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THE GOVERNMENT CONTRACTOR DEFENSE:
WHEN ARE MANUFACTURERS OF MILITARY
EQUIPMENT SHIELDED FROM LIABILITY
FOR DESIGN DEFECTS?

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I. INTRODUCTION

THE GOVERNMENT CONTRACTOR defense\(^1\) protects government contractors from liability for deaths or injuries resulting from design defects in products manufactured in strict accordance with government specifica-

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\(^1\) Some courts and legal scholars draw a distinction between the "government contractor defense" and the "contract specification defense." See, e.g., Littlehale v. E.I. du Pont de Nemours & Co., 268 F. Supp. 791, 802-04 n.16-17 (S.D.N.Y. 1966), aff'd, 380 F.2d 274 (2d Cir. 1967); see also Note, Liability of a Manufacturer for Products Defectively Designed by the Government, 23 B.C.L. REV. 1025, 1027 (1982). The two defenses interrelate and differ primarily in scope. The contract specification defense does not apply to a design so obviously defective and dangerous that a competent contractor of ordinary prudence would decline to follow the design. See, e.g., McCabe Powers Body Co. v. Sharp, 594 S.W.2d 592, 595 (Ky. 1980). In contrast, the government contractor defense may bar recovery even when the government specifications are obviously defective and dangerous. See, e.g., Barnthouse v. California Steel Bldgs. Co., 215 Cal. App. 2d 72, 76-78, 29 Cal. Rptr. 835, 838 (1963).

Not all courts draw a distinction between the two defenses. Since most of the recent cases involving defectively designed military products do not make a distinction, and since most of these cases treat all of the precedent pertaining to the defense labelled "government contractor defense," this article will not include a detailed analysis of a separate "contract specification defense."
tions. Originally, courts applied the defense only in cases involving government contractors performing public works projects such as road and sewer construction or the dredging of rivers. The defense traditionally did not find application in products liability actions. Beginning in the 1960’s, courts began to apply the defense to products liability actions grounded on a theory of negligence. Several recent cases involving military products establish a clear trend toward allowing the government contractor defense in design defect actions brought under theories of negligence, strict tort liability, and breach of warranty.

Examination of recent case law concerning the government contractor defense in the context of military products liability cases reveals that the policy considerations behind the defense today are broader and more complex than they were during the days of the early public works cases. In the public works cases, the underlying rationale for the defense was the inherent inequity of refusing to permit the contractor to share in the government’s immunity from suit. As applied to military products liability cases, the defense involves additional considerations of separation of powers and national defense.

This article uses a three-step approach to examine the government contractor defense in military products liability cases. The first section briefly traces the development of the government contractor defense from its early use in public works cases to the four-pronged analysis currently

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3 See infra notes 12-28 and accompanying text.
4 See infra notes 33-46 and accompanying text.
6 See infra notes 33-153 and accompanying text.
7 See infra notes 12-31 and accompanying text.
8 See infra notes 51-152 and accompanying text.
employed in military cases.\(^9\) The second section discusses the recent federal court cases and the standard of proof which currently must be met to prove each element of the defense.\(^10\) The final section analyzes the judicial reaction to the various rationales articulated to justify the defense, and attempts to provide insight regarding the future of the defense in the federal courts.\(^11\)

II. DEVELOPMENT OF THE GOVERNMENT CONTRACTOR DEFENSE

A. Origin and Early Development of the Defense

The government contractor defense derives from principles first articulated by the United States Supreme Court in *Yearsly v. W.A. Ross Construction Co.*\(^12\) In *Yearsly* the plaintiff sought recovery for erosion of his waterfront property allegedly caused by the construction of a dike by the defendant pursuant to a contract with the federal government.\(^13\) The plaintiff argued that the erosion constituted a taking of property for which he should receive just compensation under the fifth amendment.\(^14\) The Court found the contractor not liable, likening the contractor’s position to that of an “agent or officer” of the government.\(^15\) Since the defendant possessed valid agency authority to carry out the project and since the defendant acted within the scope of that authority, the defendant escaped liability.\(^16\)

The Court’s use of the term “agent” implies that a government contractor enjoys a grant of immunity similar to

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\(^9\) See infra notes 12-153 and accompanying text.

\(^10\) See infra notes 158-261 and accompanying text.

\(^11\) See infra notes 263-300 and accompanying text.

\(^12\) 309 U.S. 18 (1940). Although the *Yearsly* decision is the only case in which the United States Supreme Court recognized a form of immunity for federal contractors, a body of state case law concerning the tort immunity of public contractors began to develop in the early 1900’s. See Annot., 9 A.L.R. 3d 382 (1966).

\(^13\) 309 U.S. at 19.

\(^14\) Id. at 19-20.

\(^15\) Id. at 20-21.

\(^16\) Id. at 22.
the grant of immunity for persons sued in their individual capacity as agents or officers of the government.\textsuperscript{17} Although the \textit{Yearsly} opinion never expressly mentions immunity, the Supreme Court cited \textit{Yearsly} in the later case of \textit{Brady v. Roosevelt Steamship Co.}\textsuperscript{18} for the proposition that "government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States."\textsuperscript{19}

One problem with the \textit{Yearsly} decision lies in its failure to provide any guidelines for determining when a government contractor becomes an "agent" entitled to share the government's immunity.\textsuperscript{20} A decade after the \textit{Yearsly} decision, the Court made it clear that agency status is not automatic for government contractors. The case of \textit{Powell v.}

\begin{itemize}
\item \textsuperscript{17} See Note, supra note 1, at 1050.
\item \textsuperscript{18} 317 U.S. 575 (1942).
\item \textsuperscript{19} Id. at 583.
\item \textsuperscript{20} One court has gone as far as to find that a government contractor can be both an independent contractor and an agent. In \textit{Johnson v. Bechtel Assocs., P.C.}, 545 F. Supp. 783 (D.D.C. 1982), the Washington Metropolitan Transit Authority (Metro) was created with the express approval of Congress to develop and operate a transportation system. \textit{Id.} at 784. The District of Columbia and the states of Virginia and Maryland signed an agreement for a limited waiver of Metro's sovereign immunity as the exclusive remedy for the torts of its agents. \textit{Id.} The District and states did not otherwise waive the immunity of the jurisdictions entering into the agreement. \textit{Id.} Metro then contracted with Bechtel to oversee the safety of the subway project and administer various construction contracts. \textit{Id.} Plaintiff sued Bechtel for negligent performance of its duties as a safety overseer after plaintiff alleged that Bechtel had contracted silicosis from exposure to high levels of silica dust. \textit{Id.} Bechtel defended on the ground that it acted as an agent of the government and thus possessed immunity. \textit{Id.}

\textit{The Bechtel} court applied a two-pronged analysis. First, it noted that basic agency law requires the elements of consent and control. \textit{Id.} at 785. Second, the court focused on the contract and the manner in which the parties performed the contract. \textit{Id.} at 786. The contract provided that Bechtel could conduct operations in the name of Metro subject to the approval of Metro, that Bechtel had to keep Metro fully informed of contractual operations, and that Metro possessed the right of approval over the Bechtel operations manual. \textit{Id.} Bechtel held the right to order a shutdown for safety violations; however, the company rarely did this without prior approval from Metro. \textit{Id.} at 787.

Under the circumstances set forth above, the court concluded that Bechtel acted as Metro's agent on safety matters and therefore Bechtel enjoyed immunity from suit. \textit{Id.} The fact that Bechtel also might be classified as an independent contractor for other matters did not alter this result. \textit{Id.} at 785.
United States Cartridge Co. involved contractors who ran munitions plants on a cost-plus-fixed-fee basis for the government. The government supplied the materials and held title to the sites, plants, equipment, raw materials, and finished products. The contractors were responsible for manufacturing munitions according to government specifications, operating the plant, and supervising employees. The contractors argued that this arrangement amounted to an agency relationship, exempting them from the Fair Labor Standards Act. The Court rejected the argument, characterizing the defendants as "independent" contractors. The Court based this characterization on the duties of the plant managers, as well as on an explicit term of the contract which stated that "the Contractor is an independent contractor and in no wise an agent of the government."

Since Yearsly, the existence of the government contractor defense has been recognized in a long line of cases arising from public works projects, the majority of which involve claims for the taking of property. Most courts in these cases adopted the Yearsly characterization of the defense as a sharing of the government's immunity, offering various rationales to justify extension of such immunity to contractors. One court reasoned that if the law did not afford contractors this immunity, actions against contractors who perform strictly in accordance with government directives would make it "impossible for the United States

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22 Id. at 498.
23 Id. at 500.
24 Id. at 500-01.
25 Id. at 504-05.
26 Id. at 505-06.
27 Id. at 505.
29 See infra notes 30-31 and accompanying text.
to serve the public by the erection of great works of internal improvement for the benefit of all." Other courts have suggested that refusal to allow contractors to share in the government's immunity undermines the "discretionary function" exception to the Federal Tort Claims Act (FTCA).

B. Early Applications of the Government Contractor Defense in Products Liability and Negligence Actions

As discussed above, virtually all of the early cases dealing with the government contractor defense involved property damage resulting from contracts for the construction of public works projects. Beginning in the mid-1960's, however, courts began to recognize the defense in products liability actions grounded upon a theory of negligence and in actions for negligent failure to warn.

