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Boyle v. United Technologies Corp. and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense

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BOYLE v. UNITED TECHNOLOGIES CORP. AND THE GOVERNMENT CONTRACTOR DEFENSE: AN ANALYSIS BASED ON THE CURRENT CIRCUIT SPLIT REGARDING THE SCOPE OF THE DEFENSE

In its present form, the federal government contractor defense extends the federal government's immunity from suits by government employees injured by defective equipment to contractors who provide equipment to the government under government-provided specifications.[1] The U.S. Supreme Court attempted to clarify the basis for the defense in *Boyle v. United Technologies Corp.*,[2] yet important questions about the scope of the defense remain unanswered. Most important, confusion exists over exactly which types of contractors may assert the defense. Specifically, courts disagree whether contractors in nonmilitary procurements should enjoy the protection of the government contractor defense. Lower courts looking to *Boyle* for the answer to this question have foundered, resulting in a circuit split.[3] Commentators have attacked *Boyle* by criticizing its status as a decision of federal common law and by denouncing the general suitability of the judiciary to decide such empirical policy questions.

This Note examines the current split among the federal courts of appeals over the intended scope of the federal government contractor defense as articulated in *Boyle*. Analysis of each side

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1. *See* Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 258 (1991).

2. 487 U.S. 500 (1988).

3. *Compare In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806 (9th Cir. 1992) (restricting the federal government contractor defense to military contractors), *and* Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450 (9th Cir. 1990) (restricting the federal government contractor defense to military contractors providing military equipment), *with* Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir. 1993) (expanding the federal government contractor defense to nonmilitary equipment providers), *and* Johnson v. Grumman Corp., 806 F. Supp. 212 (W.D. Wis. 1992) (applying the federal government contractor defense to a manufacturer of mail delivery vehicles).

of the split will show that neither side has crafted an approach that is both true to *Boyle*'s adopted rationale and consistent with traditional notions of the interpretation of federal common law. This Note will conclude that *Boyle* and its progeny have failed to provide an adequate articulation of the federal government contractor defense, and that Congress should address the complex empirical and policy issues presented by a comprehensive government contractor defense.

BACKGROUND: *BOYLE V. UNITED TECHNOLOGIES CORP.*

On April 27, 1983, a helicopter carrying U.S. Marine helicopter copilot David A. Boyle crashed off the coast of Virginia.[4] Lieutenant Boyle survived the impact of the crash, but drowned when he could not activate the helicopter's escape hatch.[5] Investigators determined that the hatch, which engineers had designed to open outward, failed to operate because of water pressure exerted on the submerged helicopter and because instruments blocked Lieutenant Boyle's access to the hatch.[6] Boyle's heirs and estate filed a diversity action for wrongful death under Virginia state tort law against the helicopter manufacturer Sikorsky.[7] The complaint alleged that Sikorsky had designed the hatch defectively, causing Boyle's death.[8] After the jury in the initial trial returned a verdict for Boyle's estate, Judge Richard Williams, of the U.S. District Court for the Eastern District of Virginia, denied Sikorsky's motion for judgment notwithstanding the verdict.[9] On appeal, the U.S. Court of Appeals for the Fourth Circuit vacated and remanded the case with an order to enter judgment for Sikorsky.[10] The court of appeals held that the "military contractor defense" protected Sikorsky from liability.[11] The

4. *See Boyle*, 487 U.S. at 502.
5. *See id.* at 503.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See* Boyle v. United Techs. Corp., 792 F.2d 413, 414 (4th Cir. 1986), *vacated*, 487 U.S. 500 (1988).
10. *See id.*
11. *See id.* at 415. Prior to the Supreme Court's decision in *Boyle*, courts and commentators apparently used the terms "military contractor defense" and "govern-

court based its decision on the common-law version of the military contractor defense,[12] declaring that a military contractor shared the immunity of the United States when it could demonstrate that: "[(1)] the United States approved reasonably precise specifications for the equipment; [(2)] the equipment conformed to those specifications; and [(3)] 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."[13]

