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The Government Made Me Do It: Has Boyle v. United Technologies Extended the Government Contractor Defense Too Far

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I. INTRODUCTION

When a government contractor manufactures a product in compliance with a government contract, the government contractor defense \(^1\) provides the contractor with an absolute shield from liability for all deaths and injuries caused by a design defect in the product. Although the defense originated in the public works projects, \(^2\) its underlying policies and rationale have been used to broaden its application to include not only mili-

\(^1\) The government contractor defense is also known as the "contractor immunity defense," the "contract specification defense," and the "government contractor immunity defense." This comment will refer to the defense as the government contractor defense.

tary equipment, but potentially any product contracted for by the government.

This comment examines the government contractor defense in six sections. The first section discusses the history and evolution of the defense. The second section closely examines the Supreme Court's opinion in Boyle v. United Technologies Corp., the first Supreme Court ruling on the defense. The third section discusses the remaining unresolved issues after Boyle and the conflict among the circuit courts with respect to those issues. The fourth section discusses the implications of the Boyle decision. The fifth section presents arguments for limiting the scope of the defense, and the final section suggests specific limitations that could be placed upon the defense.

II. EVOLUTION OF THE GOVERNMENT CONTRACTOR DEFENSE

A. SOVEREIGN IMMUNITY

The government contractor defense originated as an extension of the doctrine of sovereign immunity. Under this doctrine, a plaintiff may not sue the government without first obtaining the government's permission. When Congress enacted the Federal Tort Claims Act (FTCA) in 1982, the government consented to suit for injuries caused by the negligence of government employees acting within the scope of their employment. Thus, the FTCA provides a broad waiver of the federal government's sovereign immunity. However, several exceptions limit this consent to suit, particularly the discretionary function exception.

In the leading case on the discretionary function excep-

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4 Haizlip, supra note 2, at 117.
5 Id.
7 28 U.S.C. § 2680(a). This section exempts "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Id.
tion, Dalehite v. United States,\(^8\) the Supreme Court established a distinction between those acts that are discretionary within the meaning of the FTCA and those that are not discretionary. The Court held that decisions involving the economic, political, or social effects of a policy or plan are discretionary, while decisions relating to daily operations that do not involve policy considerations are operational, and thus non-discretionary.\(^9\) Thus, under Dalehite, if a decision is held to be an exercise of a discretionary function, the government is immune from suit for any injuries resulting from that decision because it has not consented to suit under the FTCA.

B. Agency Basis

The government contractor defense originated in the public works cases and was based on agency principles. The Supreme Court first recognized the defense in Yearsley v. W.A. Ross Construction Co.\(^10\) In Yearsley, the Court held that a contractor was not liable for the erosion of the plaintiff's waterfront property.\(^11\) The damage occurred as a result of the contractor's construction of dikes in accordance with a government contract.\(^12\) The Court premised its holding on the fact that since the contractor was an agent of the government, it was entitled to share in the government's immunity.\(^13\) Since Yearsley, the government contractor defense has been consistently recognized in a long line of public works cases dealing primarily with

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\(^8\) 346 U.S. 15 (1953). In Dalehite, the Supreme Court held that the "discretionary function or duty" cannot be a basis for suit under the Federal Tort Claims Act. Id. at 35-36. The Court also held that this function or duty included more than the "initiation of programs and activities" and that it included "determinations made by executives or administrators in establishing plans, specifications or schedules of operations." Id. The Court reasoned that, "[w]here there is room for policy judgment and decision there is discretion." Id. (footnote omitted).

\(^9\) Id.

\(^10\) 309 U.S. 18 (1940).

\(^11\) Id. at 21.

\(^12\) Id. at 19-20.

\(^13\) Id. at 22.
claims for the taking of property.\textsuperscript{14}

Beginning in the 1960s, courts began to recognize the government contractor defense in product liability cases, including actions involving military products.\textsuperscript{15} The defense essentially extends government immunity to the contractor. However, the rationale for this extension has varied as the scope of the defense has broadened.

C. FERES-STENCHEL DOCTRINE

\textit{Feres v. United States}\textsuperscript{16} established the foundation for the application of the government contractor defense to military equipment. In \textit{Feres}, the Supreme Court held that the FTCA did not waive the government's immunity with respect to injuries to servicemen incident to their military service.\textsuperscript{17} Thus, the \textit{Feres} doctrine prohibited members of the armed forces who sustained injuries while engaged in activities incident to military service from suing the government to redress those injuries.\textsuperscript{18}

The Court broadened the scope of immunity to third party actions in \textit{Stencel Aero Engineering Corp. v. United States}.\textsuperscript{19} The \textit{Stencel} Court ruled that the United States could not be joined as a third party defendant when an injured serviceman filed suit against a government contractor.\textsuperscript{20} In extending its decision in \textit{Feres}, the Court relied upon three determinative factors: (1) the distinctive


\textsuperscript{16} 340 U.S. 135 (1950).

\textsuperscript{17} \textit{Id.} at 146. \textit{See Hurley, supra} note 2, at 231-33.

\textsuperscript{18} \textit{Feres}, 340 U.S. at 146.

\textsuperscript{19} 431 U.S. 666 (1977).

\textsuperscript{20} \textit{Id.} at 673-74.
federal character of the relationship between the government and members of the armed services; (2) the availability of the Veteran’s Benefit Act, which places an upper limit of liability on the government for service-related injuries; and (3) the effect that a suit by a member of the armed services against the government would have on military discipline. Thus, *Feres* precluded service members from suing the government for injuries sustained incident to their service, and *Stencel* extended the government’s immunity to third-party indemnity claims.

D. CIRCUIT COURT FORMULATIONS

The two predominant formulations of the defense, before *Boyle*, arose from the Ninth Circuit and the Eleventh Circuit. Although both of these formulations are based on the *Feres-Stencel* doctrine, they define the elements of the defense differently.

In *McKay v. Rockwell International Corp.*, the Ninth Circuit held that a supplier of military equipment is not liable for a design defect where the supplier can show that: (1) the United States is immune from liability under the *Feres-Stencel* doctrine; (2) the United States established or approved reasonably precise specifications for the equipment; (3) the equipment conformed to those specifications; and (4) the supplier warned the United States about dangers in the government’s specifications or in the equipment that were known to the supplier but not to the government.

The court based its holding in *McKay* on several policy grounds. First, the court said that holding contractors liable for these design defects would undermine the *Feres-*

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22 *Stencel*, 431 U.S. at 672-73.
23 704 F.2d 444 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984). Navy Lieutenant Commander McKay was killed after ejecting from his burning RA-5C aircraft. The autopsy showed that he probably died as a result of injuries sustained during the ejection. McKay’s survivors sued Rockwell for defective design of the ejection equipment. *Id.* at 446.
24 *Id.* at 451.
Stencel doctrine because contractors would pass the additional costs created by accidents on to the government.\textsuperscript{25} Secondly, refusing to grant immunity would force the judiciary into the role of second-guessing military decisions, which could implicate separation of powers concerns.\textsuperscript{26} Thirdly, the court noted that military equipment often pushed technology to its limits, resulting in risks greater than those acceptable in commercial settings.\textsuperscript{27} Lastly, the court argued that granting immunity gave the contractors an incentive to work closely with the government in developing and testing new equipment.\textsuperscript{28}

The McKay court even allowed the government contractor to invoke the defense where a defective design was selected by the contractor and merely approved by the government.\textsuperscript{29} However, the McKay standard limited the use of the defense to cases involving military equipment.\textsuperscript{30}

In contrast, the Eleventh Circuit altered the McKay elements in Shaw v. Grumman Aerospace Corp.\textsuperscript{31} by adopting a more limited defense under which the manufacturer could avoid liability only by showing the following:

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 warned the military of the design’s risks and notified the military of alternative designs, but that the military, although forewarned, clearly authorized the contractor to proceed with the design.\textsuperscript{32}

\textsuperscript{25} Id. at 449. If the contractor were held liable for injuries caused by a design defect, it would pass this cost on to the government “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.” Id.