Two of the earliest products liability cases to address the government contractor defense arose in New York and involved military products. While not calling the de-

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50 Green, 362 F. Supp. at 1266 (quoting Chattanooga & Tennessee River Power Co. v. Lawson, 139 Tenn. 354, 373, 201 S.W. 165, 169 (1917)).
51 See, e.g., Dolphin Gardens, 243 F. Supp. at 827. The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2402, 2671-80 (1982), allows suit for injury caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b). The FTCA provides a broad waiver of the federal government's sovereign immunity; however, it is by no means a complete waiver. For example, the United States Supreme Court has held that the FTCA does not permit a suit based upon a theory of strict liability. Laird v. Nelms, 406 U.S. 797, 799 (1972). Moreover, the FTCA itself lists several exceptions to the government's waiver of immunity. See 28 U.S.C. § 2680. One such exception, the "discretionary function" exception, precludes suits arising out of acts or omissions by government officials at the "planning level" of government, although the discretionary function exception does not bar suits arising out of activity at the "operational level" of government. A government decision stands a better chance for characterization as a planning level decision if the government consciously balanced policy considerations in arriving at the decision. See generally Comment, Scope of the Discretionary Function Exception Under the Federal Tort Claim Act, 67 Geo. L.J. 879 (1979).
52 See supra notes 12-31 and accompanying text.
fense by name, the court in Montgomery v. Goodyear Tire & Rubber Co.\textsuperscript{33} recognized the existence of the government contractor defense.\textsuperscript{34} The plaintiffs in Montgomery sought recovery for the wrongful death of servicemen killed when a Navy dirigible crashed off the coast of New Jersey.\textsuperscript{35} The crash occurred when defectively manufactured seams on the dirigible split during the flight.\textsuperscript{36} In a motion for summary judgment, Goodyear asserted that it should not be exposed to liability because, \textit{inter alia}, the government exercised almost complete control over the manufacture of the airship in question and Goodyear built the ship according to government specifications and under government inspection.\textsuperscript{37} The court denied Goodyear's motion for summary judgment, concluding that material questions of fact existed as to the extent of government control over the manufacturing process.\textsuperscript{38} The court implied that a sufficient level of involvement by the government would provide a valid defense to the claims against Goodyear.\textsuperscript{39}

Two years after rendering the Montgomery decision, the United States District Court for the Southern District of New York stated in Littlehale v. E.I. du Pont de Nemours & Co.\textsuperscript{40} that

where a party contracts with the Government and the Government specifies the means by which the product is to be manufactured and other details incident to the production, the manufacturer's acts in accordance with the plans are at the very least not measurable by the same tests ap-

\textsuperscript{34} 231 F. Supp. at 451.
\textsuperscript{35} \textit{Id.} at 449.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 451.
\textsuperscript{38} \textit{Id.} Goodyear also alleged that some safety factors had to be compromised because of the "advanced design" of the airship and the time pressures of producing sophisticated weaponry for the military. \textit{Id.} at 450. The court was "impressed by the sensitive questions of national defense raised," \textit{id.}, but did not address further the experimental nature of the project.
\textsuperscript{39} \textit{Id.} at 451.
\textsuperscript{40} 268 F. Supp. 791 (S.D.N.Y. 1966), \textit{aff'd}, 380 F.2d 274 (2d Cir. 1967).
Applicable to a manufacturer having sole discretion over the method of manufacture, and at the most are insulated from any liability.\textsuperscript{41}

In \textit{Littlehale} a Navy seaman and a civilian employee of the Navy were injured when blasting caps manufactured by the defendant exploded prematurely.\textsuperscript{42} Plaintiffs brought an action for negligent failure by the defendant to provide a warning of certain inherent dangers in the use of blasting caps.\textsuperscript{43} The blasting caps had been manufactured by du Pont thirteen years earlier pursuant to a contract with the Ordnance Department of the War Department.\textsuperscript{44} Du Pont brought a motion for summary judgment based in part on the government contractor defense.\textsuperscript{45} The court granted du Pont's motion, not because of the government contractor defense, but because the court found that du Pont had no duty to warn under generally applicable tort law.\textsuperscript{46} Nevertheless, the court's statement quoted above clearly indicates willingness to accept the basic concept of the defense.\textsuperscript{47}

\subsection*{C. Unequivocal Acceptance of the Government Contractor Defense in Product Liability Cases Involving Design Defects}

Any ambiguities raised by the manufacturing defect and duty-to-warn cases of the 1960's concerning the viability of the government contractor defense in products liability suits were extinguished by a series of design defect cases

\begin{itemize}
\item \textsuperscript{41} Id. at 804 n.17.
\item \textsuperscript{42} Id. at 793.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id. at 795.
\item \textsuperscript{45} Id. at 794. Du Pont pled alternatively that (a) they had no duty to warn, (b) even if a duty existed it did not extend to the government employees injured, and (c) the warnings provided were adequate. \textit{Id}.
\item \textsuperscript{46} Id. at 801. The court found that the defendant produced the product for a specific party who was well aware of the product’s dangers; the defendant could not be responsible for unforeseeable disposition of the product years later. \textit{Id}. at 801-03.
\item \textsuperscript{47} The court stated that “the defense may have merit,” but based its holding on general tort theory. \textit{Id}. at 803-04.
\end{itemize}
in the late 1970's and early 1980's. These cases, all of which involve government contracts to supply military products, show a clear trend toward allowing the defense in design defect suits grounded in negligence, breach of warranty, and strict tort liability.

In *Sanner v. Ford Motor Co.*, the court held that a passenger injured when he was thrown from an Army jeep could not recover from the vehicle manufacturer because of the manufacturer's failure to equip the vehicle with seat belts and a roll bar. The manufacturer built the vehicle in strict compliance with United States Army plans and specifications that did not require such safety devices. The court found it significant that Ford, at the Army's request, had designed seat belts to be installed in the jeep but that the Army rejected installation of the seat belts because they were incompatible with the intended use of the vehicle. Ford had no discretion to install seat belts, roll bars, or other restraints without approval of the Army. Granting Ford's motion for summary judgment, the court stated,

> To impose liability on a governmental contractor who strictly complies with the plans and specifications provided to it by the Army in a situation such as this would seriously impair the Government's ability to formulate policy and make judgments pursuant to its war powers. The Government is the agency charged with the responsibility of deciding the nature and type of military equipment that best suits its needs, not a manufacturer such as Ford.

A manufacturer is bound to comply with plans and spec-

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48 See infra notes 51-61 and accompanying text.
49 See infra notes 70-74 and accompanying text.
50 See infra notes 51-61 and 70-74 and accompanying text.
52 364 A.2d at 46-47.
53 Id. at 47.
54 Id. at 44. The Army believed seatbelts would interfere with immediate egress from the jeep and also could expose passengers to greater injury in a rollover. See id.
55 Id. at 46.
ifications provided to it by the Government in the production of military equipment. If it does it is insulated from liability.\textsuperscript{56}

The New Jersey Superior Court, Appellate Division, affirmed the \textit{Sanner} decision, placing special emphasis on the fact that (1) Ford had no discretion with respect to the installation of safety devices and (2) there was a “conscious, intentional determination by the United States Government” not to include seat belts.\textsuperscript{57} Under \textit{Sanner}, then, the government contractor defense arguably applies only in the narrow circumstances where a contract compels a manufacturer to produce a product according to specifications and the government makes an overt decision with regard to the design feature in question. Indeed, at least one court in a pre-\textit{Sanner} decision included compulsion as an element of the defense.\textsuperscript{58} The distinct trend, however, is to view the defense in much broader terms, and none of the most recent cases require compulsion.\textsuperscript{59} Most recent opinions also suggest that the defense does not depend upon an express decision by the government against a design change,\textsuperscript{60} although the law on this question remains less certain.

One other interesting point about the appellate decision in \textit{Sanner} should be noted. The appellate court, while acknowledging that the cases relied on by the trial court involved negligence rather than strict liability, stated that “the underlying policy reasons for shielding

\footnotesize{\textsuperscript{56} Id. at 47. \\
\textsuperscript{57} 381 A.2d at 806. \\
\textsuperscript{58} Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14, 16 (9th Cir. 1961) (“It is elementary that \textit{compulsion} must exist before the 'government contractor defense' is available.'”) (emphasis in original). \\
\textsuperscript{59} Indeed, two recent cases expressly state that compulsion is not an element of the defense. See Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 450-51 (9th Cir. 1983), \textit{cert. denied}, 464 U.S. 1043 (1984). \\
\textsuperscript{60} A recent case from the Eleventh Circuit, Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), suggests that an express decision by the government is required. See \textit{id.} at 744-45. Virtually every other court that has addressed the question, however, has taken a contrary position. See, \textit{e.g.}, Tillett, 756 F.2d at 595-96; McKay, 704 F.2d at 448-51.}
the manufacturer from liability for acts done in manufac-
turing a product according to Government plans are
equally applicable in products cases to strict liability situa-
tions and negligence cases.'"61

In 1980 the New York Supreme Court upheld the gov-
ernment contractor defense but limited its holding to con-
tracts for military purposes during times of war.62 In
Casabianca v. Casabianca63 defendant Teledyne Readco
manufactured a dough mixer during the early 1940's in
accordance with the Army's specifications for use in field
kitchens during World War II.64 The mixer eventually
found its way into a New York pizza shop owned by the
plaintiff's father, where the plaintiff suffered injuries
when he caught his hand in the machine.65 The court
noted that the manufacturer built the mixer according to
Army specifications during time of war, and concluded
that a supplier to the military during wartime has a right
to rely on such specifications.66 To find otherwise might
prompt manufacturers to withhold needed equipment
from the armed forces because they consider the designs
to be imprudent or dangerous.67 A manufacturer's con-
formance during wartime "to the specifications provided
to him should be, and is, a complete defense to any action
based upon design, whether faulty or not."68 The court
reserved judgment as to the availability of the government
contractor defense in actions involving products manufac-
tured at times other than in times of war.69

While the Sanner and Casabianca cases firmly established
that the government contractor defense may be raised

61 Sanner, 381 A.2d at 806.
1980).
64 428 N.Y.S.2d at 401.
65 Id.
66 Id. at 401-02.
67 Id. at 402.
68 Id.
69 Id. The court saw no need to examine immunities for products manufactured
during peacetime or for non-military purposes. See id.
successfully in products liability cases involving design defects, these cases left many questions concerning the defense unresolved. Most notably, neither case definitively set out the elements of the defense. Nor did either case address the application of the defense in an action based upon breach of warranty. The public works and early products liability cases suggested as many restrictions and caveats to the defense as there were decisions recognizing the defense. Certainly, these early cases demonstrated a lack of consensus among jurisdictions.

In 1982 the United States District Court for the Eastern District of New York answered many of these unresolved questions in *In re “Agent Orange” Product Liability Litigation.* In *Agent Orange* the court set forth three elements that a defendant must prove in order to prevail on the government contractor defense: (1) The government must have established the specifications for the product; (2) the product manufactured by the defendant must meet the government’s specifications in all material respects; and (3) the government must have known as much or more than the defendant about the hazards associated with the product. The court in *Agent Orange* expressly held that the defense, if properly established, shields the manufacturer against all claims, whether framed as negligence, strict liability, or breach of warranty. The court also concluded that the government contractor defense is an affirmative defense and thus the defendant carries the burden of proof as to each of its elements.

The *Agent Orange* court applied the above elements in

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71 See id. at 1055.
72 Id. at 1055. A subsequent opinion in the *Agent Orange* litigation modified the third element of the defense so that if a contractor cannot prove sufficient government knowledge the contractor still can avoid liability by demonstrating that “even if the government had had as much knowledge as that defendant should have had, it would have ordered production of [the product] in any event and would not have taken steps to reduce or eliminate the hazard.” *In re “Agent Orange” Product Liability Litigation*, 597 F. Supp. 740, 749 (E.D.N.Y. 1984).
73 534 F. Supp. at 1055-56.
74 Id. at 1055.
the context of the production of a chemical herbicide; however, the case appears to have set the standard for application of the defense in all products liability design defects cases involving military products. The three-element approach to the government contractor defense formulated in *Agent Orange* has been adopted or cited with approval in every federal court decision since 1982 involving design defects in military equipment built under government contract (although the defendant did not prevail on the defense in every case).

