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# Tort Law: A Private Contractor in Government Clothing

Walt A. Linscott
*University of Dayton*

**TORT LAW**: A PRIVATE CONTRACTOR IN GOVERNMENT CLOTHING—*Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (interim ed. 1988).

## I. INTRODUCTION

The military contractor defense provided military contractors with immunity from tort liability under state law.[1] The defense was created by the federal courts with various rationales used to justify it. A majority of courts based the defense on what has become known as the *Feres-Stencel* doctrine.[2] Although the *Feres-Stencel* doctrine enjoyed widespread acceptance in the circuit courts,[3] the Supreme Court of the United States had not recognized the defense until its decision in *Boyle v. United Technologies Corp.*[4] The *Boyle* decision articulates the Supreme Court's version of the defense, providing a new basis for what the Court now calls the "government contractor defense."[5]

This casenote first discusses the *Feres-Stencel* doctrine. The casenote then analyzes the rationale of the conclusion in *Boyle*. Finally, the casenote examines the ramifications of *Boyle*.

## II. FACTS AND HOLDING

On April 27, 1983, First Lieutenant David A. Boyle was co-pilot on board a United States Marine Corps helicopter.[6] The aircraft crashed a little more than a mile off the Virginia coast.[7] In addition to Boyle, a pilot, a crew chief, and a passenger were also on board at the

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1. *See* Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986) (government contractor defense barred recovery on theory of negligence for defective modification of a Navy RF-8G Reconnaissance aircraft), *cert. denied*, 108 S. Ct. 2897 (interim ed. 1988); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985) (government contractor defense provided immunity from claim brought on theory of strict liability to manufacturer of National Guard troop carrier); McKay v. Rockwell Int'l. Corp., 704 F.2d 444 (9th Cir. 1983) (government contractor defense shielded manufacturer of aircraft ejection seat from liability when pilot was killed on ejection), *cert. denied*, 464 U.S. 1043 (1984); *see also* Comment, *Strict Product Liability Suits for Design Defects in Military Products: All the Kings Men; All the King's Privileges?*, 10 U. DAYTON L. REV. 177 (1984).

2. Stencel Aero Eng'g. Corp. v. United States, 431 U.S. 666 (1977) (holding that government contractors are barred from seeking third-party indemnification from the government for suits brought against them by injured military personnel); Feres v. United States, 340 U.S. 135 (1950) (standing for the proposition that military personnel are barred from suit against the government for injuries sustained in the course of their duties).

3. *See Tozer*, 792 F.2d at 403; *Bynum*, 770 F.2d at 556; *Mckay*, 704 F.2d at 444.

4. 108 S. Ct. 2510 (interim ed. 1988).

5. *Id.*

6. *Id.* at 2513.

7. Brief for Petitioner, Boyle v. United Technologies Corp., 108 S. Ct. 2510 (interim ed. 1988) (No. 86-492).

time of the crash.[8] All persons on board survived the initial impact and, with the exception of Boyle, managed to escape.[9] The co-pilot's escape hatch was designed to open out.[10] Boyle was trapped inside the submerged aircraft, unable to open his escape hatch.[11] As a result, Boyle drowned.[12]

The decedent's father brought suit against the Sikorsky Aircraft Division of United Technologies, alleging that the helicopter was improperly maintained and defectively designed.[13] The suit was brought in federal district court based upon diversity jurisdiction, and was tried by a jury applying Virginia law.[14] The jury returned a general verdict for the plaintiff in the amount of $725,000.[15] The district court denied Sikorsky Aircraft's motion for a judgment notwithstanding the verdict, and Sikorsky Aircraft appealed to the Fourth Circuit Court of Appeals.[16] Finding that Sikorsky Aircraft was entitled to immunity under the *Feres-Stencel* doctrine, the court of appeals reversed and remanded the case to the district court.[17] The court of appeals directed that judgment be entered for Sikorsky Aircraft.[18] The United States Supreme Court granted certiorari. The Court, formulating a new version of the government contractor defense,[19] vacated the decision of the Fourth Circuit Court of Appeals and remanded the case to the district court.[20]

## III. BACKGROUND

### A. *The Military Contractor Defense*

Originally, the military contractor defense provided military contractors, who had constructed products from "reasonably precise" designs approved by the government,[21] with an affirmative defense against