Lieutenant Boyle's estate appealed and the United States Supreme Court granted certiorari.[14] Justice Scalia issued the opinion of a five-justice majority that vacated the Fourth Circuit's decision and remanded the case to the district court.[15] The Court agreed with the Fourth Circuit's general application of the government contractor defense to the facts of *Boyle*; however, it rejected the Fourth Circuit's rationale and established a version of the defense formed by federal common law.[16]

Justice Scalia's majority opinion expressed disagreement with the petitioner's contention that "in the absence of legislation specifically immunizing Government contractors from liability for design defects, there is no basis for judicial recognition of such a defense."[17] The Court asserted that when state law conflicts with

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ment contractor defense" interchangeably. *See, e.g.*, Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1015, 1139 n.44 (1996). After *Boyle*, however, use of each respective term seems to indicate a particular position regarding the defense's proper scope of application. Courts holding that the defense should apply only to military procurements use the term "military contractor defense." *See, e.g.*, *In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810-11 (9th Cir. 1992); Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1453 (9th Cir. 1990). Courts and commentators that advocate expanding the government contractor defense to include immunity for nonmilitary contractors and procurements consistently use the term "government contractor defense." *See, e.g.*, Carley v. Wheeled Coach, 991 F.2d 1117, 1119 (3d Cir. 1993); Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons From* Boyle's *Government Contractor Defense*, 63 S. CAL. L. REV. 637, 642 (1990). Given the unsettled scope of the defense, this Note refers to any immunity claimed under *Boyle* as the "government contractor defense."

12. *See Boyle*, 792 F.2d at 414.

13. *Id.* (citing Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986)).

14. Boyle v. United Techs. Corp., 479 U.S. 1029, 1029 (1987).

15. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 514 (1988).

16. *See id.* at 510-11.

17. *Id.* at 504.

a "uniquely federal interest," the Court could create protection through "so-called 'federal common law.'"[18] Citing *Texas Industries, Inc. v. Radcliff Materials, Inc.*,[19] the Court noted that "a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced."[20]

The Court argued that *Boyle* bordered two areas that involved "uniquely federal interests."[21] First, Justice Scalia noted that the Court had recognized in *National Metropolitan Bank v. United States*[22] and *Clearfield Trust Co. v. United States*[23] that the obligations to and the rights of the United States under its contracts were federal interests.[24] Second, the Court mentioned federal officials' immunity from civil liability for actions taken in the course of their duties as another "uniquely federal interest" at issue.[25] The Court conceded that *Boyle* involved an independent contractor rather than a government official, yet it asserted that liability continued to affect the government's interest in completing its work.[26] In support of its assertion, the Court noted that imposing liability for design defects on independent military contractors would directly affect government contract terms by forcing contractors either to pass liability costs to the government, or to decline to manufacture the government's specified designs.[27] The Court argued that in either case, the issue implicated federal interests.[28]

After establishing that a "uniquely federal interest" was at stake, the Court noted that finding a federal interest was a nec-

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18. *Id.*
19. 451 U.S. 630 (1981).
20. *Boyle*, 487 U.S. at 504 (citing *Texas Indus.*, 451 U.S. at 640).
21. *See id.*
22. 323 U.S. 454 (1945).
23. 318 U.S. 363 (1943).
24. *See Boyle*, 487 U.S. at 504 (citing *National Metro. Bank*, 323 U.S. at 456; *Clearfield Trust Co.*, 318 U.S. at 366-67).
25. *See id.* at 505 (citing, e.g., Westfall v. Erwin, 484 U.S. 292, 295 (1988); Barr v. Matteo, 360 U.S. 564, 569-74 (1959) (plurality opinion)).
26. *See id.*
27. *See id.* at 507.
28. *See id.*

essary, but not sufficient, condition for displacing state law.[29] The Court asserted that federal law could displace state law only where a "significant conflict" existed "between an identifiable 'federal policy or interest and the [operation] of state law.'"[30] Previously, federal courts of appeals addressing the government contractor defense had recognized the need for a significant conflict in order to displace state law and had relied on the *Feres* doctrine[31] to settle the conflict between federal and state law.[32] The lower courts reasoned that military contractor liability would be inconsistent with *Feres* because the contractors would pass the cost of liability to the government and thereby defeat the purpose of governmental immunity for military accidents.[33]

