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CASE COMMENT

AGENT ORANGE AND *BOYLE*: LEADING THE WAY IN MASS TOXIC TORT ACTIONS

I. INTRODUCTION

Servicemen who were exposed to Agent Orange during the Vietnam War and their children have suffered, and continue to suffer from an array of illnesses.[1] *In re Agent Orange Product Liability Litigation*[2] represented an attempt to lay blame for the continuing effects of the war, in which the manufacturers of Agent Orange became a likely target for this cupability. The manufacturers relied on the government contractor defense — an exception in product liability law which allows a contractor to as an extension of the government gain protection under sovereign immunity.[3] A $180 million settlement was accepted by Eastern District of New York Judge Weinstein before he ruled on the defense. However, Judge Weinstein did develop a unique test for the government contractor defense while presiding over this unprecedented mass toxic tort litigation. Applying this test, other courts have granted summary judgment in favor of the contractors in other Agent Orange cases.[4]

During the 1988 term, the Supreme Court upheld the use of the government contractor defense and created a uniform test. In *Boyle v. United Technologies Corp.*,[5] the Court reaffirmed the proper use of the government

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1. Meyers, *Soldier of Orange: The Administrative, Diplomatic, Legislative and Litigatory Impact of Herbicide Agent Orange in South Vietnam*, 8 B.C. ENVTL. AFF. L. REV. 159, 180-83 (1979). Agent Orange is now linked to cancer, fetal growth deficiencies and spontaneous abortion, mutation and numerous systemic disorders.

2. 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied*, 465 U.S. 1067 (1984). The district court specifically defined for the first time the elements of the government contractor defense. *Id.* at 1055.

3. The defense has its genesis in the *Feres* doctrine which prevented members of the United States military from recovering for injuries which "arise out of or are in the course of activity incident to service." Feres v. United States, 340 U.S. 135, 146 (1950). *See also* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977) (barring recovery would prevent "second-guessing" of military orders by the judicial system).

4. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2898 (1988).

5. 108 S. Ct. 2510 (1988). The Supreme Court for the first time recognized the government contractor defense and outlined the required standard.

contractor defense while broadening Judge Weinstein's original test. Many authors believe the test will "lead to fundamental changes in the relationship of the federal government to its contractors, as well as in the way in which aggressive plaintiffs' attorneys pursue their clients' personal injury claims against government contractors."[6] The *Boyle* fact pattern, while unrelated to toxic tort litigation, will nevertheless have an impact on all subsequent uses of the defense in toxic tort cases.

This Note will review the rationales for the government contractor defense, emphasizing the discretionary function rule and the concern for equitable treatment. Next, this Note will explore the influence of the Agent Orange litigation on the modern government contractor defense. The *Boyle* decision will then be analyzed by examining the reason for the test as well as its limitations. The Note will conclude with a discussion of the possible consequences of these two interpretations of the government contractor defense and the effect of yet unanswered questions on future mass toxic tort actions.

II. THE GOVERNMENT CONTRACTOR DEFENSE EXPLAINED

The government contractor defense enables the contractor to claim a "complete defense" to actions in negligence, warranty, or product liability resulting from products supplied to or designed for the government.[7] Thus, the defense was created as a reaction to public policy concerns surrounding the possible ramifications of product liability in weapons manufacturing. The policies are directed at both protecting the decision-making powers of the armed services and guaranteeing fair treatment for the contractor.

A. Protecting the Discretionary Function

Courts have been reluctant to subject military contractors to full tort liability because it would "inject the judicial branch into political and military decisions that are beyond its constitutional authority and institutional competence."[8] This public policy, commonly referred to as the discretionary function, has been broadly defined by the Court as an action requiring a

6. Willmore, *Boyle in Court: Invitation for New Litigation Strategies*, Legal Times, July 18, 1988, at 16, col. 3. *See also* Kriendler, *The Government Contractor Defense*, 200 N.Y.L.J. 3.

7. Comment, *Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?*, 36 U. MIAMI L. REV. 489, 494 (1982).

8. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d at 191. Many circuits have addressed the government contractor defense. *See* Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

"policy judgment and decision."[9] Therefore, it has been held that for a decision to be truly "discretionary," the government must have the freedom to judge or choose from a variety of options without judicial interference.[10] However, courts do play a role in interpreting governmental decisions as discretionary or operational. A decision, such as not ordering a mechanical locking device on a dump truck,[11] can be judicially reviewed because of the existence of fixed standards for measuring the merits of these decisions. Moreover, review of these matters would not usurp the government's discretion.[12] In contrast, decisions relating to wartime military contracts are generally classified as discretionary and thus receive special consideration. These decisions are less likely to be reviewed. "[W]hether the weapon involves any risk at all [is a] proper concern[ ] of the military which selects, buys and uses the weapon. But [it is] not [a] source[ ] of liability which should be thrust upon a supplier, nor [is it a] decision[ ] . . . properly made by a court."[13] Courts have warned that "[t]o impose liability on a governmental contractor . . . would seriously impair governments [sic] ability to formulate policy and make judgments pursuant to its war powers."[14] Consequently, the courts' respect of the discretionary function policy has become a focal point in the development of the modern government contract defense.

B. *Equitable Treatment for Contractors*

A significant rationale for the creation of the government contractor defense was to ensure fair treatment and to relieve the burden of full liability on the contractor. In opposition to basic tenets of tort law, this defense specifically holds that a contractor who ably performs a manufacturing contract according to detailed, yet defective design specifications, will not assume any resulting liability.[15] The defense directs that the wrongdoer who authored those specifications bears responsibility.[16] The reasons for the defense become apparent when analyzing the effect of possible liability on the procurement process[17] and national security.[18] The threat of liability in the

9. Dalehite v. United States, 346 U.S. 15, 36 (1953).

10. *Agent Orange and the Government Contract Defense*, *supra* note 7, at 521.

