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

225. *United States v. Shearer*, 473 U.S. 52, 57 (1985) (citation omitted).

226. *Boyle*, 792 F.2d at 414-15.

227. *Id.* at 414.

cuits.²²⁸ Under the *McKay* standard,²²⁹ the duty to warn is construed to be limited to those cases where the contractor had actual knowledge of the dangerous condition.²³⁰

In *Boyle*, the plaintiff had the burden of producing evidence to show Sikorsky possessed knowledge pertaining to the reliability of the escape hatch of which the government was not aware. However, the plaintiff did not meet this burden because he failed to produce evidence that Sikorsky was aware of hidden dangers in the escape system.²³¹ Therefore, "Sikorsky's duty to warn the Navy of any hazards known to it but not to the Navy was thus not brought into question."²³²

The Fourth Circuit properly concluded that the government contractor defense precluded Sikorsky from being held liable for the alleged defects in the design of the helicopter's emergency escape hatch. The court found that Sikorsky had affirmatively established each of the four prongs of the test.²³³ As a result, the Fourth Circuit correctly conferred immunity on Sikorsky for the design of the escape system.²³⁴

B. Proposal for New Form of Government Contractor Defense

In view of the policies underlying the government contractor defense, every circuit that has considered the issue of military contractor liability has ruled that some version of the defense is essential to prevent civilian courts from second-guessing military decisions.²³⁵ Thus, the question before the Supreme Court in *Boyle* will be the dimensions of the defense.

1. Government immunity prong

The first prong of the government contractor defense requires that the government be immune from liability under the *Feres-Stencel* doc-

228. See *infra* notes 276-81 and accompanying text.

229. The *McKay* standard is the standard adopted by the Fourth Circuit. *Tozer*, 792 F.2d at 408.

230. *McKay*, 704 F.2d at 451. See *Bynum*, 770 F.2d at 574; *In re Air Crash Disaster*, 769 F.2d at 124-25.

231. *Boyle*, 792 F.2d at 415.

232. *Id.*

233. *Id.* at 413.

234. The court did not consider whether Sikorsky was negligent during an overhaul in allowing a wire chip to enter the helicopter's pilot valve. *Boyle*, 792 F.2d at 415. The court held that the plaintiff could do little more than speculate as to how the chip was introduced into the pilot valve. *Id.* As the court pointed out, "evidence must prove more than a probability of negligence." *Id.* at 416. Thus, the Fourth Circuit refused to consider the "applicability of the military contractor defense to questions of manufacture and overhaul." *Id.* at 415.

235. See *supra* notes 18-23 and accompanying text.

trine.²³⁶ Immunity under the *Feres-Stencel* doctrine is limited to barring claims against the United States by military personnel for injuries they sustained in the line of duty.²³⁷ If the plaintiff is a member of the military and sustains a service-related injury, the United States is immune from liability and the first prong is clearly satisfied. This is the classic factual setting in which the government contractor defense has been properly raised.²³⁸ Application of the defense becomes much more difficult if the plaintiff is an ordinary civilian.²³⁹

When an ordinary civilian brings a tort action, the *Feres-Stencel* doctrine does not apply.²⁴⁰ Since the government contractor defense derives its primary justification from the *Feres-Stencel* doctrine,²⁴¹ allowing the defense to be raised in a suit brought by a civilian plaintiff would not further any of the policies underlying the defense.²⁴² Thus, making the

236. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). The *Feres-Stencel* doctrine provides the government with immunity from either direct suits brought by members of the military for service related injuries, or actions for indemnity by contractors seeking to recover damages paid, resulting from those same injuries. See *supra* notes 80-90 and accompanying text.

237. See *supra* notes 59-92 and accompanying text for a discussion of government immunity under the FTCA and the *Feres-Stencel* doctrine.

238. See, e.g., *Boyle v. United Technologies Corp.*, 792 F.2d 413, 414 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987); *Bynum v. FMC Corp.*, 770 F.2d 556, 558-59 (5th Cir. 1985); *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 738 (11th Cir. 1985), *petition for cert. filed*, 106 S. Ct. 2243 (1986); *McKay*, 704 F.2d at 446.

239. Asselta & Fitzpatrick, *Government Contractor Defense*, 28 TRIAL LAW. GUIDE 1, 36 (1984) (article by co-counsel of record for seminal case of *McKay* discussing application of government contractor defense); Ausness, *supra* note 55, at 1017; Craft, *The Government Contractor Defense: Evolution and Evaluation*, in THE GOVERNMENT CONTRACTOR DEFENSE: A FAIR DEFENSE OR THE CONTRACTOR'S SHIELD? at 44 (J. Madole ed. 1986); Pomerance, *supra* note 196, at 224 (question is whether the defense can be extended to shield contractors from liability where a military or quasi-military product injures ordinary civilians).