\textsuperscript{26} Id.

\textsuperscript{27} Id. at 460.

\textsuperscript{28} Id. at 450.

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} 778 F.2d 736 (11th Cir. 1985), cert. denied, 487 U.S. 1233 (1988).

\textsuperscript{32} Id. at 745-46. The purpose of the first element was to allow the contractor to show that the part it played was “so minimal as to excuse it from proving the second part of the test.” Id. at 746. The Supreme Court later criticized the Shaw
In *Boyle v. United Technologies*, the United States Supreme Court for the first time addressed the issue of whether a government contractor is immune from liability for design defects in products developed for the government. Writing for the majority, Justice Scalia attempted to eliminate the confusion among the circuit courts by clarifying the elements of the government contractor defense. Although the opinion established the elements of the defense, it did little to interpret their application.

### III. *BOYLE V. UNITED TECHNOLOGIES*

#### A. FACTS

In *Boyle v. United Technologies*, plaintiff's son, a United States Marine helicopter copilot, drowned after his CH-53D helicopter crashed into the ocean off the coast of Virginia. Although Boyle survived the immediate crash, he drowned when he could not escape from the helicopter. Boyle and his men were trapped inside the helicopter because the escape hatch, which opened outward rather than inward as required by government specifications, was pinned by increasing water pressure as the helicopter sank. Boyle's father brought a diversity action in federal district court against the Sikorsky division of United Technologies Corporation, the manufacturer of the helicopter.
Boyle alleged that Sikorsky had defectively designed the emergency escape system by designing the escape hatch to open outward instead of inward, thus making it inoperable against the water pressure surrounding the submerged helicopter. After the jury returned a general verdict for Boyle, the district court denied Sikorsky's motion for judgment notwithstanding the verdict. The court of appeals reversed and remanded with instructions that judgment be entered for Sikorsky. The court found, as a matter of federal law, that Sikorsky could not be held liable for the allegedly defective design of the escape hatch because Sikorsky had satisfied the requirements of the government contractor defense.

B. Opinion of the Supreme Court

In its majority opinion, the Supreme Court not only clarified the elements of the government contractor defense, it also reconsidered the justification for the defense.

1. Justification for Government Contractor Defense

a. Feres Rejected

Before defining the elements of the government contractor defense, the Supreme Court considered whether the defense should be governed by federal law and, if so, on what grounds. In a 5-4 decision, the Court rejected the Feres doctrine as the justification for the government contractor defense. The Court held that the doctrine produced results which were "in some respects too broad and in some respects too narrow." Specifically, the
court deemed the doctrine too broad because it provided immunity for injuries caused by any standard equipment purchased from stock, and too narrow because it encompassed "service-related injuries" while excluding injuries to civilians caused by the military. In other words, a civilian could sue where military personnel could not on the same facts.

b. Federal Law Governs

Justice Scalia announced that the court's justification for the application of federal law depends upon a two-step analysis. The first step involves identification of "uniquely federal interests." The second step requires determining whether a "significant conflict" exists between that interest and state law.

Traditionally, federal law has governed the United States' obligations and rights under its contracts. The Court initially noted that, although liability of government contractors to third parties has never been recognized as involving a uniquely federal interest, such liability bordered on two other areas that have been deemed uniquely federal in character: (1) the rights and obligations of the United States under its contracts; and (2) the civil liability of federal officials for actions taken in the course of their duty. The Court said that displacement of state law is justified in these areas because the

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46 Id. This has given rise to the "stock order" exception to the government contractor defense. Under this exception, if the government orders a standard product from stock, or off the shelf, "it is impossible to say that the Government has a significant interest in that particular feature." Id. at 509. "[E]ven injuries caused to military personnel by a helicopter purchased from stock . . . or by any standard equipment purchased by the Government, would be covered." Id. at 510.

47 Id. "Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state tort theory . . . ." Id. at 510-11.

48 Boyle, 487 U.S. at 504.

49 Id. at 507.

50 Id. at 504.

51 Id. at 505.
federal government's efficiency would be impaired if federal law did not govern federal contracts or if federal officials could not freely make decisions without fear of liability.\(^5\) Finally, the Court recognized that this same concern existed with respect to the liability of government contractors because the same federal interest in "getting the Government's work done" is implicated even when the case involves an independent contractor rather than either the government itself or a federal employee acting within the scope of his employment.\(^5\)

Justice Scalia stated that, standing alone, a unique federal interest would not suffice to displace state law.\(^5\) Thus, the second step of the Court's two-step analysis, determining whether a "significant conflict" exists between the federal interests and the state law, is crucial.\(^5\) The Court rejected the use of the *Feres* doctrine to determine whether this significant conflict exists.\(^5\) Instead, the Court relied on the discretionary function exception to the FTCA.\(^5\)

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\(^5\) *Id.*

\(^5\) *Boyle*, 487 U.S. at 505. The court analogized the liability of independent contractors performing work for the federal government to the liability of federal officials and concluded that tort liability arising out of the performance of a government contract is a unique federal interest, and thus subject to federal common law. *Id.*

\(^5\) *Id.* at 507.

\(^5\) *Id.* The Court added that the conflict with federal interests need not be "as sharp" as that required for pre-emption when Congress legislates "in a field which the States have traditionally occupied." *Id.* If the contractor could comply with both its contractual obligations and the state law duty of care, state law would not be preempted. *Id.* at 509.

\(^5\) *Id.* at 510-11. "There is, however, a statutory provision that demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of Government procurement." *Id.* at 511.

\(^5\) *Id.* Under the FTCA, Congress authorizes suits for damages "against the United States for harm caused by negligent or wrongful conduct of government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred." *Id.* (citing 28 U.S.C. § 1346(b) (1988)). Congress excepted from this consent to suit any claim based on the exercise, or the failure to exercise, a discretionary function by a federal agency or government employee. *Id.* (citing 28 U.S.C. § 2680(a) (1988)). State law must yield to federal law only where the contractor cannot comply with both; the government contractor defense is then applied to protect federal interests. *Id.*
The Court then held that the selection of the appropriate design for military equipment to be used by the Armed Forces is a discretionary function within the meaning of the FTCA, because it involves the balancing of many "technical, military, and even social considerations, including the trade-off between greater safety and greater combat effectiveness." The Court concluded that permitting judicial second-guessing of these judgments through state tort suits against contractors would result in the contractors passing the financial burdens created onto the government in the form of higher prices.

Having established that federal interests are implicated in suits against government contractors, the Court then determined that those interests are in conflict with the state’s definition of the contractor’s duty of care. The Court said that this duty of care conflicted with the duty imposed by the contract, which was to deliver products conforming to government specifications. Therefore, the Court concluded that the government contractor defense should be controlled by federal law because it implicates uniquely federal interests and there is a significant

58 Boyle, 487 U.S. at 511.
59 Id. at 511-12. The Court reasoned that it makes little sense to insulate the government from financial liability when the government produces the equipment but not when it contracts for production. Id. at 512. Thus, if the contractors could be held liable for design defects, Congress’ purpose in excepting the exercise of discretionary functions from liability would be circumvented.

"And we are further of the view that permitting ‘second-guessing’ of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption." Id. at 511 (citation omitted). "The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs." Id. at 511-12. "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." Id. at 512.