11. *See* Medley v. United States, 480 F. Supp. 1005, 1009 (M.D. Ala. 1979).

12. *Agent Orange and the Government Contract Defense*, *supra* note 7, at 521.

13. *In re* Agent Orange Prod. Liab. Litig., 534 F. Supp. 1046, 1054 (2d Cir. 1982).

14. Sanner v. Ford Motor Co., 144 N.J. Super. 1, 9, 364 A.2d 43, 47 (N.J. Super. Ct. Law Div. 1976), 154 N.J. Super. 407, 381 A.2d 805 (N.J. Super. Ct. App. Div. 1977), *cert. denied*, 75 N.J. 616, 384 A.2d 816 (1978).

15. *In re* Agent Orange Prod. Liab. Litig., 506 F. Supp. 762, 793 (E.D.N.Y. 1980).

16. *Id.*

17. The procurement process is the regulated mechanism in which government contracts are awarded. It is believed that if contractors are exposed to full tort liability, the procurement

procurement process could manifest itself in escalating contractors' costs due to insurance difficulties or the impossibility to procure any insurance at all. The likely ensuing liquidations or reorganizations[19] among military contractors, could affect national security.[20]

The defense, viewed as a mechanism to maintain a healthy military industrial complex, could without its protection cause:

> a manufacturer capable of producing military goods for government use [to] face the untenable position of choosing between severe penalties for failing to supply products necessary to conduct a war,[21] and producing what the government requires but at a contract price that makes no provision for the need to insure against potential liability for design flaws in the government's plans.[22]

This "catch-22" situation disrupts the procurement process by giving the contractor few incentives "to work closely with and to consult the military authorities in the development and testing of equipment"[23] essential to encourage "uninhibited assistance of private contractors"[24] in the advancement of military technology. Likewise, national security may be threatened by this scenario. Courts reason that if military contractors are faced with potentially massive liability awards they will avoid entering the industry and the United States will fall behind in the weapons buildup.

Therefore, the policy rationales which dictate the direction of the government contractor defense encompass many of the fundamental concerns of the United States Department of Defense and the American people. These policy rationales while characterized as a fairness justification rather, reflect a belief protecting the military industry.

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process would be severely impaired. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 187, 191 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2898 (1988).

18. *Id.*

19. *See* Stouk, *Government Contracts and Tort Liability: Time for Reform*, 30 FED. B. NEWS & J. 70, 75 (1983). Liability for a catastrophic event could easily "exceed both the available insurance and the net worth of those contractors." *Id.* at 70.

20. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 187, 191 (2d Cir. 1987).

21. Judge Pratt is referring to the Defense Production Act which compels contractors to perform the contracts or face "upon conviction, [a fine] not more than $10,000, or imprison[ment] not more than one year, or both." 50 U.S.C. App. § 2073 (1982). The contractors involved in Agent Orange production were subject to the Act.

22. *In re* Agent Orange Prod. Liab. Litig., 506 F. Supp. 762, 794 (E.D.N.Y. 1980).

23. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

24. Tozer v. LTV Corp., 792 F.2d 403, 407 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988).

II. *In re* Agent Orange: The Creation of a Modern Defense

A. *The Pratt Test*

In re Agent Orange Prod. Liab. Litig. represented the collectivized claims of Vietnam veterans, their spouses, their parents, and their children[25] in a class action against the manufacturers[26] of Agent Orange. After a series of jurisdictional conflicts, the Judicial Panel on Multidistrict Litigation ordered all Agent Orange cases consolidated and transferred to the District Court for the Eastern District of New York. The plaintiffs relied on numerous theories one of which was product liability. The manufacturers asserted the government contractor defense. After seven years of litigation, the settlement awarding $180 million to the plaintiffs was upheld.[27]

However, years before settlement, Judge Pratt, the first presiding judge, developed what was viewed as the modern form of the government contractor defense.[28] To successfully utilize the defense, the contractor must prove each element of a three-pronged test:

> 1. That the government established the specifications for [the product]; 2. That the [product] manufactured by the defendant met the government's specifications in all material respects; and 3. That the government knew as much as or more than the defendant about the hazards to people that accompanied use of [the product].[29]

The first two prongs have "fairly light"[30] burdens of proof. Judge Pratt concluded that, under the first prong, it was only necessary that "the product . . . supplied [by the contractor] was [the] particular product specified by the government."[31] The contractor's involvement in preparing the specifications

25. *Agent Orange,* 506 F. Supp. at 769.

26. Initially, there were nineteen defendant companies which were reduced to seven by the conclusion of the case. *Id.* at 768.

27. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 187 (2d Cir. 1987).

28. *In re* Agent Orange Prod. Liab. Litig., 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982). Although, in Sanner v. Ford Motor Co., 154 N.J. Super. 407, 381 A.2d 805 (1977), the court applied similar reasoning. It was not until Agent Orange that a test was created especially for military contractors. *See* Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940) (A negligence suit sought against public works contractors).

29. *Agent Orange,* 534 F. Supp. at 1055.

30. Note, *The Government Contractor Defense: Is Sovereign Immunity a Necessary Perquisite?,* 52 Brooklyn L. Rev. 495, 507 (1986). The author notes that "[p]rongs one and two are particularly unimportant if government approval of contractor designs is sufficient to give rise to the defense." *Id.* at 507 n.46. *See also* Scadron, *The New Government Contractor Defense: Will It Insulate Asbestos Manufacturers From Liability For The Harm Caused By Their Insulation Products?,* 25 Idaho L. Rev. 375, 377 n.8 (1988-89) ("[t]he government action necessary to trigger the defense [is] minimal . . .").