240. *Johnston v. United States*, 568 F. Supp. 351, 358 (D. Kan. 1983) (civilian employees of aircraft manufacturer injured by ionizing radiation originating from radioactive compounds used to coat faces of aircraft instruments). "*Feres* immunity has no relevance to this lawsuit . . . since the injured individuals were not servicemen." *Id.*; see 28 U.S.C. §§ 2671-2680 (1983) (statutes waiving governmental immunity to tort claims by civilians); Ausness, *supra* note 55, at 1017 (*Feres* only applies to service-related injuries and would not necessarily bar non-derivative civilian claims); Craft, *supra* note 239, at 45 (if civilian brings tort action, *Feres-Stencel* concern over military discipline or veterans compensation would arguably not arise).

241. Pomerance, *supra* note 196, at 224 ("legal justification for the government contractor defense is the government's immunity to suits by *servicemen*" (emphasis in original)). See *supra* note 95 and accompanying text.

242. Barring the defense under these circumstances would not result in unfairness to the contractor. If the government was negligent in making the equipment's specifications and the contractor reasonably followed the specifications, the contractor can implead or cross-claim against the United States for indemnity or contribution, or be relieved of liability altogether. Craft, *supra* note 239, at 45. Claims by the contractor against the government are not precluded by the holding in *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977).

defense available in cases involving ordinary civilian plaintiffs would unwarrantably overextend the defense and would "wholly repudiate the *Feres-Stencel* doctrine."²⁴³ Moreover, allowing contractors to escape liability to civilian plaintiffs in these cases would give the contractors greater immunity than the government currently enjoys.²⁴⁴

However, when a civilian plaintiff is an employee of the government and "play[s] an integral role in military activities" with an associated reasonably foreseeable increased risk of danger, an exception to this rule should be created.²⁴⁵ In the *McKay* decision, the Ninth Circuit explicitly acknowledged that members of the military are not ordinary consumers, and that their expectations of safety are much lower than those of civilians.²⁴⁶ As a result, the Ninth Circuit held that normal products liability principles did not apply to members of the armed forces.²⁴⁷ The Ninth Circuit's reasoning applies to cases where the civilian is intimately involved with the military and can be reasonably expected to foresee the greater risk of danger.²⁴⁸ Thus, when a civilian holds a close relationship with the military and knowingly accepts heightened risks, a military contractor may arguably raise the government contractor defense.²⁴⁹

The construction of the government immunity prong should be very strict. Except for the cases where the civilian plaintiff is closely associated with the military and is reasonably aware of the greater risks in-

243. Pomerance, *supra* note 196, at 224.

244. *Id.* at 224-25. The government is liable for its torts to civilians under the FTCA. 28 U.S.C. §§ 2671-2680 (1983).

245. *United States v. Johnson*, 107 S. Ct. 2063, 2069 n.11 (1987). The *Johnson* Court held that where a civilian employee of the government plays an integral role in military activities, "an inquiry into the civilian activities would have the same effect on military discipline as a direct inquiry into military judgments." *Id.* This second-guessing of military judgment is one of the primary rationales for the development of the *Feres-Stencel* doctrine. See *supra* notes 86-89 and accompanying text. Allowing the government contractor defense under those circumstances would further the defense's underlying policies.

246. *McKay*, 704 F.2d at 453. The Ninth Circuit reasoned that members of the military must "recognize when they join the armed forces that they may be exposed to grave risks of danger This is part of the job." *Id.*

247. *Id.* at 451.

248. Pomerance, *supra* note 196, at 225.

249. An example of the application of this exception to the general rule, that the government contractor defense applies only to members of the military, is the explosion of the space shuttle Challenger. Although the seven members of the NASA crew were not military personnel, they were employed by the government and must have been aware of the increased risks associated with their jobs. In this situation, the crew were more than mere ordinary consumers and the government contractor defense should be available. Pomerance, *supra* note 196, at 222-25 (discussion of applicability of government contractor defense to the space shuttle); see also *L.A. Times*, Jan. 4, 1988, at 12, col. 3 (discussing pending litigation involving Morton Thiokol, the government contractor who manufactured defective booster rocket for space shuttle).

volved, the availability of the defense must be restricted to those instances where the plaintiff is a member of the military.²⁵⁰ Only under these conditions could the underlying justification for the government contractor defense be fulfilled. Thus, in the proposed test for the availability of the defense, the first prong is only satisfied if the plaintiff is a member of the military or is closely associated with the military and conscious of the risks involved.²⁵¹