In *Boyle*, the Court rejected *Feres* as a limiting principle for determining whether a significant conflict existed between federal interests and state law.[34] It considered the *Feres* doctrine's rationale flawed in two respects: it was overly-broad and overly-narrow.[35] The Court argued that the *Feres* doctrine was too broad because it extended immunity to contractors for any injury to military personnel caused by any sort of government equipment.[36] The Court recognized the need to distinguish protection

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29. *See id.*

30. *Id.* (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)).

31. The *Feres* doctrine, which originated in *Feres v. United States*, 340 U.S. 135 (1990), immunizes the government from liability in suits brought by military members injured in the performance of their duties. *See* Green & Matasar, *supra* note 11, at 646 n.26; *see also* Greg L. Bernstein, Comment, *An Interpretation of the* Feres *Doctrine After* West v. United States and *In re* "Agent Orange" Product Liability Litigation, 70 IOWA L. REV. 737, 737-38 (1984) (discussing the scope of *Feres* immunity). Commentators have pointed out that, in its support for the argument that federal official immunity is a "uniquely federal interest," the Court's opinion in *Boyle* noticeably omitted *Feres*. *See* Green & Matasar, *supra* note 11, at 641. Professors Green and Matasar have suggested that Justice Scalia's omission of *Feres* as a basis for the government contractor defense may have emanated from his dissenting opinion in *United States v. Johnson*, 481 U.S. 681 (1987). *See id.* at 710. Green and Matasar noted that in *Johnson*, Justice Scalia described *Feres* as "the rankest form of judicial lawmaking because it flew in the face of congressional intent." *Id.*

32. *See* Bynum v. FMC Corp., 770 F.2d 556, 565-66 (5th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983).

33. *See Bynum*, 770 F.2d at 565-66; *McKay*, 704 F.2d at 449.

34. *See Boyle*, 487 U.S. at 510.

35. *See id.*

36. *See id.*

for government contractors who provide government-designed equipment from those who provide "stock" or standard equipment also available for purchase on the open market.[37] Justice Scalia explained that the *Feres* doctrine's prohibition on all service-related injury claims against the government would allow a manufacturer to assert the government contractor defense without regard to the three limiting criteria adopted by the Fourth Circuit.[38]

Simultaneously, the Court reasoned that asserting the *Feres* doctrine as a rationale for a government contractor defense produced overly-narrow results.[39] The Court noted because *Feres* covered only service-related injuries, nothing prevented civilians who were injured by military equipment while on duty from suing the manufacturer.[40] The Court argued such a loophole would defeat the purpose of providing immunity from suits by soldiers and sailors, and would not adequately protect the federal interest in shielding military contractors from liability.[41]

With the above flaws of the *Feres* doctrine in mind, the Court suggested an alternate outline for demonstrating a "significant

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37. *See id.* The Court emphasized the distinction between procurements based on government-provided specifications and "stock" purchases with this example:

> If, for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, . . . [t]he contractor could comply with both its contractual obligations and the state-prescribed duty of care. . . . [Or, i]f, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature.

Id. at 509. The Court concluded contractor immunity would not be appropriate under such circumstances. *See id.*

38. *See id.* at 510.

39. *See id.*

40. *See id.* The Court provided another example to illustrate this point:

> [The government contractor defense] 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. at 510-11.