31. *Agent Orange,* 534 F. Supp. at 1056. The approval requirement has been stretched by the circuits so that the defense applies even when the contractor drew up all the specifications in detail because the specifications were approved by the military. In McKay v. Rockwell Int'l

became "relevant [only in] . . . establish[ing] the relative degrees of knowledge as between the government and the defendants."[32] Under the second prong, the defense would only be defeated if the "discrepancy between specifications and product was a material one."[33] According to Judge Pratt, the "central question" of the test was addressed in the third prong.[34]

Judge Pratt, before assigning the case over to Judge Weinstein,[35] granted summary judgment in the defendants' favor on the first two prongs of the test. "Each defendant has established . . . that the government established specifications for Agent Orange and that the Agent Orange manufactured by the defendant met those specifications in all material respects."[36] Judge Pratt concluded that the three remaining contractors[37] had not sufficiently proven the "question of relative knowledge" known to the contractor and questions of fact remained as to when the knowledge of possible hazards was determined.[38]

B. Judge Weinstein Alters the test

When applying Judge Pratt's test to the facts in *Agent Orange*, Judge Weinstein faced many difficult issues posed by plaintiffs' counsel. The plaintiffs contended that the defendants' role in developing Agent Orange and their long time civilian experience with its components made it the defendants' own product and therefore, the government contract defense was inapplicable.[39] In an *amicus* brief, the Justice Department contended that dioxin, the injury-causing ingredient of Agent Orange, was never ordered by the government to be included as an ingredient.[40] This contention was dam-

Corp., 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984), the plaintiffs have no cause of action under the first prong of Judge Pratt's test since "the United States . . . approved, reasonably precise specifications for the allegedly defective military equipment." 704 F.2d at 451.

32. *Agent Orange*, 534 F. Supp. at 1057.

33. *Id.*

34. *Id.* Judge Pratt in his discussion of the third prong, concluded that "if a defendant was aware of hazards that might reasonably have affected the government's decision about the use of 'Agent Orange,' and if that defendant failed to disclose those hazards to the government, then the defense fails." *Id.* at 1057-58. *See also In re* Agent Orange Prod. Liab. Litig., 565 F. Supp. at 1265 ("the central issue raised . . . centers on its third element.").

35. Judge Weinstein presided over the Agent Orange litigation after Judge Pratt was promoted to the Second Circuit.

36. *Agent Orange*, 565 F. Supp. at 1274.

37. Dow Chemical Company, T.H. Agriculture & Nutrition Company and Uniroyal, Inc. were denied summary judgment of all the issues. *Id.* at 1270-72.

38. *Id.*

39. *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984).

40. United States Memorandum in Opposition to defendants' Motion for Summary Judgment based on the Government Contractor Defense at 8, *Agent Orange*, 597 F. Supp. at 848.

aging to the defendants, because, if proved, it would negate their reliance on the discretionary theory.

The defendants' response to these allegations influenced Judge Weinstein's decision to allow for the application of the defense, though insisting upon modifications.[41] The defendants maintained that although the components of Agent Orange were not unique, the spray concentrations were much greater than those recommended for civilian use and, in addition, the spray was used without the recommended precautions. This change, the defendants claimed, made the product distinctively different from the civilian product and thus, a military product.[42] Moreover, the defendants asserted that they were compelled to produce Agent Orange during wartime and subsequently had little control over the use of the herbicide.[43]

With these arguments and the general policy reasons for the government contractor defense in consideration, Judge Weinstein crafted a new standard of liability which expanded the third prong of Judge Pratt's test. While the first two prongs remained intact, under the expanded third prong the plaintiff had to prove, "with other elements of the cause of action, that the hazards to him that accompanied use of Agent Orange were or reasonably should have been known to the defendant."[44] Judge Weinstein was satisfied that a proper balance was struck by the now expanded third prong. Under this standard, the defendants had the burden of proving:

> that the government knew as much or more than that defendant knew or reasonably should have known about the dangers of Agent Orange, or even if the government had had as much knowledge as that of the defendant should have had, it would have ordered production of Agent Orange in any event and would not have taken steps to reduce or eliminate the hazard.[45]

Judge Weinstein specifically used the "knew or reasonably should have known" standard with the contractor to insure that, in the case of a highly technical product, a manufacturer is not encouraged to know as little as possible about the dangers of its product.[46] In not imposing the "should have known" standard on the government, Judge Weinstein carefully avoided any possible interference in the military's discretionary function.[47] Judge Weinstein never ruled on whether the companies satisfied the test because he granted settlement between the parties.

41. *Agent Orange*, 597 F. Supp. at 849.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 850.