2. Approval prong

The second prong of the test requires that the government establish or approve reasonably precise specifications for the equipment in question.²⁵² This prong of the test specifies the degree of government involvement necessary to justify sharing the government's immunity with the contractor. Prior to the *McKay* decision, the standard was whether the government "established the specifications" for the product.²⁵³ *McKay* extended this definition to include cases where the government "reviewed and approved a detailed set of specifications."²⁵⁴

The "reasonably detailed" specifications requirement has been the area of most expansion in the post-*McKay* decisions. The Third Circuit has held that a "continuous back-and-forth" dialogue between the gov-

250. The defense would also be available where someone was suing derivatively on behalf of a member of the military. Ausness, *supra* note 55, at 1017 n.263.

251. A possible solution to restricting the interpretation of the government immunity prong is to excise it completely as an element of the defense and merely place a restriction on who a contractor may raise the defense against. *See, e.g.,* Amici Brief, *supra* note 49, at 18-19 n.4 (discussion of unnecessary and confusing nature of first prong of *McKay* test). This is similar to the version of the government contractor defense formulated by the District Court for the Eastern District of New York. *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982) (products liability action by families of Vietnam servicemen exposed to defoliant Agent Orange). The *In re Agent Orange* decision was the first time the elements of the government contractor defense were specifically set out. The court held that for the defense to apply, the defendant, Dow Chemical Co., had to prove:

1. That the government established the specifications for "Agent Orange";
2. That the "Agent Orange" 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 the use of "Agent Orange."

Id. This is the version of the government contractor defense adopted by the Third Circuit. *Koutsoubos*, 755 F.2d at 355.

Although the *In re Agent Orange* court did not explicitly restrict the defense to members of the military, the particular facts of the case imply the constraint. Thus, under this formulation of the defense, a government contractor will not be allowed to raise the defense unless the plaintiff is a member of the service or is a civilian who has a special relationship with the military.

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

253. *In re Agent Orange*, 534 F. Supp. at 1055 (emphasis added).

254. *McKay*, 704 F.2d at 450 (emphasis added).

ernment and the contractor is sufficient to satisfy the approval requirement.²⁵⁵ The Third Circuit went on to hold that "so long as the government's approval consists of more than a mere rubber stamp," the approval requirement will be satisfied even if the contractor originated the majority of the specifications.²⁵⁶

The Fourth Circuit has taken a particularly liberal view of the specifications requirement. Of the three most recent decisions issued by the Fourth Circuit, *Dowd v. Textron, Inc.*²⁵⁷ may possess the greatest expansion of the government contractor defense since *McKay*.²⁵⁸ All that is required under *Dowd* for the approval requirement to be satisfied is that the government use the product for a certain amount of time. Under this

255. *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.), cert. denied, 474 U.S. 821 (1985). The Third Circuit re-affirmed the decision in *Koutsoubos* in *In re Air Crash Disaster at Mannheim Germany*, 769 F.2d 115, 122 (3d Cir. 1985), cert. denied, 474 U.S. 1082 (1986), reh'g denied, 107 S. Ct. 1636 (1987). "[G]overnment approval of specifications developed through a continuous series of negotiations between the contractor and the military satisfied . . . [the approval requirement]." *Id.* at 122.

256. *In re Air Crash Disaster*, 769 F.2d at 122. This concept has recently received support in the Fourth Circuit, "[t]he contractor's participation in design—or even its origination of specifications—does not constitute a waiver of the government contractor defense." *Tozer v. LTV Corp.*, 792 F.2d 403, 407 (4th Cir.), petition for cert. filed (1986). Further, a district court in Texas has ruled that mere acceptance of the completed product may be enough to satisfy the approval requirement. *Hendrix v. Bell Helicopter Textron Inc.*, 634 F. Supp. 1551, 1557 (N.D. Tex. 1986).

257. 792 F.2d 409 (4th Cir. 1986). In *Dowd*, the decedent was killed when his helicopter crashed during an instructional flight. The plaintiff alleged that the crash resulted from the hub of the rotor system striking the mast and severing it, a phenomenon known as "mast bumping." *Id.* at 410. The helicopter involved in the crash had a 540 rotor system that the defendant Bell designed in the early 1960's. *Id.* Plaintiff argued that since Bell originated the design of the 540 rotor system in the early 1960's without Army participation, that the second prong of the *McKay* test was not satisfied inasmuch as the government neither set or approved reasonably detailed specifications. *Id.* at 412. The manufacturer argued that although it had originated the design for the rotor system, the Army's experience with the system was sufficient to fulfill the approval requirement. *Id.* The court also pointed out that a large amount of subsequent history existed. *Id.* The Army used helicopters with the 540 rotor system for twenty years before the accident in question. *Id.* The Army itself had investigated the mast bumping in the early 1970's, discussed the problem in detail with Bell, and produced two reports on the dangers of inflight mast bumping. *Id.*