41. *See id.* at 511.

conflict" between federal interests and state law.[42] Justice Scalia explained that the discretionary function exception to the Federal Tort Claims Act (FTCA)[43] provided a better limiting principle for determining the presence of a "significant conflict."[44] Through the FTCA, the government allows claimants to sue the United States for damages when government employees cause harm through negligence or wrongful conduct.[45] The Court noted the existence of an exception to this type of governmental consent 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, whether or not the discretion involved be abused."[46]

According to the Court, the discretionary function exception of the FTCA applied when the government "select[ed] . . . the appropriate design for military equipment to be used by our Armed Forces."[47] The Court also stated that the military equipment selection process included engineering analysis;[48] technical, military, and social consideration;[49] and specific determinations of "the trade-off between greater safety and greater combat effectiveness."[50] The Court concluded that allowing state tort suits against contractors who implemented the discretionary judgments of government officials would defeat the purpose of the discretionary function exception of the FTCA.[51] The Court reasoned "[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."[52]

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42. *Id.*
43. 28 U.S.C. § 1346(b) (1994).
44. *See Boyle*, 487 U.S. at 511.
45. *See* 28 U.S.C. § 2680 (1994); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1034 (5th ed. 1984) (describing the FTCA).
46. *Boyle*, 487 U.S. at 511 (quoting 28 U.S.C. § 2680(a)).
47. *Id.*
48. *See id.*
49. *See id.*
50. *Id.*
51. *See id.*
52. *Id.* at 512.

The Court limited the application of the government contractor defense by embracing a three-part test adopted by the Ninth Circuit.[53] It ruled lawsuits that imposed liability for design defects in military equipment under state law are precluded 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."[54] The Court explained the first two conditions met the discretionary function requirement by assuring the government actually considered or submitted the design in question and did not merely adopt the contractor's own product design.[55] The Court considered the third condition necessary as an incentive to encourage contractors to divulge known risks without fear of incurring liability or disrupting contract performance.[56]

Boyle thus affirmed the common-law notion of a government contractor defense immunizing contractors from liability for injuries caused by military equipment manufactured and provided pursuant to "reasonably precise" government specifications.[57] Additionally, the Court established a new rationale for the defense by adopting the discretionary function exception of the FTCA as a limiting principle in determining whether a significant conflict exists between federal interests and state law that would permit displacement of state law.[58] Importantly, the Court phrased the decision to apply only to the narrow facts presented by the case. Consistent with traditional practice, the Court did not engage in speculation or attempt to apply its decision beyond the facts immediately presented.[59] The narrow wording of the decision was particularly relevant given that *Boyle* was a deci-

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53. *See id.* (citing McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983)).

54. *Id.*

55. *See id.* The first two conditions of the three-part test seemingly addressed Justice Scalia's concern for avoiding an overly broad government contractor defense.

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.* at 512 n.5 (declining to expand the Court's treatment of the government contractor defense as suggested by Justice Brennan's dissent, *see id.* at 526-30 (Brennan, J., dissenting)).

sion based on federal common law.[60] Lower courts were left to decipher the intended scope of the defense solely from the majority opinion in *Boyle* and without the benefit of an accompanying statute.[61] The remainder of this Note will examine the lower courts' struggle to find a workable definition of the government contractor defense.

MODERN JURISPRUDENCE: THE CURRENT CIRCUIT SPLIT

Following the Supreme Court's decision in *Boyle*, lower courts have struggled to apply the government contractor defense. In particular, courts have disagreed about the intended scope of the defense with regard to nonmilitary procurements.[62] *Boyle*'s nar-

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60. *See supra* text accompanying notes 18-28; *infra* text accompanying notes 198-211.

61. *See infra* text accompanying notes 190-212.