In combination with these allegations, Judge Weinstein stated in his settlement opinion that, if the dangers alleged by the plaintiffs that accompanied the spraying of Agent Orange were correct, then those dangers were "far greater than those posed by the products in the 'ordinary' product liability cases in which the government contract defense has been invoked, and unprecedented in tort law in their magnitude."[48]

In further litigation by those veterans who had chosen not to join in the *Agent Orange* class action, the question of whether the contractor satisfied the test was addressed.[49] The Court of Appeals for the Second Circuit upheld the district court ruling granting summary judgment in favor of the contractors because the court found no genuine factual dispute as to whether the government possessed as much information as the chemical companies with respect to the possible hazards of Agent Orange.[50] The court of appeals concluded that the proper use of Agent Orange required a balancing of the risk to friendly personnel against the potential military advantage that the use of the defoliant would provide.[51] The contractors only responsibility was to advise the government of hazards known to them in order for the government to make an informed balancing of the risks and hereafter.[52]

The court devised a test to evaluate whether a possible hazard warranted an obligation of the contractor to warn the government. First, the hazard must be based on scientific evidence. "A military contractor is no more obiligated to inform the government of speculative risks than it is entitled to claim speculative benefits."[53] Second, the nature of the danger to friendly personnel must be serious enough to justify a weighing of the risks against the military benefits.[54] Neither aspect of this test was satisfied in the Agent Orange case because the court concluded that there was a "paucity" of scientific evidence indicating that the herbicide was hazardous.[55] Furthermore, the court of appeals held that the plaintiffs had failed to prove that Agent Orange in fact caused their injuries.[56] In forming its decision, the court con-

48. *Id.* at 849.

49. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2898 (1988). This opinion addressed the disposition of 287 appeals taken from Judge Weinstein's decision granting summary judgement to the defendants. *See In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223 (E.D.N.Y. 1985).

50. *Agent Orange*, 818 F.2d at 189-90.

51. *Id.* at 192.

52. *Id.*

53. *Id.* at 193.

54. *Id.*

55. *Id.*

56. *Id.* at 190. The court did note that epidemiological studies do not exclude the possibility of harm in isolated cases but that this fact is irrelevant because it does not "constitute evidence material to the military decisions in question." *Id.* at 194.

strued Congress' decision not to compensate veterans claiming exposure to Agent Orange[57] as a reflection of Congress' factual conclusion that Agent Orange was only hazardous in a limited manner.[58] In the court's view, Congress' actions "further demonstrate[d] that the military decision to use Agent Orange was [considered] fully informed."[59] In complete agreement with the policies supporting the government contractor defense, Judge Winter concluded that holding contractors "liable in such circumstances would be unjust to them and would create a devastating precedent"[60] by exposing the contractor as the sole "deep pocket." [61]

III. *Boyle v. United Technologies, Corp.*: Creates A New Way To Play

A. *The Test Defined*

In 1983, a United Technologies helicopter crashed into the Atlantic Ocean, resulting in the death of Marine pilot David Boyle. Boyle's estate sued the contractor, citing negligence and breach of warranty in the design of the helicopter escape hatch. A district court jury returned a verdict in favor of the plaintiff for $725,000.[62] On appeal to the Fourth Circuit, the court of appeals reversed as a matter of federal law, finding that the defendants could not be held liable for the defective designs because the contractor satisfied the requirements of the military contractor defense as recognized by the court.[63] The Supreme Court granted *certiorari* to consider whether the contractor was immune from tort liability because the design of and access to the escape hatch conformed with government specifications and whether the defense should be governed by federal or state law.[64]

57. Veteran's Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (The Act allowed for compensation for chloracne and PCT but rejected earlier versions that would have compensated such veterans for other medical conditions including soft tissue sarcomas and birth defects).

58. *Agent Orange*, 818 F.2d at 194.

59. *Id.*

60. *Id.*

61. *Id.* at 191.

62. Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986), *vacated*, 108 S. Ct. 2570 (1988).

63. *Id.* The Fourth Circuit relied on a four-prong test: the contractor must prove that "1) the United States is immune from liability; 2) the United States approved reasonably precise specifications for the equipment; 3) the equipment conformed to these specifications; and 4) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* The court cited as the source of this test the prior Fourth Circuit decision of Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988).

64. Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2513 (1988).

Justice Scalia, writing for the majority,[65] stated that the Court has been reluctant to find federal preemption of state law without a clear statutory mandate or a direct conflict between federal and state law. There are, however, a few areas involving federal interests "so committed by the Constitution and laws of the United States to federal control that the state law is preempted."[66] The Court held that the dispute in this case bordered on "two areas that [the Court has] found to involve such 'uniquely federal interests.' "[67] First, obligations to and rights of the United States under its contracts are governed exclusively by federal law.[68] The performance of a government contract represents an obligation of the United States.[69] Second, the civil liabilities of federal officials for actions taken in the course of their duty have traditionally been controlled by federal law.[70] The Court compared the position of an independent contractor performing its obligations under a procurement contract with that of an official performing his duty as a federal employee and determined that both have a similar interest in "getting the [g]overnment's work done."[71] The Court concluded that the "reasons for considering those closely related areas to be of 'uniquely federal' interest apply as well to the civil liabilities arising out of the performance of federal procurement contracts."[72] Those reasons were embodied in the discretionary function involved. Therefore, the Court displaced state law and applied federal law. The Court limited displacement to "only where . . . [a] 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law'[73] or the application of state law would 'frustrate specific objectives' of federal legislation."[74]

Reiterating the policy reasons supporting the government contractor defense, the Court justified the defense based upon the "discretionary function" inherent in military procurements.[75] "[W]e are . . . of the view that

65. Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy joined Justice Scalia's opinion. Justices Marshall and Blackmun joined Justice Brennan's dissent. Justice Stevens filed a separate dissenting opinion.

66. *Boyle*, 108 S. Ct. at 2514.

67. *Id.*

68. *Id.* (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-94 (1973)).

69. *Boyle*, 108 S. Ct. at 2514.

70. *Id.*

71. *Id.* (footnote omitted).

72. *Id.* The Court cites for support Yearsley v. W. A. Ross Const. Co., 309 U.S. 18 (1940) (a public works contractor was held not liable under state law because the project was done within the powers delegated by Congress).

73. *Boyle*, 108 S. Ct. at 2515 (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).

74. *Id.* (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)).