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* Sikorsky Aircraft, a division of United Technologies, manufactured the helicopter.
14. Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2513 (interim ed. 1988).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 2519.
21. The Ninth Circuit developed the notion of the prerequisite of the government's approval of designs in McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). The Ninth Circuit made no attempt to explain what "reasonably precise specifications" were and, unfortunately, the Supreme Court in *Boyle* made no attempt to explain what constituted these "reasonably precise specifications." Justice Scalia argued that requiring a contractor to obtain government approval is a method of assuring that a government officer review the design. *Boyle*, 108 S. Ct. at 2518. According to the majority in *Boyle*, this review by an officer

tort liability imposed by state law.[22] The military contractor defense was created to provide military contractors with pre-emptory immunity from liability under state tort law.[23] The lower federal courts had struggled for a number of years to formulate a rationale for the defense.[24] This struggle came from a search for a limiting principle that would identify the situations where there was a "significant conflict" between federal interests and state tort law; when this "significant conflict" arose, courts could pre-empt state tort law.[25]

### *B. The Feres-Stencel Doctrine*

The majority of courts have based the limiting principle on the *Feres-Stencel* doctrine.[26] This doctrine was derived from the immunity provided to the United States Government under the Federal Tort Claims Act (FTCA).[27] This provision of the FTCA, codified at section 2680(j) of title 28, provides the federal government with immunity regarding "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[28] The circuit courts of appeal have taken the view that disallowing military contractors the same immunity as the government would result in the contractors passing the high cost of judgments to the government in the form of high contract prices.[29] The net effect of this situation would be to subvert the government's immunity under the FTCA.[30]

In formulating its version of the government contractor defense,

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brings the design's approval within the scope of the discretionary function aspect of the Federal Tort Claims Act, 28 U.S.C. § 2680 (1982). *Boyle*, 108 S. Ct. at 2518. Unfortunately, the Court did not elaborate the necessary extent of the officer's review. It seems somewhat unrealistic to expect one, or even several officers, to evaluate adequately a complex design that perhaps took years to develop. Conversely, a superficial analysis of the design by the government officer may allow a contractor to reap benefits from a poor and dangerously defective design with impunity.

22. Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2518 (interim ed. 1988).

23. This doctrine was first established in *McKay*, 704 F.2d at 444, where the court stated:

> [A] supplier of military equipment is not subject to section 402A liability for a design defect where: (1) the United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

24. *See* cases cited *supra* note 1.

25. *Boyle*, 108 S. Ct. at 2510.

26. *See* cases cited *supra* note 1.

27. 28 U.S.C. § 2680(j); *see also* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977); Feres v. United States, 340 U.S. 135, 138 (1950).

28. 28 U.S.C. § 2680(j).

29. *See* cases cited *supra* note 1.

30. *Id.*

the Supreme Court in *Boyle v. United Technologies Corp.*[31] agreed with the result of the court of appeals' decision,[32] but rejected the *Feres-Stencel* doctrine as the basis for the government contractor defense. According to the Court, the government contractor defense based on the *Feres-Stencel* doctrine would produce inconsistent results.[33]

### C. *The Supreme Court Sets Forth a New Basis for the Government Contractor Defense*

In order to dispense with the court of appeals' rationale for the government contractor defense, the United States Supreme Court was forced to find a new limiting principle to replace the one based upon the *Feres-Stencel* doctrine. The *Boyle* Court recognized that, in order to pre-empt state tort law, there must be a "significant conflict" between state law and a fundamental federal interest.[34] Unable to find

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31. 108 S. Ct. 2510 (interim ed. 1988).

32. The Court agreed with the scope of the displacement of state tort law formulated by the Fourth Circuit and noted that the Ninth Circuit in McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), had adopted a similar displacement. *Boyle*, 108 S. Ct. at 2518. This scope was articulated as follows:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

*Id.*

33. *Boyle*, 108 S. Ct. at 2517. Justice Scalia, writing for the majority, stated:

> [I]n its application to the present problem, [the *Feres-Stencel* doctrine] logically produces results that are in some respects too broad and in some respects too narrow. Too broad, because if the Government contractor defense is to prohibit suit against the manufacturer whenever *Feres* would prevent suit against the Government, then even injuries caused to military personnel by a helicopter purchased from stock . . . , or by any standard equipment purchased by the Government, would be covered. Since *Feres* prohibits all service-related tort claims against the Government, a contractor defense that rests upon it should prohibit all service-related tort claims against the manufacturer . . . . [R]eliance on *Feres* [also] produces (or logically should produce) results that are in another respect too narrow. Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent . . . a civilian's suit against the manufacturer of fighter planes, based on a state tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines. Yet we think that the character of the jet engines the Government orders for its fighter planes cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the armed services.