62. Certain courts have restricted application of the government contractor defense to military contractors providing military equipment. *See, e.g., In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810-12 (9th Cir. 1992) (disallowing the government contractor defense with regard to asbestos sold to the Navy because it was not military equipment); Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1452-55 (9th Cir. 1990) (applying state law to a claim by a civilian worker injured in a civilian job); Ritch v. AM Gen. Corp., No. 95-451-SD, 1996 U.S. Dist. LEXIS 8361, at *6 (D.N.H. Mar. 28, 1996) (applying the government contractor defense to a manufacturer of the "Humvee" military vehicle); *In re* Chateaugay Corp., 146 B.R. 339, 348-51 (S.D.N.Y. 1992) (disallowing the government contractor defense when civilians were injured by a mail delivery vehicle not used for postal service purposes); Pietz v. Orthopedic Equip. Co., 562 So. 2d 152, 155 (Ala. 1989) (reversing grant of summary judgment for contractor because application of the government contractor defense was a question for the jury); Reynolds v. Penn Metal Fabricators, Inc., 550 N.Y.S.2d 811, 811-12 (Sup. Ct. 1990) (disallowing claim of the government contractor defense by a government contractor who manufactured postal carts).

Other courts, however, have expanded the government contractor defense to contractors providing nonmilitary equipment. *See, e.g.*, Carley v. Wheeled Coach, 991 F.2d 1117, 1125 (3d Cir. 1993) (holding that the government contractor defense applies to military and nonmilitary equipment alike, in order to protect the government interest in the discretionary function of the FTCA); Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986) (applying, prior to *Boyle*, the government contractor defense to manufacturer of flu vaccines used in civilian setting); Andrew v. Unisys Corp., 936 F. Supp. 821, 828-30 (W.D. Okla. 1996) (allowing the government contractor defense for nonmilitary equipment because *Boyle* did not limit it); Russek v. Unisys Corp., 921 F. Supp. 1277, 1287 & n.5 (D.N.J. 1996) (applying the government contractor defense to a nonmilitary contract because of binding authority of *Carley*, but preferring the reasoning of *Carley*'s dissent, which limited the government contractor defense to military contracts); Guillory v. Ree's Contract Serv. Inc., 872 F. Supp. 344, 346 (S.D. Miss. 1994) (allowing the government contractor defense

row wording and federal common law basis have left courts with a difficult choice between limiting the decision on its face, at the risk of not providing the proper level of protection from liability to contractors,[63] or expanding the decision, at the risk of exceeding the rational limits of *Boyle*'s supporting federal common law precedent.[64] The current split between the Ninth and Third Circuits over the application of the government contractor defense to nonmilitary procurements illustrates the essence of the debate.

Nielsen v. George Diamond Vogel Paint Co.[65]

In 1987, Ronald Nielsen, a former civilian government employee, instituted an action in federal district court alleging that he suffered permanent brain damage after using paint manufactured by the defendant.[66] The defendant paint manufacturer claimed protection under *Boyle* as a government contractor, to manufacture paint under approved government specifications given by the Army Corps of Engineers.[67] The defendant based its defense on the state of Idaho's version of the government contractor defense.[68] The district court had denied the defendant's previous request for summary judgment under the federal government contractor defense established by *Boyle*,[69] reasoning that under the given facts, the conditions of the federal government contractor defense were not satisfied[70] and that consequently, the defense could not displace Idaho state tort law.[71]

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for a security provider at a government building); Richland-Lexington Airport Dist. v. Atlas Properties Inc., 854 F. Supp. 400, 421-22 (D.S.C. 1994) (allowing the government contractor defense for a nonmilitary contractor because the FTCA supported the defense); Johnson v. Grumman Corp., 806 F. Supp. 212, 216-17 (W.D. Wis. 1992) (applying the government contractor defense to a manufacturer of mail delivery vehicles).

63. *See, e.g.*, *Hawaii Asbestos*, 960 F.2d at 810.

64. *See, e.g.*, *Carley*, 991 F.2d at 1120-21.

65. 892 F.2d 1450 (9th Cir. 1990).

66. *See id.* at 1451.

67. *See id.*

68. *See id.* at 1455 (citing Green v. Bannock Paving Co., 720 P.2d 186 (Idaho 1986); Black v. Peter Kiewit Sons' Co., 497 P.2d 1056 (Idaho 1972)).

69. *See id.* at 1451.

70. *See id.* at 1455; *see also supra* text accompanying note 54 (setting forth the criteria for satisfying the government contractor defense).