75. *Id.* at 2517.

permitting 'second-guessing' of these judgements, . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption."[76] The Court specified that design selection "is assuredly a discretionary function within the meaning of . . . [the FTCA] provision."[77] Moreover, the Court noted that the practical effect of denying the defense could result in financial burdens on the contractor which would ultimately be passed through to the Government itself in the form of higher procurement prices.[78]

After analyzing the conflicting standards of the government contractor defense adopted in several federal circuits, the Court formulated a three-prong test under which a contractor may escape liability for defects in military equipment so long as: "(1) [T]he United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[79]

The first two prongs of the *Boyle* test assure that the suit falls within the scope of the discretionary function doctrine. The third prong is necessary "because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying the knowledge might disrupt the contract but withholding it would produce no liability."[80] The underlying purpose of the standard supports the promotion of "active contractor participation in the design process, [without] placing the contractor at risk unless it [fails to] identify all design defects."[81]

The Court specifically rejected the standard that the Eleventh Circuit adopted in *Shaw v. Grumman Aerospace Corp.*[82] Under the *Shaw* test, the contractor would escape liability if it did not participate, or only participated minimally in the design of defective equipment. Alternatively, the contrac-

76. *Id.* at 2517-18 (citation omitted). FCTA is a consent to sue for harm caused by negligent or wrongful conduct of government employees, to the extent a private person could be sued. The exemption disallow suits which are based on the "exercise or performance or the failure to exercise or perform a discretionary function . . . on the part of a federal agency or an employee of the Government." 28 U.S.C. § 2680(*a*) (1982).

77. *Boyle*, 108 S. Ct. at 2517. The Court's justification for devising the test clearly supported the policy reasons which created the defense. *See supra* notes 7-23 and accompanying text.

78. *Boyle*, 108 S. Ct. at 2518.

79. *Id.* This language is identical to the Fourth Circuit standard. *See supra* note 63.

80. *Boyle*, 108 S. Ct. at 2518.

81. *Id.*

82. 778 F.2d 735, 746 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896, *reh'g denied*, 109 S. Ct. 10 (1988).

tor could avoid liability if it timely warned the government of the design risks and informed it of reasonably known alternative designs and the government clearly authorized subsequent production.[83] The Court concluded that this formulation did not sufficiently protect the discretionary function exception.[84] The Court queried that "the design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor developed the design."[85]

The Court did not rule on whether Boyle satisfied the test but remanded the case to the Fourth Circuit for review under the new standard.[86]

B. Court Created Doctrine

In the dissent, Justice Brennan criticized the majority for creating a doctrine unprescribed by Congress. "The Court-unelected and unaccountable to the people—has unabashedly stepped into the breach to legislate a rule denying Lt. Boyle's family the compensation that state law assures them."[87] Justice Brennan warned that the majority had created a defense so "breathtakingly sweeping"[88] that "[i]t applies even if the government has not intentionally sacrificed safety for other interests like speed and efficiency, and, indeed, even if the equipment is not of a type that is typically considered dangerous."[89] Moreover, the defense could be invoked regardless of how flagrant the defect is and how easily it can be remedied, so as long as the contractor missed it and the government approved reasonably precise specifications.[90]

Others have criticized the Court's ruling calling it "undeniably judicial legislation at its most extreme."[91] Critics take offense with the Court's de-

83. *Id.*

84. *Boyle*, 108 S. Ct. at 2518.

85. *Id.* The Fifth Circuit has attempted to clarify the necessary requirements of the first prong by indicating that the "approval" by the government must involve more than rubber-stamping a contractor's specification or decision but must illustrate a discretionary function. *See* Trevino v. General Dynamics Corp., 865 F.2d 1474, 1480 (5th Cir.), *reh'g denied*, 876 F.2d 1154 (5th Cir.), *cert. denied*, 110 S. Ct. 327 (1989) ("[a] rubber stamp is not a discretionary function; therefore, a rubber stamp is not 'approval' under *Boyle*"); *But see* Scadron, *supra* note 30, at 379 ("[u]nder Boyle, so long as the United States approved, even if by rubber stamp, design specifications," the first prong is satisfied).

86. *Boyle*, 108 S. Ct. at 2519, *on remand*, 857 F.2d 1468 (4th Cir.), *cert. denied*, 109 S. Ct. 559 (1988), *reh'g denied*, 109 S. Ct. 1182 (1989).

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

88. *Id.*

89. *Id.* *See* Scadron *supra* note 30, at 392 n.58 (noting that before *Boyle*, courts were uncertain whether the military contractor defense applied to equipment not typically considered dangerous).

90. *Boyle*, 108 S. Ct. at 2520.

91. Kriendler, *supra* note 6, at 3, col. 2.

parture from the *Feres-Stencel* doctrine[92] and are further upset by the fact that the Court's limitations on state tort law were undertaken without an authorizing act of Congress.[93] Commentators note that the Court's flat rejection of the *Shaw* test supports the dissent's concerns of rubber stamping in that "it now makes no difference whether or not, or to what extent, the manufacturers influenced or contributed to the substance of the specification."[94]

Supporters of the ruling foresee mixed blessings for government contractors. For instance, as a result of the decision there now exists a defense which should be more expansive than that allowed under the test previously utilized in the circuit courts. This effect is illustrated by the Court's expansion of the doctrine to bar suits brought not only by members of the armed services but also by civilians, where conditions justify preemption. Civilians may be barred from recovery due to the Court's reliance on the discretionary function exemption,[95] which is not limited to service-related injuries.[96] Some analysts argue that the circuit courts felt comfortable with the government contractor defense only because it applied to servicemen who, irrespective of the result of the litigation, received benefits from the Pentagon and the Veterans Administration.[97] The Court's extension of the doctrine could result in an entirely uncompensated class of injured plaintiffs, a possibility which troubled lower courts.[98] Additionally, many supporters of the defense have theorized that Justice Brennan's statement referring to the Court's ruling as "breathtakingly sweeping,"[99] suggests that "the court implicitly intended a broader rule than it explicitly announced."[100]

One problem with the Court's redefined defense is the Court's failure to

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92. Feres v. United States, 340 U.S. 135 (1950).