*Id.*

34. *Id.* at 2518. The Court has recognized this pre-emption in areas that are "so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law'." *Id.* at 2514.

any statutory authority directly on point,[35] the Court fashioned a new basis for the defense by using the discretionary function strand of section 2680(a) of the FTCA.[36] The majority in *Boyle* considered that the selection of products for the government by a federal official was an exercise of the official's discretion.[37] That discretion should, in the eyes of the Court, fall within the immunity granted under section 2680(a) of the FTCA.[38]

The Court in *Boyle* found two federal interests that were sufficiently fundamental to warrant the pre-emption of state tort law.[39] The first federal interest involved principles of contract law. The majority in *Boyle* engaged in a strained analysis of obligations to, and rights of, the United States under contract law.[40] This first interest gained little recognition in the opinion and appears to be an attempt at rationalizing the final outcome.[41] The second fundamental interest articulated by the Court provided the basis for the creation of the new doctrine. This sec-

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35. *Id.* at 2514.

36. *Id.* at 2517. The FTCA allows civil suits against the government; however, the act does set forth certain immunities for the government and officials acting within the scope of their duties. The Court focused its attention on 28 U.S.C. § 2680, which sets forth exceptions as to when the government is immune from suit. Specifically, the Court used the discretionary function strand of the FTCA, which is found at 28 U.S.C. § 2680(a):

> The provisions [of the FTCA] shall not apply to—
>
> (a) Any 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.

*Id.*

37. *Boyle*, 108 S. Ct. at 2517.

38. *Id.*

39. *Id.* at 2514.

40. The Court made an archaic connection between contract and tort law. Previous cases decided by the Court involving federal interests sufficient to pre-empt state law have involved contract law. *Id.* at 2514; *see, e.g.*, United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947). The Court in *Boyle* reasoned that since, traditionally, there had been a requirement of privity before a suit in tort was allowed, there was a sufficient relation to the contract to trigger a fundamental government interest. *Boyle*, 108 S. Ct. at 2514.

41. The majority presents this "interest" in a short and strained analysis. *Boyle*, 108 S. Ct. at 2514. The Court was trying to find a link to federal law that would allow the principles of the government contractor defense to override state tort law. *Id.*

> The present case does not involve an obligation to the United States under its contract, but rather liability to third persons. That liability may be styled one in tort, but it arises out of performance of the contract—and traditionally has been regarded as sufficiently related to the contract that until 1962 Virginia would generally allow design defect suits only by the purchaser and those in privity with the seller.

*Id.*

This analysis is curious considering that the Court was attempting to demonstrate why federal law should *override* state law.

ond interest was described as "the civil liability of federal officials for actions taken in the course of their duty."[42] The Court connected the procurement function of federal officials with the production function of the contractors[43] and found these functions reciprocal in terms of liability.[44] It was upon this rationale that the *Boyle* Court ultimately premised its interpretation of what had been known as the military contractor defense.[45]

One area that has received consistent attention from both the lower federal courts and the Supreme Court in deciding the scope of the government contractor defense has been the theoretical negative economic impact of allowing military contractors to be held liable in tort.[46] The decision in *Boyle* did not depart from this theme. The Court theorized that any costs incurred by contractors from suits brought against them would eventually be passed to the government in the form of price increases.[47]

The crux of the Supreme Court's formulation of the government contractor defense, and its greatest departure from previous formulations of the defense,[48] may be found in its extrapolation from the concept of discretionary authority. The Court looked to section 2680(a) of the FTCA as statutory authority to support its position.[49] This provision of the FTCA provides immunity to the government when "[a]ny claim . . . [is] 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."[50] From the government's perspective, the *Boyle* Court found the selection and procurement of a particular piece of military hardware to be "assuredly a discretionary function."[51]

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42. *Id.*

43. *Id.*

44. In essence, the Court felt that "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise the price. Either way, the interests of the United States will be directly affected." *Id.* at 2515.

45. The *Boyle* Court renamed "the military contractor defense" "the government contractor defense."

46. The underlying theory is that costs incurred by contractors from successful claims against them will be passed to the government. The extra cost is perceived as an unacceptable burden upon the government. The ultimate concern is that burgeoning costs caused by tort claims will severely hamper the government's ability to procure items and will limit competition among contractors for government contracts. *See id.* at 2510; cases cited *supra* note 1.