71. *See Nielsen*, 892 F.2d at 1455.

On appeal, the Ninth Circuit ruled that the manufacturer could claim immunity from liability.[72] In outlining its decision, the court examined Justice Scalia's majority opinion in *Boyle* and took notice of the fact that *Boyle* established a "military contractor defense"[73] as opposed to a government contractor defense.[74] The court also recognized that in *Boyle*, the Supreme Court had adopted the Ninth Circuit's three-part test originally formulated in *McKay v. Rockwell International Corp.*[75] Examining *Boyle*'s underlying analysis, however, the court in *Nielsen* noted that the Supreme Court had departed from *McKay*'s rationale for displacing state tort law under the *Feres* doctrine, causing "an alteration of the scope of the defense as it had previously been applied."[76]

The *Nielsen* court conceded that the new rationale identified "a 'uniquely federal interest' in potential liabilities arising out of the performance of any government contract, regardless of its military or civilian nature."[77] The court quickly pointed out, however, that *Boyle* did not consider a "uniquely federal interest" a condition sufficient to displace state law, but merely a condition necessary for federal preemption to apply.[78] The court emphasized that *Boyle* stated that federal law displaced state tort law only when a "significant conflict" existed between federal interests and the operation of state law.[79] Further, although the *Nielsen* court acknowledged that *Boyle* changed the "intellectual mooring"[80] of the government contractor defense from the *Feres* doctrine to the FTCA's discretionary function exception, it pointed out that the result only changed the scope of the defense such that it would provide immunity against civilians injured by military equipment.[81] The court supported its interpretation by

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72. *See id.*
73. *Id.* at 1454.
74. *See id.* at 1453; *see also supra* note 11 (discussing the use of the phrase "military contractor defense" versus "government contractor defense").
75. 704 F.2d 444 (9th Cir. 1983).
76. *Nielsen*, 892 F.2d at 1453.
77. *Id.* at 1454.
78. *See id.*
79. *See id.* (quoting Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988)).
80. *Id.*
81. *See id.* at 1454-55.

citing the Supreme Court's rationale for rejecting the *Feres* doctrine as an overly narrow basis to support finding the requisite "significant conflict."[82]

The Ninth Circuit thus ruled that the policy behind the defense articulated in *Boyle* "remain[ed] rooted in considerations peculiar to the military."[83] The court cited decisions from two other courts of appeals as support for limiting the defense to military contractors.[84] Consequently, the Ninth Circuit did not extend the government contractor defense to the paint manufacturer, and concluded that applying local law did not significantly conflict with any identifiable uniquely federal interests outside the military context.[85]

In re Hawaii Federal Asbestos Cases[86]

Approximately two years after the *Nielsen* decision, the Ninth Circuit revisited the issue of whether the government contractor defense, or military contractor defense,[87] applied in the nonmilitary procurement context.[88] In *Hawaii Asbestos*, an insulation manufacturer appealed the U.S. District Court for the District of Hawaii's decision awarding recovery to plaintiffs exposed to asbestos while serving on U.S. Navy ships.[89] The manufacturer contended that the district court improperly denied it the opportunity to assert the government contractor defense, as articulated in *Boyle*, to bar liability.[90] The Ninth Circuit agreed with the district court's holding that although the manufacturer did provide equipment to the military under a government contract, the manufacturer could not assert the defense because *Boyle* limited

82. *See id.* at 1454 (quoting *Boyle*, 487 U.S. at 510).

83. *Id.* at 1454-55.

84. *See id.* (citing Garner v. Santoro, 865 F.2d 629, 634-36 (5th Cir. 1989); Trevino v. General Dynamics Corp., 865 F.2d 1474, 1483-84 (5th Cir. 1989); Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1315-16 (11th Cir. 1989)).

85. *See id.* at 1455.

86. 960 F.2d 806 (9th Cir. 1992).

87. *See id.* at 810 (using, once again, the phrase "military contractor defense" in lieu of "government contractor defense").

88. *See id.*

89. *See id.* at 809.