93. Kriendler, *supra* note 6, at 3, col. 2.

94. Scadron, *supra* note 30, at 386.

95. The *Feres-Stencel* doctrine which bars suits against the government is based on sovereign immunity and therefore only applies to injured servicemen. This expansion of the doctrine by Justice Scalia adds a new dimension to the previously supported government contractor defense. *See also* Scadron, *supra* note 30, at 379-80 ("Clearly, it is the design of military equipment that is of primary concern, not the status of the injured party.").

96. Willmore, *supra* note 6, at 17, col. 2.

97. *Id.*

98. Private citizens have been previously subjected to the defense and thus, have been injured without compensation. Ramey v. Martin-Baker Aircraft Co., 874 F.2d 946, 947 (4th Cir. 1989) (private citizen trained by the Air Force injured while working on a Navy F/A-18 fighter aircraft at the Naval Air Test Center in which his employer, the defendant, a subcontractor, successfully used the defense).

99. Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2520 (1988) (Brennan, J., dissenting).

100. O'Toole, *Defendants Win Big, But Face Legal and Political Aftershocks*, Legal Times, July 18, 1988, at 20, col. 3.

identify the nuances of the test, thereby creating the need for a case-by-case exploration of the outer parameters of the defense.[101] Generally, product liability suits involve claims based on either a theory of defective manufacturing, defective design, or a failure to warn. The *Boyle* court only considered claims of defective design. Future litigation will dictate whether the decision is applicable in defective manufacturing and failure-to-warn cases as well. The Fifth Circuit has responded to the *Boyle* ruling, and this apparent limitation on the ruling, by concluding that "[t]he [*Boyle*] opinion does not change the law in this and other Circuits except to reject the ideological basis for contractor immunity based upon the *Feres* doctrine. Hence, it remains the law . . . that military contractor immunity does not apply . . . [to] . . . defective manufactur[ing]."[102] However, in *Nicholson v. United Technologies*,[103] the United States District Court for the District of Connecticut further applied the *Boyle* opinion to cases involving failure-to-warn. In *Nicholson*, the plaintiffs argued that the contractor failed to provide sufficient warnings in the helicopter manual. The contractor alleged that the government controlled the contents of the manual.[104] The court, in applying the *Boyle* decision to failure-to-warn cases, concluded that "[l]iability for failure to warn . . . would have the same negative effects on military procurement as was outlined in *Boyle*. Further the government's decision . . . [in this case] involves the same balancing of technical, military and even social considerations protected in *Boyle*."[105] Therefore, the court permitted the application of the government contractor defense as an affirmative defense in both defective design and failure-to-warn cases.[106]

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101. *Id.* This author notes that since the Court's ruling several cases have applied and defined the *Boyle* defense. *See* Trevino v. General Dynamics, 865 F.2d 1474 (5th Cir. 1989) (clarified and defined the "approval" requirement); Harduvel v. General Dynamics Corp., 878 F.2d 1311 (11th Cir. 1989) (determining what can be characterized as a manufacturing or a design defect in order to apply the test); Ramey v. Martin-Baker Aircraft, Co., 874 F.2d 946 (4th Cir. 1989) (government participation factor); Smith v. Xerox Corp., 866 F.2d 135 (5th Cir. 1989) (questioned the "approval of reasonably precise specifications").

102. McGonigal v. Gearhart Indus., Inc., 851 F.2d 774, 777 (5th Cir. 1988).

103. 697 F. Supp. 598 (D. Conn. 1988).

104. *Id.* at 603.

105. *Id.* at 604.

106. The court utilized the *Boyle* standard. The court held that the contractor satisfied the first prong by adequately demonstrating that the government precisely outlined the changes to the manuals and the specifications used in the development of the manuals. *Id.* at 604. The court concluded that the contractors proved that they were not aware of the hazards posed by the landing gear and that the plaintiff failed to offer evidence rebutting that conclusion. *Id.* at 605. Thus, the court held that the contractor was *entitled* to summary judgment. *See* Fairchild Republic Co., v. The United States and the Department of the Air Force, 712 F. Supp. 711, 715-16 (S.D. Ill. 1988) (*Boyle* test applied and upheld the contractor defense where the court defined the government's failure to warn employees about hazardous material as discretionary).

IV. Consequences on Mass Toxic Tort Actions

A. Questions Not Answered

A number of questions have been identified that were not answered in the *Agent Orange* or *Boyle* decisions and which could affect future mass toxic tort litigation. As noted in recent cases, one question is whether the *Boyle* defense is limited to defective-design product liability claims, or whether it applies to other types of liability.[107] A second question is whether the defense will be limited to military contractors.[108] After consideration of the underlying policies of the defense and the Court's rejection of the *Feres-Stencel* doctrinal basis, it is possible to theorize that the defense's now expanded application to civilian plaintiffs will lead to application in the non-defense activities.