60 Id. "[S]tate law which holds Government contractors liable for design defects in military equipment does in some circumstances present a ‘significant conflict’ with federal policy and must be displaced." Id.
61 Id.
conflict between those interests and state tort law.\textsuperscript{62}

2. Elements of the Government Contractor Defense

a. Adoption of McKay

In \textit{Boyle v. United Technologies Corp.},\textsuperscript{63} the Supreme Court adopted the Ninth Circuit's formulation of the government contractor defense\textsuperscript{64} developed in \textit{McKay v. Rockwell International Corp.}\textsuperscript{65} In \textit{McKay}, the Ninth Circuit held that government contractors are immune from liability for design defects in military equipment when: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about dangers in the equipment that were known to the supplier but not to the United States.\textsuperscript{66}

The first two elements ensure that the design feature in question is considered by a government officer and not merely by the contractor itself. Once this is established, the discretionary function exception applies.\textsuperscript{67} The third element is necessary to encourage a cooperative design and development effort between the contractor and the government. It also ensures that the contractor has no incentive to withhold information from the government.\textsuperscript{68}

\textsuperscript{62} \textit{Id.}
\textsuperscript{63} 487 U.S. 500 (1988).
\textsuperscript{64} \textit{Id.} at 512.
\textsuperscript{65} 704 F.2d 444 (9th Cir. 1983).
\textsuperscript{66} \textit{Id.} at 451.
\textsuperscript{67} \textit{Boyle}, 487 U.S. at 512. "The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—\textit{i.e.}, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself." \textit{Id.}
\textsuperscript{68} \textit{Id.} Conveying that knowledge to the government might disrupt the contract, but withholding it would produce no liability if state tort law were displaced. \textit{Id.}

The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.

\textit{Id.} at 512-13.
b. Rejection of Shaw

The majority of the Court considered, and expressly rejected, the government contractor defense enunciated by the Eleventh Circuit in Shaw v. Grumman Aerospace Corp.\(^69\) The Shaw test would bar suit only if: (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; or (2) the contractor timely warned the government of the risks of the design and notified it of alternative designs reasonably known to the contractor, and the government, although forewarned, clearly authorized the contractor to proceed with the dangerous design.\(^70\) The Court rejected this test because the design chosen may have reflected significant policy judgments by government officials regardless of who developed the design.\(^71\) The Court also rejected Shaw to avoid penalizing, and thus deterring, active contractor participation in the design process.\(^72\) The Court felt that active participation would be hindered if contractors were required to identify all design defects or to participate only minimally in order to avoid liability.\(^73\)

C. JUSTICE BRENNAN'S DISSENT

Justice Brennan based his dissent on three grounds. First, he challenged the majority's conclusion that federal displacement of state law in this area was justified.\(^74\)

1. Displacement Not Justified

Justice Brennan recalled Erie Railroad Co. v. Tompkins,\(^75\) in which the Supreme Court held that there is no federal general common law and that the federal courts have no

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\(^{69}\) Id. at 513 (citing Shaw, 778 F.2d at 736 (1985)).

\(^{70}\) Id. "While this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the federal interest embodied in the 'discretionary function' exemption." Id.

\(^{71}\) Boyle, 487 U.S. at 512.

\(^{72}\) Id.

\(^{73}\) Id.

\(^{74}\) Id. at 516-18.

\(^{75}\) 304 U.S. 64, 78 (1938).
authority to develop rules of substantive law based on their grant of diversity jurisdiction.\textsuperscript{76} Brennan argued that \textit{Erie} was most seriously implicated when, as in \textit{Boyle}, federal judges displaced the applicable state law with their own rules of federal common law.\textsuperscript{77}

He accused the Court of creating a new category of federal interests out of a combination of two interests whose origins predated \textit{Erie} itself: the interest in administering the United States' obligations and rights under its contracts, and the interest in regulating the civil liability of federal officials for actions taken in the course of their duty.\textsuperscript{78} He argued that the broad extension of the government contractor defense was unwarranted because, even where immunity was authorized by Congress, the Court had restricted its scope to circumstances in which the contributions of immunity to effective government outweighed the harm to the individual citizen.\textsuperscript{79}

In support of his argument that the displacement of state tort law was not warranted in \textit{Boyle}, Brennan referred to Scalia's opinion just two months prior to \textit{Boyle} in \textit{Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.}\textsuperscript{80} In \textit{Isla}, a unanimous Court held that the "historic police powers of the States were not to be superseded... unless that was the clear and manifest purpose of Congress."\textsuperscript{81} The Court had emphasized that federal common law can displace state law only in such narrow areas as those con-

\textsuperscript{76} \textit{Boyle}, 487 U.S. at 517. "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." \textit{Id.} (quoting \textit{Erie}, 304 U.S. at 78).

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.} at 518-19.

\textsuperscript{79} \textit{Id.} at 523. This limitation on the scope of immunity was necessary because immunity contradicts the basic tenet that individuals be held accountable for their wrongful conduct. \textit{Id.} The extension of immunity to government contractors "skewed the historical balance" between effective government and individual harm. \textit{Id.}

\textsuperscript{80} 485 U.S. 495 (1988).

\textsuperscript{81} \textit{Boyle}, 487 U.S. at 517. Just as there is no federal pre-emption without a constitutional text or a federal statute to assert it, federal common law cannot supersede state law out of "no more than an idiosyncratic determination by five Justices that a particular area is 'uniquely federal.'" \textit{Id.} at 517-18.
cerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of states or United States' relations with foreign nations, and admiralty cases. The Boyle case did not present any of these situations.

a. Burdens

Justice Brennan stated that the majority had cited no authority for the proposition that costs passed on to the government by government contractors would burden the government in a way that justified extension of immunity to the contractor. He noted that the Court had held in other cases that even substantial indirect burdens were legally irrelevant. He argued that the FTCA's retention of sovereign immunity for the government's discretionary acts did not imply a defense for the benefit of contractors who participated in those acts, even though they might pass on the financial burden to the United States.

b. Collateral Relationships

Federal law typically controls when the federal government is a party to a suit involving its rights or obligations under a contract. It is well established that the Court's

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82 Id. at 518. "State laws should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." Id. (quoting United States v. Yanell, 382 U.S. 341, 352 (1966)).

83 Id. at 527.

84 Id. Brennan recalled that the Court had rejected an analytically similar attempt to construct federal common law out of the FTCA when it held in United States v. Gilman, 347 U.S. 507 (1954), that the government's waiver of sovereign immunity for the torts of its employees did not give the government an implied right of indemnity from the employees, even though the financial burden placed on the United States by the FTCA could be so great that government employees should be required to carry part of the burden. Boyle, 487 U.S. at 528. "However substantial such indirect burdens may be, we have held in other contexts that they are legally irrelevant." Id. at 527.

85 Id.

86 Boyle, 487 U.S. at 519. Brennan stated that federal law usually applies "when the Federal Government is a party to a suit involving its rights or obligations under a contract." Id.
power to create federal common law controlling the federal government's contractual rights and obligations does not extend to contractual relations that are collateral to government contracts. Brennan pointed out that the Court had previously declined to impose federal contract law on relationships that were collateral to a federal contract. The relationship between the parties in Boyle was collateral to the government contract. Boyle was simply a suit between two private parties, thus federal contract law did not apply.

