

NOTES

EXPANDING FEDERAL INTERESTS AND DIMINISHED PLAINTIFF RIGHTS: THE GOVERNMENT CONTRACTOR DEFENSE

The United States Supreme Court recently took another step forward in its campaign to deny plaintiffs access to the federal courts to recover for their injuries. In June, 1988, the United States Supreme Court in *Boyle v. United Technologies Corp.* affirmatively recognized the "government contractor defense" already formulated by some federal courts.¹ The government contractor defense shields manufacturers of government-procured equipment from liability for design defects in the equipment if the manufacturer can satisfy the three-prong test set forth by the *Boyle* Court. The manufacturer must show that the government approved reasonably precise specifications for the equipment. The manufacturer must also demonstrate that the equipment conformed to the government-approved specifications. Finally, the manufacturer must show that it warned the government of design dangers of which the manufacturer was aware but the government was not.²

In *Boyle*, a helicopter copilot's father sued the aircraft's manufacturer under Virginia tort law for his son's wrongful death, basing federal court jurisdiction on diversity of citizenship.³ According to the rule set forth by the Supreme Court in the landmark 1938 decision of *Erie Railroad Co. v. Tompkins*, in diversity actions a federal court must apply the law of the state in which it sits, unless an

¹ 108 S. Ct. 2510, 2518 (1988), *vacating* 792 F.2d 413 (4th Cir. 1986) *reh'g denied*, 109 S. Ct. 1182 (1989). Justice Scalia delivered the opinion of the Court. Concurring with Justice Scalia were Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy. Justices Marshall and Blackmun joined Justice Brennan in dissent. Justice Stevens filed a separate dissenting opinion. The Fourth Circuit had previously recognized such a defense in *Tozer v. LTV Corp.*, 792 F.2d 403, 404 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988).

² *Boyle*, 108 S. Ct. at 2518.

³ *Id.* at 2513.

overriding federal concern displaces state law.⁴ In the fifty years since the *Erie* decision, the Court has recognized only a few subject areas—those of “uniquely federal interest”—sufficient to oust state law.⁵ The Supreme Court considers an area one of uniquely federal interest if the Constitution and laws of the United States in some way grant the federal government control of the area.⁶ In post-*Erie* cases, the Court identified as uniquely federal interests such areas as international relations, the rights and duties of the United States under its contracts, relations between the government and military personnel, government officials' immunity, admiralty law, and interstate conflicts.⁷

Because the *Boyle* controversy did not directly implicate any of these traditional areas of federal interest, the Court had to show that the displacement of Virginia law by federal common law was a legitimate exercise of its authority.⁸ The Court did so by extending its traditional view of the concept of a uniquely federal interest. The *Boyle* Court reasoned that the government's interest in getting its work done qualified as a uniquely federal interest because that interest impinged upon two traditionally-recognized interests—the United States' contractual rights and government officials' immunity.⁹ The *Boyle* controversy implicated the government's interest in

⁴ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Federal Judiciary Act of September 24, 1789, provides that “the laws of the several states where applicable shall be applied in federal court trials, except where the Constitution, treaties, or statutes of the United States otherwise provide.” Federal Judiciary Act, ch. 34, 1 Stat. 72, 92 (1789). The Supreme Court in the 1842 decision of *Swift v. Tyson* interpreted the Federal Judiciary Act as not requiring federal courts to apply the unwritten common law of the states. 41 U.S. (16 Pet.) 166, 170 (1842). *Erie* overruled *Swift* and held that the term “laws of the several states” included common law. 304 U.S. at 77–78.

⁵ Cf. Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1030–31 (1967).

⁶ See *Boyle*, 108 S. Ct. at 2514–15.

⁷ See Hill, *supra* note 5, at 1031–49 (citing *Hinderlider v. LaPlata River Co.*, 304 U.S. 92, 110 (1938) (federal common law regarding use of interstate streams applicable to state court actions); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 214–15 (1917) (founding fathers intended that a uniform maritime law should prevail in federal court); *Pope & Talbort, Inc. v. Hawn*, 346 U.S. 406, 409–11 (1953) (same, in state court); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (rights of United States with respect to its commercial paper governed by federal law); *United States v. Standard Oil of Cal.*, 332 U.S. 301 (1947) (relationship between United States and members of armed forces governed by federal law); *Barr v. Matteo*, 360 U.S. 564 (1959) (federal law governs United States' officials' immunity); *Howard v. Lyons*, 360 U.S. 593 (1959) (same); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (federal common law applies to questions of international relations).

⁸ See *Boyle*, 108 S. Ct. at 2513–14.

⁹ *Id.* at 2514.

getting its work done, the Court concluded, because it involved the design and procurement of government equipment.

Although the *Boyle* Court settled the question of whether courts will recognize a government contractor defense, several issues remain unresolved. The Court did not define the terms "approval" of a design and "reasonably precise specifications." Rather, the Court left interpretation of these terms for later courts. In addition to its failure to define key terms, *Boyle* might also hamper the government's efficient functioning by encouraging contractors to insist on high levels of government involvement in equipment design.

This note discusses the foundations of *Boyle* and its implications for the future. Section I outlines Supreme Court jurisprudence that has developed since *Erie* concerning uniquely federal interests.¹⁰ Section II examines *Boyle*, the case in which the Supreme Court recognized a new uniquely federal interest—that of getting the government's work done.¹¹ Section III suggests that the *Boyle* Court possessed the authority to fashion federal common law, but for reasons in addition to those set forth by the majority.¹² Section III also suggests, however, that in the exercise of its common lawmaking power the *Boyle* Court should have refused to recognize the government contractor defense and instead should have relegated its creation to Congress.¹³ Finally, Section III predicts the government contractor defense's future development through analysis of lower court cases that have been decided since *Boyle*.¹⁴

I. THE TRADITIONAL CONCEPT OF A UNIQUELY FEDERAL INTEREST

Although Justice Brandeis proclaimed in *Erie* that "[t]here is no federal general common law,"¹⁵ the idea that the federal courts

¹⁰ See *infra* notes 21–67 and accompanying text for a discussion of post-*Erie* cases in which the Supreme Court recognized a uniquely federal interest sufficient to displace state law.

¹¹ See *infra* notes 68–155 and accompanying text for a brief discussion of the government contractor defense's historical development and a discussion of *Boyle v. United Technologies*.

¹² See *infra* notes 201–13 and accompanying text for a discussion of additional theories upon which the *Boyle* Court might have based its authority to fashion federal common law.

¹³ See *infra* notes 214–20 and accompanying text for a discussion of reasons why the *Boyle* Court should have deferred to Congress for creation of the defense.

¹⁴ See *infra* notes 221–29 and accompanying text for a discussion of the government contractor defense's future and for an analysis of post-*Boyle* cases. See also *infra* notes 156–200 for a summary of post-*Boyle* cases.

¹⁵ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

should fashion law in certain areas has survived.¹⁶ In some instances, the Constitution expressly grants federal control of an area.¹⁷ Federal legislation enacted under Congress's constitutional power also mandates federal control in some circumstances.¹⁸ In other instances, the federal courts' lawmaking power derives from the notion that a federal interest is involved, rather than from an express mandate.¹⁹ Where federal interests are implicated, only the displacement of state law and the application of federal law can insure that courts will fully consider federal interests in the adjudication process.²⁰

On the same day that *Erie* was decided in 1938, the United States Supreme Court first recognized a federal interest sufficient to override state law in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*²¹ The Court held that the apportionment of an interstate stream's waters could be determined only under federal common law.²² In *Hinderlider*, a ditch company sued to invalidate the actions of Colorado's state engineer under a water-sharing compact between Colorado and New Mexico.²³ The ditch company argued that Colorado's state engineer, Hinderlider, by following the water-sharing scheme, had deprived the company of water that it had a right under state law to divert.²⁴

¹⁶ Hill, *supra* note 5, at 1026.

¹⁷ *Id.* at 1030-34. For example, the Constitution grants the federal judiciary original jurisdiction over controversies to which a state is a party. U.S. CONST. art. III, § 2, cl. 1. The same section extends federal judicial power to admiralty cases.

¹⁸ Hill, *supra* note 5, at 1028-30. An example of a case in which the Court found a congressional mandate for courts to formulate federal law was *Textile Workers' Union of America v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957).

¹⁹ See Hill, *supra* note 5, at 1035.

²⁰ *Cf.* *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). This is not to say that the government will always win. See *infra* notes 50-59 and accompanying text for a discussion of a case in which the Court denied the United States recovery after consideration of federal interests. *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 314 (1947).

²¹ 304 U.S. 92 (1938), *reh'g denied*, 305 U.S. 668 (1938). The Supreme Court decided *Erie* and *Hinderlider* on the same day, April 25, 1938. Justice Brandeis delivered both opinions.

²² *Id.* at 110.

²³ *Id.* at 98-99.

²⁴ *Id.* The water-sharing agreement provided that each state would have unrestricted use of the water for the two-and-one-half month period between December 1 and February 15 of each following year. At all other times, each state had unrestricted access to the water on each day that the mean flow at the interstate station was at least 100 cubic feet per second. On days when the mean flow fell short of that mark, Colorado was required to deliver one-half of the mean flow at the Hesperus Station for the previous day. At times of low flow, state engineers had the discretion to allow use of all the water by one state at a time, on an alternating basis. *Id.* at 96-97.

In *Hinderlider*, the Supreme Court noted that it had long considered the resolution of interstate boundary disputes to be a legitimate federal interest.²⁵ The Court concluded that the apportionment of interstate streams likewise presented federal questions. The apportionment of an interstate stream, the Court reasoned, was a matter of federal common law, even where the litigants were private parties.²⁶ The case before it, the *Hinderlider* Court observed, implicated the federal interest in settling interstate disputes even though neither Colorado nor New Mexico could be made parties to the action. Thus, by categorizing the apportionment of an interstate stream as an interstate boundary dispute, the Court was able to resolve the dispute under federal common law.