The *Boyle* Court specifically denied application of the defense to off-the-shelf products,[109] a fact which raises questions about reliance on the defense in the non-arms arena.[110] An argument for application could be made using the *Agent Orange* facts. Agent Orange was a commercially available herbicide prior to its use in Vietnam, however, the specific concentrations used were determined pursuant to detailed government specifications. This "off-the-shelf" product did not retain its commercial makeup when utilized by the government. This argument raises doubts as to the defense's practical use when Agent Orange can be defined as an off-the-shelf and commercially available product and thus be unqualified to use the defense under *Boyle*. Therefore, the defense becomes a vague mixture of two extremes.

Interestingly, the Court recently denied review of cases connected with the *Agent Orange* litigation.[111] The most significant case involved those veterans who opted out of the principal Agent Orange class action. The Second Circuit Court of Appeals upheld Judge Weinstein's determination that sum-

107. Willmore, *supra* note 6, at 17, col. 3. Failure-to-warn product liability claims and negligence-based claims are significantly more numerous in toxic tort actions. *See* P. Schuck, Agent Orange On Trial: Mass Toxic Disasters in the Courts (1986).

108. Willmore, *supra* note 6, at 17, col. 3.

109. Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2517 (1988).

110. One commentator notes that the Court's pronouncement of an off-the-shelf exception "is unclear . . . as to whether there is no design specification at issue (its use of the term "from stock" may imply this) or whether the Court means to continue to limit application of the government contractor defense to equipment which is uniquely military in nature." Scadron, *supra* note 30, at 380. The commentator concluded that in his opinion the Court was not extending the defense to off-the-shelf consumer products because none of the policies supporting application of the defense encompass such products. *Id.* at 392.

111. *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223 (D.C.N.Y. 1985), 818 F.2d 187 (2d Cir. 1987), *cert. denied*, Lombardi v. Dow Chem. Co., 108 S. Ct. 2898 (1988). *See also In re* Agent Orange Prod. Liab. Litig. v. Dow Chem. Co., 611 F. Supp. 1396 (D.C.N.Y. 1985), 818 F.2d 179 (2d Cir. 1987), *cert. denied*, Krupkin v. Dow Chem. Co., 108 S. Ct. 2899 (1988).

mary judgment should be granted to the defendants.[112] The court applied the government contractor defense set forth by Judge Weinstein. The Supreme Court's action is significantly confusing because by failing to review the decision or to remand it for application of the *Boyle* test, the Court allowed for the use of a different government contractor defense.

One might question whether denial of review by the Supreme Court of the Second Circuit's ruling reflects an acceptance of the *Agent Orange* defense over the *Boyle* defense. In application, the two tests are significantly different. For example, *Boyle's* third prong requiring contractors to warn the government clearly contradicts the *Agent Orange* defense which compares the government's knowledge with a reasonable contractor's knowledge. Additionally, the *Agent Orange* defense was tailored to combat the uniqueness of the facts involved, as indicated in Judge Winter's definition of a hazard. In contrast, the *Boyle* test has been constructed to address all possible applications.

Adding more doubt to the future application of the *Boyle* decision, the Court recently denied review of *Shaw v. Grumman Aerospace Corp.*[113] in which the Eleventh Circuit held the defendants liable for the death of a military pilot. The *Boyle* decision specifically rejected the standards used in the Eleventh Circuit[114] as inadequately protecting federal interests. Counsel for the defendants was puzzled at the Court's denial of rehearing and could only speculate that interpretations of the Death on the High Seas Act were contributing factors.[115] In the *Boyle* decision, Justice Scalia noted that the case might not have been decidedly differently under the Act and because that issue was not before the Court "it [is] inappropriate to decide it in order to refute (or for that matter, to construct) an alleged inconsistency."[116] However, as Grumman argued in its petition for rehearing, the Eleventh Circuit standard rejected in *Boyle* appears to be the one that will govern in Death on the High Seas Act cases in that circuit. Thus, a "direct and substantial conflict among the circuits"[117] now exists.

112. *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1263 (D.C.N.Y. 1985), 818 F.2d 187 (2d Cir. 1987), *cert. denied*, Lombardi v. Dow Chem., 108 S. Ct. 2898 (1988). "[I]n light of the information received to date, [it is clear] that the government knew as much as, or more than the defendant . . . about the adverse health effects of Agent Orange." *Id.*

113. 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988).

114. *Boyle*, 108 S. Ct. 2896 (1988).

115. 50 Fed. Cont. Rep. (BNA) 100 (July 11, 1988).

116. *Boyle*, 108 S. Ct. 2896 (1988).

117. 50 Fed. Cont. Rep. (BNA) 407 (Aug. 29, 1988) (quoting Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), from petition for rehearing).

B. Future Litigation

Peter Schuck succinctly stated that "[i]n the Agent Orange case, we confront an unprecedented challenge to our legal system: a future in which the law must grapple with chemical revolution and help us live comfortably with it."[118] Many authors compare asbestos litigation to the *Agent Orange* litigation.[119] Johns-Manville Corporation, the nation's largest asbestos manufacturer, filed for reorganization after it became obvious that defending the extremely large number of filed lawsuits (as well as anticipated lawsuits) would cost the company over two billion dollars.[120] This example only confirms the courts' fears that without the general contractor defense national security could be threatened. In light of the *Boyle* decision, asbestos cases such as *Hansen v. Johns-Manville Products Corp.*[121] could be ruled upon differently even though the *Hansen* court had stressed the importance of the plaintiff's civilian status in denying application of the government contractor defense.