Brennan characterized the majority's use of Yearsley as a "valiant attempt to bridge the analytical canyon" between what Yearsley held and "what the Court wishes it had said." He argued that Yearsley had never been interpreted to grant immunity to the discretionary acts of those who perform service contracts for the government. Brennan alleged that it was "unlikely that the Court intended Yearsley to extend anywhere beyond the takings context, and we have never applied it else-

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87 Id. "But it is by now established that our power to create federal common law controlling the Federal Government's contractual rights and obligations does not translate into a power to prescribe rules that cover all transactions or contractual relationships collateral to Government contracts." Id.
88 Id.
89 Id. at 521. "The relationship at issue is at best collateral to the Government contract. We have no greater power to displace state law government the collateral relationship in the Government procurement realm than we had to dictate federal rules governing equally collateral relationships in the areas of aviation, Government-issued commercial paper, or federal lands." Id. (footnote omitted).
90 Boyle, 487 U.S. at 519. In Miree v. DeKalb County, 433 U.S. 25 (1977), the Court held that state law should govern the contractual claim because only the rights of private litigants were at issue, and the claims would have no direct effect on the United States or its treasury. Boyle, 487 U.S. at 520 (citing Miree, 433 U.S. at 25). A government contract was in the background, but the United States was not a party to any of the suits, and the suits neither "touch[ed] the rights and duties of the United States" nor had a "direct effect on the United States or its Treasury." Id.
91 309 U.S. 18 (1940).
92 Boyle, 487 U.S. at 526. "In Yearsley, we barred the suit of landowners against a private Government contractor alleging that its construction of a dam eroded their land without just compensation in violation of the Takings Clause of the Fifth Amendment." Id. at 524.
93 Id.
He added that *Yearsley* was not relevant to the facts in *Boyle* because the contractor in *Yearsley* was "following, not formulating" the government's specifications, and because *Yearsley* depended on an agency relationship, which did not exist in *Boyle*.

2. Use of Discretionary Function Has Far-Reaching Results

Secondly, Brennan criticized the majority for basing the defense on the discretionary function exception and thus rejecting the *Feres* doctrine. He characterized the opinion as extending immunity to any contractor "so long as it obtained approval of 'reasonably precise specifications'—perhaps no more than a rubberstamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them."

Brennan argued that the newly defined defense was too broad for several reasons. First, it applied not only to military equipment but also to "any made-to-order gadget that the Federal Government might purchase after previewing plans." Secondly, the defense barred suits brought by both military personnel and by civilians injured by a government contractor's defective design. Finally, the defense could be invoked regardless of how

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*94* Id.

*95* Id. at 525. If the contractor in *Boyle* had merely manufactured the helicopter, following the government's own in-house specifications, it would be analogous to the contractor in *Yearsley*, although not analytically identical since *Yearsley* depended on an actual agency relationship with the government, which was never established in *Boyle*. *Id.* "The contractor's work 'was done pursuant to a contract with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States, . . . as authorized by an Act of Congress.'" *Id.* (citing *Yearsley*, 309 U.S. at 19).

*96* Id. at 515.

*97* *Boyle*, 487 U.S. at 516. Brennan argued that the defense would apply not only to military equipment but also to "any made-to-order gadget that the Federal Government might purchase after previewing plans—from NASA's Challenger space shuttle to the Postal Service's old mail cars." *Id.*

*98* Id. "The contractor may invoke the defense in suits brought not only by military personnel . . . but by anyone injured by a Government contractor's negligent design, including, for example, the children who might have died had respondent's helicopter crashed on the beach." *Id.*
obvious or how easily remedied the defect. As long as the contractor did not discover the defect, and the specifications approved by the government were reasonably precise, the defense could be invoked as a complete shield against liability no matter how unreasonably dangerous the defect.

3. Court Should Refrain; Congress’ Role

Third, Brennan referred to Congress’ continued refusal to pass legislation establishing a government contractor defense and argued that the Court should refrain from doing so. He pointed out that Congress had not superseded state law in this situation, and that, “if anything, it had decided not to.”

In summary, Brennan characterized the majority’s analysis as beginning and ending with an exception to a statute that was, in itself, not applicable. He pointed out the inconsistency inherent in the fact that plaintiffs could have recovered under the Death on the High Seas Act if

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99 Id.
100 Id.
102 Boyle at 529.

There is no more reason for federal common law to shield contractors now that the Government is liable for some torts than there was when the Government was liable for none. The discretionary function exception does not support an immunity for the discretionary acts of Government contractors any more than the exception for ‘any claim against the Government arising out of assault,’ section 2680(h), supports a personal immunity for Government employees who commit assaults. . . . In short, while the Court purports to divine whether Congress would object to this suit, it inexplicably begins and ends its sortilege with an exception to a statute that is itself inapplicable and whose repeal would leave unchanged every relationship remotely relevant to the accident underlying this suit.

Id. (citation omitted).
Boyle's helicopter had crashed three miles further off the coast. Under those facts, federal law itself would provide a tort remedy, but no government contractor defense, against the same manufacturer for an accident involving the same equipment.

Brennan concluded that the tort system is premised on the assumption that the imposition of liability encourages the prevention of injuries when the expected costs of those injuries exceed the cost of their prevention. If the system works as it should, government contractors would design equipment to avoid injuries whose costs would burden the government. He also said that if Congress shared the Court's assumptions and conclusion, it could enact legislation to place limitations on the civil liability of government contractors to ensure that such liability would not impede the ability of the United States to procure necessary goods and services.

IV. UNRESOLVED ISSUES AFTER BOYLE

Although Boyle resolved the conflict between the circuit courts concerning the elements of the government contractor defense, the definition of those elements has been subject to conflicting interpretations in subsequent cases. For instance, the initial determination of what constitutes a discretionary function is subjective. Circuit courts are not consistent in determining how much approval is necessary for the exercise of a discretionary function, or what constitutes reasonably precise specifications.

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104 Boyle, 487 U.S. at 529.
105 Id.; but see Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986), cert. denied, 487 U.S. 1233 (1988) (applied the government contractor defense in a suit brought under the Death on the High Seas Act).
106 Boyle, 487 U.S. at 530. "[T]he Court's analysis is premised on the proposition that any tort liability indirectly absorbed by the Government so burdens governmental functions as to compel us to act when Congress has not." Id.
107 Id.
108 Id. at 531. Congress has thus far refused to do so. Id. (citing H.R. 4765, 99th Cong., 2d Sess. (1986); S. 2441, 99th Cong., 2d Sess. (1986).
A. What Is a Discretionary Function?

The threshold question of whether the government has exercised a discretionary function is problematic. Not all decisions made by government employees are covered by the discretionary function exception. The Supreme Court has held that where there is room for policy judgment and decision, there is discretion. Thus, a government decision, at a minimum, must involve judgment or policy choice to fall within the discretionary function exception.

After the Supreme Court’s decision in Boyle, the Fifth Circuit decided Trevino v. General Dynamics Corp. In Trevino, the Fifth Circuit defined the discretionary function at issue as the discretion involved in selecting an appropriate design for equipment. The court said that if the government delegates its design discretion to a private contractor, governmental approval of the contractor’s design is not an exercise of a discretionary function.

B. Definition of Approval

There is also conflict over how much approval is sufficient to meet the standard of a discretionary function. The cases following Boyle have held generally that the government must be an active participant in the development of specifications in order for its approval of the specifications to be an exercise of discretion.

For example, in Trevino, the Fifth Circuit interpreted Boyle’s “approval” requirement to mean that the government has: (1) established reasonably precise specifications, (2) chosen a design feature, (3) exercised judgment and policy choice, and (4) substantially reviewed and eval-

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111 Id. at 1485 n.100 (citing Boyle, 487 U.S. at 500).
112 Id. at 1485. “If the government has chosen to delegate its design discretion to a private contractor, however, the government does not exercise a discretionary function by merely approving the contractor's work.” Id.
113 Id. In Trevino, the families of five Navy divers who died in an accident aboard a submarine sued General Dynamics. Id.
uated the design.\textsuperscript{114}

The Fifth Circuit affirmed the district court's finding that the level of government review in \textit{Trevino} was not sufficient to constitute approval.\textsuperscript{115} The Fifth Circuit held that the government must be an active participant, by actively exercising its discretion, to meet the approval requirement.\textsuperscript{116} The Fifth Circuit felt that the absence of review was critical in the \textit{Trevino} case and held that mere review for compliance with very general performance criteria was not sufficient to satisfy the approval required by the \textit{Boyle} decision.\textsuperscript{117}

The district court in \textit{Boyle} also held that the discrepancy in knowledge between the Navy and General Dynamics prevented the Navy from performing any substantial re-

\textsuperscript{114} Id. at 1486-87 n.12.