The first application of the *Agent Orange* three-element approach to a military case occurred in *Koutsoubos v. Boeing Vertol, Division of Boeing Co.* In *Koutsoubos* plaintiff's dece-

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75 See id. at 1056. "Agent Orange," as the court uses the term, denotes any herbicide used in Southeast Asia during the Vietnam Conflict. See id.

76 The *Agent Orange* opinions do not list the government's immunity under the *Feres-Stencel* doctrine, explained infra note 97, as a separate element of the defense. The *Agent Orange* courts seemed to take such immunity for granted. Many of the more recent government contractor defense cases do list *Feres-Stencel* immunity as a separate, fourth element of the defense. See infra notes 158-180 and accompanying text.


The approach also has been adopted in at least one state court. See McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 205, 210-11, 195 Cal. Rptr. 764, 768 (Cal. Ct. App. 1983) (holding government contractor defense available to defendant who manufactured helicopter according to government specifications).

dent was killed when a Navy helicopter manufactured by Boeing Vertol crashed while conducting a simulated rescue on a training flight. 79 Plaintiff proceeded on a theory of strict liability alleging that the helicopter possessed defects making it "unsafe, unairworthy and dangerously unfit for its intended use." 80 Boeing moved for summary judgment based upon the government contractor defense. 81 The district court found the Agent Orange tri-factor analysis applicable, but denied summary judgment because Boeing failed to meet its burden of proof as to the third element of the defense. 82 Trial on that issue resulted in a finding that the "third element of the defense had also been established." 83 The Navy exercised responsibility for making final decisions on the helicopter's specifications and therefore the Navy knew as much as, and in most instances considerably more than Boeing about the hazards alleged by plaintiff. 84 The district court finally concluded that Boeing had established the government contractor defense. 85 The United States Court of Appeals for the Third Circuit affirmed. 86

The Third Circuit cited the Agent Orange approach with approval in Brown v. Caterpillar Tractor Co., 87 when the court held that a contractor who built a bulldozer for the Army according to Army specifications could assert the government contractor defense. 88 In Brown an Army reservist bulldozer operator on weekend duty suffered injuries when a tree fell over his bulldozer's blade and struck him. 89 Claiming that he would not have been injured had the bulldozer been equipped with a protective structure

79 Id. at 341.
80 Id.
81 Id.
82 Id. at 342-44.
83 Koutsoubos, 755 F.2d at 354.
84 See id.
85 See id.
86 Id. at 355.
87 696 F.2d 246 (3d Cir. 1982) [hereinafter cited as Brown I].
88 Id. at 254.
89 Id. at 247.
around the passenger seat, Brown sued Caterpillar on
theories of negligence, strict liability, and breach of war-
 ranty.\textsuperscript{90} The district court granted Caterpillar's motion
for summary judgment based on the government contrac-
tor defense.\textsuperscript{91}

On appeal the Third Circuit held that the government
contractor defense existed under Pennsylvania law, but
the court vacated the grant of summary judgment because
material questions of fact remained as to whether or not
the contract specifications were followed in all material re-
spects.\textsuperscript{92} Although the appellate court in \textit{Brown} did not
specifically adopt the three-element analysis from \textit{Agent
Orange}, the court cited the elements in a footnote and
stated that the court found "attractive the novel approach
adopted by Judge Pratt."\textsuperscript{93} The court in fact applied the
first two elements; \textit{i.e.}, the court required that the govern-
ment prepare the specifications and that the manufacturer
follow those specifications in all material respects.\textsuperscript{94} The
\textit{Brown} court did not apply the third element, suggesting
without explanation that the relative knowledge of the
government and Caterpillar was not an issue.\textsuperscript{95}

In \textit{McKay v. Rockwell International Corp.}\textsuperscript{96} the United

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id. at 254 n.17.
\item \textsuperscript{94} Id. at 254. The Third Circuit recently handed down a second opinion in \textit{Brown v. Caterpillar Tractor Co.}, 741 F.2d 656 (3d Cir. 1984) [hereinafter cited as \textit{Brown II}]. In \textit{Brown I}, discussed \textit{supra} notes 87-93 and accompanying text, the Third Circuit vacated summary judgment and remanded. \textit{Brown I}, 696 F.2d at 257. On remand the district court entered judgment on a jury verdict in favor of the manufacturer. Plaintiff appealed and, in \textit{Brown II}, the Third Circuit once again vacated and remanded. \textit{Brown II}, 741 F.2d at 662.
\item Although the errors cited by the court in \textit{Brown II} involved instructions by the district court regarding failure to warn and defective design, the appellate court found no error with the district court's instructions concerning the degree to which a manufacturer must comply with the government's specifications. Specifically, the Third Circuit reiterated that the government contractor defense requires neither compulsion to comply nor strict compliance. \textit{Id.} at 662. Instead, "the issue in a design defects case is whether the design of the product is or is not that called for by the specifications." \textit{Id.}
\item \textsuperscript{95} \textit{Brown I}, 696 F.2d at 254 n.17.
\item \textsuperscript{96} 704 F.2d 444 (9th Cir. 1983), \textit{cert. denied}, 464 U.S. 1043 (1984).
\end{itemize}
\end{footnotesize}
States Court of Appeals for the Ninth Circuit adopted the *Agent Orange* three-part analysis and added a requirement that the contractor enjoys immunity only if the government also would be immune from liability under the *Feres-Stencel* doctrine. In *McKay* the widows of two Navy pilots killed in separate aircraft crashes brought an action against Rockwell, the manufacturer of the aircraft and its ejector seat system. Both pilots died of injuries received from the ejector system during ejection from their burning aircraft. Focusing on the immunity of the government under the *Feres-Stencel* doctrine against indemnity claims filed by government contractors for damages paid to injured servicemen, the court found that "[i]t is consistent with this limitation to construe the government contractor rule so as to avoid imposing on the contractor liability properly attributable to acts of the government."

In 1983 and 1984 the United States District Court for the Eastern District of Pennsylvania reached opposite conclusions in two government contractor defense cases, both of which involved military helicopter crashes. *Hubbs v. United Technologies* adopted the *Agent Orange* approach and allowed the defense. *Schoenborn v. Boeing*

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97 In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court held that the United States remains immune from liability under the FTCA to a member of the Armed Forces who sustains an injury while engaged in activities incident to military service. *Id.* at 146. The Court broadened the scope of this immunity in *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977). In *Stencel* the Court held that defense contractors may not seek indemnity from the federal government for damages paid by the contractors to members of the armed forces who sue for injuries incident to military service. *See id.* at 672-73. For a more complete discussion of the *Feres-Stencel* doctrine, see generally Note, *Johnson v. United States*, 51 J. AIR L. & COM. 1087 (1986). *See infra* notes 158-180 and accompanying text for further discussion of the *Feres-Stencel* doctrine as it relates to the government contractor defense.

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

99 *Id.*

100 *Id.* at 450-51.

101 *See infra* notes 102-104 and accompanying text.


103 *Id.* at 100.
Co. also adopted the Agent Orange approach but held the contractor liable. The different outcomes apparently resulted from inconsistent interpretations of the first element of the defense.

The United States District Court for the Southern District of Florida discussed the government contractor defense in Shaw v. Grumman Aerospace Corp. In Shaw the widow of a Navy pilot filed a products liability action against the manufacturer of an aircraft that crashed into the ocean after a catapult launch, killing her husband. The design defect alleged in Shaw involved a disconnect unit in the longitudinal flight control system of Grumman KA-6D aircraft. Specifically, the plaintiff alleged that the lack of redundancy in the flight control system made the system's design defective. In a memorandum opinion the Shaw court held that Grumman had not met its burden of proof with respect to all three elements of the government contractor defense. In particular the court found that

there was an imbalance of knowledge about the defect between the supplier and the military at the time Grumman's detail specifications were approved. Once aware of the design defects, the Navy was lead by Grumman to believe

105 Id. at 718-21.
106 Compare Schoenborn, 586 F. Supp. at 717, with Hubbs, 574 F. Supp. at 99. In both opinions the court acknowledges the Agent Orange proviso that the government must have specified a particular product and design rather than a mere "performance specification," before the first element of the defense can be satisfied. See Agent Orange, 534 F. Supp. at 1056. The court in Hubbs suggested that the government specifies a particular product and design when the government either sets detailed specifications or approves the manufacturer's final design work. See 574 F. Supp. at 99 (citing McKay, 704 F.2d at 453). The Schoenborn court expressly rejected the contention that mere government approval of final specifications designed by the manufacturer will suffice. See 586 F. Supp. at 717.
108 Id. at 1067-68.
109 Id. at 1069.
110 Id.
111 Id. at 1074.
that the installation of the self-retaining bolts would correct the problem. The Navy was justified in relying on Grumman's design expertise and experience when it represented the new bolt would correct the problems caused by the defect.\(^{112}\)

In addition, the Shaw court expressly adopted the position of the Schoenborn court that “where a contractor establishes a product's detailed specifications and the government merely approves them, the government contractor defense is not available to the contractor.”\(^{113}\)

The Eleventh Circuit affirmed Shaw on appeal.\(^{114}\) In a confusing and poorly structured analysis, the Eleventh Circuit attempted to redefine the government contractor defense. The court set forth a two-element defense which the court termed “the military contractor defense.”\(^{115}\) The court stated,

A contractor may escape 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.\(^{116}\)

Taken out of context with the rest of the Eleventh Circuit's opinion, this test appears on its face to be considerably narrower and more restrictive than the test set forth in McKay and its progeny. Read in its entirety, however, the Shaw opinion sets forth a test substantially the same as the test in McKay. Certainly, the two tests share the same objective:

The over-riding objective of this test, again, is to determine whether or not a military judgment to go ahead with

\(^{112}\) Id.

\(^{113}\) Id. (quoting Schoenborn, 586 F. Supp. at 718).

\(^{114}\) 778 F.2d 736 (11th Cir. 1985).

\(^{115}\) Id. at 739 n.3.