The Supreme Court has also recognized that some commercial transactions implicate federal interests. In *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, decided in 1942, the Supreme Court fashioned federal common law to further the federal interest of protecting federal corporations and held that a bank's liability to the Federal Deposit Insurance Corporation involved a federal question.²⁷ In *D'Oench*, the FDIC acquired an allegedly worthless note as collateral for a loan that it issued.²⁸ When the FDIC sued in federal district court to collect on the note, the court found the maker liable under Illinois law. The United States Court of Appeals for the Eighth Circuit affirmed the decision.²⁹

The Supreme Court in *D'Oench* reversed, deciding that state law should not apply because certain provisions of the Federal Reserve Act revealed Congress's policy to protect the FDIC and the public funds entrusted to it.³⁰ The Court reasoned that it should give force to the policy evinced by the Federal Reserve Act even though, technically, the statute was inapplicable.³¹ The statute was inapplicable to the facts in *D'Oench*, the Court noted, because the maker issued the note in 1933, one year before the government created the FDIC. Therefore, reasoned the Court, the maker of the note and the bank could not have acted with the intent necessary to deceive the FDIC and violate the statute. Yet, the *D'Oench* Court

²⁵ *Id.* at 110.

²⁶ *Id.* at 110-11.

²⁷ 315 U.S. 447, 456-59 (1942), *rev'g* 117 F.2d 491 (8th Cir. 1941), *reh'g denied*, 315 U.S. 830 (1942).

²⁸ *Id.* at 456.

²⁹ 117 F.2d 491 (8th Cir. 1941), *cert. granted*, 314 U.S. 592 (1941).

³⁰ 315 U.S. at 456-57.

³¹ *See id.* at 459.

believed that because the defendant had violated the statute's underlying policy, the controversy implicated a federal interest sufficient to preempt state law.³² Thus, the *D'Oench* Court established that commercial transactions affecting federal corporations are federal in nature.

The Supreme Court also addressed uniquely federal interests in the realm of commercial transactions in the 1943 case of *Clearfield Trust Co. v. United States*.³³ The *Clearfield* Court held that federal law governs the rights and duties of the United States on its commercial paper.³⁴ In that case, an unauthorized individual obtained a pay-check issued to a Works Project Administration (WPA) employee and fraudulently cashed it at a J.C. Penney store. The store turned the check over to its bank, Clearfield Trust, and the bank collected the funds from the United States treasury.³⁵ When the government discovered the forgery, it attempted to obtain reimbursement from Clearfield Trust.³⁶ When the bank refused, the United States brought suit in federal district court. Applying Pennsylvania law, the district court held that the bank need not return the funds, because the government had not notified the bank in a timely fashion that a possible forgery was involved.³⁷

Although the federal district court applied Pennsylvania law, consistent with *Erie*, the United States Court of Appeals for the Third Circuit reversed, ruling that the *Erie* doctrine did not apply under the circumstances in *Clearfield* because federal court jurisdiction was not based on diversity.³⁸ The Supreme Court affirmed, reasoning that federal law had to prevail in cases that affected the rights and duties of the United States' commercial paper. The Court noted that the Constitution confers upon the federal government the power to disburse funds and to pay debts. The *Clearfield* Court reasoned that because the authority to issue the check derived from the Constitution and from a federal statute, the substantive rules concerning the check must also be federal. Because there was no statute on point, the Court stated, the federal courts must fashion the rule of law.³⁹ According to the *Clearfield* Court, the application

³² See *id.* at 456.

³³ 318 U.S. 363 (1943), *aff'g* 130 F.2d 93 (3d Cir. 1942).

³⁴ *Id.* at 366.

³⁵ *Id.* at 364-65.

³⁶ *Id.* at 365.

³⁷ *Id.* at 366.

³⁸ 130 F.2d 93, 94 (3d Cir. 1942).

³⁹ *Clearfield Trust*, 318 U.S. at 367.

of state law in cases involving checks drawn on the United States treasury could result in different state laws governing identical transactions, depending upon the state in which the transaction happened to occur. Therefore, the Court decided, a uniform rule was necessary.

The *Clearfield* Court formulated a uniform rule that would allow the United States to recover the funds from Clearfield Trust.⁴⁰ The United States had failed to give Clearfield Trust prompt notice of the forgery, and so the doctrine of laches applied to the United States as it would to any other drawee.⁴¹ The United States government, the Court observed, "does business on business terms."⁴² Nevertheless, the Court stated that the United States would be precluded from recovery only if its delay in notifying Clearfield Trust of the forgery had damaged Clearfield Trust.⁴³ In this way, the *Clearfield* Court extended the rule of *D'Oench* that commercial transactions affecting federal agencies implicate federal interests.

Another area of federal interest that the Supreme Court has recognized is the United States' rights and duties with respect to its employees. In the 1959 decision of *Howard v. Lyons*, the Supreme Court addressed the federal interest of immunity for government officials acting within the scope of their duty.⁴⁴ The Supreme Court held that only federal law could determine the extent of the privilege for government employees acting within the scope of their authority.⁴⁵ In *Howard*, the Boston Navy Shipyard's commanding officer wrote a letter to the Massachusetts congressional delegation, informing it that he was withdrawing his support from the union representing workers at the shipyard.⁴⁶ The letter contained allegedly defamatory statements. The *Howard* Court stated that the question of whether the commanding officer was immune from suit involved a federal question because federal officers' authority to act derives from federal sources.⁴⁷ In addition, the *Howard* Court concluded, the purpose of the immunity privilege is to promote the effective functioning of the federal government by insuring that

⁴⁰ See *id.* at 370.

⁴¹ *Id.* at 369.

⁴² *Id.* (quoting *United States v. National Exchange Bank of Baltimore*, 270 U.S. 527, 534 (1925)).

⁴³ *Id.* at 370.

⁴⁴ 360 U.S. 593, 597 (1959), *rev'g* *Lyons v. Howard*, 250 F.2d 912 (1958), *reh'g denied*, 361 U.S. 854 (1959).

⁴⁵ *Id.* at 597.

⁴⁶ *Id.* at 594.

⁴⁷ *Id.* at 597.

the threat of liability does not influence officials' actions. The Court observed that the promotion of the federal government's effective functioning was obviously a matter of federal concern.

As *Hinderlider*, *D'Oench*, *Clearfield*, and *Howard* illustrate, the courts typically apply federal law when a controversy implicates a federal interest. The cases illustrate that the Court is likely to find that a federal interest is implicated when the result will affect some government agency or employee. Absent an applicable statute or controlling precedent, the court must formulate the rule of decision.⁴⁸ Sometimes a court may exercise judicial restraint in creating its own rule, thereby relegating to Congress the duty of creating new remedies, novel causes of action, or ground-breaking defenses.⁴⁹

An example of the Supreme Court declining to create federal common law is the 1947 case of *United States v. Standard Oil Co. of California*. In *Standard Oil*, the Supreme Court held that the United States has no cause of action against tortfeasors who cause injury to military personnel, and that only Congress should create such a novel cause of action.⁵⁰ In *Standard Oil*, a truck owned by Standard Oil of California and operated by one of its employees struck and injured a soldier. The government paid for the soldier's hospitalization and continued to pay his salary throughout the term of his disability.⁵¹ The government sued Standard Oil for the expenses it incurred and for the loss of the soldier's services during the disability period. In its petition to the Supreme Court, the government claimed that it had received more than 450 reports of negligent injuries to service personnel over a three-year period, and that it continued to receive approximately forty reports every month. The government claimed that this particular suit was representative of many others.

In deciding to apply federal law in *Standard Oil*, the Supreme Court relied on the *Clearfield* reasoning.⁵² In the same way that the authority to issue commercial paper has a federal source, the Court noted, the scope and nature of the relationship between the government and persons in the armed services derives from federal

⁴⁸ See, e.g., *Clearfield Trust*, 318 U.S. at 367.

⁴⁹ Hill, *supra* note 5, at 1039.

⁵⁰ 332 U.S. 301, 314 (1947), *aff'g* *Standard Oil Co. of Cal. v. United States*, 153 F.2d 958 (9th Cir. 1946).

⁵¹ *Id.* at 302. Total cost to the government of the soldier's hospitalization was \$123.45. His pay was \$69.31 per month.

⁵² *Id.* at 305.

sources.⁵³ Because the United States has the power to establish a relationship with persons in the armed forces and to define that relationship, the Court concluded that the United States also has the power to protect the relationship from harm by third parties.

In addition to the government's interest in protecting its relationship with armed forces personnel, the government's interest in protecting its treasury also was involved in *Standard Oil*. The government argued that the cumulative effect of the hundreds of separate acts of tortious conduct against service personnel was detrimental to the government's fiscal operations. Thus, the *Standard Oil* Court stated, the government's power to protect its own fiscal welfare adds weight to the argument for preempting state law.⁵⁴

The Court stated that the preemption of state law in *Standard Oil* did not offend the *Erie* doctrine.⁵⁵ *Erie's* purpose, said the *Standard Oil* Court, was not to broaden state power over matters federal in character, nor to broaden the state power for determining which matters are federal. Rather, the Court observed, *Erie's* purpose was to bring federal judicial power under state law subjection when federal courts adjudicate matters of local interest and concern.⁵⁶ The Court reasoned that consistency and certainty would suffer were state law to control in *Standard Oil*, because the government's indemnification rights would vary depending upon the state in which a soldier was injured.⁵⁷ The Court noted that the potential for uncertainty increased because armed forces personnel move often.

In spite of its conclusion that *Standard Oil* implicated a legitimate federal interest, the Court refused to create the indemnity sought by the government and elected to leave the matter to Congress.⁵⁸ The Court noted that Congress had acted previously to protect the government's fiscal interests when necessary and would possibly do so in the future.⁵⁹ The judiciary would intrude upon a congressional prerogative, the *Standard Oil* Court reasoned, if the courts, rather than the legislature, created the indemnification. The Supreme Court has evinced this same deference to congressional authority in more recent cases.

⁵³ *Id.* at 305-06.

⁵⁴ 332 U.S. at 306.

⁵⁵ *Id.* at 307.

⁵⁶ *Id.*

⁵⁷ *Id.* at 310.

⁵⁸ *Id.* at 314.

⁵⁹ *Id.* at 315-16.