The *Dowd* court held that the second prong of the *McKay* test, 704 F.2d at 451, was satisfied by "[t]he length and breadth of the Army's experience with the 540 rotor system—and its decision to continue using it . . ." *Dowd*, 792 F.2d at 412. The Army's continued use of the product "amply establish[ed] government approval of the alleged design defects." *Id.* The Fourth Circuit held that "[t]he decision of the United States Army to contract with Bell for a helicopter rotor system with which the Army had extensive familiarity and field experience operates to shield defendant from any liability for alleged design defects in that system." *Id.* at 410. Thus, for the first time, the government's past experience with a product was held as satisfying the approval requirement of the *McKay* test.

258. Scantlebury, *The Government Contract Defense: Alive and Well in The Fourth Circuit*, XXII TORT & INS. L.J. 268, 277 (1987).

reasoning, a contractor could originate its own design without any government involvement and still meet the approval requirement. As long as a reasonable amount of time passes before an injury occurs, the contractor has satisfied the approval requirement. Moreover, a defense attorney could argue that with *Dowd* as a precedent, the approval requirement could be held satisfied by merely showing the government's past experience with *similar* products rather than with the *actual* product in question.

This expansion by the Fourth Circuit is too liberal and goes far beyond the approval requirement contemplated by the Ninth Circuit in *McKay*. After all, the primary rationale justifying extending the government's immunity to a military contractor is the government's actual involvement in the specifications for the design of the equipment. If this involvement becomes too minimal or too far removed, no justification exists for holding the military contractor immune from liability.²⁵⁹

The recent expansions of the approval requirement in the Third and Fourth Circuits are precursors of a trend in the appellate courts toward a very liberal construction of the government contractor defense. By construing the defense in such a broad manner, contractors receive immunity in circumstances where the government's involvement is so minimal that no danger exists that judicial review would frustrate constitutional separation of powers principles.²⁶⁰ A contractor would be given immunity in situations where it was solely responsible for the defective design.²⁶¹ As a result, contractors might be held immune in situations that are clearly outside those contemplated when the defense was first formulated.

The appellate courts should return to the principles set forth by the Ninth Circuit in *McKay*. The second prong of the test should be satisfied only when the contractor proves that the government either "established"²⁶² or "approved"²⁶³ reasonably precise specifications.²⁶⁴ Ex-

259. "The defense is available so long as there is true government participation in the design." *In re Air Crash Disaster*, 769 F.2d at 122.

260. In particular, the civilian court would not be required to second-guess military decisions, because the contractor and not the government would be making the design decisions. See *supra* note 212 and accompanying text.

261. Such a policy would encourage underhanded dealings with the government. Contractors might try to pass defectively designed equipment onto the government in the hope that the equipment would be accepted and used. Once the government had used the equipment, the contractor would argue that it is relieved from liability under the *Dowd* decision.

262. The defense is available without government approval if the government established the specifications. *McKay*, 704 F.2d at 451. For this requirement to be satisfied, however, the government must have provided more than "only minimal or very general requirements" for the equipment. *Id.* at 450.

tending immunity in other circumstances would not further the underlying policies of the defense.

3. Conformance prong

The third prong of the test requires that the equipment conform to the government's specifications.²⁶⁵ This prong of the *McKay* test is explicit and has not been the subject of dissension among the appellate circuits.²⁶⁶ Failure to comply with the government's expert judgment as to how the equipment should be manufactured requires that the contractor be held accountable for any injuries caused by its deviations.²⁶⁷ Accordingly, this prong of the test should be left intact.

4. Duty to warn prong

The fourth prong of the *McKay* test requires the contractor to disclose any known dangers involved in the use of the equipment of which the government is unaware.²⁶⁸ "The primary purpose of this requirement is to enable the government to make determinations as to the design and use of military equipment based on all readily available information."²⁶⁹ With full disclosure by the contractor, the government's decision to adhere to a design may be assumed to indicate the government's choice to accept the risks of the product.²⁷⁰

The majority of the circuits have adopted an actual knowledge stan-

263. The term "approved" is defined to include only those situations where the government has reviewed the specifications and approved them. *McKay*, 704 F.2d at 451. This standard should be applied with the requirement that the approval must amount to "more than a mere rubber stamp" by the government to be valid. *In re Air Crash Disaster*, 769 F.2d at 122.