\(^{116}\) Id. at 746.
a dangerous design was actually made. If so, the contractor that created or helped create the design is absolved from judicially-imposed liability. If not, then the contractor is subject to the customary strictures of product liability law.\textsuperscript{117}

In the more recent government contractor defense case of \textit{Trevino v. General Dynamics Corp.}\textsuperscript{118} the survivors of five Navy divers who died from vacuum-induced bends in a submarine hangar diving system brought suit against General Dynamics, the system designer.\textsuperscript{119} Under the express terms of the Navy contract, General Dynamics assumed full responsibility for all technical research, review of all work produced, and all quality assurance actions pertaining to the design of the product, including inspection of the final product.\textsuperscript{120}

General Dynamics contended that the government contractor defense shielded it from any liability to the plaintiffs.\textsuperscript{121} Adopting the Fifth Circuit's four-element statement of the defense in \textit{Bynum v. FMC Corp.},\textsuperscript{122} which the court noted "conforms to the trend in law on the government contractor's defense,"\textsuperscript{123} the \textit{Trevino} court found that General Dynamics failed to meet its burden of proof on all elements of the defense.\textsuperscript{124} In the court's opinion General Dynamics successfully demonstrated governmental immunity under the \textit{Feres-Stencel} doctrine, but failed to meet each of the other three elements of the test.\textsuperscript{125}

As to the second element of the defense, the establishment or approval by the government of reasonable speci-
fications, the court found that the government provided General Dynamics with mere skeletal guidelines, leaving the design entirely to the discretion of General Dynamics.\textsuperscript{126} Moreover, the court found that although "the trend in the law is to interpret the phrase 'established by the government' as including the situation where the government, after having conducted a detailed review, approves drawings and specifications on which the contractor assisted," the level of review in the \textit{Trevino} case fell short of "approval."\textsuperscript{127} The court concluded that General Dynamics' level of participation made the company ultimately responsible for the "reasonably precise specifications" involved in the case.\textsuperscript{128} The court relied, \textit{inter alia}, upon an internal General Dynamics memorandum stating that contractor personnel accomplished most of the design work unchecked by the Navy's experienced technical experts.\textsuperscript{129}

The \textit{Trevino} court observed that General Dynamics clearly could not prove the third element of the defense, compliance with government specifications, because General Dynamics established the specifications.\textsuperscript{130} The court went on to note, however, that the system designed by General Dynamics did not even conform to the general requirement provided by the government.\textsuperscript{131} Similarly, General Dynamics could not satisfy the final element of the defense which concerns warnings, since General Dynamics assumed responsibility for advising and warning the Navy about the safety aspects of the systems in question.\textsuperscript{132} The court found that not only did General Dynamics fail to warn the Navy about safety problems with the system's design, but the company also failed to warn the Navy about errors in the government's general re-

\textsuperscript{126} \textit{Id.} at 1335.
\textsuperscript{127} \textit{Id.} at 1336.
\textsuperscript{128} \textit{Id.} at 1337.
\textsuperscript{129} \textit{See id.}
\textsuperscript{130} \textit{Id.} at 1337-38.
\textsuperscript{131} \textit{Id.} at 1338.
\textsuperscript{132} \textit{Id.}
quirements for their own working drawings.\(^{133}\)

The *Trevino* decision continues the trend in the federal
courts toward construing the "reviewed and approved" standard for the "establishment" element of the defense
to mean more than a superficial review of specifications
drafted by the contractor.\(^{134}\) At the same time, the *Trevino*
decision makes the "warning" element requirements of
the defense more stringent.\(^{135}\)

More recently, the United States Court of Appeals for
the Fourth Circuit addressed the government contractor
defense in two decisions\(^{136}\) handed down on the same day,
both of which overturned plaintiffs' verdicts in military
products liability cases.\(^{137}\) The court expressly rejected
the more restricted view of the defense espoused by the
Eleventh Circuit in *Shaw*, and adopted the *McKay*
statement of the defense, including the "reviewed and ap-
proved" standard. In *Tozer v. LTV Corp.*\(^{138}\) plaintiffs
brought an action for the wrongful death of a Navy pilot
killed when the RF-8G reconnaissance plane he was piloting
-crashed into the ocean while performing a low-alti-
tude, high-speed fly-by of an aircraft carrier.\(^{139}\) At trial,
plaintiffs argued that the plane crashed because a panel
known as the "Buick Hood" — a removable panel that
gives maintenance crews access to the equipment in the
nose of the aircraft — came off in mid-flight, resulting in a

\(^{133}\) *Id.*

\(^{134}\) See infra notes 236-238 and accompanying text. See also *Black v. Fairchild Industries, Inc.*, 19 Av. Cas. (CCH) 18,461 (E.D.N.Y. 1986) (court applied govern-
ment contractor defense in routine fashion, granting Fairchild's summary judg-
ment motion on the issue of the contractor's liability for design of A-10 close
ground support aircraft).

\(^{135}\) See infra notes 258-261 and accompanying text.

\(^{136}\) The Fourth Circuit actually handed down three decisions relating to the
government contractor defense on May 27, 1986. However, the court did not
reach the government contractor defense issues in one of the cases, *Boyle v.*
United Technologies Corp., 792 F.2d 413 (4th Cir. 1986), because the plaintiff in
this case failed to meet his burden of proof under Virginia's products liability law.
See *id.* at 416.

\(^{137}\) See infra notes 138-150 and accompanying text.

\(^{138}\) 792 F.2d 403 (4th Cir. 1986).

\(^{139}\) *Id.* at 404.
loss of control over the aircraft. Specifically, the plaintiffs alleged that the designer of the Buick Hood committed negligence by failing to secure the panel with redundant fasteners. The jury returned a verdict for the plaintiffs. On appeal the Fourth Circuit reversed on the ground that the trial court erred in refusing to instruct the jury that the government contractor defense precludes recovery for negligence as well as strict liability.

In holding that the government contractor defense applies equally to negligence and strict liability claims in military products liability cases, the Fourth Circuit focused on the separation of powers problems the defense alleviates. In addition, the court noted that a jury is ill-equipped to decide issues involving national security implications:

There is a danger in transporting the rubric of tort law and products liability to a military setting and military technology. While jurors may possess familiarity and experience with consumer products, it would be the rare juror — or judge — who has been in the cockpit of a Navy RF-8G off the deck of a carrier on a low level, high speed fly-by maneuver. . . . What 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. . . . Difficult choices, trade-offs, and compromises inhere in military planning that simply find no analogue in civilian life. "This is not to say that [military] designers are unconcerned with safety. Rather, they attempt to design as safe a plane as possible within the scope of its orig-

140 Id.
141 The manufacturer of the RF-8G, Vought Corporation, originally designed the airplane with a one-piece panel that wrapped around the top of the plane, all of which had to be removed before maintenance could be performed on the aircraft. Id. In order to provide for quicker access, the Navy asked Vought Corporation to modify the panel so that the system could be more easily and quickly maintained. Id.
142 Id. at 405.
143 Id.
144 See infra notes 284-300 and accompanying text.
Accordingly, the court found it essential that the military refrain from intervention into military matters. "In holding that the government contractor defense bars recovery on a theory of negligence as well as strict liability," stated the court, "we join the growing ranks of circuit courts that recognize the utility of the defense and its inescapable function in the deflection of unwarranted judicial oversight over matters of procurement and defense."146

The Fourth Circuit decided Tozer on the same day it decided Dowd v. Textron, Inc.147 Dowd involved a product liability action alleging negligence and strict liability for the design of a rotor system installed on a military helicopter that crashed during a flight instruction session, killing two servicemen.148 As in the Tozer case, the court held that "the elements of the defense do not vary with plaintiffs' theory of recovery."149 Moreover, the court reiterated its belief that military matters generally should not be subjected to judicial review:

The required installation of the 540 rotor system in the AH-1S helicopter may reflect the Army's judgment that, despite the defects alleged in this tort suit, the equipment had largely accomplished its mission and proved its military worth. It may reflect the Army's view that safety problems were remediable through pilot training, or that any alteration of the rotor system entailed increased risks or costs. It may simply reflect the Army's disinclination to tinker with a system that had over time worked well enough. Whatever the reasons, it is not up to the jury to second-guess this military judgment.150

146 Id. at 409 (footnote and citations omitted).
147 792 F.2d 409 (4th Cir. 1986).
148 Id. at 410.
149 Id. at 411.
150 Id. at 412. For additional discussion of the Fourth Circuit's position on the separation of powers rationale for the defense, see infra notes 297-299 and accompanying text.
As a final note on recent acceptance of the government contractor defense in a products liability context, it should be pointed out that drafters wrote the government contractor defense into the Uniform Product Liability Law promulgated by the United States Department of Commerce Task Force on Product Liability under the chairmanship of Professor Victor E. Schwartz. An effort currently is underway in the United States House of Representatives to introduce a statutory limitation of liability for government contractors. The ranking minority leader of the House Judiciary Committee, Representative Fish, has introduced H.R. 4765, a proposed Government Contractor Liability Reform Act of 1986. The bill, which has been introduced in the Senate as S. 2440, is a component of President Reagan's response to the problems of the insurance industry. The bill would apply to all actions in federal or state courts filed against firms that contract with the federal government, and the bill would supercede all inconsistent state laws, but would not create jurisdiction in the federal courts over cases which otherwise would be matters of state jurisdiction. Although the bill does not contain the elements of the defense as set forth in the cases discussed above, it does illustrate growing recognition of the need to provide some form of protection to private contractors who do business with the federal government.

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152 The Uniform Product Liability Law codifies the government contractor defense at section 108:
Relevance of Legislative or Administrative Regulatory Standards and Mandatory Government Contract Specifications . . . . (C) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with a mandatory government contract specification relating to design, this shall be an absolute defense and the product shall be deemed not defective under Subsection 104(B), or, if the specification related to warnings or instructions, under Subsection 104(C) or 105(A).
155 The following summary of the basic provisions of H.R. 4765 appears in West Federal Case News, Congressional and Administrative Highlights, vol. 9, no. 24, at 51 (1986):
III. STANDARD OF PROOF FOR EACH ELEMENT OF THE GOVERNMENT CONTRACTOR DEFENSE

The preceding section traces the development of the government contractor defense and briefly reviews the recent cases that firmly establish a trend toward allowing the defense in cases that involve design defects in military equipment supplied under government contract and built to government specifications. Although not every question regarding the defense has been resolved, *Agent Orange* and its progeny provide substantial guidance as to what a defendant must prove in order to prevail under the government contractor defense.¹⁵⁶ This section takes a closer

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A contractor would be liable only for injury resulting from use that was reasonable and foreseeable; he would not be liable for injury resulting from an unreasonable or unforeseeable alteration of the product or an alteration specifically prohibited or warned against. The plaintiff would have to show that the contractor was negligent in the design, production, distribution or sale of the product, or that the product was defective. A contractor would not be liable for failing to provide an adequate warning or instruction for a danger that would be apparent to a reasonable person or otherwise a matter of common knowledge.