In the 1981 decision of *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Supreme Court held that a controversy may not be subject to federal judicial lawmaking even though it implicates a federal interest.⁶⁰ In *Texas Industries*, a purchaser of concrete sued the petitioner, Texas Industries, for damages arising from alleged violations of the Sherman Antitrust Act.⁶¹ The petitioner filed a third-party complaint seeking contribution against respondent.⁶² The district court dismissed the third-party complaint for failure to state a claim upon which relief could be granted because federal statutory law contained no provision allowing antitrust defendants to receive contribution from co-conspirators. The United States Court of Appeals for the Fifth Circuit affirmed the judgment, holding that the issue of whether contribution should be allowed was a matter of federal common law. After examination of the merits, the Fifth Circuit decided not to create the right of contribution.⁶³

On review, the Supreme Court observed that the legislative history of neither the Sherman Act nor the Clayton Act indicates that Congress intended a right of contribution.⁶⁴ Therefore, the *Texas Industries* Court concluded that it could create such a right only out of its power to make federal common law. In this case, however, the Court took a narrow view of its own authority to make law, asserting that such power exists only in limited areas.⁶⁵ The Court noted that the case's outcome was indirectly related to federal interests, because any decisions in the area of antitrust necessarily would supplement the federal statutory scheme.⁶⁶ Nevertheless, the Court stated, the right of contribution does not directly affect any matters "necessarily subject to federal control." Thus, the *Texas Industries* Court held, absent Congressional direction, it lacked the power to create the right of contribution.⁶⁷ The Court was reluctant to overstep its bounds and stated that only Congress has the authority to create such a right.

⁶⁰ 451 U.S. 630, 646 (1981).

⁶¹ *Id.* at 632.

⁶² 451 U.S. at 633. The plaintiff in the original antitrust suit believed that respondent was one of petitioner's co-conspirators.

⁶³ *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 900 (1979).

⁶⁴ *Texas Industries*, 451 U.S. at 639-40.

⁶⁵ *Id.* at 641. According to the *Texas Industries* Court, these areas include issues involving the rights and obligations of the federal government under its contracts, interstate and international disputes, and admiralty cases. *Id.*

⁶⁶ *Id.* at 642.

⁶⁷ *Id.* at 646.

As the cases indicate, the Supreme Court will fashion and apply federal common law to protect the government's interests when the government is dealing in the commercial marketplace. In other areas where Congress has already exercised its power, however, or where fashioning federal common law would intrude upon Congress's power, the Supreme Court is less likely to engage in judicial activism. The notion of government contractor immunity can be viewed as fitting into both categories of cases at the same time. On one hand, when the government purchases military equipment, it ventures into the commercial marketplace and may require the protection of federal common law. On the other hand, the outfitting of the Army is generally considered within the realm of Congress's discretion.

II. CREATION OF A NEW UNIQUELY FEDERAL INTEREST: THE GOVERNMENT CONTRACTOR DEFENSE

A. *Pre-Boyle Decisions*

The government contractor defense recently adopted by the Supreme Court in *Boyle v. United Technologies Corp.* shields manufacturers of government-procured equipment from liability for design defects in the equipment if the manufacturer can satisfy a three-prong test.⁶⁸ The manufacturer must show that the government approved reasonably precise specifications for the equipment, that the equipment conformed to the specifications, and that it warned the government of design dangers known to the manufacturer but not to the government.⁶⁹

This common-law defense for government contractors has evolved slowly since *Erie*.⁷⁰ The first contractor defense cases involved construction contractors working under direct government supervision.⁷¹ Cases then arose involving the liability of manufacturers for design defects in products made for use by the military

⁶⁸ 108 S. Ct. 2510, 2518 (1988).

⁶⁹ *Id.*

⁷⁰ For a more complete history of the defense, see Turner & Sutin, *The Government Contractor Defense: When are Manufacturers of Military Equipment Shielded from Liability for Design Defects?*, 52 J. AIR L. & COM. 397, 399-420 (1986); Note, *The Government Contract Defense in Product Liability Suits: Lethal Weapon for Non-Military Government Contractors*, 37 SYRACUSE L. REV. 1131, 1133-45 (1987); Note, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity After McKay v. Rockwell International Corp.*, 37 BAYLOR L. REV. 181, 193-98 (1985).

⁷¹ See, e.g., *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940).

during wartime.⁷² Later, cases came before the federal courts involving alleged negligent design of military aircraft.⁷³

The United States Court of Appeals for the Ninth Circuit recognized the government contractor defense in the 1983 decision of *McKay v. Rockwell International Corp.*⁷⁴ In *McKay*, the court held that an aircraft manufacturer is not strictly liable for design defects where the government itself is immune from suit⁷⁵ under the doctrines of *Feres v. United States*⁷⁶ and *Stencel Aero Engineering Corp. v. United States*.⁷⁷ The *Feres* doctrine states that the federal government is not liable to service personnel under the Federal Tort Claims Act for injuries sustained in the course of military service.⁷⁸ Under the *Stencel* doctrine, the United States is not required to indemnify a third party for damages paid to a member of the military.⁷⁹

In addition to holding that federal immunity is a prerequisite to defense contractor immunity, the Ninth Circuit in *McKay* held that the defense contractor must show that the equipment conformed to reasonably precise specifications that the government had established or approved.⁸⁰ The government contractor must also show that it warned the government about patent errors in the specifications or dangers in the use of the equipment of which the manufacturer was aware but the government was not.

In *Tozer v. LTV Corp.*, a 1986 case, the United States Court of Appeals for the Fourth Circuit followed the Ninth Circuit's opinion in *McKay*, holding that the government contractor defense shielded an aircraft's manufacturer from both negligent and strict liability.⁸¹ In recognizing the government contractor defense, the *Tozer* court considered separation of powers to be important.⁸² The Fourth Circuit observed that the judicial branch of the government, lacking the power to declare war or to administer the armed forces, is the

⁷² See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 534 F. Supp. 1046 (E.D.N.Y. 1982).

⁷³ See, e.g., *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988).

⁷⁴ 704 F.2d 444 (9th Cir. 1983).

⁷⁵ *Id.* at 451.

⁷⁶ 340 U.S. 135 (1950).

⁷⁷ 431 U.S. 666 (1977).

⁷⁸ *Feres*, 340 U.S. at 146.

⁷⁹ *Stencel*, 431 U.S. at 673-74.

⁸⁰ 704 F.2d at 451.

⁸¹ 792 F.2d 403, 408-09 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988).

⁸² 792 F.2d at 405. For a more detailed discussion of the policy reasons behind the defense, see Note, *The Government Contract Defense: Is Sovereign Immunity a Necessary Prerequisite?*, 52 BROOKLYN L. REV. 495, 499-506 (1986).

least involved in military affairs of the three government branches. The *Tozer* court also pointed out that the judicial branch lacks the military expertise that the other branches possess by virtue of their dedicated departments and committees. Therefore, the court concluded, the judiciary was ill-equipped to question military decisions and should defer to the other government branches.⁸³

B. *Boyle v. United Technologies Corp.*

The Supreme Court first addressed the government contractor defense issue in the 1988 case of *Boyle v. United Technologies*.⁸⁴ The *Boyle* Court held that government contractors are immune from product liability where the government approved reasonably precise specifications to which the allegedly defective equipment conformed, and where the equipment manufacturer warned the government of dangers known to the manufacturer but not to the government.⁸⁵ In *Boyle*, the father of Marine helicopter copilot David A. Boyle brought a diversity action against the Sikorsky Division of United Technologies for his son's wrongful death.⁸⁶ David Boyle died on April 27, 1983, when the helicopter in which he was flying crashed into the ocean off Virginia Beach, Virginia. Boyle survived the crash, but was unable to operate the escape hatch and was drowned.

At trial, the plaintiff presented two tort theories of recovery based on Virginia law.⁸⁷ The first theory alleged that Sikorsky had defectively repaired the helicopter's servo,⁸⁸ resulting in a malfunction that caused the crash.⁸⁹ The plaintiff also alleged that Sikorsky defectively designed the helicopter's escape hatch such that it opened outward and could not be opened against the water pressure on the submerged craft. In addition, the plaintiff contended that other equipment obstructed the escape hatch handle.⁹⁰ The jury returned a verdict in favor of the plaintiff.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the jury decision and remanded with directions to

⁸³ *Tozer*, 792 F.2d at 405-06.

⁸⁴ 108 S. Ct. 2510 (1988).

⁸⁵ *Id.* at 2518.

⁸⁶ *Id.* at 2513.

⁸⁷ *Id.*

⁸⁸ The servo is part of the helicopter's automatic flight control system.

⁸⁹ *Id.*

⁹⁰ *Id.*

enter a judgment for Sikorsky.⁹¹ The Fourth Circuit ruled, as a matter of Virginia law, that the plaintiff failed to meet the burden of proving that Sikorsky's repair work caused the malfunction.⁹² The court also concluded that as a matter of federal law Sikorsky was not liable for design defects.⁹³ In so finding, the court relied on the elements of the "military contractor defense" that it had recognized earlier that day in *Tozer*.⁹⁴

Boyle's father petitioned the Supreme Court for review of the court of appeals decision on three grounds.⁹⁵ He asserted that there was no justification in federal law for granting government contractors immunity from suits based on design defects. Even if the defense did exist, he argued, the Fourth Circuit's articulation of its elements was inappropriate. Finally, Boyle's father contended that the court of appeals should have remanded the case for determination of whether the defendant had satisfied the defense's elements.

After the Supreme Court granted certiorari, several third parties interested in the controversy's outcome filed *amicus curiae* briefs with the Court.⁹⁶ The United States, in its *amicus curiae* brief supporting affirmance of the Fourth Circuit's decision, urged the Court to recognize the government contractor defense.⁹⁷ The government claimed that, without immunity, military contractors would be reluctant to participate in designing equipment, thus depriving the government of its contractors' expertise.⁹⁸ The government also argued that, without immunity, contractors would carry the entire burden of judgments in military equipment design defect cases,

⁹¹ *Id.*

⁹² *Id.* The appellate decision is reported at 792 F.2d 413 (4th Cir. 1986).

⁹³ *Id.*

⁹⁴ *Id.* See *supra* notes 81-83 and accompanying text for a discussion of the Fourth Circuit's opinion in *Tozer*.

⁹⁵ *Boyle*, 108 S. Ct. at 2513.