\textsuperscript{115} \textit{Trevino}, 865 F.2d at 1487. Although the Navy developed the basic design concept, General Dynamics did the actual design work on the diving hangar aboard the submarine. \textit{Id.} The contract required General Dynamics to make working drawings of the hangar and the valve system, which were signed by a government employee. \textit{Id.} The contract also required General Dynamics to assume full responsibility for all the technical research, to review its own work to assure compliance and to conduct all quality assurance testing, including inspection before the submarine was issued to the Navy. \textit{Id.} Prior to the accident, the Navy did not perform or require a formal design or safety review of the system. \textit{Id.}

\textsuperscript{116} To support the requirement of active participation, the court looked to the facts of \textit{Shaw v. Grumman Aerospace Corp.}, 778 F.2d at 736, where the relationship between the Navy and a military contractor was similar to the relationship in \textit{Trevino}. \textit{Trevino}, 865 F.2d at 1482 (citing \textit{Shaw}, 778 F.2d at 747). In \textit{Shaw}, the Eleventh Circuit held that governmental approval was not an "informed military decision" because the Navy relied too much on the contractor's advice. \textit{Shaw}, 778 F.2d at 747.

Although the Supreme Court rejected \textit{Shaw}'s definition of the elements of the defense in \textit{Boyle}, it never indicated that the Eleventh Circuit's interpretation of "approval" was wrong. \textit{Trevino}, 865 F.2d at 1483 n.8. In fact, the Supreme Court denied a petition for writ of certiorari and a petition for rehearing in the \textit{Shaw} case after its decision in \textit{Boyle}. See \textit{Shaw v. Grumman Aerospace Corp.}, 487 U.S. 1233 (1988) (denial of petition for writ certiorari); \textit{Shaw v. Grumman Aerospace Corp.}, 487 U.S. 1250 (1988) (denial of petition for rehearing).

\textsuperscript{117} \textit{Trevino}, 865 F.2d at 1487 n.14. The district court held that the contracts left the design entirely to the discretion of General Dynamics, because the Navy set only general performance standards, and left the details for General Dynamics to determine. \textit{Id.} at 1487. Although government employees signed each page of the working drawings to indicate their approval of the design, the district court held that the level of review was not sufficient to constitute approval as contemplated by the discretionary function exception. \textit{Id.}
view of the specifications.\textsuperscript{118} That court, however, said that the question was not the quality of the government’s review, but whether the government actually exercised discretion.\textsuperscript{119} The court cautioned, though, that using unqualified people to review and approve a design may be evidence that the government does not intend to exercise discretion but is merely rubber-stamping the contractor’s design specifications.\textsuperscript{120}

The Fifth Circuit also held that “rubber stamp” approval failed to meet the Boyle standard of approval.\textsuperscript{121} The Fifth Circuit determined that the government contractor defense required a more active exercise of discretion than a mere rubber-stamping of the contractor’s work by the government.\textsuperscript{122} It based this holding on the

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\textsuperscript{118} Id. at 1486-87 n.12. \\
\textsuperscript{119} Id. at 1487. If the government intended to exercise its discretion over the design, and the official undertakes to substantially review the design, and to evaluate and approve it, the first element of the test is satisfied even if the official doing the review was incompetent or negligent. Id. \\
\textsuperscript{120} Id. at 1486-87 n.12. \\
\textsuperscript{121} Id. at 1481. “That Boyle requires more than a rubber stamp is clear from its formulation of the elements of the defense, each of which serve to locate the exercise of discretion in the government.” Id. \\
\textsuperscript{122} Trevino, 865 F.2d at 1481. The Fifth Circuit held that the mere retention of the right of final approval, without a substantive review, was not sufficient to establish the defense. Id. at 1480. The court stated that the government exercised its discretion over the design when it actually chose a design feature. Id. at 1480. The government delegated the design discretion when: (1) it purchased a product designed by a private manufacturer; (2) it contracted for the design of a product or a feature of a product, leaving the critical design decision to the private contractor; or (3) it contracted out the design of a concept generated by the government, requiring only that the final design satisfy minimal or general standards established by the government. Id. \\
The mere signature of a government employee on the approval line of a drawing, without more, does not establish the defense. Id. If the contractor exercised actual discretion over the defective feature of the design, then the contractor will not escape liability via the defense, the government’s rubber stamp on the design drawings notwithstanding. Id. \\
It would be absurd, then, to fashion a rule that allowed liability when the specifications were not sufficiently precise or when the contractor deviated from the specifications while disallowing liability when the federal officer signing the design approval did not review or understand the specifications or care whether the contractor deviated from them. Id. at 1481.
\end{flushleft}
fact that the purpose of the defense was to protect the government's discretionary function and, therefore, approval under the defense must constitute a discretionary function.\(^{123}\) The court stated that mere acceptance was not a discretionary function because the government was not making a policy judgment as required by Boyle.\(^{124}\) The Fifth Circuit also argued that the third element of the defense supported an active exercise of discretion by the government, by requiring that the contractor warn the government when the contractor has information which the government lacks.\(^{125}\)

The Fifth Circuit referred to *McKay v. Rockwell International Corp.*\(^{126}\) in defining "approval." In *McKay*, the Ninth Circuit held that the defense was not available to the contractor who built a dam that later collapsed.\(^{127}\) The *McKay* court held that the defense applied when the United States reviewed and approved a detailed set of specifications.\(^{128}\) Even after *McKay*, however, it still was not clear how much approval is necessary, nor what facts constitute that approval.

In contrast to *Trevino*, the Fourth Circuit in *Kleemann v. McDonnell Douglas Corp.*,\(^{129}\) held that the Navy had exer-

\(^{123}\) Id. When the government merely accepts decisions made by a government contractor, without any substantive review or evaluation, then the contractor, not the government, is exercising discretion. *Id.*

\(^{124}\) Id. If the government delegated the design discretion to the contractor, then the government could not claim it had exercised a discretionary function unless it had also performed a substantive review or evaluation of the design. *Id.* at 1480.

\(^{125}\) Id. at 1481. This element contemplates that the government's approval of the design will involve informed decisions and considered choices. *Id.*

The primary purpose of the warning element is to enable the government to make determinations as to the design and use of military equipment based on all readily available information. *Id.* The Supreme Court's inclusion of a warning element must indicate that approval requires some level of evaluation and review. *Id.*


\(^{127}\) Id. at 450. The contract specified location, height, and some performance requirements of the dam, but left the design, materials, and method of construction to the discretion of the contractor. *Id.*

\(^{128}\) Id. According to the court, when only minimal or very general requirements are set for the contractor by the United States, the defense is not applicable. *Id.*

cised sufficient approval to satisfy the discretionary function exception. Beginning with bids for the F/A-18, Navy engineers met with each contractor for extended discussions of their proposals. Final design contracts for the aircraft incorporated McDonnell Douglas' original proposal as modified during extensive negotiations with the Navy.

During design development, McDonnell Douglas was required to submit detailed engineering drawings to the Navy. Navy approval was required for all changes to the design or specifications of the aircraft. The Kleemann court declared that governmental participation in the various stages of the aircraft's development had established the government contractor defense.

Other jurisdictions have also dealt with the definition of approval. In Deniston v. Boeing Co., the court observed that the purpose of the approval component of the Boyle test is to assure that the design feature in question was considered by a government officer, not merely by the

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Kleemann, a U.S. Navy pilot, was killed when he lost control of his F/A-18 aircraft during landing. Id. at 700. The plane left the runway and overturned. Defendant McDonnell Douglas Corporation had designed the plane for the Navy. The Navy concluded that Captain Kleemann's accident was partially caused by the failure of the planing link assembly on the main landing gear. Id.