90. *See id.*

its protection to products "manufactured with the special needs of the military in mind."[91] The court of appeals concluded that in this context, insulation provided by the defendant manufacturer did not constitute military equipment.[92]

Reexamining *Boyle*, the Ninth Circuit significantly expanded on its analysis in *Nielsen*. The court observed that *Boyle* "repeatedly described the military contractor defense in terms limiting it to those who supply military equipment to the Government."[93] The court emphasized the Supreme Court's careful effort in *Boyle* to fit the government's military equipment selection process into the discretionary function exception of the FTCA.[94] The Ninth Circuit quoted the *Boyle* Court's characterization of the military equipment selection process as specific evidence that the Supreme Court intended to ground the rationale for the defense in military concerns.[95] Noting the Court's concern that, without immunity, contractors would raise prices or refuse to manufacture critical military equipment,[96] the *Hawaii Asbestos* court reasoned that these concerns did not apply to products that "have not been developed on the basis of involved judgments made by the military."[97]

Hawaii Asbestos was the second opinion in which the Ninth Circuit established a narrow interpretation of *Boyle*. Both *Nielsen* and *Hawaii Asbestos* depended heavily on the idea that concerns relating to the military context provided the impetus for the government contractor defense.[98]

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91. *Id.* at 812.
92. *See id.*
93. *Id.* at 810.
94. *See id.*
95. *See id.* (stating that this process of selection "often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness" (quoting Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988)).
96. *See id.* at 811 (citing *Boyle*, 487 U.S. at 512).
97. *Id.*
98. *See id.*; *see also* Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450 (9th Cir. 1990) (linking the government contractor defense to the federal government's need to protect contractors that provide crucial military equipment).

Carley v. Wheeled Coach[99]

In December 1992, the U.S. Court of Appeals for the Third Circuit heard arguments in *Carley v. Wheeled Coach*.[100] In *Carley*, an emergency medical technician employed at a Virgin Islands Department of Health hospital sued the manufacturer of an ambulance procured by the General Services Administration on behalf of the Department.[101] The employee suffered an injury when the ambulance overturned while executing an evasive maneuver.[102] The employee alleged the accident resulted from a design defect that placed the vehicle's center of gravity too high.[103] The manufacturer, Wheeled Coach, asserted that the government contractor defense, as established in *Boyle*, entitled it to immunity because it had provided the ambulance to the government pursuant to a contract with reasonably precise, government-approved design specifications.[104] The Third Circuit initially observed that *Boyle* did not specifically address whether the government contractor defense applied to contractors who provided nonmilitary products to the federal government.[105] The court also acknowledged the considerable split in authority over expanding the scope of the defense.[106]

In its own analysis of *Boyle*, the court discussed the decision's requirement that a "uniquely federal interest" be involved.[107] The Third Circuit emphasized that in *Boyle*, the Supreme Court had borrowed from *Yearsley v. W.A. Ross Construction Co.*[108] as a basis for the government contractor defense.[109] *Boyle*, the *Carley* court argued, interpreted *Yearsley* as support for the proposition that "if [the] authority to carry out the project was validly conferred, that is, if what was done was within the con-

99. 991 F.2d 1117 (3d Cir. 1993).
100. *See id.* at 1117.
101. *See id.* at 1118.
102. *See id.*
103. *See id.*
104. *See id.* at 1127.
105. *See id.* at 1119.
106. *See id.* at 1119 nn.1-2.
107. *See id.* at 1119 (citing Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988)).
108. 309 U.S. 18 (1940)
109. *See Carley*, 991 F.2d at 1120 (citing *Boyle*, 487 U.S. at 506).

stitutional power of Congress, there is no liability on the part of the contractor for executing its will."[110] The court concluded *Boyle* logically supported the idea that "[a] private contractor who is compelled by a contract to perform an obligation for the United States should, in some circumstances, share the sovereign immunity of the United States."[111]