⁹⁶ The following is a partial list of parties filing *amicus curiae* briefs in the case: Joan S. Tozer (plaintiff in *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988)); Edwin Lees Shaw (party in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988)); Bell Helicopter; UNR Industries, Inc. The following corporations joined with several manufacturing associations in filing a joint brief on behalf of respondent: The Boeing Company, Eaton Corp., Emerson Electric Co., FMC Corp., The Goodyear Tire & Rubber Co., Hughes Aircraft Co., IBM Corp., ITT Defense Technology Corp., Litton Industries, Inc., Martin Marietta Corp., McDonnell Douglas Corp., Motorola, Inc., Oshkosh Truck Corp., Raytheon Co., Rockwell International Corp., The Singer Co., Texas Instruments, Inc., and Unisys Corp.

⁹⁷ Brief for United States as *Amicus Curiae* Supporting Affirmance at 13, *Boyle v. United Technologies*, 108 S. Ct. 2510 (1988) (No. 86-492).

⁹⁸ *Id.*

because the government is generally immune from suit in such cases.⁹⁹

An *amicus curiae* brief filed on petitioner's behalf stressed that in 1984 the government had urged Congress not to create the defense.¹⁰⁰ Testifying before a congressional subcommittee, a defense department representative stated that the government desired contractor liability because it promoted safety.¹⁰¹ The government representative asserted that the government preferred to contract for goods in a commercial-type marketplace where suppliers protect themselves from liability by obtaining insurance.¹⁰² This brief suggested that the government's change of position on the contractor liability issue in *Boyle* represented an attempt to relieve defense-industry pressure on Congress to grant contractor immunity.¹⁰³ The Court addressed the arguments before it, beginning with the petitioner's contention that the federal judiciary lacked the power to create the defense.

1. The Court's Authority to Create the Defense

Prior to *Boyle*, some federal court decisions that recognized the government contractor defense, most notably *Tozer v. LTV Corp.* and *McKay v. Rockwell International Corp.*, arose in the context of maritime statutory law.¹⁰⁴ Thus, jurisdiction was not based on diversity, and the courts did not have to contend with the *Erie* doctrine.¹⁰⁵ In *Boyle*, however, federal court jurisdiction was based on diversity,¹⁰⁶ and so the Court was forced to confront *Erie*.

⁹⁹ *Id.* at 13-14.

¹⁰⁰ Brief for Edwin Lees Shaw as *Amicus Curiae* on Behalf of Petitioner at 27-29, *Boyle v. United Technologies*, 108 S. Ct. 2510 (1988) (No. 86-492).

¹⁰¹ *Id.* (citing *Hearings on HR 4083 and HR 4199 Before the Subcommittee on Administrative Law and Government Relations of the Committee on the Judiciary*, 99th Cong., 2d Sess. 48 (1984)).

¹⁰² Brief for Edwin Lees Shaw as *Amicus Curiae* on Behalf of Petitioner at 27-29, *Boyle v. United Technologies*, 108 S. Ct. 2510 (1988) (No. 86-492).

¹⁰³ *Id.* at 28-29.

¹⁰⁴ *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 446-47 (9th Cir. 1983); *Tozer v. LTV Corp.*, 792 F.2d 403, 404 (4th Cir. 1983), *cert. denied*, 108 S. Ct. 2897 (1988). Federal court jurisdiction in both cases was based on the Death on the High Seas Act, 46 U.S.C. §§ 761-767 (1982).

¹⁰⁵ Even if the plaintiffs in *Tozer* and *McKay* had brought their claims under general maritime theories, the federal courts likely would have applied federal common law. The Constitution extends federal court jurisdiction to admiralty matters. U.S. CONST. art. III, § 2, cl. 1. The Supreme Court has interpreted this provision to mean that admiralty cases require a uniform rule. Hill, *supra* note 5, at 1032. It is now well settled that federal common law applies in most admiralty cases.

¹⁰⁶ *Boyle*, 108 S. Ct. at 2513.

Boyle's first assignment of error was that because no legislation shielded government contractors from liability, there was no basis for judicial recognition of the defense. The Supreme Court rejected this argument, noting that the controversy involved a "uniquely federal interest."¹⁰⁷ Uniquely federal interests, stated the Court, are those that the Constitution and laws of the United States so commit to federal control that state law is preempted, even where *Erie* would otherwise apply.¹⁰⁸

The Court declared that the controversy in *Boyle* bordered on two areas that the Court had called uniquely federal interests.¹⁰⁹ The first area, the Court noted, was the United States' rights and duties under its contracts.¹¹⁰ The Court observed that, although *Boyle* did not involve the United States' rights or obligations under any contract, the manufacturer's liability arose out of the performance of a contract with the United States.¹¹¹ According to the *Boyle* Court, such liability was so closely related to the contract that, until 1962, Virginia allowed only purchasers of products and those in privity with the seller to bring design defect suits.

The second area of uniquely federal interest upon which *Boyle* impinged was the liability of federal officials for actions taken in the line of duty.¹¹² The Court observed that, although *Boyle* involved the performance of a government contract by a private party rather than the official action of a government official, the two situations were analogous.¹¹³ Both situations, the Court stated, "obviously implicated the same interest in getting the government's work done."¹¹⁴ The *Boyle* Court then extended to procurement contractors what it viewed as the same immunity already granted to performance contractors.¹¹⁵ The Court reasoned that contractors ful-

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2514.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 590-94 (1973); *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *National Metro. Bank v. United States*, 323 U.S. 454, 456 (1945); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943)).

¹¹¹ 108 S. Ct. at 2514.

¹¹² *Id.* (citing *Westfall v. Erwin*, 108 S. Ct. 580 (1988); *Howard v. Lyons*, 360 U.S. 593, 597 (1959); *Barr v. Matteo*, 360 U.S. 564, 569-74 (1959); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927) (*per curiam*); *Spaulding v. Vilas*, 161 U.S. 463 (1896); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872)).

¹¹³ *Boyle*, 108 S. Ct. at 2514.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2514-15 (citing *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940)). In *Yearsley*, the Court held that if the Constitution grants Congress the authority to carry out

filling government procurement contracts could not be liable as long as the Constitution conferred authority upon the government to make the contract and to obtain the equipment.¹¹⁶

In dissent, Justice Brennan sharply criticized the Court for offending the notions of federalism set forth in *Erie*.¹¹⁷ Prior to *Erie*, Justice Brennan noted, federal courts were generally free to establish rules of federal common law when sitting in diversity, unless a state statute otherwise controlled.¹¹⁸ Justice Brennan observed that *Erie* sharply limited this power of the federal courts by requiring them to apply state law except in matters that the Constitution or congressional acts governed. According to Justice Brennan, the *Erie* Court branded federal common lawmaking an unconstitutional invasion of states' authority.¹¹⁹ Thus, concluded Justice Brennan, the Court should exercise restraint and proclaim federal common law only in such special, recognized instances as admiralty, interstate and international conflicts, and disputes concerning the United States' contractual rights and duties.

Justice Brennan noted that because the electorate, through its representatives, usually decides whether to displace state law, the decision is not one for the courts.¹²⁰ Justice Brennan observed that Congress had not granted immunity to contractors at the time *Boyle* was decided.¹²¹ In fact, he noted, Congress had defeated several bills on the subject in the decade prior to *Boyle*.¹²² Therefore, Justice Brennan concluded, the Court had overstepped its authority in creating the defense.

The dissent also noted that the majority did not pretend that the newly-proclaimed government contractor defense fit within any of the handful of uniquely federal interests already recognized.¹²³ The dissent considered the mere fact that the majority was able to list some federal interests — which Justice Brennan called "inapplicable" — insufficient support for the conclusion that government contractors' liability was also an important federal interest

the project, then the contractor performing the work could not be liable for exercising Congress's will. 309 U.S. at 20-21.

¹¹⁶ *Boyle*, 108 S. Ct. at 2515-16.

¹¹⁷ *Id.* at 2520-21 (Brennan, J., dissenting).

¹¹⁸ *Id.* at 2520 (Brennan, J., dissenting).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 2519-21 (Brennan, J., dissenting).

¹²² *Id.* at 2519-20 & n.1 (Brennan, J., dissenting).

¹²³ 108 S. Ct. at 2521 (Brennan, J., dissenting).

that the Court must protect.¹²⁴ Justice Brennan viewed the interests implicated in *Boyle* as collateral to the government contract, not intimately tied up in it.¹²⁵ According to the dissent, the fact that the government might be forced to pay a premium for designs that exposed the manufacturer to liability was insufficient cause for the Court to intervene: the government's interest in the outcome of the dispute was "too speculative and remote" to displace state law.¹²⁶

2. The Court's Justification for the Creation of the Defense

The *Boyle* Court noted that the classification of an area as one of "uniquely federal interest" was a necessary, but not a sufficient, condition for the preemption of state law.¹²⁷ According to the Court, for preemption to occur, a "significant conflict" must exist between a federal policy or interest and the application of state law.¹²⁸ Alternatively, stated the Court, courts may preempt state law where its application would "frustrate specific objectives" of the federal legislation.

The *Boyle* Court noted that the Fourth Circuit in *Tozer* had attempted to define situations in which a significant conflict with federal interests would exist.¹²⁹ The Fourth Circuit, observed the *Boyle* Court, looked to the *Feres* doctrine for guidance.¹³⁰ The Court noted that the Fourth Circuit saw a conflict between adopting *Feres*, which states that the federal government is not liable to military personnel for injuries sustained in the course of service, and continuing the common law policy of military contractor liability. According to the Fourth Circuit, the *Boyle* Court observed, the purpose of *Feres* was to protect the government's pocketbook.¹³¹ The Fourth Circuit, noted the *Boyle* Court, reasoned that military contractors who incurred liability for defective designs would pass the liability costs on to the government, thus increasing the cost of government procurement.

¹²⁴ *Id.* at 2521-22 (Brennan, J., dissenting) (citing *Yazell v. United States*, 382 U.S. 341, 352 (1966)).

¹²⁵ *Id.* at 2523 (Brennan, J., dissenting).

¹²⁶ *Id.* (quoting *Miree v. DeKalb County*, 433 U.S. 25, 32-33 (1977) (quoting *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33-34 (1956))).

¹²⁷ *Boyle*, 108 S. Ct. at 2515.

¹²⁸ *Id.*

¹²⁹ *Id.* at 2517 (citing *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986)).

¹³⁰ *Id.* at 2517. See *supra* notes 76-78 and accompanying text for a discussion of the *Feres* doctrine.