Id. at 701.

Id.

Id.

Kleemann, 890 F.2d at 701.

Id. The more intimately involved the Navy was at various stages of the design and development process, the more likely it would be that the government approval requirement was met. Id.

It is this salient fact of governmental participation in the various stages of the aircraft's development that establishes the military contractor defense. Where, as here, the Navy was intimately involved at various stages of the design and development process, the required government approval of the alleged design defect is more likely to be made out. As a final matter, extensive governmental participation provides tangible evidence of the strong federal interest which justifies the creation of a federal common law defense for government contractors in the first place.

Id.

contractor itself. The Deniston court held that the approval component is satisfied if either the government itself selected or proposed the allegedly defective design features or if those design features were approved by the government after active consideration. Active consideration may be demonstrated by a "back and forth" discussion between the government and the contractor.

The Third Circuit held that the approval requirement was satisfied in Maguire v. Allison Gas Turbine. In Maguire, the plaintiff alleged that a defectively designed engine ball bearing caused a helicopter crash. The plaintiff argued that the government's approval of the change in the bearing was only a rubber stamp approval because the change originated with the contractor.

The Third Circuit found that the approval of the change was an exercise of a discretionary function even though the change originated with the contractor. Thus, the court held that the changes originating with the contractor were not automatically "rubber-stamped," but were approved by the government.

137 Id. at *4.  
138 Id.  
139 Id.  
140 912 F.2d 67 (3d Cir. 1990). Appellant Edward Maguire was forced to crash land his helicopter. Two days after the crash, an Army flight surgeon certified that Maguire was able to return to active flight status. Two days later, Maguire was seriously injured when he lost consciousness while driving his motorcycle. Maguire alleged that his motorcycle crash was a result of injuries he sustained in the helicopter crash and that Hughes and Allison were responsible for the injuries in both accidents. Id. at 68.  
141 Id. at 69.  
142 Id. at 71. The rationale behind the rubber stamp exception to the defense is two-fold. The Supreme Court stated that it is clear that where the government rubber stamped a design proposed by a contractor, the officials had not performed a discretionary function. Id. at 72. The Maguire court stated that the mere fact that a design proposal originated with the contractor is not enough for the rubber stamp exception to apply. Id. at 72 n.2.  
143 Id. at 72. The court based its holding on the fact that the military specifications contained detailed design and performance specifications for the engine, and that the government reviewed and approved the proposed design along with every proposed design change, and also subjected the engine to stringent qualification testing. Id.  
144 Id.
Therefore, the amount of participation by the government in the actual design process is very important in determining whether the government's approval rises to the level of a discretionary function. The amount of participation varies from an active participant to a passive participant, with the contractor being potentially liable depending on how a particular circuit court views that participation.

C. Definition of Reasonably Precise Specifications

Another key to determining whether approval rises to the level of a discretionary function is whether the specifications being approved are sufficiently precise so that the government can be said to be making a policy judgment. Detailed discussions between the contractor and the government have been held to produce reasonably precise specifications.145

In a post-Boyle case, Kleemann v. McDonnell Douglas Corp.,146 the Fourth Circuit held that the government contractor defense applied to shield the contractor from liability when specifications evolved along with the development and production of the aircraft.147 The court

145 In Boyle, the Fourth Circuit held that the contractor had demonstrated that the Navy had approved reasonably precise specifications where the contractor and the Navy had engaged in detailed discussions to develop detailed specifications. 792 F.2d at 414-15.

146 890 F.2d 698. Plaintiff's decedent died when his F/A-18 aircraft left the runway and flipped during landing. Id. The Navy concluded that the accident was caused in part by failure of planing link assembly on the main landing gear. The plaintiffs contended that the landing gear did not conform to reasonably precise specifications contained in the Navy's original contract with McDonnell Douglas. Id. at 700.

The contractor argued that specifications proffered by plaintiff were not the reasonably precise specifications required by Boyle because such general requirements do not tell the contractor what to build or how to design the product. The contractor contended that the accident aircraft incorporated all the current Navy-approved landing gear designs and modifications through date of delivery. Id.

147 Id. The Fourth Circuit defined the issue as whether the landing gear conformed to the ultimate design specifications, rather than to qualitative precatory specifications used in the procurement process. Id. The court held that the contractor's working drawings, which incorporated general qualitative specifications, were reasonably precise specifications because they included all subsequent draw-
noted that military hardware does not suddenly spring into being from initial design and procurement specifications, but evolves through drawings, blueprints and mock-ups agreed upon by the parties.\textsuperscript{148}

The court distinguished general, qualitative specifications from the "detailed, precise and typically quantitative specifications for manufacture of a particular military product."\textsuperscript{149} The court held that the general, qualitative specifications contained in the documents cited by the plaintiffs were merely initial theoretical phases of development, which were incorporated by reference into the full scale development contracts issued to McDonnell Douglas for the development of the F/A-18.\textsuperscript{150} The court stated that "[w]here the military procurement process involves this kind of continuous exchange between the contractor and the government, the process itself becomes persuasive evidence that the product conformed to precise specifications."\textsuperscript{151}

In contrast to the Fifth Circuit's conclusion in\textit{Trevino} that there had been inadequate review of the design drawings to establish the defense, the Fourth Circuit held in\textit{Kleemann} that the Navy had performed extensive review of detailed design drawings submitted by McDonnell Douglas.\textsuperscript{152} The Fourth Circuit concluded that the government

\textsuperscript{148} \textit{Id.} at 702-03.
\textsuperscript{149} \textit{Id.} at 702. The court noted that the ultimate design of the product is determined not only by the original procurement and contract specifications but also by specific, quantitative engineering analysis developed during the actual production process. \textit{Id.}
\textsuperscript{150} \textit{Id.} at 703 (quoting\textit{Shaw}, 778 F.2d at 745). "Only the detailed, quantitative specifications, and not those calling for such vagaries as a failsafe, simple or inexpensive product, are relevant to the contractor defense." \textit{Id.} at 703.
\textsuperscript{151} \textit{Id.} at 702. This contract also required McDonnell Douglas to submit detailed design drawings to the Navy for approval as their general specifications became embodied in the actual landing gear. The Navy reserved the right to reject drawings and to require revisions and modifications. \textit{Id.} The court held that these working drawings, and not simply the general, qualitative specifications from the procurement stage, comprised the reasonably precise specifications contemplated by\textit{Boyle}. \textit{Id.}
\textsuperscript{152} 890 F.2d at 702.
did not turn over its discretion or the military decisions to a contractor.\textsuperscript{155} Thus, the court held that the Navy exercised complete discretion over suggested design changes in connection with the landing gear design, and that the government contractor defense applied.\textsuperscript{154} A federal district court in New York, in \textit{Deniston v. The Boeing Co.},\textsuperscript{155} adopted \textit{Kleemann}'s definition of reasonably precise specifications.\textsuperscript{156} The \textit{Deniston} court defined quantitative specifications as "detailed, precise" specifications to be used for manufacturing.\textsuperscript{157} The court adopted the \textit{Kleemann} holding that only these detailed, quantitative specifications were relevant to the government contractor defense.\textsuperscript{158}

The Fifth Circuit addressed the question of reasonably precise specifications in \textit{Smith v. Xerox Corp.}.\textsuperscript{159} In \textit{Smith}, the Fifth Circuit held that Xerox had sufficiently demonstrated governmental approval of reasonably precise specifications for the VIPER simulator.\textsuperscript{160}