47. *See supra* note 44.

48. *See* Comment, *supra* note 2, at 117; Note, *Under a Cloak of Olive Drab: Extending the Military Contractor Defense in Tozer v. LTV Corp.*, 48 U. PITT. L. REV. 933 (1987).

49. *Boyle*, 108 S. Ct. at 2517.

50. 28 U.S.C. § 2680(a).

51. *Boyle*, 108 S. Ct. at 2517.

In sum, the Court reasoned that the net effect of a failure to provide government contractors with tort immunity would be a form of passive indemnification on the part of the government.[52] The Court theorized that this failure to provide immunity would, in effect, serve to hold the government liable for the exercise of a federal official's discretionary authority, thereby subverting the goals of the FTCA.[53]

## IV. ANALYSIS

The United States Supreme Court has departed from earlier formulations of the military contractor defense with its decision in *Boyle v. United Technologies Corp.*[54] While the decision essentially reached the same outcome as previous formulations of the defense,[55] the *Boyle* Court rejected the *Feres-Stencel* doctrine, which was fairly limited in scope.[56] Instead, the Court based the defense on the discretionary authority provision of the FTCA[57] and, consequently, removed the defense from the limited sector of military contractors and granted all government contractors the ability to use the defense. More than one author has suggested this outcome.[58]

Lower federal courts had justified attaching immunity to private contractors by recognizing the unique characteristic of items procured for military use. These justifications were at least conceptually appealing.[59] The *Boyle* formulation no longer limits the availability of the defense to military contractors.[60] Today, it would appear that the defense is applicable to any government contractor as long as the government approved the contract design.[61]

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52. *See supra* note 43.

53. *Boyle*, 108 S. Ct. at 2516.

54. 108 S. Ct. 2510 (interim ed. 1988).

55. *See* cases cited *supra* note 1.

56. The *Feres-Stencel* doctrine was limited to injured service personnel. *See id.*

57. 28 U.S.C. § 2680(j) (1982).

58. *See, e.g.*, Willmore, *Boyle in Court: Invitation for New Litigation Strategies*, Legal Times, July 18, 1988, at 16, col. 4; Kriendler, *The Government Contractor Defense*, N.Y.L.J., July 6, 1988, at 3, col. 1.

59. *See* cases cited *supra* note 1. Justice Wilkinson quoted *In re* "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982), and stated: "[C]onsiderations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and are exempt from review by civilian courts." *Tozer*, 792 F.2d at 406 (quoting *In re "Agent Orange,"* 534 F. Supp. at 1054 n.1).

60. The discretionary function provision of the FTCA does not limit the exercise of discretion to officials who procure military items. By choosing this provision of the FTCA, the *Boyle* Court arguably has created a doctrine that will allow any contractor who receives approval of a design by a government official to obtain immunity under the government contractor defense.

61. *Boyle*, 108 S. Ct. at 2514. The Court dismissed this issue as not being before it for decision. *Id.* at 2514 n.1. If the Court wanted to prevent the application of the defense to non-military contractors, it should have incorporated more precise language that would limit the de-

### A. *Flaws in the Supreme Court's Rationale*

The government contractor defense was fashioned by the *Boyle* Court in an effort to insulate the government from price increases stimulated by successful litigation against government contractors.[62] In fact, this seems to be the link the Court needed to connect the discretionary function strand of the FTCA to the government contractor defense. This link is, perhaps, best characterized as implied indemnity.[63] The most significant problem with relying upon the notion of implied indemnity as a basis for the creation of the defense is that it is highly theoretical.[64] The *Boyle* Court did not offer any statistical or empirical data, and if it had, there may have been potential conflicts with the doctrine espoused in *Stencel Aero Engineering Corp v. United States*.[65]

Another flaw in the *Boyle* Court's rationale is its apparent failure to consider the costs incurred by the United States when servicemen are injured by defectively designed products.[66] It would seem more efficient to impose liability for design defects upon government contractors as a motivation to ensure the product is made safely.[67] Contrary to the *Boyle* Court's rationale, it would seem that the costs passed to the government from an occasionally successful products liability action would be less of a burden on the United States than the replacement cost of a

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fense to military contractors. The Court's discussion of the basis of the defense speaks only of obligations of the government under its contracts in generic terms. *See id.* at 2514–16.