¹³¹ See *Boyle*, 108 S. Ct. at 2517.

The *Boyle* Court rejected the Fourth Circuit's reasoning in *Tozer* because it produced results that were both too broad and too narrow.¹³² The results under *Tozer* would be too broad, according to the Court, because the defense would cover injuries caused by equipment purchased from stock if the test were whether the plaintiff could sue the government under *Feres*. The Court stated that the results would also be too narrow, however, because the *Feres* doctrine covers injuries to military personnel only and not injuries to civilians.¹³³

Having rejected the *Feres* doctrine, the *Boyle* Court turned to the Federal Tort Claims Act for guidance.¹³⁴ The Court noted that section 1346(b) of the Act exempts from the government's consent to be sued any complaints based on acts or omissions committed by government agencies or employees in the exercise of a discretionary function.¹³⁵ The Court reasoned that the selection of designs for military equipment was a discretionary function, and therefore needed to be protected.¹³⁶ Permitting tort suits against contractors, reasoned the Court, would result in judgments being passed on to the United States.¹³⁷ This, the Court stated, could interfere with the exercise of the military's discretion in choosing equipment.¹³⁸

Adopting the other elements of the Fourth Circuit's defense, the *Boyle* Court ruled that a plaintiff may not impose liability on a contractor if the government approved reasonably precise equipment specifications, if the equipment conformed to those specifications, and if the supplier warned the United States about dangers in the design that were known to the supplier but not to the gov-

¹³² *Id.*

¹³³ *Id.* As an example of a suit civilians could bring if the Court adopted the *Feres* test, the *Boyle* Court suggested a suit against the manufacturer of jet fighters for harm caused by high levels of noise. *Id.* This, stated the Court, would result in state law regulation of the type of jet engines ordered by the military.

¹³⁴ *Id.*

¹³⁵ *Id.* Section 2680(a) of the Federal Tort Claims Act states that the consent to suit shall not apply to:

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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.

28 U.S.C. § 2680(a) (1982).

¹³⁶ *Boyle*, 108 S. Ct. at 2517.

¹³⁷ *Id.* at 2518.

¹³⁸ *See id.*

ernment.¹³⁹ The Court stated that the requirement of government approval of specifications and equipment conformance to those specifications was necessary to ascertain whether the situation was one in which the government's discretionary function to procure equipment was in danger of frustration. For example, observed the Court, a procurement officer who orders a piece of equipment from stock does not have a significant interest in the defective feature.¹⁴⁰ The requirement that manufacturers inform the government of known design dangers, the Court reasoned, would encourage contractors to disclose such design defects and allow the government to make an informed decision whether to procure the equipment.

In adopting the criteria set forth by the Fourth Circuit, the *Boyle* Court expressly rejected criteria suggested by the Eleventh Circuit in a similar case.¹⁴¹ The *Boyle* Court noted that in the 1985 case of *Shaw v. Grumman Aerospace Corp.* the United States Court of Appeals for the Eleventh Circuit held that a contractor would not be liable for design defects if that contractor did not participate, or participated only minimally, in designing defective equipment or if the government told the contractor to proceed after the contractor warned the government of the design's dangers.¹⁴² The criteria established by the Eleventh Circuit, reasoned the *Boyle* Court, would not advance the protection of the government's discretionary functions, because the government might make a policy decision to proceed with a design regardless of whether the government or the contractor originated the design.¹⁴³

The Court remanded *Boyle* to the Fourth Circuit for clarification of its earlier ruling.¹⁴⁴ The Court instructed the Fourth Circuit to enter judgment in favor of Sikorsky if the court held that no reasonable jury could find that the defendant had not met the elements of the defense. Alternatively, the Court instructed the Fourth Circuit to put the question of whether the defendant had satisfied the elements of the defense to a jury.

In his dissent, Justice Brennan criticized the majority's use of the Federal Tort Claims Act's discretionary-function exception in

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2516.

¹⁴¹ *Id.* (rejecting *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985), cert. denied, 108 S. Ct. 2896 (1988)).

¹⁴² *Boyle*, 108 S. Ct. at 2518 (citing *Grumman*, 778 F.2d at 745-46).

¹⁴³ *Boyle*, 108 S. Ct. at 2518.

¹⁴⁴ *Id.* at 2519.

support of the defense.¹⁴⁵ The Federal Tort Claims Act had no direct bearing in the case, argued Justice Brennan, because the government was not a party to the suit.¹⁴⁶ He also argued that, even if contractors were liable, the government would still be able to obtain equipment of a specific design.¹⁴⁷ The dissent suggested that the majority actually feared that the government would not be able to get the equipment it wanted at the price it wanted to pay. The dissent reasoned that this concern did not warrant extension of immunity to contractors.

Justice Brennan foresaw many dangers in the newly-created defense because of its "breathtakingly sweeping" scope.¹⁴⁸ The defense, observed Justice Brennan, would be available not only to military equipment manufacturers, but also to manufacturers of almost anything the federal government purchases after reviewing its design, including everything from "NASA's Challenger space shuttle to the Postal Service's old mail cars."¹⁴⁹ Justice Brennan also feared that government approval of specifications might consist of little more than a rubber stamping of the manufacturer's plans.¹⁵⁰

In addition, the dissent suggested that contractors might use the defense against civilians as well as against military personnel and government employees.¹⁵¹ Justice Brennan hypothetically asked what would have happened had the helicopter crashed *on* Virginia beach instead of in the water. The dissent reasoned that in such a case the manufacturer could have raised the defense against children who had been injured while playing on the beach, just as Sikorsky raised the defense against David Boyle's father.

Moreover, contended the dissent, the defense would apply even where there was no evidence that the government intentionally "sacrificed safety" for some other feature, such as speed, agility, or efficiency.¹⁵² Nor would it matter whether the piece of equipment was something most people would not consider dangerous, observed Justice Brennan. Thus, he reasoned, if a contractor designed a building and a wall collapsed due to poor design, the contractor

¹⁴⁵ *Id.* at 2525 (Brennan, J., dissenting).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2526 (Brennan, J., dissenting).

¹⁴⁸ *Id.* at 2520 (Brennan, J., dissenting).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2519 (Brennan, J., dissenting).

¹⁵¹ *Id.* at 2520 (Brennan, J., dissenting).

¹⁵² *Id.*

could raise the defense if the government had approved the design.¹⁵³ According to Justice Brennan, the defense would be successful no matter how blatant the defect was or how easily the contractor might have remedied it.

Justice Brennan referred to the fact that the third element of the defense requires that the manufacturer warn the government about dangers of which the manufacturer is aware but the government is not.¹⁵⁴ This standard requires courts to examine whether the manufacturer had actual knowledge — not whether the manufacturer knew or should have known of the danger.¹⁵⁵ Thus, argued Justice Brennan, the manufacturer would avoid liability even where it negligently failed to discover a defect, as long as the specifications — no matter how dangerous — were reasonably precise.

C. *Post-Boyle Developments*

Since *Boyle*, some federal courts have announced decisions that further elaborate on the *Boyle* standard. Despite Justice Brennan's prediction in the *Boyle* dissent that the government contractor defense would result in denial of recovery to those injured in nonmilitary accidents, courts have not thus far extended the defense to nonmilitary situations. Courts have, however, extended the defense to include application in failure to warn claims. In addition, some federal court cases have shed additional light on the meaning of "approval" under the defense.

In 1988, the United States District Court for the District of Hawaii declined to apply the contractor defense in a nonmilitary context in *In re Hawaii Federal Asbestos Cases*.¹⁵⁶ The court in that case held that the government contractor defense is unavailable where there is no conflict between the defendant's contractual duty to the government and its state law duty to warn. Plaintiffs based their claim upon the failure of asbestos insulation manufacturers to warn them of the dangers asbestos exposure presents.¹⁵⁷ The court noted that government specifications in this situation neither require nor forbid any particular warnings. Thus, the asbestos manufacturers could have complied with their state tort law duty to

¹⁵³ *Id.*

¹⁵⁴ *See id.* at 2520 (Brennan, J., dissenting).

¹⁵⁵ *See id.* (Brennan, J., dissenting).

¹⁵⁶ 715 F. Supp. 298 (D. Haw. 1988).

¹⁵⁷ *Id.* at 299-300.

warn without being in conflict with their contractual duty to the government.¹⁵⁸ The government contractor defense was also unavailable to the defendants, reasoned the court, because *Boyle* applies only to military equipment and because asbestos insulation does not qualify as military equipment.¹⁵⁹ Thus, the combination of the unexcused failure to warn and the nonmilitary nature of the asbestos persuaded the court to decline to apply the government contractor defense.

Courts have also elaborated on other aspects of the *Boyle* test. The United States Court of Appeals for the Fifth Circuit recently addressed the definition of "approval" under *Boyle*. In the 1989 case of *Smith v. Xerox Corp.*, the Fifth Circuit held that a weapons simulator manufacturer had satisfied the *Boyle* standard. In *Smith*, a soldier sued for injuries he sustained when an explosive cartridge in a shoulder-mounted VIPER weapon simulator discharged prematurely.¹⁶⁰ The soldier alleged that Xerox, the equipment manufacturer, negligently designed or manufactured the unit. In addition, he claimed that Xerox failed to warn him that the weapon simulator might fire spontaneously when armed despite previous similar malfunctions. Xerox claimed immunity under the government contractor defense.¹⁶¹

The Fifth Circuit first considered whether the government had approved the design for the VIPER simulator. In concluding that the government did approve the specifications, the *Smith* court noted that the government had supplied the environmental specifications that it wanted the VIPER to meet.¹⁶² In addition, a Xerox employee involved in the VIPER's development testified in an un-rebutted deposition that the government reviewed and approved Xerox's final drawings for the VIPER. Although Xerox did not produce complete specifications for the VIPERS at trial, the court noted that Xerox did produce a list of the specifications and a production contract that contained specific references to govern-

¹⁵⁸ *Id.* at 300. The United States District Courts for the Eastern and Southern Districts of New York made a similar holding in an asbestos case. *In re Joint Eastern and Southern District Asbestos Litig.*, 715 F. Supp. 1167, 1168 (E.D.N.Y. 1988). See also *Dorse v. Armstrong World Indus., Inc.*, 716 F. Supp. 589 (S.D. Fla. 1989).