The Fifth Circuit consulted pre-\textit{Boyle} cases to determine what constituted reasonably precise specifications, since the Supreme Court in \textit{Boyle} did not give much guidance on the interpretation.\textsuperscript{161} The Fifth Circuit recalled the Ninth Circuit’s decision in \textit{McKay}, where the Ninth Circuit said that the contractor would be subject to strict liability

\begin{footnotesize}
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  \item \textsuperscript{155} \textit{Id.}\ The contract data requirements list specifically required that landing gear design reports and landing gear specifications be submitted for Navy review and approval. There were also periodic design review meetings between the Navy and the contractor. \textit{Id.} at 702-03.
  \item \textsuperscript{154} \textit{Id.}
  \item \textsuperscript{155} No. 87-CV-1205, 1990 WL 37621 (N.D.N.Y. Mar. 28, 1990).
  \item \textsuperscript{156} \textit{Id.} at *5. The \textit{Kleemann} court stated that "only detailed quantitative specifications... are relevant to the government contractor defense". 890 F.2d at 703.
  \item \textsuperscript{157} \textit{Deniston}, No. 87-CV-1205 at *5. The \textit{Deniston} court cited \textit{Kleemann} as distinguishing general, qualitative specifications from the detailed, precise and typically quantitative specifications for manufacture of a particular military product. \textit{Id.} at *6.
  \item \textsuperscript{158} \textit{Id.}
  \item \textsuperscript{159} 866 F.2d 135 (5th Cir. 1989).
  \item \textsuperscript{160} \textit{Id.} at 137. \textit{Smith} was a suit for personal injuries arising from the malfunctioning and premature discharge of a VIPER anti-tank weapon simulator used during military training exercises. \textit{Id.} at 136.
  \item \textsuperscript{161} \textit{Id.} at 137.
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for the design defect if the United States neither set specifications for the system (other than general outlines of what type of system it required) nor approved the contractor's final reasonably detailed specifications by examining and agreeing to a detailed description of the workings of the system.\(^{162}\)

The Fifth Circuit said that "[t]he government contractor defense requires only that the government approve reasonably precise specifications."\(^{163}\) The court held that Xerox met its burden of proof on the defense because Xerox incorporated the government's environmental specifications for the VIPER into its production contract.\(^{164}\)

The characterization of a given defect as either a fatal defect, a design defect, or a manufacturing defect is also critical to the defense. The government contractor defense does not apply to manufacturing defects because products with manufacturing defects do not conform to government specifications.\(^{165}\) If the defect is one of design, the defense applies provided its elements are met. Cases have differed on how to distinguish between these two types of defects.

For instance, in *Harduvel v. General Dynamics Corp.*,\(^{166}\) the plaintiff alleged that wire-chafing caused the crash of an F-16.\(^{167}\) The Eleventh Circuit held, as a matter of federal common law, that a manufacturing defect consists only of "aberrational" defects and not those that occurred

\(^{162}\) *Id.* at 138 (quoting *McKay*, 704 F.2d at 453).

\(^{163}\) *Id.*

\(^{164}\) *Id.* The Fifth Circuit stated that, although Xerox failed to produce complete specifications for the original VIPERs it manufactured, Xerox did produce a listing of those specifications, a copy of the original government performance criteria, and a production contract furnished by Xerox for a series of VIPERs containing specific reference to government approved specifications. *Id.* In addition, an employee of Xerox testified that the Army reviewed and approved the drawings and specifications prepared by Xerox. *Id.*

\(^{165}\) "We also note that the rule enunciated here does not relieve suppliers of military equipment of liability for defects in the manufacture of that equipment." *McKay*, 704 F.2d at 451.


\(^{167}\) *Id.* at 1314-15.
"throughout an entire line of products." The Harduvel court found that wire chafing in the F-16 was a design defect, not a manufacturing defect, based on the fact that it was common throughout the production line. The court concluded that the government contractor defense applied, and that the contractor was immune from suit.

However, in *Mitchell v. Lone Star Ammunition, Inc.*, the Fifth Circuit held that voids found in a batch of mortar casings were manufacturing defects, rather than design defects, and concluded that the government contractor defense did not apply. The Fifth Circuit considered the Harduvel definition "unfortunate," because "shoddy workmanship" could produce a defect throughout an entire line of production, as in the mortar shells at issue in that case.

**D. Specifications for Aircraft or Component?**

It is also unclear whether the stock order exception to

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168 *Id.* at 1317. The Eleventh Circuit distinguished design defects and manufacturing defects based on the distinction between an intended configuration (design), and an unintended configuration (manufacturing) that may produce unintended and unwanted results. *Id.*

169 *Id.* at 1318.

170 *Id.* The Air Force issued general performance specifications, and General Dynamics responded with quantitative specifications, including drawings and blueprints. *Id.* at 1320. The Eleventh Circuit held that the first element of the defense was met when the contractor incorporated government specifications into a design that "the government subsequently reviewed and approved." *Id.* at 1320 (citing *Smith*, 866 F.2d at 138).

The government's specifications contained a general proscription against chafing that applied to all aircraft. Both the industry and the Air Force acknowledged that wire tracking chafing had long been a problem both in industry and the Air Force. Despite its full knowledge of the chafing problem in the design of the aircraft, the Air Force continued to purchase F-16s after 1979. *Id.* at 1318. The government reviewed and approved the design and production methods proposed by General Dynamics. *Id.* at 1320.

171 913 F.2d 242 (5th Cir. 1990).

172 *Id.*

173 *Id.* at 247. "Defects of this nature are clearly the result of the manufacturing process, not the design process." *Id.* "Where a defect is merely an instance of shoddy workmanship, it implicates no federal interest. This distinction between 'aberrational' defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design." *Id.*
the defense is applicable to the entire product or to components of that product. This question could be very important when the failure is due to an identifiable component in a product. Components are often manufactured by more than one contractor and integrated into the final product.

The Fifth Circuit addressed this question in *Trevino*. The court recalled the Supreme Court's holding that the government does not exercise a discretionary function when it orders an item from stock. The Fifth Circuit then held that where reasonably precise specifications called for a stock component, the government contractor defense is not applicable because the choice of that component would not then be the exercise of a discretionary function.

In contrast, the district court in *Neiman v. McDonnell Douglas Corp.* held that the aircraft as a whole, rather than its components, was the basis for determining whether reasonably precise specifications existed. The court held that the product at issue was the aircraft, not the asbestos strip components, and that the decision to use these strips was a discretionary function.

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174 865 F.2d at 1474.
175 Id.
176 Id.
177 721 F. Supp. 1019 (S.D. Ill. 1989). The plaintiff sought recovery for the wrongful death of her husband, alleging that he died from asbestosis and lung cancer caused by exposure to asbestos during his employment. Plaintiff’s decedent, Vincent Niemann, was a civilian repairman, working on aircraft manufactured by General Dynamics and McDonnell Douglas. His work consisted of cleaning and repairing engine cowlings which included replacing asbestos strips. After his retirement, Mr. Niemann was diagnosed with lung cancer, and he subsequently died six months later. Id. at 1021.
178 Id. at 1023. “The products at issue before the court are the aircraft themselves, and not each individual component part, nor is this a situation wherein the government merely ordered a quantity of a product.” Id.
179 Id. It is clear that the procurement of the aircraft at issue involved a great deal more than merely a procurement officer contacting General Dynamics and McDonnell Douglas to order a quantity of these aircraft, and that the aircraft in question were indeed ‘military equipment’ and not, as plaintiff suggests, merely ‘stock products.’
V. IMPLICATIONS OF \textit{BOYLE}

A. CIVILIAN CLAIMS PRECLUDED

The Supreme Court’s decision in \textit{Boyle} opened the door to non-military applications of the government contractor defense and the preclusion of civilian claims and created great uncertainty about the future application of the government contractor defense. Civilian claims have already been barred in cases subsequent to \textit{Boyle}. For example, in \textit{Garner v. Santoro}, a civilian spray painter employed by the Navy brought suit for systemic injuries incurred due to inhaling the vapors of the paint. The Fifth Circuit held that Garner's civilian status did not automatically preclude the application of the government contractor defense in light of \textit{Boyle}. In \textit{Nicholson v. United Technologies Corp.}, the district court held that a federal civil service technician, injured while repairing helicopter landing gear, was barred from suing by the government contractor defense. In \textit{Niemann v. McDonnell Douglas Corp.}, the district court held that the defense was applicable to bar recovery by a civilian aircraft repairman's estate for his wrongful death which was allegedly caused by asbestos exposure during the course of his employment with the government.

though the asbestos strips were purchased commercially. \textit{Id.} at 1023-24. Commercial purchase was necessary because there was no military specification for the strips. \textit{Id.} 865 F.2d 629 (5th Cir. 1989).