62. The major emphasis for justifying the defense rested on litigation costs that would be passed to the government. *Id.* at 2518. The *Boyle* Court stated: "The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs." *Id.*

63. Implied indemnity is characterized as the passing of liability costs to the consumer by the manufacturer. In *Boyle*, the Court drew on this notion of implied indemnity to illustrate that when a government contractor is held liable, in effect, the government itself is being held liable. *See supra* note 61.

64. The "cost-pass-through" aspect of the majority's rationale provoked a vitriolic dissent by Justice Brennan. *Boyle*, 108 S. Ct. at 2528 (Brennan, J., dissenting). Elucidating specifically on the "cost-pass-through" basis, Justice Brennan stated: "I would probably vote against any law absolving multibillion dollar private enterprises from answering for their tragic mistakes, at least if that law were justified by no more than the unsupported speculation that their liability might ultimately burden the United States Treasury." *Id.*

65. 431 U.S. 666 (1977). If the Court could have offered any evidence of the cost-pass-through, the indemnification would have been in direct conflict with *Stencel* since the *Stencel* doctrine bars such indemnification. *See id.*

66. The Court did not specifically consider the cost in terms of lost workdays, hospitalization, death benefits, and human life for bodily injury or death caused by defectively designed products.

67. The notion of motivating manufacturers to produce products free from defects is underscored by the American Law Institute's Restatement (Second) of Torts § 402A, Special Liability of Seller of Product for Physical Harm to User or Consumer, RESTATEMENT (SECOND) OF TORTS § 402A (1965).

defectively designed jet fighter.

Through judicial fiat, the *Boyle* Court has carved out an exception to the FTCA and applied it in a way that limits the scope of state tort law.[68] In an attempt to create a more concise rule, the Supreme Court has created a doctrine that is tenuous at best. The goal of attaching immunity to military contractors may have been met in *Boyle*, but there remains the question of the extent of immunity for non-military contractors. The Court's decision in *Boyle* announced a new "limiting principle"[69] for the government contractor defense. In theory, the Court succeeded in articulating a new limiting principle; however, in fact, the Court has created an "expanding principle" for the application of the government contractor defense.

### *B. Raising the Defense: A Difficult Task for the Defendant*

One of the primary justifications the *Boyle* Court articulated for the government contractor defense was that of preventing the subversion of the discretionary function provision of the FTCA.[70] The discretion the Court was trying to protect was the ability of a government official to approve or disapprove a contractor's design after making an informed decision. In essence, a government official should have a free choice. While the desire of the Court may have been to protect this government official's discretion, its vision of how the new government contractor would work may have been overly optimistic.

The *Boyle* decision makes clear that the defense must be raised by the contractor and that it is an affirmative defense.[71] In this regard, the

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68. *See Boyle*, 108 S. Ct. at 2510.

69. *Id.* at 2517. The vitality of this limiting principle is already in question. In McGonigal v. Gearhart Indus., 851 F.2d 774 (5th Cir. 1988), the Fifth Circuit paid lip service to the *Boyle* rationale but decided against the military contractor defense:

> The opinion [in *Boyle*] 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 of this Circuit that military contractor immunity does not apply in cases of defective manufacture: 'federal law provides no defense to the military contractor that mismanufactures military equipment. . . .'

*Id.* at 777 (quoting Bynum v. FMC Corp., 770 F.2d 556, 574 (5th Cir. 1985)).

70. The *Boyle* Court stated:

> [We] are . . . of the view that permitting 'second-guessing' of [procurement decisions by government officials] . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against contractors would ultimately be passed through. . . to the United States itself, since defense contractors will predictably raise their prices to cover . . . contingent liability for the Government-ordered designs.

*Boyle*, 108 S. Ct. at 2517–18.