¹⁵⁹ *In re Hawaii*, 715 F. Supp. at 300.

¹⁶⁰ 866 F.2d 135, 136 (5th Cir. 1989).

¹⁶¹ *Id.*

¹⁶² *Id.* at 138. The environmental specifications included temperature, humidity, and salt resistance.

ment-approved specifications. Thus, the court concluded that Xerox had met its burden of proof on the issue of government approval of the specifications.¹⁶³

The *Smith* court next examined whether the VIPER conformed to the government-approved specifications. The court concluded that it did, because a Xerox employee testified at his deposition that government inspectors were present on the assembly line and that each unit was routinely given a functional test. The plaintiff was unable to produce contradictory evidence to show that the VIPER did not conform to specifications. Thus, the *Smith* court reasoned, the district court could reasonably have concluded that the second prong of *Boyle* was satisfied.¹⁶⁴

Lastly, the court examined the third prong of the *Boyle* test—whether the manufacturer warned the government of dangers of which it was aware but the government was not. The plaintiff argued that Xerox knew that the VIPER might misfire because it had modified another system; the CHAPPARAL, to prevent similar accidents in humid conditions. The plaintiff further argued that, because Xerox did not tell the government that the VIPER might misfire, Xerox could not rely on the government contractor defense.¹⁶⁵

The Fifth Circuit agreed with the district court's finding that the VIPER and the CHAPPARAL were sufficiently different from one another such that Xerox's knowledge of problems with the CHAPPARAL could not result in knowledge of problems with the VIPER being imputed to Xerox.¹⁶⁶ In addition, the court noted that reports of previous similar misfirings amounted to unconfirmed hearsay. Even if similar accidents had occurred, reasoned the *Smith* court, the government would have known about them because the government requires the military to file accident reports. The court therefore concluded that Xerox could not have possessed information that the government did not also have.¹⁶⁷ Thus, the detailed

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 139.

¹⁶⁶ *Id.* The court noted that the CHAPPARAL was intended to be stored outdoors and had originally been designed such that it filled with water whenever it rained. When Xerox learned of misfires with the CHAPPARAL, it redesigned the weapon's housing and changed the circuit board that fired the weapon so that a larger charge would be required to set it off. The VIPER, on the other hand, was never supposed to be stored outside. VIPERS were stored in carrying cases to prevent exposure to the elements.

¹⁶⁷ *Smith*, 866 F.2d at 139.

factual findings of the district court allowed the Fifth Circuit to elaborate on the three-prong *Boyle* test.

On the same day that it decided *Smith v. Xerox*, the Fifth Circuit also decided *Trevino v. General Dynamics Corp.*¹⁶⁸ The *Trevino* court held that a corporation that had designed a submarine modification had not satisfied the three-prong *Boyle* test. In *Trevino*, survivors of five Navy divers killed in a submarine accident brought a products liability action against the designer of the submarine's diving chamber. On January 16, 1982, the diving chamber's ventilation valve, which was supposed to allow air into the flooded chamber, did not open fully. A vacuum formed when the divers drained the chamber, and they were killed.¹⁶⁹ General Dynamics asserted the government contractor defense in response to the plaintiffs' allegations that the design lacked sufficient safety features such that a diver would know that the system was drawing a vacuum or such that the system would automatically prevent this condition.¹⁷⁰

As it did in *Smith v. Xerox*, the Fifth Circuit first analyzed whether the government "approved" the design under the *Boyle* standard.¹⁷¹ In this case, the *Trevino* court held that this element was not satisfied.¹⁷² The court reasoned that although all of the design drawings for the diving chamber were signed by a government employee, mere acceptance of the design without substantive review is no more than a rubber stamping.¹⁷³ The court observed that the Navy had granted a low priority to the design work because of more important work in progress at the shipyard where the submarine was being retrofitted. The Navy assigned its less-experienced engineers and technicians to this project and brought in "farm-in" personnel to do much of the work, the *Trevino* court observed. In addition, the court noted, the Navy's investigation of the accident revealed that the lack of formal Navy design review contributed to the problem with the chamber's design.¹⁷⁴ The Navy had, in the court's view, delegated its discretion to General Dynam-

¹⁶⁸ 865 F.2d 1474 (5th Cir. 1989).

¹⁶⁹ *Id.* at 1476.

¹⁷⁰ Divers could not operate the ventilation valve handwheel control from inside the chamber's bubble. There was no lighted position indicator on the valve control, nor were there any remote valve position indicators, vacuum gauges, interlocks, or warning devices. *Id.* at 1477-78.

¹⁷¹ *Id.* at 1479.

¹⁷² *Id.* at 1487.

¹⁷³ *See id.* at 1480.

¹⁷⁴ *Id.* at 1486-87.

ics.¹⁷⁵ The *Trevino* court stated that the judiciary's function is not to evaluate the quality of the government's design review.¹⁷⁶

The *Trevino* court noted that the Navy had reviewed the drawings for compliance with a 339-page circular of requirements. The court, however, termed this review a "mere review for compliance with very general performance criteria," and stated that such review was insufficient to satisfy *Boyle*.¹⁷⁷ Thus, the *Trevino* court concluded, the district court was correct in holding that General Dynamics had not satisfied the approval element of the *Boyle* standard and therefore could not shield itself with the government contractor defense.¹⁷⁸

The Fifth Circuit declined to rehear *Trevino*.¹⁷⁹ Circuit Judge Jolly filed an opinion dissenting from the denial of rehearing. Judge Jolly stated that he believed both that *Trevino* had rewritten the *Boyle* test and that *Trevino* was at odds with *Smith v. Xerox*.¹⁸⁰

According to Judge Jolly, the *Boyle* Court deliberately chose the word "approve," rather than a stronger synonym, such as "endorse," in formulating the first prong of the test.¹⁸¹ He claimed that *Trevino*

¹⁷⁵ See *id.* at 1486.

¹⁷⁶ *Id.* The court stated that the proper focus of examination was:

[W]hether the government actually exercised design discretion. If the government intended to exercise its discretion over the design of a product and a government official undertakes to substantially review, evaluate, and then approve the design, the first element of the *Boyle* test is satisfied even if the government official doing the review was incompetent or negligent. The government's use of clearly unqualified individuals to review and approve highly technical design work, however, may be evidence that the government does not intend to exercise design discretion but is merely rubber-stamping the contractor's design specifications

Id. at n.12.

¹⁷⁷ *Id.* at 1476 & n.14.

¹⁷⁸ *Id.* at 1487. The court found it unnecessary to examine the second prong of *Boyle* because the Navy performed the actual construction work without General Dynamics's participation. In addition, the court did not need to examine the third *Boyle* element because a finding that any of the elements are unsatisfied precludes use of the defense. The court noted, however, that the third element would not have been satisfied in any event because both General Dynamics and the Navy could see that the design lacked safety features. *Id.*

¹⁷⁹ 876 F.2d 1154, 1155 (5th Cir. 1989).

¹⁸⁰ *Id.* at 1155 (Jolly, J., dissenting).

¹⁸¹ *Id.* Judge Jolly noted that the *Boyle* Court might have used several synonyms, as illustrated by this list:

Approve the most widely applicable, may indicate varying degrees of admiration. *Endorse* (or *indorse*), stronger than *approve*, implies expression of support, often by public statement. *Sanction* adds authorization, usually official, to ap-

had rewritten *Boyle* because *Trevino* defined "approved" to mean "established."¹⁸² Judge Jolly cited passages in *Trevino* that referred to "approval" in terms of choosing a design feature, making policy choices, and substantively reviewing and evaluating a design.¹⁸³ In addition, Judge Jolly argued that *Trevino* did not allow courts to assume that the government had approved a design by continuing to use it—"defect and all"—for a thirteen-year period.¹⁸⁴

Agreeing that "approval" and "rubber stamping" were not the same thing, Judge Jolly argued that the government's involvement level in *Trevino* went beyond rubber stamping.¹⁸⁵ Judge Jolly noted that the Navy had furnished General Dynamics with 339 pages of specifications and had assigned a review team to the project. Judge Jolly would hold that, if the government had considered General Dynamics's plans and had assented affirmatively to them, the approval standard was satisfied. Alternatively, he would hold that if the government had known of the defect but had accepted the design for a period of years without complaint, then the design was approved within the meaning of *Boyle*. The appropriate inquiry under *Boyle*'s first prong, he suggested, is to examine whether the allegedly defective feature's characteristics were disclosed with reasonable precision in the design documents that the government accepted. If so, he would then ask whether a government official who possessed the duty and authority—and knew that he or she possessed the duty and authority—to accept or decline the challenged feature on safety grounds had accepted the design.¹⁸⁶

Judge Jolly also believed that *Trevino* could not comfortably coexist with *Smith v. Xerox*. The court's focus in *Smith*, he observed, was different from that in *Trevino*. In *Trevino*, the Fifth Circuit discussed in detail the meaning of the term "approval," Jolly noted. In *Smith*, the focal point was the specifications in evidence and whether they were sufficiently precise such that the government could have approved them.¹⁸⁷ Thus, Judge Jolly concluded that if

proval. *Certify* and *accredit* imply official endorsement gained upon conforming to set standards. *Ratify* refers to making legal by formal official approval.

Id. at 1155 (quoting THE AMERICAN HERITAGE DICTIONARY (Second College Edition 1982)).

¹⁸² See *Trevino*, 876 F.2d at 1155 (Jolly, J., dissenting) (citing *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1479 (5th Cir. 1989)).

¹⁸³ *Id.* (Jolly, J., dissenting) (citing *Trevino*, 865 F.2d at 1479, 1480, 1484, and 1487, n.12)).

¹⁸⁴ *Id.* at 1155 (Jolly, J., dissenting).

¹⁸⁵ *Id.* at 1156 (Jolly, J., dissenting).

¹⁸⁶ *Id.*

¹⁸⁷ See *id.* at 1156 (Jolly, J., dissenting).