264. *McKay*, 704 F.2d at 451. The requirement set forth in *In re Agent Orange*, 1046 F. Supp. at 1055, that the government must have established the specifications for the equipment is too restrictive in light of the present day defense procurement process. Active participation by the defense contractor is now accepted as a required vital part of the development of any complex military system. As a result, the appellate courts have properly held that the government contractor defense should also apply when the government has reviewed and approved the contractor's specifications. *In re Air Crash Disaster*, 769 F.2d at 122; *McKay*, 704 F.2d at 450.

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

266. See *supra* notes 220-25 and accompanying text.

267. The government contractor defense does not relieve contractors from liability for manufacturing defects. *McKay*, 704 F.2d at 451.

268. *Id.*

269. *Bynum v. FMC Corp.*, 770 F.2d 556, 574 (5th Cir. 1985).

270. *Ausness, supra* note 55, at 1026. "A supplier should not be insulated from liability for damages that would never have occurred if the military had been apprised of hazards known to the supplier." *In re Agent Orange*, 534 F. Supp. at 1055. The district court went on to hold that a contractor has a duty to inform the government of known risks "so as to provide the military with at least an opportunity fairly to balance the weapon's risks and benefits." *Id.*

dard.²⁷¹ Under this standard, the contractor is only under a duty to disclose hazards of which it had actual knowledge.²⁷² As pointed out in *In re Agent Orange*, a contractor under this duty would not be required to perform additional testing that is not included in the product's specifications.²⁷³ The duty merely requires the contractor to disclose to the government the extent of the contractor's knowledge of the dangers of the product.²⁷⁴

In contrast, the Eleventh Circuit in *Shaw* adopted a "should have known" test.²⁷⁵ To avoid liability, a contractor must prove that it participated only minimally in the design of the equipment. If the contractor fails to meet this burden, it can only avoid liability by proving that it both warned the government of the product's risks and that it informed the government of any design alternatives "reasonably known to the contractor."²⁷⁶

The "should have known" test of *Shaw* will result in judicial review of military decisions, and as such would violate the basic policies underlying the government contractor defense.²⁷⁷ This view was asserted by the Fifth Circuit in *Bynum*.²⁷⁸ There, the court held that a "should have known" test would require contractors to reevaluate the government's design specifications and to engage in testing that was not mandated

271. *Koutsoubos*, 755 F.2d at 354; *Boyle v. United Technologies Corp.*, 792 F.2d 413, 415 (4th Cir. 1986), cert. granted, 107 S. Ct. 872 (1987); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 599 (7th Cir. 1985); *Bynum*, 770 F.2d at 575 n.28; *In re Agent Orange*, 534 F. Supp. at 1055.

272. The circuits have held that contractors have no duty to warn of dangers known to both the contractor and the government. *Tillett*, 756 F.2d at 599 (no duty to warn of dangers in use of front end loader of which government was already aware); *In re Air Crash Disaster*, 769 F.2d at 124 (no duty to warn of hazards in helicopter's transmission of which government was already aware). If the level of knowledge between the government and the contractor "is at least in balance," the contractor is shielded from liability by the government contractor defense. *In re Agent Orange*, 534 F. Supp. at 1055.

273. *In re Agent Orange*, 534 F. Supp. at 1055.

274. *Id.*

275. *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985), petition for cert. filed, 106 S. Ct. 2243 (1986).

276. *Id.* The Eleventh Circuit held that "[a] risk is reasonably known when it is either actually known, or reasonably ought to be known given good design practice in the industry." *Id.* The court pointed out that reasonable knowledge does not amount to a requirement of omniscience. *Id.*

277. *Bynum*, 770 F.2d at 576. A court hearing a case under this standard would be forced to evaluate the adequacy of the government's testing program and to determine whether the contractor was under a duty to engage in testing beyond that required in the government contract. Thus, the court would be reviewing decisions the military had made regarding the immediate need for a product, which would compel the contractor to perform only minimal testing, or review military decisions relating to the development costs of a particular system.

278. *Id.*

under the government contract.²⁷⁹ The reevaluations and further testing, the court continued, would cause delays and increased costs that the government did not anticipate.²⁸⁰ After all, the court held, “[w]hen to require additional testing of military equipment, and at what cost, are decisions that are better left to the military and the political branches of the government.”²⁸¹

Although most circuits presently hold the contractor to have only a duty to disclose hazards actually known to the contractor, it is not an unreasonable burden to require contractors also to adhere to the first part of the *Shaw* “should have known” test. Contractors should be required to disclose hazards of which they have actual knowledge and to reveal hazards that reasonably should be known given the standards of the industry in which they are working.