Joint and several liability could not be applied to any action subject to this bill, unless the contractor acted in concert with another person. The contractor could only be found liable for damages directly attributable to his pro rata share of fault or responsibility for the injury except where the contractor acted in concert with another.

Noneconomic loss, including pain and suffering, emotional distress, and punitive damages, could not exceed $100,000 in all actions which arose out of or were caused by the same personal injury or death. There would be no limit on economic loss.

A contractor could not be required to pay in excess of $100,000 for future economic loss in a single, lump-sum payment. He would be permitted to make periodic payments based upon when the damages would likely occur. In that case, the court could require the contractor to purchase an annuity. An award of damages would be reduced by the following collateral sources: (1) any payment or benefit paid for by any agency or instrumentality of the federal, state or local government; or (2) any payment or benefit funded by a workers' compensation or health insurance program funded by the employer.

The bill would limit attorney fees, paid on a contingency basis, to 25% of the first $100,000, 20% of the next $100,000, 15% of the next $300,000, and 10% of any amount in excess of $300,000.

¹⁵⁶ See *supra* notes 70-153 and accompanying text.
look at the standard of proof for each element of the defense as set forth in the cases already discussed.

A. The Government Must Be Immune From Liability Under the Feres-Stencel Doctrine

Although early cases do not list the government's immunity under the *Feres-Stencel* doctrine as a prerequisite to the government contractor defense, the immunity appears to have been assumed.\(^{157}\) Many of the later cases specifically list immunity under *Feres-Stencel* as a specific requirement of the defense.\(^{158}\) It now seems clear that, at least in military products liability cases, the government contractor defense is available only when the *Feres-Stencel* doctrine bars a plaintiff from bringing an action directly against the government.\(^{159}\) Briefly stated, the *Feres-Stencel* doctrine provides that an accident causing injury or death to military personnel generally cannot provide the basis for FTCA claims against the United States by either the victim or private defendants seeking indemnity.\(^{160}\)

The scope of the *Feres-Stencel* doctrine has been the subject of debate in several courts. This debate revolves principally around the issue of whether the doctrine applies only to injuries that arise from military service-related activities. Specifically, courts disagree on whether the mere status of the victim as a serviceman on duty bars his tort claim against the government, or whether the claim falls prey to *Feres-Stencel* only if issues concerning military discipline

\(^{157}\) See *supra* notes 70-117 and accompanying text.

\(^{158}\) The requirement of immunity under the *Feres-Stencel* doctrine appeared as a specific element of the government contractor defense for the first time in *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983). After *McKay* other courts began to list *Feres-Stencel* immunity as a separate element of the defense. *See, e.g.*, *Trevino v. General Dynamics Corp.*, 626 F. Supp. 1330, 1335 (E.D. Tex. 1986); *Tillet v. J.I. Case Co.*, 756 F.2d 591, 596-97 (7th Cir. 1985). Whether or not courts specifically list *Feres-Stencel* immunity as a separate and distinct element, it seems clear that such immunity must exist before the defense will apply in a military products liability case.

\(^{159}\) See *supra* note 158 and accompanying text.

\(^{160}\) See *supra* note 12-14.
will arise.\textsuperscript{161}

The confusion arises from difficulty in determining the precise rationale for the \textit{Feres-Stencel} doctrine.\textsuperscript{162} The \textit{Feres} opinion itself suggested several rationales which can be divided loosely into two groups. The first group consists of a legalistic interpretation of the \textit{FTCA}.\textsuperscript{163} The \textit{FTCA} provides that the government shall be liable for torts "in the same manner and to the same extent as a private individual under like circumstances."\textsuperscript{164} The Court reasoned in \textit{Feres} that Congress, by making the government liable only to the same extent as a "private individual," intended to limit the government's liability only to those circumstances in which analogous tort liability would be imposed on a private person.\textsuperscript{165} Since private individuals do not conscript armies, engage in warfare, or exert life and death discipline over other civilians, the government should not be liable to servicemen in suits that involve such activities.\textsuperscript{166}

The second group of rationales discussed in the \textit{Feres} decision might be referred to broadly as "public policy rationales." The \textit{Feres} Court discussed two such rationales in support of its decision.\textsuperscript{167} First, the Court found that

\textsuperscript{161} Compare, e.g., Johnson v. United States, 749 F.2d 1530 (11th Cir.) (\textit{Feres} doctrine does not bar recovery by military personnel injured while on active duty if tortfeasor is a civilian employee of the government and suit will not adversely affect military discipline), vacated, 760 F.2d 244 (11th Cir. 1985), reinstated, 779 F.2d 1492 (11th Cir. 1986) (en banc); with Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979) (\textit{Feres} doctrine bars recovery from the government by service personnel injured incident to service, regardless of tortfeasor's military or non-military status), cert. denied, 444 U.S. 1044 (1980).


\textsuperscript{163} See supra note 31 for a discussion of the \textit{FTCA}. The \textit{Feres-Stencel} doctrine rests on the Supreme Court's conclusion that while the text of the \textit{FTCA} does not contain a blanket prohibition on tort actions by servicemen, Congress surely did not intend to waive the government's immunity for injuries to servicemen that arise incident to military service. See \textit{Feres}, 340 U.S. at 146; see also infra notes 164-170 and accompanying text.


\textsuperscript{165} \textit{Feres}, 340 U.S. at 141.

\textsuperscript{166} Id.; see Salem, \textit{The Feres Doctrine And The Government Contractor Defense: Together They Stand (Or Fall)}, Twentieth JALC Air Law Symposium G-5 (1986).

\textsuperscript{167} See infra notes 168-170 and accompanying text.
the “distinctly federal” relationship between the government and military personnel should not be subject to differing state laws according to the place of the injury.168 Second, the Court noted that veterans’ benefits provide an alternative compensation system.169 The Supreme Court in subsequent cases added a third “public policy” rationale, namely that suits by servicemen against the government would have a damaging impact on military discipline.170

Later cases have clarified and explained the Feres decision. In Chappell v. Wallace171 the Supreme Court emphasized the military discipline rationale underlying the Feres-Stencel doctrine.172 The Chappell Court denied recovery of damages and injunctive relief to five Navy enlisted men who sued their superiors alleging racial discrimination.173 The Court opined that the same rationales that supported the Feres doctrine also supported denial of relief in the case at bar.174 The Court cited the “special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel” as the primary bases for the doctrine.175

In the recent case of United States v. Shearer176 the Supreme Court suggested that the original rationales for the Feres-Stencel doctrine, other than the preservation of military discipline, are “no longer controlling.”177 In Shearer the mother of a serviceman murdered by a fellow soldier sued the United States for negligently discharging the military prisoner who murdered her son.178 The

168 Feres, 340 U.S. at 143-44.
169 Id. at 144-45.
172 See id. at 298-305.
173 Id. at 297.
174 See id. at 297-305.
175 Id. at 304.
177 Id. at 3043 n.4.
178 Id. at 3041. The mother alleged that the Army knew the murderer was dan-
Court held that the *Feres* doctrine barred plaintiff's claim because "[the claim went] directly to the 'management' of the military [calling] into question basic choices about the discipline, supervision, and control of a serviceman."\(^{179}\)

The emphasis on military discipline in *Shearer* suggests that the *Feres* doctrine does not bar all suits by servicemen against the United States; the *Feres* doctrine shields the government from liability only in cases which, if subjected to judicial review, would adversely affect basic military discipline.\(^{180}\) The mere status of the victim as a service-man on duty at the time of injury may not be sufficient, standing alone, to invoke the *Feres* doctrine.\(^{181}\) In a military products liability context, therefore, the *Feres-Stencel* immunity element of the government contractor defense should make the defense available to a defendant only under circumstances in which issues of military discipline or control will arise.

**B. Government Established Specifications for the Product**

In *Agent Orange* the court stated that the government contractor defense can apply only if the government "established the design and specific characteristics" of the product in issue.\(^{182}\) The plaintiffs in *Agent Orange* argued that "any role a defendant plays in preparation of the specifications, whether it be advice to the government about product design, or even touting of the product to the government," should be sufficient to defeat this ele-

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\(^{179}\) *Id.* at 3043.

\(^{180}\) *Id.* at 3043-44. The *Shearer* Court quoted United States v. Muniz, 374 U.S. 150, 162 (1963):

In the last analysis, *Feres* seems best explained by the 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 would obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty.

\(^{181}\) *See Johnson*, 749 F.2d at 1539-40.

\(^{182}\) 534 F. Supp. at 1056.
ment of the defense. The court rejected the plaintiffs’ argument, stating that while the factors urged by plaintiff may be relevant in establishing the relative degrees of knowledge as between the government and the defendant, all that is necessary on this element of the defense is for defendant to prove that the product it supplied was a particular product specified by the government. If it should appear that the contract set forth merely a “performance specification”, as opposed to a specified product, then the government contractor defense would be far more restricted than as described here.

Thus, the defense clearly may be applied in situations where a defendant participated in the design of a product. However, the degree of participation permissible under Agent Orange remains unclear for two reasons. First, the court offers no guidance for distinguishing a “performance specification” from a “specified product.” Second, the court provides no instruction for determining how “restricted” the defense becomes if a specification is found to be a mere performance specification.