Smith had followed *Trevino*, *Smith's* outcome would have been different because there was little evidence in *Smith* concerning the extent of the government's review.¹⁸⁸

The United States Court of Appeals for the Fourth Circuit also addressed the meaning of "approval" under *Boyle* in 1989. In *Ramey v. Martin-Baker Aircraft Co.*, the Fourth Circuit held that a government contractor was entitled to immunity under *Boyle*. In *Ramey*, an aircraft mechanic sued the manufacturer of a military jet's ejection seat for injuries he sustained when the seat's explosive discharged while the mechanic attempted to remove the seat.¹⁸⁹ In holding that the defendant was entitled to the government contractor defense's protection, the court noted that there were two methods by which the defendant could satisfy the approval standard.¹⁹⁰ The *Ramey* court noted that the "length and breadth" of the government's experience with the equipment, coupled with the government's decision to continue using it, would be enough to constitute approval. Alternatively, the defense is available where approval is more than a rubber stamping. The military's participation in the design process was more than rubber stamping, the court reasoned, because the military had issued original specifications for the seat, had inspected and tested the seat's components, and had examined a mock-up of the seat.¹⁹¹

The plaintiff in *Ramey* did not allege that the ejection seat did not conform to specifications. Thus, the *Ramey* court concluded that it did not need to examine whether the defendant had satisfied the second *Boyle* prong. Also, the court noted that because the military possessed full knowledge of the dangers to mechanics of removing the ejection seat, the third and final prong of the *Boyle* test had been met. Thus, the *Ramey* court concluded, the government contractor defense shielded Martin-Baker from liability for *Ramey's* injuries.¹⁹²

The United States Court of Appeals for the Eleventh Circuit recently has shed some light on the *Boyle* standard. The Eleventh Circuit held in the 1989 case of *Harduvel v. General Dynamics Corp.* that a military aircraft's manufacturer was shielded from liability under *Boyle*.¹⁹³ In *Harduvel*, an Air Force Captain's widow sued the manufacturer of the F-16 fighter jet in which her husband was

¹⁸⁸ *Id.* Both cases were decided on the same day, so neither was precedent for the other.

¹⁸⁹ 874 F.2d 946, 947 (4th Cir. 1989).

¹⁹⁰ *Id.* at 950.

¹⁹¹ *Id.*

¹⁹² *Id.* at 951.

¹⁹³ 878 F.2d 1311 (11th Cir. 1989).

killed. On November 15, 1982, Captain Harduvel's plane crashed into the back of a mountain ridge in South Korea. Expert witnesses testifying on General Dynamics's behalf theorized that Captain Harduvel had been suffering severe side effects from taking an antibiotic, and that nausea and discomfort caused him to lose control of his aircraft. Plaintiff's experts blamed the crash on a massive electrical failure in the F-16 that caused the flight instruments to malfunction. This malfunction caused Captain Harduvel to become disoriented in the clouds because he could not ascertain the position of his wings or the direction in which his jet's nose was pointed. The electrical failure's cause, hypothesized the plaintiff's experts, was chafing of the plane's wires—rubbing of the wires against each other and against the structural members of the aircraft.¹⁹⁴

At trial, the jury awarded the plaintiff \$3.1 million, specifically finding that General Dynamics negligently designed and manufactured the F-16. In addition, the jury found that the government contractor defense, as it existed before *Boyle*, was unavailable to General Dynamics.¹⁹⁵ The primary question before the Eleventh Circuit on review was *Boyle's* effect on the trial court's decision.¹⁹⁶

In holding that General Dynamics was immune from suit under *Boyle*, the Eleventh Circuit first addressed the plaintiff's argument that a finding of negligent manufacture under state law precluded application of the government contractor defense. The *Harduvel* court reasoned that, because the government contractor defense was a federal common law creation, determination of whether a defect should be characterized as a design or a manufacturing flaw was also a matter of federal common law.¹⁹⁷ The court characterized Mrs. Harduvel's claim as one of defective design, stating that if a defect is something that is inherent in a product or system that the government has approved, the defense will apply.¹⁹⁸ The plaintiff, the court noted, had offered into evidence a training videotape that General Dynamics had produced to instruct Air Force personnel about the dangers of wire chafing. The court viewed this tape as indicating that wire chafing problems are inherent in the F-16's design.

Having determined that Mrs. Harduvel's claim involved allegations of design defects, the court applied the *Boyle* test. The

¹⁹⁴ *Id.* at 1314.

¹⁹⁵ *Id.* at 1315.

¹⁹⁶ *Id.* at 1316.

¹⁹⁷ *Id.* at 1317.

¹⁹⁸ *Id.*

Harduvel court held that the F-16's design process satisfied *Boyle*'s first prong because the design resulted from "a continuous back and forth" between General Dynamics and the Air Force.¹⁹⁹ The court noted that the Air Force had conducted an extensive review of the design, examining specifications, drawings, and blueprints. In addition, the Air Force assigned a group of engineers specifically to review the electrical system.²⁰⁰

The *Harduvel* court noted an absence of evidence of manufacturing defects. Thus, the court concluded, the defendant satisfied *Boyle*'s second requirement that the equipment conform to specifications as a matter of law. The defendant had also satisfied the third prong of *Boyle*, concluded the *Harduvel* court, because much of what General Dynamics knew about wire chafing came from Air Force reports. Thus, General Dynamics was not aware of dangers of which the government was not also aware.

As the post-*Boyle* cases indicate, rubber stamping of a manufacturer's design will be insufficient to satisfy *Boyle*. According to *Trevino*, mere "signing off" by a government employee constitutes rubber stamping. According to *Smith*, however, a court may say that the government approved a design where the manufacturer cannot produce final engineering drawings at trial. In the *Harduvel* court's view, formal approval procedures are less important to the *Boyle* standard than is the existence of a "continuous back and forth" between the contractor and the government.

In *Boyle*, the Supreme Court recognized government contractor immunity and expanded the realm of uniquely federal interests to include "getting the government's work done." The Court possessed the power to fashion federal common law in the case, for reasons in addition to those it stated in *Boyle*. Whether the Court should have exercised the power is a question open for debate. Regardless of what the Court should or should not have done, *Boyle* will have implications for the future.

III. THE *BOYLE* COURT'S POWER TO FASHION FEDERAL COMMON LAW, ITS LACK OF JUDICIAL RESTRAINT, AND *BOYLE*'S IMPLICATIONS FOR THE FUTURE

The government's interest in "getting its work done" does not fall comfortably within any of the areas of uniquely federal interest

¹⁹⁹ *Id.* at 1320.

²⁰⁰ *Id.*

that the Supreme Court traditionally has recognized.²⁰¹ Rather, the government's interest in getting its work done borders on two traditionally recognized uniquely federal interests—the United States' rights and duties under its contracts and federal officials' liability for actions taken in the course of duty.²⁰² Justice Brennan criticized the majority's synthesis of a new uniquely federal interest from these two recognized interests.²⁰³ As Justice Brennan noted, because *Boyle* involved a suit between private parties, the two federal interests relied upon by the majority were inapplicable. Justice Brennan's criticism is valid. Still, the majority might have set forth some other basis in precedent for its authority to fashion common law.

The *Boyle* Court, without citing the case, employed reasoning similar to that used in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*²⁰⁴ In *D'Oench*, the Court justified creating federal common law by seizing upon a policy consideration embodied in a statute that did not actually apply to the facts of the case.²⁰⁵ The inapplicable statute in *D'Oench* was the Federal Reserve Act, which evinced Congress's policy to protect the FDIC.²⁰⁶ Similarly, the *Boyle* Court used the discretionary-function exception to the Federal Tort Claims Act²⁰⁷ to support the creation of federal common law even though that statute did not apply because the government was not being sued.²⁰⁸ The *Boyle* Court might have reasoned that the discretionary-function exception to the Federal Tort Claims Act evidenced Congress's intention to protect all exercises of the government's discretion, including the power to procure equipment. The Court could have argued that, by creating the government contractor defense, it was simply promoting Congress's stated policy of protecting government officials' discretionary actions.

This line of reasoning is not flawless, however. As Justice Brennan stressed in the *Boyle* dissent, the government would still be able

²⁰¹ See *supra* notes 123–26 and accompanying text for a discussion of the dissent's observations on the incompatibility between the newly recognized federal interest in getting the government's work done and the traditional areas of federal interest upon which the majority claimed *Boyle* impinged.

²⁰² *Boyle*, 108 S. Ct. at 2514.

²⁰³ *Id.* at 2521 (Brennan, J., dissenting).

²⁰⁴ See *id.* at 2517. See *supra* notes 27–32 and accompanying text for a discussion of *D'Oench*.

²⁰⁵ *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 459 (1952).

²⁰⁶ *Id.* at 456–57.

²⁰⁷ See *supra* notes 134–38 and accompanying text for a discussion of the *Boyle* Court's reference to the Federal Tort Claims Act.

²⁰⁸ 108 S. Ct. at 2517–18.

to procure the equipment it desired if courts imposed design defect liability on government contractors — the price may just be somewhat higher for dangerous products than for those safely designed.²⁰⁹ Thus, contractor liability would not totally frustrate Congress's policy of protecting the government's discretionary functions. Still, the *Boyle* Court might have used this reasoning to avoid combining two recognized, but inapplicable, federal interests to support the creation of federal common law.

Alternatively, the *Boyle* Court could have stressed the argument, used in *Clearfield Trust Co. v. United States*, that courts must apply a uniform rule where the United States' contractual rights and duties are involved.²¹⁰ In *Clearfield*, the Court reasoned that the application of state law could result in identical commercial transactions being subject to different rules depending upon the state in which the transaction occurred. Because the federal government must issue commercial paper nationwide and cannot avoid doing so in states that have laws unfavorable to its interests, courts must apply a uniform rule. The *Boyle* Court might similarly have reasoned that the government has no control over the occurrence of accidents involving government equipment and cannot avoid using government equipment in states imposing contractor liability. Thus, the Court might have concluded, courts should apply a uniform rule in contractor liability cases to insure that all government contracts are subject to the same conditions.

The *Boyle* Court might have encountered opposition to such reasoning, however. State tort law schemes may already impose uniform conditions on government contracts. If courts were to apply state law, government equipment manufacturers would assume that the government might use the equipment in a state that imposes contractor liability. Contractors therefore would factor potential liability costs into all government contracts. Thus, the state tort law scheme imposes the same result as would a uniform rule imposing contractor liability.

The *Boyle* Court might also have supported creation of the contractor defense by relying upon the recognized federal interest of the government's relationships with armed forces personnel, an interest recognized in *United States v. Standard Oil of California*.²¹¹

²⁰⁹ *Id.* at 2526 (Brennan, J., dissenting).