71. *Boyle*, 108 S. Ct. 2510. Federal Rule of Civil Procedure 8(c) states: "In pleading . . . a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." FED. R. CIV. P. 8(c).

contractor has the burden of proving the defense.[72] Since the basis of the defense is a factual determination, the issue will be decided by a jury. This aspect of the defense should be quite appealing to plaintiffs because, as one author phrased it: "All of these elements invite evidence and the exercise of judgment by the jury. Given the tragedy . . . on the one hand, and the existence of a manufacturer-caused defect on the other hand, one would expect plaintiffs to do well with the jury."[73]

The Court's articulation of the government contractor defense creates a factual argument that a contractor must make to a jury to obtain immunity under the defense.[74] Should the contractor fail to adequately meet its burden, it is subject to liability. With this in mind, contractors would seek specific and complete approval of every design. The potential for delay in production, therefore, could be great. The alternative to slowing down production is the receipt of a blanket approval of the design, a mere "rubber stamp."[75]

Widespread use of the "rubber stamp" approach by government contractors would subject the government to an increase in liability costs. The increase in liability costs would result from the failure to meet the third aspect of the government contractor defense, which requires that the "supplier warn[] the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[76] During the extensive discovery that would inevitably result, this third aspect of the defense would be extraordinarily difficult for a government contractor to maintain if the contractor used the "rubber stamp" approach. The government would once again be in a position to absorb costs, a result the *Boyle* court attempted to avoid.[77]

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72. *See* FED. R. CIV. P. 8(c).

73. Kriendler, *supra* note 58, at 5, col. 2.

74. *Id.* Perhaps the most difficult fact for a contractor to prove is that it made the government aware of all defects known to the contractor. Requiring this type of disclosure seems to serve as a double-edged sword. On the one hand, a contractor would be wise to disclose everything it possibly could in regard to design defects of a product it was manufacturing for the government, which would provide protection from potential lawsuits by private parties. On the other hand, there is motivation for the contractor to keep its knowledge of design defects from the government for fear that its product may not be selected. The result would be an immediate economic detriment to the contractor that it may perceive as unacceptable, thereby creating an incentive for nondisclosure of defects.

75. "[The contractor] is immune from liability so long as it obtained approval of 'reasonably precise specifications'— perhaps no more than a rubber stamp from a federal procurement officer who might not have noticed or cared about the defects, or even had the expertise to discover them." *Boyle*, 108 S. Ct. at 2519 (Brennan, J., dissenting).

76. *Id.* at 2518.

77. The Court fails to describe any mechanism for assuring that costs associated with liability for non-government procured items are not passed on to the government. It is difficult to conceive of a manufacturer that limits all of its products completely to the government. Even more difficult to conceive is how a manufacturer would maintain the division between product lines in

### C. *Equitable Principles are Violated*

Before *Boyle*, courts looked for an equitable principle to make the formulations of the government contractor defense more palatable.[78] The class of plaintiffs who were barred from recovery in tort in the earlier cases had been limited to servicemen and their survivors.[79] While not as reliable as perhaps a civil suit, there was some possibility of relief provided in the Veteran's Benefit Act.[80]

Today, the government contractor defense will affect anyone who is injured by a product built for, and with the approval of, the government.[81] One author suggests that it makes little sense to draw a distinction between the contracting for services the government chooses not to perform itself and the contracting for the production of military equipment the government chooses not to produce itself.[82]

## V. CONCLUSION

The United States Supreme Court's decision in *Boyle v. United Technologies Corp.*[83] presents a classic example of judicial activism. Absent any statutory provisions on point, the Court fashioned a basis for the government contractor defense from the FTCA. While attempting to find a new limiting principle, the Court has created a doctrine that has expanded the scope of immunity afforded those who produce products for the government.

There is support for the government contractor defense as it relates to military contractors. It is easily recognized that weapons systems are sophisticated. As warfare becomes increasingly more complex, the drive to stay one step ahead of adversaries does not always give a nation time to flesh out all the problems with a new and much needed military design. On the other hand, providing compensation for those who are victims of design defects seems to be a just and equitable re-

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its overall financial statement necessary to ensure that the government was not incurring costs for a defective product sold to non-government sources. Such a system seems inherently cost inefficient and burdensome.

78. *See generally* Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986) (citing to the Veteran's Benefit Act, 38 U.S.C. §§ 1–5226 (1982)).

79. *Id.*

80. 38 U.S.C. §§ 1–5226.

81. The dissent by Justice Brennan points to the broad sweep of the majority's articulation of the defense: "[The government contractor defense] applies not only to military equipment . . . but to any made-to-order gadget that the Federal Government might purchase after previewing plans." *Boyle*, 108 S. Ct. at 2520 (Brennan, J., dissenting).

82. Willmore, *supra* note 58, at 18, col. 5.

83. 108 S. Ct. 2510 (interim ed. 1988).

sult. It seems inconsistent that a person or his family should be barred from recovery because of the defendant's seal of government "approval."

*Walt A. Linscott*