\textit{Id.} at 631-32. “Garner had chronic hepatitis, chronic liver abnormalities, and chronic pancreatitis.” \textit{Id.} at 632. (footnote omitted). Garner’s doctor stated that it was his opinion that “the toxicity of the Seaguard epoxy paint caused Garner’s chronic pancreatitis, his hepatitis, and his liver damage.” \textit{Id.} 697 F. Supp. 598 (D. Conn. 1988).

\textit{Id.} at 605.


\textit{Id.} Plaintiff’s decedent was a civilian who repaired aircraft and was exposed to asbestos in the aircraft. He subsequently died of lung cancer. The district court held that the government exercised a discretionary function by allowing the aircraft to contain asbestos, so that the defense granted immunity to the contractor. \textit{Id.}
B. APPLICATION TO NON-Military EQUIPMENT

In Boyle, the Supreme Court held that the procurement of equipment, not just military equipment, was a uniquely federal interest. The Court’s decision was ambiguous as to whether the government contractor defense applied only to military products and military contractors or extended to any product contracted for by the government. At least one circuit has already encountered this issue. In Garner, the Fifth Circuit said Boyle applied to a variety of products but did not address whether those products had to be military products. The Fifth Circuit cited cases where the contractor had been held immune from suit even before the Boyle decision. These examples included vaccines, front end loaders, tractor-bulldozers, night vision goggles, and pizza dough mixers. In all these cases, the products were manufactured for the government, even though some of them were not specifically military products. However, the Garner court dodged the issue by finding that the paint was military equipment because it was used on Navy ships.

VI. ARGUMENTS FOR LIMITATION OF THE DEFENSE

There are many compelling arguments for limiting the government contractor defense. First, civilians lack the protection provided to military personnel under the Veteran’s Benefit Act. This leaves an injured civilian without

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187 487 U.S. at 507. “That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry.” Id.
188 Id. at 510-12. The opinion used the terms “military contractor,” “government contractor,” and “defense contractor” apparently interchangeably. Id. at 512. The examples used in the opinion concerned injuries to civilians caused by noise from “fighter planes.” Id. at 510-512.
189 865 F.2d at 635.
190 Boruski v. United States, 803 F.2d 1421 (7th Cir. 1986).
191 Tillet v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985).
195 Garner, 865 F.2d at 637-38.
a remedy if state tort law is displaced. Second, military personnel do have reasonable expectations that their equipment will not fail due to a design defect. Third, faulty products can cause several problems, such as (1) an increase in public criticism of the federal procurement process, (2) personnel’s lack of faith in their weapons, and even (3) risks to national security if a product fails in war due to a design flaw.

Fourth, the current defense does not deter either the government or the contractor from producing poorly designed products. The pre-Boyle case, In re Air Crash Disaster at Mannheim, Germany on September 11, 1982, demonstrates this lack of deterrance.196 In that case, a helicopter designed by Boeing-Vertol in accordance with Army mission and performance requirements crashed killing forty-six passengers. The court adopted the formulation of the government contractor defense established by the Ninth Circuit in McKay.197 The Third Circuit then held that the approval element is satisfied as long as there is “true government participation in the design” amounting to more than a rubber stamp.198 The Third Circuit also found that, although the Army was aware of the fatal defect and had refused to implement a correction suggested by Boeing, the government contractor defense still applied because the specifications for the helicopter represented a “military judgment.”199 In this case, potential liability

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196 769 F.2d 115 (3rd Cir. 1985), cert. denied, 474 U.S. 1082 (1986). This product liability action was brought by survivors and personal representatives of servicemen who died in the crash of an Army Chinook helicopter manufactured by Boeing-Vertol. Id. at 117.

197 Id. at 122. For a discussion of the McKay decision, see supra note 23 and corresponding text.

198 Air Crash Disaster at Mannheim, 769 F.2d at 122. The Third Circuit found that the Army had approved the design because the Army had inspected and modified the prototype helicopter, had subjected it to rigorous flight tests under severe conditions, and had disassembled and reassembled it. Id. at 123.

199 Id. at 123-25.

[T]he issue of the Army’s knowledge of the sync shaft’s tendency to fail as a result of transmission failure is irrelevant to the government contractor defense in this case. . . . [T]he Army knew that the forward transmission was hazardous and that failure of the transmission
could have created an incentive for the Army to accept this design change, and thus prevented the needless death of forty-six crew members and passengers on board that helicopter.\footnote{Id. at 124-25.}

Imposing liability on the contractor for defective products would make the contractor's bids less competitive because it would have to pay the higher costs of accidents and injuries caused by that product. This would lead to improved designs because, in order to remain competitive with manufacturers of non-defective products, government contractors would improve their products. If the contractors failed to improve their designs, government contracts would go to contractors with better products because their bids would be lower.

Fifth, not all decisions involving the design of military equipment involve military judgments. Some performance requirements are completely independent of whether the product is to be used by the military or by civilians. Regardless of whether a product is designed for military or civilian use, it should be designed reasonably.

Another reason for limiting the defense is that the government lacks the technical ability to actively oversee the development of many types of highly technical products. Thus, it is arguable whether they truly exercise discretion in selecting a design.\footnote{Id. at 118.} In almost all cases, the contractor has the greater technical expertise, with contracts often being awarded based on this expertise.\footnote{Id.} Design decisions that result in preventable death or injury of service

\footnote{The government's involvement in designing its own equipment has greatly decreased over the years. See Hurley, supra note 2, at 240-41. In the past, the government actually designed much of its own equipment and gave the contractor detailed specifications based on that design. Now, the government relies substantially, and sometimes totally, on the design expertise of the contractor, with the government assuming an advisory or monitoring role. Id.}
members should not fall within those military decisions that deserve special protection from judicial review.\textsuperscript{203}

VII. CONCLUSION: RECOMMENDATIONS FOR LIMITATIONS

There are several ways to avoid the far-reaching implications of the government contractor defense while still upholding the basic policies on which it is founded. First, the defense should not be applicable where the contractor developed engineering specifications based on general qualitative specifications provided by the government. Even with government approval, it is questionable whether the government truly exercises the degree of discretion contemplated in \textit{Dalehite}\textsuperscript{204} and interpreted by the circuit courts as being required under the elements of the \textit{Boyle} formulation of the defense.

Secondly, the contractor should be held to a reasonable standard of care within the military industry. This standard may be lower than that in a commercial industry due to the tradeoffs between military performance requirements and absolute safety. This would help eliminate the more obvious defects caused by poor design rather than by conscious trade-offs between performance and safety.

Thirdly, the courts should implement stricter standards to find informed approval and reasonably precise specifications. The active exercise of discretion contemplated by the Fifth Circuit in \textit{Trevino} could serve as a standard for the contractor to meet the defense.

In conclusion, the government contractor defense must be limited or many of Justice Brennan’s predictions may come true. Otherwise, we are all exposed to possible injury by government equipment, buildings, or products. Once injured, we may be left without a remedy, the courtroom door closed by the far-reaching impact of the government contractor defense.

\textsuperscript{203} \textit{Id.}

\textsuperscript{204} 346 U.S. at 15.
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