The cases which followed Agent Orange provide some insight into the distinction between a performance specification and a specified product. In Koutsoubos the defendant’s senior contract administrator submitted an affidavit declaring that the contract between the Navy and the defendant, Boeing-Vertol, established a long list of general and detailed specifications regarding safety features, testing requirements, emergency exit marking requirements, interior lighting requirements, and other matters. The affidavit further declared that “[e]very feature of the CH-46A, including its water landing and flotation capability and emergency egress and lighting, was tested and inspected to Navy requirements.” The district court held that this affidavit and its supporting exhib-
its provided sufficient proof of the government specification element of the government contractor defense.\textsuperscript{187}

On appeal the Third Circuit upheld the district court's ruling, finding that although Boeing proposed some of the specifications to the Navy, "these proposals simply initiated a 'back-and-forth' discussion between Boeing and the Navy, with the Navy making all final decisions as to the helicopter specifications."\textsuperscript{188}

In \textit{McKay} the Ninth Circuit evaluated the first element by reference to dictum in the earlier public works case of \textit{Merritt, Chapman \& Scott Corp. v. Guy F. Atkinson Co.}\textsuperscript{189} \textit{Merritt, Chapman} held that a subcontractor who built a defective cofferdam in a dam project could be held liable for damage caused by the collapse of the cofferdam.\textsuperscript{190} The \textit{Merritt, Chapman} court rejected the defendant's government contractor defense because the contract left the design, materials, and method of construction entirely up to the subcontractor.\textsuperscript{191} The contract merely established the height requirement for the cofferdam.\textsuperscript{192} The court in \textit{McKay} concluded that the court in \textit{Merritt, Chapman} correctly applied the government contractor defense, but the \textit{McKay} court warned against construing the defense too narrowly based upon the dictum in that case.\textsuperscript{193} The \textit{McKay} court, referring to \textit{Merritt, Chapman}, said,

When only minimal or very general requirements are set for the contractor by the United States the [government contractor] rule is inapplicable. The situation is different where the United States reviewed and approved a detailed set of specifications. This is precisely what may have hap-

\textsuperscript{187} Id.
\textsuperscript{188} Koutsoubos, 755 F.2d at 354.
\textsuperscript{189} 295 F.2d 14 (9th Cir. 1961).
\textsuperscript{190} Id. at 15-16.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} \textit{McKay}, 704 F.2d at 451 ("The scope of the government contractor rule, when applied in cases involving military personnel, should be drawn somewhat more broadly than the dictum in \textit{Merritt, Chapman} might suggest.").
pened in the present cases.\textsuperscript{194}

Thus, the McKay court gave the first element of the defense a broad interpretation.

The McKay decision antedated two decisions in the United States District Court for the Eastern District of Pennsylvania which reached diametrically opposite interpretations of the government specification element based upon similar sets of operative facts. In the Hubbs case discussed earlier,\textsuperscript{195} the court adopted the McKay approach to conclude that the defendant manufacturer of a military helicopter would be shielded from liability by the government contractor defense only upon a finding that the United States either established specifications or approved a set of final, reasonably detailed specifications.\textsuperscript{196}

The court stated that ‘'[d]efendants’ burden of proof on this particular element is not particularly heavy, however. ‘[A]ll that is necessary on this element of the defense is for defendant to prove that the product it supplied was a particular product specified by the government.'’\textsuperscript{197}

The district court opinion in the previously cited Schoenborn case,\textsuperscript{198} handed down just six months after Hubbs, expressly declined to follow the Ninth Circuit reasoning in McKay.\textsuperscript{199} Schoenborn involved the crash of an Army CH-47C “Chinook” helicopter manufactured by Boeing-Vertol.\textsuperscript{200} The crash killed all forty-six passengers and crew members aboard.\textsuperscript{201} The crash occurred when a failure of the synchronization system caused blade-to-
blade contact of the helicopter's tandem rotor blades.\footnote{Id.} In a jury trial on the issue of liability only, the jury returned a verdict in favor of the plaintiffs.\footnote{Id.} Boeing-Vertol moved for judgment notwithstanding the verdict or, in the alternative, a new trial.\footnote{Id.} Boeing-Vertol based its motion in part on the government contractor defense.\footnote{Id.} The court denied the motion, holding that Boeing-Vertol could not satisfy the first element of the government contractor defense because Boeing-Vertol, and not the government, developed the detailed design for the helicopter.\footnote{Id.} The court concluded that the government did not "establish" the design specifications for the helicopters, notwithstanding the fact that Boeing-Vertol could not make any final design changes without the Army's approval.\footnote{Id.}

The district court in Schoenborn makes no reference to the Hubbs opinion that mere government approval of detailed specifications may satisfy the first element of the defense. Although the court did not distinguish Hubbs, it went to great lengths to distinguish McKay.\footnote{Id.} The Schoenborn court took the position that while the four policy reasons advanced in McKay for the defense\footnote{See id. at 717-18; see infra note 210.} support application of the defense when the government sets the specifications, these policies do not support application of the defense when the government merely approves the specifications.\footnote{586 F. Supp. at 717-18. First, the McKay court stated that holding a "supplier liable in government contractor cases without regard to the extent of government involvement in fixing the product's design and specifications would subvert the Feres-Stencel rule since military suppliers, despite the government's immunity, would pass the costs of accidents off to the United States . . . ." 704 F.2d at 449. In Schoenborn the district court found that "with respect to the civilian plaintiffs in the case sub judice, this action would not be barred by the Feres-Stencel rule . . . ." 704 F.2d at 449. In Schoenborn the district court found that "with respect to the civilian plaintiffs in the case sub judice, this action would not be barred by the Feres-Stencel rule . . . ." 704 F.2d at 449.}
The Third Circuit reversed the district court decision in *Schoenborn* and reaffirmed the earlier Third Circuit holding in *Koutsoubos*. The Third Circuit in *Schoenborn* held that the defense can be asserted successfully despite the contractor's participation in the development of the design, so long as the government approved the design after a substantial review of the specifications. The circuit court focused on two facts in finding that the district court erred by submitting the question of liability to the jury. First, the contract between the Army and Boeing-Vertol contained a clause which stated that the prototype configuration of the CH-47C could not be revised until an Engineering Change Proposal had been submitted by the contractor and approved by the government. Second, undisputed testimony showed that the Army performed rigorous tests on the prototype and required certain design changes before the aircraft went into production.

document because they are not members of the armed forces and because the helicopter crash did not occur during a military mission." 586 F. Supp. at 717-18.

Second, *McKay* asserts that when the United States approves design specifications, holding suppliers liable for design defects thrusts the judiciary into the military decision-making process. 704 F.2d at 449. This raises concern about separation of powers. See id. The district court in *Schoenborn* found that this policy reason applies only when the defective element of the design relates to a military matter. 586 F. Supp. at 718. The court stated, "There is no imposition of the judiciary upon military decision making by requiring the helicopter to have a synchronization system free from defects so as to enable it to fly safely." *Id.*

The third rationale for the defense offered in *McKay* is that in setting specifications for military equipment, "the United States 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." 704 F.2d at 449-50. The *Schoenborn* court noted that the tandem rotor design in question had been used by Boeing for more than twenty years; thus, this was "not a case of the Army pushing technology to its limits." 586 F. Supp. at 718.

Finally, *McKay* found that the government contractor defense provides an incentive for a supplier of military equipment to work closely with and to consult military authorities in the development and testing of equipment. 704 F.2d at 450. In *Schoenborn* the court stated that a contractor has no incentive to consult with the military if the contractor can insulate itself from liability simply by obtaining final approval of the specifications from the government. 586 F. Supp. at 718.

211 *Schoenborn*, 769 F.2d at 121-25.
212 *Id.* at 122-23.
213 *Id.* at 123.
214 *Id.* at 123-24.
Taking these two factors into consideration, the circuit court stated, "[I]t is evident that the Army retained final authority over the design of the helicopter and that therefore the government 'approval' prong of the Koutsoubos test has been met."\[215\]

Another 1985 case dealing with the government contractor defense in a military products case, *Tillett v. J.I. Case Co.*,\[216\] adopts the McKay "reviewed and approved" standard.\[217\] In *Tillett* the widow of a serviceman crushed and killed in Germany when the front end loader he operated overturned, brought a wrongful death action in Wisconsin against the manufacturer.\[218\] The plaintiff alleged a design defect in the front end loader because the loader did not have rollover protection.\[219\] The district court determined that Wisconsin law applied and that the Wisconsin wrongful death statute would allow recovery only if the act or omission causing the death occurred in Wisconsin.\[220\] The district court granted defendant's motion for summary judgment on the ground "that all design, manufacture and shipment of the loader occurred in Indiana," not in Wisconsin.\[221\] The Seventh Circuit affirmed, agreeing that plaintiff did not have a cause of action and adding that even if plaintiff did have a cause of action, her claim would be barred by the government contractor defense.\[222\]

The Seventh Circuit in *Tillett* adopted the McKay rule

\[215\] Id. at 124.
\[216\] 756 F.2d 591 (7th Cir. 1985).
\[217\] See id. at 600.
\[218\] Id. at 591.
\[219\] Id. at 595.
\[220\] See id. at 593-95.
\[221\] Id. at 595 (citing the district court decision in *Tillett*, 580 F. Supp. at 1279).
\[222\] Id. at 600. The circuit court stated, "This court alternatively holds that the district court should have granted defendant's motion for summary judgment on the ground that the government contractor defense insulated defendant from liability. We affirm the final judgment of the district court, however, because we agree . . . that decedent's death was not caused in Wisconsin.

*Id.*
that establishment or approval by the United States Government of reasonably precise specifications for an allegedly defective product satisfies the first element of the government contractor defense. In *Tillett* the evidence demonstrated that the government provided the defendant with specifications for various component parts of the front end loader. These specifications did not include rollover protection. The defendant agreed to produce the loader in conformance with the defendant's own commercial specifications when the government specifications were silent. The government further required the defendant to produce a prototype and to submit the prototype to the government for inspection and approval before manufacturing the final product. The defendant submitted a prototype of the front end loader that did not include rollover protection, and the government approved the defendant's prototype. The circuit court stated, "Under these circumstances, this court finds that the Government established reasonably precise specifications for the front end loader and approved any supplementary specifications tendered by defendant in the form of a prototype loader." The *Tillett* court adopted the *McKay* "reviewed and approved" approach because "the Ninth Circuit's formulation best reflects the substantial policies underlying the defense." The court further found that conformity to the government's specifications was not an issue and that the defendant had met its burden of proof with regard to the fourth element concerning the government's relative knowledge of dangers

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223 See id. at 598-600.
224 Id. at 599.
225 Id.
226 Id.
227 Id.
228 Id.
229 Id.
230 Id. at 600.
231 See id. at 599. The plaintiff did not dispute that the manufacturer complied with the government's specifications. Id.
associated with lack of rollover protection.\textsuperscript{232}

The circuit court discussions of the government contractor defense in \textit{Schoenborn} and \textit{Tillett} indicate that despite general acceptance of the "reviewed and approved" standard, the courts require more than simply a superficial review of contractor-prepared specifications. These recent opinions demonstrate that the standard requires some active involvement by government personnel.