The application of the *Boyle* decision in asbestos litigation in which the use of asbestos is in both private and public shipyards has been addressed by one district court.[122] The court denied the contractor's motion for summary judgement based on the military contractor defense. The court reasoned that there was no conflict of state and federal interest because federal specifications were silent as to requirements for warning labels.[123] Moreover, the court distinguished *Nicholson* because on those facts the "government's control was exhaustive and preclusive."[124] Moreover, the court rejected the defendant's contention that "the government's asserted fear of labor unrest and [shipyard worker] lawsuits would have impeded any . . . 'uniquely federal interest' sufficient to displace state common law."[125] Therefore, the court concluded that the defense was inapplicable in this case because of a lack of justifiable displacement. Even if an asbestos contractor could prove the nec-

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118. Schuck, *supra* note 107, at 6.

119. *Agent Orange and the Government Contract Defense, supra* note 7, at 506-07 n.74. *See generally* Note, *Boyle v. United Technologies Corp.,: The Government Contractor Defense,* 8 ST. LOUIS U. PUB. L. REV. 189, 202-03 (1989).

120. Miami Herald, Aug. 29, 1982, at 1, col. 1 (int'l ed.).

121. 734 F.2d 1036 (5th Cir. 1984), *cert. denied,* 470 U.S. 1051 (1985) (a suit brought for injuries to a shipyard worker allegedly incurred from working with asbestos).

122. *In re* Joint Eastern and Southern Dist. Asbestos Litig., 715 F. Supp. 1167 (E.S.D.N.Y. 1988).

123. *Id.* at 1168. The court distinguished *Boyle* because in those facts state and federal law directly conflicted over the placement of the escape hatch.

124. *Id.* at 1169 (citing Nicholson v. United Technologies, 697 F. Supp. 598 (D. Conn. 1988)).

125. *Id.* at 1169. The court relied on *In re* Hawaii Federal Asbestos Cases, No. 85-0447 (D. Haw. Oct. 24, 1988), for support.

essary prerequisite to the defense, the hurdle of the third prong remains. The contractors must show that the government had equal knowledge of the hazards of asbestos. This may prove difficult for the contractor because "the history of asbestos litigation . . . has left little doubt that most asbestos companies possessed equal knowledge of the hazards posed by their products at shipyards, but did little to advance the medical state of the art."[126] The third prong may become the asbestos manufacturer's fatal flaw in the successful use of the defense.

One recent application of the *Boyle* defense has caused public outrage and has raised questions of health and safety welfare responsibility. In a class action suit against NLO Inc.,[127] owners of an uranium processing plant in Fernald, Ohio, community residents charged that the plant emitted thousands of pounds of uranium dust into the air, discharged waste into a nearby river and stored material from the World War II Manhattan Atomic Project in leaking concrete silos.[128] Department of Energy officials have revealed that the government knew for decades that the plant was emitting hazardous substances and that the "problems at Fernald stemmed from the government's capital investment and policy decisions."[129] The government's acknowledgement was an attempt to insulate NLO from liability and take advantage of the *Boyle* decision by claiming a discretionary action.[130] The government's action was a complete change of tactic after assuring residents prior to *Boyle* that "safety and welfare of employees at the site and our neighbors . . . [are a] high priority."[131] However, the United States District Court for the Southern District of Ohio denied the government's motion to dismiss the suit under the government contractor defense.[132] The Fernald plant litigation raises concern that the defense will be used as a legal tactic to circumvent liability, to encourage participation in the risky nuclear industry and to allow for the failure to implement health and safety measures.[133] Therefore, one must ask whether *Boyle* is being stretched too far.

126. Scadron, *supra* note 30, at 397. Most companies did not warn the government until after 1972 when Congress passed the Occupational Safety and Health Act (OSHA). The author notes that the courts have considered the government's involvement as secondary. *Id.* at 398.

127. *In re* Fernald Litig. No. 85-0149 (S.D. Ohio 1989) The suit claims damages for declining property values and the emotional trauma caused by the presence of the 1984 plant radon leak.

128. Newsday Nassau and Suffolk Edition, Mar. 1, 1989, at 67.

129. *Id.* The officials also stated that it was a government decision "not to spend money to stop the pollution or tell the public about it." Nat'l L.J., Nov. 28, 1988, at 3, col. 2.

130. Newsday, *supra* note 128, at 67.

131. *Id.*

132. *Id.*

133. Nat'l L.J., Nov. 28, 1988, at 22. *See* Newsday, *supra* note 128, at 67 ("the govern-

V. Conclusion

The United States government's decision to order the manufacture and use of the herbicide Agent Orange in Vietnam has resulted in many debates, only one of which is the application of the government contractor defense. In an effort to protect the discretionary function rule and guarantee contractors equitable treatment, the defense allows a contractor to escape liability for injuries resulting from defective designs which have been specified by the government. The bottom line concern reflected in the development of the defense centers on the effect of accountability on national security. This fear propelled the defense from a limited, generally discouraged argument, to a widely accepted and expanding affirmative defense.

Judge Weinstein's standard in *Agent Orange* began this growth which culminated in the Supreme Court's ruling in *Boyle*. The Court continued the expansion by rejecting the previously accepted *Feres/Stencel* doctrinal basis and finding justification in the discretionary function involved in these "uniquely federal" interests. Thus, the Court has allowed preemption of state law and created a federal doctrine. Many critics raise questions as to the practical application of the *Boyle* test, however, only future litigation will answer those questions. Moreover, public outrage may play a larger role in the future application of the defense if nonmilitary contractors, such as the Fernald nuclear plant, successfully escape liability through the application of the defense. In the interim, practitioners should be aware that the application of the defense in the courts of this country may not be entirely uniform as the Supreme Court appears to have inadvertently created confusion.

Mary Cathern Hensinger

ment's catch-22 legal strategy is a cause for alarm, for it raises questions about the government's trustworthiness about all nuclear safety").