²¹⁰ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). See *supra* notes 33–43 and accompanying text for a discussion of *Clearfield*.

²¹¹ *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 305–06 (1947). See *supra* notes 50–59 and accompanying text for a discussion of *Standard Oil*.

David Boyle was a member of the United States military. The *Boyle* Court, like the *Standard Oil* Court, could have reasoned that federal law should govern all suits involving injuries that members of the military sustained in the course of military service.²¹² The *Boyle* Court probably did not do so because it did not want to limit the defense only to cases in which armed forces personnel were injured.²¹³

Assuming that the *Boyle* Court possessed the authority to fashion federal common law, the Court nevertheless should have deferred to Congress for the rule of decision. Just as the courts are ill-equipped to second-guess the substantive decisions of the executive and legislative branches in military matters,²¹⁴ the courts are also ill-equipped to make fiscal policy in the area. In *Standard Oil*, the government argued that state tort law passed liability through to the United States in the form of lost services and added medical care expenses.²¹⁵ Similarly, the *Boyle* Court believed that tort liability was being passed through to the United States in the form of higher contract prices.²¹⁶ In *Standard Oil*, the Court elected to defer the creation of indemnity to Congress, reasoning that the legislature would act if necessary to protect the government's fiscal interests.²¹⁷ The *Boyle* Court should have followed the *Standard Oil* lead by allowing Congress to determine whether to create the government contractor defense. Instead, the *Boyle* Court yielded to executive branch and defense industry pressure²¹⁸ and usurped Congress's prerogative to control government fiscal policy.

Alternatively, the *Boyle* Court should have accepted Justice Brennan's suggestion that the imposition of contractor liability does not harm the government's discretionary functions.²¹⁹ If government contractors are liable for design defects, then the government could still obtain dangerously designed equipment by paying the contractor a premium.²²⁰ Thus, the government would be able to exercise freely its discretion to obtain desired equipment.

²¹² Cf. *Standard Oil*, 332 U.S. at 305-06.

²¹³ See *Boyle*, 108 S. Ct. at 2517.

²¹⁴ *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986).

²¹⁵ See *supra* note 54 and accompanying text for a discussion of the government's claim that state tort law passed liability through to the United States.

²¹⁶ *Boyle*, 108 S. Ct. at 2518.

²¹⁷ *Standard Oil*, 332 U.S. at 314-16.

²¹⁸ See *supra* notes 100-103 and accompanying text for a discussion of contentions made in an *amicus curiae* brief on behalf of petitioner that defense industry pressure influenced the government's position in the case.

²¹⁹ *Boyle*, 108 S. Ct. at 2526 (Brennan, J., dissenting).

²²⁰ *Id.*

Regardless of whether the Supreme Court should have recognized the government contractor defense, or what reasoning it should have used to justify its actions, *Boyle* is law. Unless Congress acts to nullify *Boyle*'s effect or to legislate its limits, the government contractor defense will continue to evolve judicially. Some post-*Boyle* decisions have already been announced, but none has created any sweeping changes in the *Boyle* standard.

The *Boyle* Court has established three requirements for the government contractor defense's application. If the government approves reasonably precise specifications for equipment, the equipment conforms to those specifications, and the manufacturer warns the government of dangers of which the manufacturer is aware, the manufacturer may avoid liability by asserting the defense.²²¹ In future cases, however, courts will have to answer several questions that remain in the wake of *Boyle*.

Boyle raised the obvious question of what constitutes "government approval." The Court stated that the defense will not be available to manufacturers of goods purchased from stock, because the government lacks a significant interest in the particular feature that turns out to be defective.²²² One can imagine, however, a situation in which a government procurement officer examines a stock item and chooses it specifically because of a particular feature. Thus, suppose a government officer purchases a certain type of pen from stock because the catalog description claims that it has a particularly sharp point and is good for pressing through multiple layers of carbon. Because most government work involves the use of duplicate forms, the officer has a significant interest in the sharpness of the pen. Suppose that the procurement officer obtains a sample pen or relies on the catalog description in placing the order. Further suppose that, because the pen's point is extremely sharp, one of the pens injures someone. In such a case, the government contractor defense might apply. Although not a specific element of the defense, the *Boyle* Court reasoned that the government official ought to have some significant interest in the design feature that turns out to be dangerous in order for the manufacturer to assert the defense.²²³ In this hypothetical situation, the procurement officer is interested in the pen's sharpness. Courts might deem such interest in one of the pen's features "approval" of the specific design. In addition, the

²²¹ *Boyle*, 108 S. Ct. at 2518.

²²² *See id.* at 2516.

²²³ *See id.*

pen's manufacturer would have little difficulty proving that the pen conforms to the design. Thus, two of the defense's three elements would be satisfied. The third element would be satisfied easily also, because, as Justice Brennan pointed out in his dissent, the standard necessary for the third element is the contractor's actual knowledge of design dangers.²²⁴ Therefore, if the manufacturer could show that it did not know that the pens were dangerously sharp, the manufacturer could escape liability.

In his dissent, Justice Brennan expressed concern that government approval might constitute simply a rubber stamping of whatever design a manufacturer submits.²²⁵ Post-*Boyle* cases that have addressed the issue have stated affirmatively that a rubber-stamp review is insufficient.²²⁶ The question remains, however, as to exactly what level of review is required to elevate the government's involvement beyond a mere rubber stamp.

In *Trevino v. General Dynamics Corp.*, the Fifth Circuit concluded that the government's involvement was insufficient where the Navy assigned inexperienced engineers and technicians to a low-priority job.²²⁷ A mere "signing off" on the final design drawings by government workers constituted rubber-stamping. On the other hand, the absence of a government employee's signature on design drawings will not necessarily mean that the design was not approved. Indeed, the defendant in *Smith v. Xerox Corp.* was unable to produce the final design drawings for the weapons simulator that it manufactured. More important than the presence or absence of official signatures is the actual level of involvement by government personnel. In *Harduvel v. General Dynamics Corp.*, the Eleventh Circuit held that the government's design review satisfied *Boyle* where there was a "continuous back and forth" between General Dynamics and the Air Force.²²⁸

Although these cases do little to clarify *Boyle*, prudent contractors can learn some small lessons from *Trevino* and *Harduvel*. Contractors can strive to set up the "back and forth" of which the *Harduvel* court spoke by insisting upon frequent meetings with government officials. They can and should demand that high-ranking and experienced engineers review designs to avoid the result

²²⁴ See *id.* at 2519 (Brennan, J., dissenting).

²²⁵ *Id.*

²²⁶ See, e.g., *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946, 947 (4th Cir. 1989).

²²⁷ 865 F.2d 1474, 1486-87 (5th Cir. 1989).

²²⁸ 878 F.2d 1311, 1320 (11th Cir. 1989).

reached in *Trevino*. They can and should document every conversation with government officials by sending confirming letters and memoranda. In short, prudent contractors should be in constant contact with the government. Although it is unlikely after *Trevino* that a minor bureaucrat could approve the design of sophisticated, expensive equipment for purposes of the *Boyle* test, personnel at low levels could approve other military procurements. In addition, *Boyle* does not provide any assurances to the public that the decision-maker possesses the technical competence to evaluate the design in question. Indeed, after *Trevino*, contractors may use the government contractor defense even where the government official reviewing the design was incompetent or negligent.²²⁹

Another aspect of the government contractor defense that will require clarification is the meaning of the word "specification." Courts may conclude that the term refers only to manufacturing specifications, which contain specifics such as desired construction materials and manufacturing tolerances. Alternatively, courts may include in the definition performance specifications that describe the desired capabilities of the equipment, such as speed or agility. Courts that follow *Trevino* will probably conclude that very general performance criteria do not qualify as reasonably precise specifications.

In addition, it is unclear whether approval of "specifications" will include approval of a sample of fungible goods or a catalog description of a simple item. In the case of sophisticated equipment, approval of a model or prototype may constitute approval of the specifications. The Fourth Circuit, in *Ramey v. Martin-Baker Aircraft*, considered the military's examination of an ejection seat mock-up to be part of the approval process. Future cases will have to address more completely the question of what constitutes reasonably precise specifications.

IV. CONCLUSION

In recognizing the government contractor defense, the *Boyle* Court added the government's interest in getting its work done to the limited number of uniquely federal interests that, when implicated in a controversy, justify courts' application of federal common law. The *Boyle* Court based its authority to fashion federal common law on the theory that the controversy bordered on two uniquely federal interests that the Supreme Court had recognized in earlier

²²⁹ 865 F.2d at 1486-87, n.12.

decisions — the United States' contractual rights and government officials' immunity. The *Boyle* dissent criticized this line of reasoning, because the controversy did not implicate directly either previously recognized interest upon which the majority relied. Even if the Court's reasoning was flawed, as the dissent suggested, the majority could have based its common lawmaking authority on other theories. The Court might have reasoned that in recognizing the defense it was enforcing Congress's policy of protecting the government's discretionary functions. The *Boyle* Court might also have stressed the necessity for a uniform rule in controversies that implicate the United States' relationship with armed forces personnel or its contractual obligations.

Regardless of the theory upon which the Court justified its common-lawmaking ability, the Court erred in recognizing the defense. The Court should have relegated creation of such a novel defense to Congress. Congress, with its committees and advisors, is better able to determine whether the defense is necessary and what form it should take.

In creating the defense, the *Boyle* Court opened a Pandora's box, because the Court has, in effect, extended the immunity to anyone helping to get the government's work done. Future cases will, of course, define the defense's parameters more precisely. Courts must further clarify the terms "specifications" and "government approval." Courts will also confront situations in which manufacturers raise the defense in civilian injury cases and in situations involving nonmilitary equipment. Manufacturers will probably be allowed to assert the defense successfully where the plaintiff can otherwise receive compensation through a federal scheme. For example, Congress has provided compensation for government workers injured in the course of duty. Courts may be reluctant, however, to allow a contractor to claim the defense where a suit against the contractor offers the plaintiff his or her only hope for recovery. In any event, Congress should not wait for the courts to extend the defense further, but should immediately limit it through legislation or abolish it entirely. Our legal system should not deny an innocent plaintiff recovery simply because the government approved the design of the object that caused the plaintiff's injury.

PAULA G. CURRY