The \textit{Shaw} opinion, discussed previously,\textsuperscript{233} purported to narrow significantly the scope of the government establishment element of the defense. The \textit{Shaw} court held that a contractor may escape liability only if it affirmatively proves "that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective."\textsuperscript{234} The court explained this standard as follows:

Here, we do not ask the contractor to prove that the Government prepared the specs and find that the contractor's participation in their development through "continuous back and forth" will not defeat the defense, \textit{Koutsoubos}, 755 F.2d at 355. Rather, we require the contractor to show that it did not prepare the specs, and hold that the Government's participation, if sufficiently great, may prove the defense.\textsuperscript{235}

A more reasoned approach to restricting the scope of the "reviewed and approved" standard appears in the opinion of the United States District Court for the Eastern District of Texas in \textit{Trevino v. General Dynamics Corp.}\textsuperscript{236} In \textit{Trevino} the court suggested that the government's review of contractor specifications should involve a substantial engineering evaluation of those specifications.\textsuperscript{237} Referring to the Navy's review of General Dynamics' specifications, the court stated,

\textsuperscript{232} Id.
\textsuperscript{233} See supra notes 114-117 and accompanying text.
\textsuperscript{234} 778 F.2d at 746.
\textsuperscript{235} Id.
\textsuperscript{236} 626 F. Supp. 1390 (E.D. Tex. 1986).
\textsuperscript{237} See id. at 1337.
If approval of the design of military hardware by examining [and] agreeing to a detailed description of the working drawings of the system is sufficient to satisfy the requirements of the government contractor's defense, then there was no such "approval" under the facts of the case. Although the government's review did involve some subjective evaluation of the contents of the plans, the level of examination did not equate to the amount of engineering expertise required by General Dynamics to prepare the plans. Therefore, this Court concludes that "true government participation in the design" necessary to constitute approval was lacking. Mannheim, 769 F.2d at 122.238

The Trevino court did not state clearly the degree of government participation required to satisfy the government establishment element of the defense. The overall tenor of the decision, however, suggests that the military must retain final control over the acceptance or rejection of detailed specifications and in fact must review the specifications closely enough to make an informed decision concerning the adequacy of the specifications.239

The Fourth Circuit opinion in Tozer contains the most recent judicial pronouncements on the "establishment of specifications" issue.240 The Tozer court adopted a more liberal interpretation of the term "establishment." Exhibiting strong concern about the effects that waiver of the defense would have on the entire procurement process of the United States military, the court held that "the contractor's participation in design — or even its origination of specifications — does not constitute a waiver of the government contract defense."241 Holding that contractor participation alone does not waive the defense, the court stated,

If the defense were to be waived by such participation, the contractor would be trapped between its fear of liability and its desire to provide needed ideas and information.

238 Id.
239 See id.
240 See 792 F.2d at 407-09; see also infra notes 241-243.
241 Tozer, 792 F.2d at 407.
The "incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment" would be lost.242

The Fourth Circuit held that the defense should be available so long as there is "genuine government participation in the design."243

C. The Product Meets the Government's Specifications in All Material Respects

The second element of the government contractor defense as formulated in Agent Orange is that the defendant's product must meet the government's specifications "in all material respects."244 This relatively straightforward element of the defense has not been a major issue in any of the products liability cases decided after Agent Orange. This stems in part from the Agent Orange declaration that the "failure of a defendant to conform to the specifications would defeat the defense only if the discrepancy between specifications and product was a material one . . . ."245 "Material" specifications relate to those aspects of a product's design alleged to be defective.246 Thus, the defendant has only the burden of showing conformance in the area of design alleged by plaintiff to be defective.247

In Koutsoubos the court found that the defendant established the second element by submitting an affidavit and supporting exhibits demonstrating that the Navy tested the helicopter and found it acceptable:

[T]he Affidavit declares that the Navy established safety

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242 Id. (quoting McKay, 704 F.2d at 450). The Tozer opinion is among the first of the recent cases discussing the government contractor defense to recognize the reality that the military equipment procurement process depends upon a "continuous back and forth" of design revisions by contractors and the government. Id. at 407 (quoting Koutsoubos, 755 F.2d at 355).

243 Id. at 407-08.

244 534 F. Supp. at 1055.

245 Id. at 1057.

246 Koutsoubos, 553 F. Supp. at 343.

247 See id.
features, testing requirements, emergency exit marking requirements, and interior lighting requirements. In short, "[e]very feature of the CH-46A, including its water landing and flotation capability and emergency egress and lighting, was tested and inspected to Navy requirements." Affidavit 11. Finally, "[o]n March 3, 1966, after satisfying itself that Boeing had furnished an aircraft which met all requirements of the Contract, the Navy accepted Helicopter 152510."248

Similarly, the court in Hubbs noted that

if it is established at trial that the Navy tested and inspected the flight control system and determined it to meet its own material design specifications, then defendants will have met their burden with respect to the second element of the government contract defense as it relates to the design specification deviations alleged by plaintiffs. . . . 249

In sum, a defendant satisfies the second element by showing that the government tested and inspected the portion of the product alleged to be defective and found that it met the government's specifications.

D. The Government Knew as Much or More Than the Defendant About the Hazards Associated With the Product

Setting out the final element of the government contractor defense, the court in Agent Orange stated that it is "only if defendants concealed or failed to disclose to the government information about hazards of which the government was ignorant that defendants fail to gain the protection of the government contract defense."250

Furthermore, the court held that a contractor will be insulated from liability by the government contractor defense if it can "show that it was not aware of hazard-causing deficiencies in the specifications as to the design or method

248 Id. at 340.
249 574 F. Supp. at 100.
250 534 F. Supp. at 1057.
of manufacture, deficiencies which, if known to the government, might have altered the government's decisions as to whether and how to use the [product]."  

The Agent Orange passage cited above has been expressly adopted as the standard of proof for the warning element of the defense in several of the military design defects cases which have followed Agent Orange. Few of these cases, however, provide much insight into how the standard should be met. In Hubbs, for example, the court found that the defendants had not met the burden of proving that the government established the design of the product. Thus, the Hubbs court never reached the warning element. The court in Koutsoubos found that the defendants in that case met the burden of proving that the government established specifications for the product and that the product conformed to those specifications. The defendants in Koutsoubos failed to meet their burden of proof with respect to the warning element of the defense, however, and the district court denied defendants' motion for summary judgment. The court unfortunately provided little instruction on how the defendants should establish the warning element at trial. The only guidance provided by the opinion on this question appears in the following passage:

Under this element of the defense it is appropriate to address plaintiff's argument that the government contract defense does not apply in a situation where the government consulted with the contractor in establishing the specifications for the product. As Judge Pratt noted in Agent Orange, however, evidence of defendant participation in preparation of the specifications could not defeat the government contract defense, although such evidence might be "relevant in establishing the relative degrees of knowledge as between the government and the

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251 Id. (emphasis added).
252 See, e.g., Hubbs, 574 F. Supp. at 100; Koutsoubos, 553 F. Supp. at 344.
253 574 F. Supp. at 99.
254 553 F. Supp. at 344.
255 Id.
Only the *Trevino* opinion contains further substantive discussion of the warning element of the defense. In *Trevino* the court found that the Navy hired General Dynamics specifically because the company possessed specialized knowledge of the submarine design and, therefore, General Dynamics "assumed the responsibility of advising and warning the Navy on the safety aspects of the systems that General Dynamics was designing." The court noted that both the Navy and General Dynamics knew or should have known about the dangers associated with the system’s potential to create a partial vacuum absent basic safety features. However, the court found that in light of the specialized knowledge for which General Dynamics was hired, the Navy’s failure to perform sufficient operational testing or to conduct a formal design review before putting the system into operation did not relieve General Dynamics of liability. The court stated,

If either General Dynamics or the Navy had paid sufficient attention to the COR or the working drawings or had engaged in any quality assurance or operational testing procedures, the problem of a partial vacuum would have been obvious. General Dynamics, however, failed to warn the Navy about patent errors in the government’s general requirements or their own working drawing.

The *Trevino* court reasoning significantly increases the burden of proof on the warning element of the government contractor defense by requiring a contractor to warn the government of patent errors in government specifications if the government hired the contractor for its specialized knowledge.

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256 *Id.* (quoting *Agent Orange*, 534 F. Supp. at 1056).
257 See 626 F. Supp. at 1338.
258 *Id.*
259 *Id.*
260 *Id.*
261 *Id.*
IV. Judicial Reaction to the Rationales Offered in Justification of the Government Contractor Defense

Although phrased different ways in different cases, three basic rationales have been offered to justify application of the government contractor defense in cases involving products built for the armed forces of the United States. First, holding military suppliers liable without regard to the extent of government involvement in the design of products undermines the government's immunity under the Feres-Stencel doctrine because military suppliers pass on their accident costs to the United States through contractual mechanisms. Second, holding contractors liable for design defects created or approved by the government thrusts the judiciary into the military decision-making process, raising concerns about separation of powers. Third, extending the government's immunity to contractors provides an incentive for suppliers of military equipment to consult and cooperate with the government in the development and testing of military equipment. Judicial reaction to these rationales has been mixed. This section reviews the rationales and examines the reactions of the federal courts to each of the rationales.

A. Abolishing the Government Contractor Defense Would Increase the Cost of Military Products

In a products liability case involving a product not manufactured for the military, a defendant technically liable for a product defect can shift the liability burden to the party actually responsible for the defect through a third-party claim for contribution or indemnity. This princi-
ple does not apply when the product was manufactured for the Armed Forces of the United States. The United States Supreme Court held in *United States v. Yellow Cab Co.*\(^{267}\) that the United States can be impleaded on a theory of indemnity or contribution if the government shares at least partial responsibility for an injury.\(^{268}\) However, the Court qualified the *Yellow Cab* doctrine in *Stencil Aero Engineering Corp. v. United States*\(^{269}\) by holding that a contractor may implead the government only when the original plaintiff could have sued the government directly.\(^{270}\) In *Stencil* the Court rejected the contractor's indemnity claim because the serviceman injured could not assert a claim against the government directly under the *Feres* doctrine.\(^{271}\) As a result of *Stencil*, a contractor who supplies products to the military generally cannot assert a claim for contribution or indemnity against the United States government for damages paid to injured military personnel in a products liability suit.\(^{272}\)

After *Stencil* it becomes obvious that disallowing the government contractor defense might prompt military contractors simply to pass the costs of product liability judgments to the government in the form of increased contract costs.\(^{273}\) The *McKay* court recognized this, noting that

holding the supplier liable in government contractor cases without regard to the extent of government involvement in fixing the product's design and specifications would subvert the *Feres-Stencil* rule since military suppliers, de-

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\(^{268}\) *Id.* at 546.


\(^{270}\) *Id.* at 673-74.