No reason exists why a contractor should not be held to the minimum level of knowledge and skill in its particular industry. However, the difficulty with applying the *Shaw* court’s test as written is that it defines “industry” to include both civilian and military industry.²⁸² Under this standard, a court may be forced to evaluate the practices of military industry which would conflict with constitutional separation of powers doctrine.²⁸³ To avoid this problem, “industry” in the proposed test will refer to civilian industry. Thus, the fourth prong of the *McKay* test should be expanded to include the duty to warn of hazards reasonably known, given the good design practices of the civilian defense industry.²⁸⁴

279. *Id.*

280. *Id.*

281. *Id.* Another problem with the *Shaw* test is that it requires contractors to inform the military of alternative designs which are reasonably known to the contractor. *Shaw*, 778 F.2d at 746. This would compel the government contractor to expend valuable resources in determining alternate designs which the government may have already found to be inadequate in light of the equipment’s mission. The contractor will become, in essence, a reviewer of the military’s safety decisions, and consequently the courts will become reviewers of the contractor’s findings. But, as pointed out by the district court in *In re Agent Orange*, the military’s decisions pertaining to the production, risks, and costs of a weapon are exempt from review by civilian courts. *In re Agent Orange*, 534 F. Supp. at 1054 n.1. To adopt this part of the *Shaw* test will result in courts examining these very decisions. Thus, this part of the *Shaw* test is in conflict with the basic principles justifying the existence of the government contractor defense.

282. *Shaw*, 778 F.2d at 746 n.17.

283. See *supra* note 127 and accompanying text.

284. This construction of the fourth prong does not include the associated increased costs inherent in the Eleventh Circuit’s formulation. See *supra* notes 285-86 and accompanying text. Under the proposed standard, the government contractor is held to disclose those hazards of which the contractor has actual knowledge as well as those hazards that any competent contractor would be aware of. The contractor is not compelled to research alternate designs as is required by the Eleventh Circuit’s test. *Id.*

The proposed test for the availability of the government contractor defense is summarized as follows:

- 1) The plaintiff is a member of the military or is a civilian who has a special relationship with the military;
- 2) the government must have established or approved reasonably precise specifications for the equipment in question;
- 3) the equipment must conform in all material respects to the government's specifications;
- 4) the contractor must warn the government about dangers in the equipment of which the contractor has actual knowledge as well as dangers that reasonably should be known, given the standards of the civilian industry in which the contractor is working.

Under the proposed test, the defense will continue to protect the policy decisions of the military from being second-guessed by civilian courts, while preventing military contractors from sharing in the government's immunity when those policies are not brought into question.²⁸⁵

285. Applying the proposed test to the *Boyle* case is straightforward. The first prong, the governmental immunity requirement, is satisfied because the decedent, Lt. Boyle, was a member of the military and died in the line of duty. *See supra* note 205 and accompanying text. The second prong requires the government to have established or approved the equipment's specifications. Sikorsky easily satisfied this prong by maintaining continuous back-and-forth discussions with the government during the design of the helicopter and by obtaining the government's approval of a fully detailed mock-up of the helicopter's cockpit. *See supra* notes 213-15.

The third prong of the test requires that the equipment must conform materially to the government's specifications. Satisfaction of this requirement can be implied from the government's acceptance of the detailed full scale mock-up of the helicopter's cockpit. If there were material differences between the government's specifications and the mock-up, the government surely would have objected when it inspected the mock-up.

The last requirement is the duty to warn prong. Under the proposed test, the government contractor is held not only to disclose those dangers of which it has actual knowledge but also those that a reasonably competent contractor would know given the standards of the particular industry. To prove that the contractor has not satisfied this prong, the plaintiff has the burden of producing evidence showing that the contractor's duty has not been met. *See supra* notes 229-30. However, as the Fourth Circuit pointed out, the plaintiff in the *Boyle* case failed to produce any evidence that would tend to show that Sikorsky failed to disclose knowledge of dangers of which the government was not aware. *Id.* Unless the plaintiff could have shown that other manufacturers of helicopters would have been aware of hazards in the escape system, this prong would be held satisfied by default.

Unless the plaintiff can show some failure of Sikorsky to live up to the standards of its industry to warn of design hazards, all four prongs of the proposed test are satisfied. Sikorsky can properly raise the government contractor defense and share in the government's sovereign immunity.

VI. PLAINTIFFS UNDER THE PROPOSED TEST

The final question to be considered is the remedy plaintiffs are left with after a military contractor successfully raises the government contractor defense. After all, if the purpose of the tort system is to compensate a party who has been injured by another, a worthy plaintiff in the government contractor context should not go uncompensated. Accordingly, if a plaintiff is precluded from recovering from both the government and the military contractor, an alternate form of compensation must be available to him.