\(^{271}\) *Id.*

\(^{272}\) See *id.*

\(^{273}\) See *McKay*, 704 F.2d at 449.
spite the government's immunity, would pass the cost of accidents off to the United States through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales.\textsuperscript{274}

According to the \textit{McKay} court, this interpretation is consistent with the policy expressed in \textit{Stencel} that plaintiffs injured incident to military service should not be permitted to "judicially admit at the back door that which has been legislatively turned away at the front door."\textsuperscript{275}

\section*{B. The Defense Provides an Incentive for Contractors to Consult and Cooperate with the Military}

Another argument asserted in support of the government contractor defense suggests that without the defense, manufacturers who supply products to the military have little incentive to inform the government of potential defects in those products.\textsuperscript{276} Although this argument has not been addressed at length by the courts, abolishing the government contractor defense encourages contractors not to report potential defects discovered after delivery of the product. One easily can imagine how, without the government contractor defense, a contractor's warning to the military might be construed as an admission of liability. Consider the following hypothetical example. Assume that a serviceman suffers permanent injury when the ejection system of his fighter aircraft malfunctions during a mid-air emergency. Assume further that a contractor supplied the ejection system pursuant to government contract. During testing of the product, the manufacturer uncovers failures indicating a faulty parachute pack design. The manufacturer urges the Air Force to change the design of the system, recommending certain changes to solve the faulty design problems. The Air Force refuses to allow the manufacturer to implement these changes

\textsuperscript{274} \textit{Id.}

\textsuperscript{275} \textit{Id.} (quoting \textit{Stencel}, 431 U.S. at 673).

\textsuperscript{276} \textit{See McKay}, 704 F.2d at 450.
and instead insists on the implementation of its own design change or requires that the packs be built as originally designed. Under this compulsion the manufacturer goes forward with pack production for the Air Force. The manufacturer’s warnings to the military concerning problems with the parachute packs might be viewed in a lawsuit as an admission that the packs were defective.

If the government contractor defense is not allowed in cases like the hypothetical case above, manufacturers who have doubts about whether or not a warning would be heeded by the military logically would choose not to warn the government of possible design defects. A warning would result in certain liability should the manufacturer subsequently be faced with a products liability suit. Moreover, if a contractor intentionally manufactures an unreasonably dangerous product, it exposes itself to liability for punitive damages. Together, these facts provide a strong disincentive for a manufacturer to warn the military of any potential design defects that the manufacturer discovers. In contrast, by immunizing a contractor from liability for design defects about which the contractor warns the government, the government contractor defense gives contractors a strong motivation to warn the government of dangers inherent to the products they manufacture.

In McKay the Ninth Circuit required only that contractors warn the military of risks known to the manufacturer. However, as one commentator counseled government contractors after the McKay decision:

While the Rockwell court only required that the errors be “patent,” a prudent contractor will report errors that may not be obvious. In that view, contractors should report to the Government all dangers, including those that seem remote and unlikely. Since warning the Government is a requirement for the defense to be effective, contractors

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278 McKay, 704 F.2d at 451.
should err on the side of overwarning. 279

While many courts have found the McKay rationale valid, 280 the Eleventh Circuit expressly rejected the idea that the government contractor defense encourages cooperation between the contractor and the military. 281 In Shaw the Eleventh Circuit stated,

We find the last McKay rationale — the notion that the military contractor defense encourages the military and its suppliers to work closely together, thereby making it easier to discover who is responsible for product design — somewhat inscrutable. Indeed, on the contrary, our experience is that the more closely the contractor and the military work together, the more difficult it is to determine exactly who made design decisions. 282

The Eleventh Circuit, however, misunderstands the rationale set forth in McKay. McKay does not view the defense as merely a mechanism for more easily determining who is responsible for design decisions. The nature of government military contracting requires the military to assume responsibility for making the final determination on any given design element. The rationale expressed in McKay simply supposes that the defense provides incentive for the contractor to relay all information in its possession to the military so that the decision made by the military will be an informed decision. 283

C. The Military Decision-Making Process Should Not Be Subject to Judicial Review

Perhaps the most persuasive justification offered for the government contractor defense rests with the argument that holding military suppliers liable for defective designs after the United States establishes or approves those de-

280 See, e.g., Tillett, 756 F.2d at 597; Koustoubos, 755 F.2d at 355.
281 Shaw, 778 F.2d at 743.
282 Id.
283 See McKay, 704 F.2d at 450.
signs thrusts the judiciary into the military decision-making process. This rationale has been raised in many government contractor defense cases involving military products and has been considered generally persuasive by most federal courts who have considered the issue. Most of these courts note that second-guessing military decisions on product designs in the courtroom often requires members of the Armed Services to testify as to each other's decisions and actions. Such trials raise concerns about adverse effects on both military discipline and national security.

In Agent Orange the court expressly recognized the separation of powers problem that would result if the government contractor defense did not exist to bar judicial intervention when appropriate. The court stated,

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

This language from Agent Orange reiterates a point of national public policy recognized by numerous other courts. In Sanner, for example, the plaintiff alleged a design defect in an Army jeep manufactured by Ford Mo-

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284 See id. at 449.
285 See Tillet, 756 F.2d at 597; McKay, 704 F.2d at 449; Agent Orange, 534 F. Supp. at 1054; see also Morrison v. Larsen, 446 F.2d 250, 253 (9th Cir. 1971); Aero Corp. v. Department of the Navy, 493 F. Supp. 558, 567 (D.D.C. 1981); Montgomery, 231 F. Supp. at 450.
286 See cases cited supra note 77.
287 See Stencel, 431 U.S. at 673.
289 534 F. Supp. at 1054.
290 Id. at 1054 n.1.
291 See infra notes 292-300 and accompanying text.
tor Company because the jeep lacked seat belts. The Sanner court granted summary judgment in favor of Ford under the government contractor defense, stating,

The procurement of military equipment by the Government is made pursuant to its war powers and its inherent right and obligation to maintain an adequate defense posture. In carrying out its responsibilities the Government must be given wide latitude in its decision making process. . . .

To impose liability on a governmental contractor who strictly complies with the plans and specifications provided to it by the Army in a situation such as this would seriously impair the governments [sic] ability to formulate policy and make judgments pursuant to its war powers. The Government is the agency charged with the responsibility of deciding the nature and type of military equipment that suits its needs, not a manufacturer such as Ford.

Similarly, the court noted in Horn that "in judgments requiring military expertise and involving military discretion within unique professional fields . . . 'judges are not given the task of running the Army.'" In Campbell v. Beaugher the court observed that "the military has a right to govern its affairs without untoward intervention from the judiciary."

The Fourth Circuit discussed the separation of powers rationale at some length in Tozer. The court noted that, of the three branches of government, the judicial branch is "by design" the least involved with military matters:

"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 Execu-

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292 Sanner, 364 A.2d at 43-44; see supra notes 51-61 and accompanying text.
293 364 A.2d at 47.
294 514 F.2d at 551 (quoting Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953)).
295 519 F.2d 1307 (9th Cir. 1975).
296 Id. at 1309.
297 See infra notes 298-299 and accompanying text. For a complete discussion of the recent Tozer decision, see supra notes 138-146 and accompanying text.
tive Branches.” Gillian v. Morgan, 413 U.S. 1, 10 (1973) (emphasis in original). Judges possess no power “To declare War . . . To raise and support Armies . . . To provide and maintain a Navy.” U.S. Const. art. 1, sec. 8, cl. 11-13. Nor have they been “given the task of running the Army.” Orloff v. Willoughby, 345 U.S. 83, 93 (1953). In the face of a “textually demonstrable” commitment of an issue to “a coordinate political department,” Baker v. Carr, 369 U.S. 186, 217 (1962), judicial caution is advisable. Even apart from matters of constitutional text, the reservation of judicial judgment on strictly military matters is sound policy. The judicial branch contains no Department of Defense or Armed Services Committee or other ongoing fund of expertise on which its personnel may draw. Nor is it seemly that a democracy’s most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government.298

In concluding that the separation of powers concerns were overriding when compared with policy matters such as promoting safety, the court noted that “[w]hile debate over the safety and necessity of advanced weaponry is essential, the First Amendment does not require that the forum be the courtroom or the vehicle be a lawsuit.”299

The separation of powers rationale for the government contractor defense is compelling. Even the Eleventh Circuit, demonstrating an otherwise hostile attitude toward the government contractor defense in Shaw, found that “the constitutional separation of powers compels the judiciary to defer to a military decision to use a weapon or weapons system (or a part thereof) designed by an independent contractor, despite its risks to servicemen.”300

This judicial reluctance to second-guess military product design decisions also comports with basic common sense. The policy decisions made by the Armed Forces during preparation of design specifications and drawings usually are so complex and interwoven that no judicial

298 Tozer, 792 F.2d at 405.
299 Id.
300 778 F.2d at 743.
proceeding could or should attempt to adjudicate the propriety of those decisions. Imagine the chaos that would occur in the Armed Forces of the United States if the judiciary could cause the recall or withdrawal of military equipment and products.

V. CONCLUSION

As defense contractors have become increasingly reliant upon the government contractor defense, both supporters and critics of the defense have become more vocal. Those in favor of the defense believe that it properly keeps the judicial branch from becoming involved in military matters, reduces the cost of military products, and provides incentive for manufacturers to cooperate with the military to develop safer products. Those opposed to the defense maintain that it unfairly burdens plaintiffs with the costs of injuries caused by defective military products. Although federal court treatment of the defense has been far from consistent over the years, the elements of the defense and the standard of proof for proving those elements have taken on clearer definition since the 1980 *Agent Orange* decision.

The government contractor defense will not shield a manufacturer from liability simply because the government enjoys immunity under the *Feres-Stencel* doctrine. To avail itself of the defense, a manufacturer must demonstrate all three elements of the defense. First, it must show that the government established the specifications for the product. The term "established" has been construed to mean that the government either provided complete specifications or reviewed and approved specifications from the manufacturer.\(^\text{301}\) Next, the manufacturer must demonstrate that the product in question met the government's specifications in all material respects.\(^\text{302}\) Finally, the manufacturer must prove that the

\(^{301}\) See supra notes 182-239 and accompanying text.

\(^{302}\) See supra notes 244-249 and accompanying text.
government possessed knowledge or was warned of any hazards associated with the product.\textsuperscript{303}

While debate over the government contractor defense undoubtedly will continue, the courts have firmly embraced the concept that manufacturers of military products should not be held responsible for design defects when the military makes the ultimate design decisions. Even the more recent opinions do not reflect complete agreement concerning the precise theoretical rationale for the defense. An examination of these recent opinions, however, demonstrates that the courts generally are committed to making the government contractor defense a permanent part of American jurisprudence.

\textsuperscript{303} See supra notes 250-261 and accompanying text.
Comments