When an injury is caused by a piece of military equipment, there are three possible classes of plaintiffs: members of the military, civilian employees of the government,²⁸⁶ and ordinary civilians. This section will discuss the various compensation schemes available to each of these prospective plaintiffs.

Presently, the government contractor defense applies almost exclusively to actions brought by members of the military to recover for injuries they sustain while in the line of duty. If the defense is successful, the injured serviceman is prevented from recovering in tort against both the United States and the military contractor who manufactured the equipment. This does not mean, however, that injured servicemen will go uncompensated.²⁸⁷ Rather, the injured serviceman is provided with a statutory compensation system.²⁸⁸

Although members of the military cannot recover under the FTCA, Congress has provided a "simple, certain, and uniform compensation for injuries or death of those in [the] armed services."²⁸⁹ The compensation system the Supreme Court was referring to in *Feres v. United States*²⁹⁰ was the Veterans' Benefit Act.²⁹¹ The VBA "establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen . . ."²⁹² Recovery under the VBA has been analogized to recovery under the workmens' compen-

286. This category of government employee would include the crew of the space shuttle.

287. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 452, 452 n.11 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984) ("the serviceman or his family will not go uncompensated"); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672 (1976) (servicemen "are assured compensation regardless of fault under the Veterans' Benefits Act"); see Comment, *supra* note 6, at 294 ("injured military personnel are compensated by the provisions of the Veterans Benefit Act").

288. The Veterans' Benefit Act (VBA), 38 U.S.C. §§ 101-5228 (1983).

289. *Feres v. United States*, 340 U.S. 135, 144 (1950).

290. *Id.*

291. 38 U.S.C. §§ 101-5228 (1983); see *supra* note 71 and accompanying text.

292. *Stencel*, 431 U.S. at 671.

sation statutes.²⁹³ Although the VBA does not compensate for loss of companionship or services, the compensation under the VBA is not "reduced by the high transaction costs present in ordinary products liability litigation."²⁹⁴ Therefore, injured military personnel are provided with just and adequate compensation.

If the plaintiff is a government employee who is not a member of the military, a compensation scheme similar to the VBA is available. The Federal Employees Compensation Act (FECA)²⁹⁵ covers civilian employees of the government.²⁹⁶ FECA contains an express exclusivity clause which bars recovery under the FTCA.²⁹⁷ Thus, both civilian employees of the government and members of the military are restricted to recovery under their respective uniform compensation systems.²⁹⁸

Finally, when an ordinary civilian is injured by a piece of military equipment, the government contractor defense is inapplicable. Under the first prong of the proposed test, the government must be immune from liability under the *Feres-Stencel* doctrine.²⁹⁹ Because the doctrine only applies to injuries arising out of military service, the doctrine would not serve to bar actions brought by civilians.³⁰⁰ As a result, the first prong of the test would not be satisfied and the defense would fail.

An injured civilian plaintiff can also bring a tort action directly against the United States under the FTCA.³⁰¹ Unlike military plaintiffs who are barred from recovery by an exception to the FTCA, civilians are specifically authorized under the FTCA to file tort actions against the

293. R. KIMBROUGH, *supra* note 48, § 21:64; Comment, *The Government Contract Defense in Strict Liability Suits for Defective Design*, 48 U. CHI. L. REV. 1030, 1035 (1981). Under workmen's compensation statutes, "the theory of negligence as the basis of liability is discarded, the common-law defenses are eliminated, and a right to compensation is given for all injuries incident to the employment, with some exceptions, the amount of which is limited and determined in accordance with a definite schedule, in a summary and informal method of procedure." R. KIMBROUGH, *supra* note 48, § 21:60.

294. *McKay*, 704 F.2d at 452 n.11. Moreover, recovery under the VBA does not have the associated long delays inherent in civil litigation. *Stencel*, 431 U.S. at 673 (VBA "provides a swift, efficient remedy for the injured serviceman").

295. 5 U.S.C. §§ 8101-8193 (1982).

296. Comment, *supra* note 292, at 1035; R. KIMBROUGH, *supra* note 48, § 21:64.

297. 5 U.S.C. § 8116(c) (1982).

298. These compensation systems provide an "assured minimum level of compensation in exchange for relief from the vagaries of litigation." Comment, *supra* note 292, at 1035.

299. *Supra* note 236 and accompanying text.

300. Pomerance, *supra* note 196, at 224 ("legal justification for the government contractor defense is the government's immunity to suits by *servicemen*" (emphasis in original)); Craft, *supra* note 239, at 45 ("[w]here a civilian brings a tort action, *Feres-Stencel* concern over military discipline or veterans compensation would arguably not arise"); Ausness, *supra* note 55, at 1017 ("*Feres* rule only applies to service-related injuries").

301. See *supra* note 61 and accompanying text for discussion of FTCA.

government.³⁰² Consequently, an injured civilian has two possible causes of action. First, the *Feres-Stencel* doctrine does not prohibit an action against the military contractor who was responsible for manufacturing the equipment that caused the plaintiff's injury.³⁰³ Second, under the FTCA an action can be filed directly against the United States.

Although the preceding discussion indicates that plaintiffs are not completely without remedy, much remains to be accomplished to provide more complete compensation to plaintiffs who are injured by military equipment. Initially, government agencies should be encouraged to include voluntary indemnification clauses in their contracts.³⁰⁴ Another possibility is the expanded use of cost-reimbursement contracts which entitle a contractor to reimbursement for the reasonable costs of insurance.³⁰⁵ Finally, legislation should be passed to provide reasonable indemnification for contractors.³⁰⁶

VII. CONCLUSION

To date, six appellate circuits have accepted some form of the government contractor defense.³⁰⁷ The courts cite two main reasons why the defense is necessary. First, the defense prevents unconstitutional judicial scrutiny of military judgment and interference with military discipline.³⁰⁸ Second, the defense protects innocent government contractors from unjust liability.

The present state of the defense is unacceptable. No uniform standard exists that contractors can use to predict the scope of liability to

302. 28 U.S.C. § 2680(j) (1983); *see supra* note 63 and accompanying text.

303. If the contractor is held liable, it is not barred from seeking indemnity from the government. "A contractor can pursue a claim for the Government's negligence under the Federal Tort Claims Act if the injured person is not a Government employee." Polinsky, *Product Liability and the United States Government Contractor*, 14 PUB. CONT. L.J. 312, 331 (1984).

304. Currently several federal regulations already specifically provide for the "indemnification of contractors above the level of insurance without regard to any limitation of costs or funds otherwise contained in the contract." Souk, *Government Contracts and Tort Liability: Time for Reform*, 30 FED. B. NEWS & J. 70, 74 (1983).

305. Polinsky, *supra* note 302, at 327. Measures such as these "can be implemented quickly and without high-level government involvement." *Id.*

306. Souk, *supra* note 303, at 72; Polinsky, *supra* note 302, at 329. "Vital public policy considerations—promotion of safe practices by the government and the desirability of fairness and maximum industry participation in the procurement process—mitigate for legislative reform." Souk, *supra* note 303, at 75. Some indemnification statutes already exist. For example, the military is authorized to indemnify contractors involved in the research and development of certain "unusually hazardous" products. 10 U.S.C. § 2354 (1982). *See also* Souk, *supra* note 303, at 73.

307. *See supra* notes 18-23 and accompanying text for appellate circuits adopting some form of the government contractor defense.

308. *See supra* notes 59-92 and accompanying text.

which they may be exposed. Some circuits, like the Fourth Circuit, construe the defense very broadly and would allow its use in a large number of circumstances.³⁰⁹ Other circuits, like the Eleventh Circuit,³¹⁰ define the defense very narrowly and demand that contractors satisfy stringent requirements before allowing the defense to be raised.³¹¹ As a result, a contractor's liability could potentially vary greatly from circuit to circuit.

The formulation proposed in this Note strikes a balance between the liberal and conservative constructions of the defense. Availability of the defense is limited to only those cases where legitimate separation of powers concerns are present. Thus, the proposed defense protects innocent contractors without spreading an unduly wide cloak of immunity. Further, the plaintiff class is constrained to prevent the use of the defense in actions brought by injured civilians. Finally, the proposed defense provides for the greatest possible disclosure of information to the government.

In conclusion, the need for a government contractor defense is evident. The difficulty lies in specifying a standard. To this end, the proposed government contractor defense is submitted. This formulation of the defense prevents contractors who are responsible for design defects from escaping liability while protecting innocent contractors. The proposed formulation improves on recent constructions of the defense by allowing the defense to be applied with a fine rather than broad brush.

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Editor's note: After this Note was sent to the printer, the Supreme Court handed down its decision in *Boyle v. United Technologies Corp.*, 56 U.S.L.W. 4792 (1988). Relying on the discretionary function exception to the Federal Tort Claims Act, the Court essentially adopted the Ninth Circuit's construction of the government contractor defense.

309. See *supra* notes 256-64 and accompanying text.

310. *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *petition for cert. filed*, 106 S. Ct. 2243 (1986).

311. See *supra* notes 150-52 and accompanying text for a discussion of the *Shaw* standard.

* This note is dedicated to my wife, Amy Field, and my parents, Robert and Phyllis Overly, for their constant love and support.