The Third Circuit viewed the Supreme Court's rejection of the *Feres* doctrine as the limiting principle of the defense, and its adoption of the discretionary function exception of the FTCA as "[t]he strongest reason for making the government contractor defense available to all contractors."[112] The *Carley* court reasoned that the Supreme Court's reliance in *Boyle* on the discretionary function exception implied the defense could apply to a civilian.[113] Although the *Feres* doctrine applied only to torts arising out of military service, the court noted that the discretionary function exception of the FTCA applied to all government action in both military and nonmilitary matters.[114] The court specifically analyzed the aspects of decisionmaking cited by *Boyle* as worthy of protection; for instance, engineering analysis, technical, military, and social considerations, and trade-offs between safety and combat effectiveness.[115] The court emphasized that *Boyle* merely listed combat effectiveness as one of several policy considerations worth protecting as part of the discretionary function exception and that the remaining considerations were all present in nonmilitary procurement decisions.[116]

Following this interpretation of *Boyle*, the Third Circuit cited *Dalehite v. United States*[117] as support for the proposition that the Supreme Court considered the discretionary function excep-

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110. *Id.* (quoting *Yearsley*, 309 U.S. at 20-21).
111. *Id.*
112. *Id.*
113. *See id.* at 1121-22 (stating that the government would suffer economic harm in a civilian context also).
114. *See id.*
115. *See id.* Note that in *Hawaii Asbestos*, the Ninth Circuit cited these same considerations as evidence that the defense was intended to apply exclusively to military procurements. *See In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810 (9th Cir. 1992) (citing Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988)).
116. *See Carley*, 991 F.2d at 1121.
117. 346 U.S. 15 (1953).

tion to include a broad range of functions.[118] The court also argued that by failing to address the discretionary function's application to nonmilitary matters, the Supreme Court merely answered the narrow question presented by the facts of the case and did not preclude a logical expansion of its rationale.[119]

The *Carley* court ultimately reached the conclusion that "[i]t is the exercise of discretion by the government in approving a product design, and not whether the product was military or nonmilitary in nature, which determines whether the government contractor defense is appropriate."[120] Interestingly, after addressing the threshold issue of the scope of the government contractor defense,[121] the *Carley* court reversed and remanded the lower court's grant of summary judgment to the manufacturer because it found that a question of material fact existed as to whether the manufacturer satisfied the third part of the *Boyle* three prong test, warning of known dangers.[122] Despite this uncertainty, the *Carley* decision clearly defined the dispute surrounding the scope of the government contractor defense and explicitly rejected the Ninth Circuit's existing interpretation.[123] In late 1993, the Supreme Court denied certiorari to *Carley*,[124] precluding an immediate judicial resolution of the circuit split.

ANALYSIS

As noted earlier, the Supreme Court's decision in *Boyle v. United Technologies Corp.* has led to a variety of conflicts among lower courts.[125] In particular, lower courts have disagreed over the intended scope of the government contractor defense and its

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118. *See Carley*, 991 F.2d at 1121. The court also cited a number of decisions from federal district courts and courts of appeals to bolster a broad reading of the discretionary function exclusion. *See id.* at 1122-23 (citing Miller v. United States, 710 F.2d 656, 666-67 (10th Cir. 1983); Wright v. United States, 568 F.2d 153, 158-59 (10th Cir. 1977); Schmitz v. United States, 796 F. Supp. 263, 268 (W.D. Mich. 1992); Baum v. United States, 765 F. Supp. 268, 275-76 (D. Md. 1991)).

119. *See id.* at 1124-25.

120. *Id.* at 1124.

121. *See id.* at 1125.

122. *See id.* at 1126.

123. *See id.* at 1124.

124. *See Carley v. Wheeled Coach*, 510 U.S. 868, 868 (1993).

125. *See supra* notes 62-64 and accompanying text.

application beyond the narrow facts presented in *Boyle*.[126] By basing its decision on federal common law and not judicial interpretation of either the Constitution or a specifically relevant statute, the Supreme Court left lower courts to speculate as to the intended reach of the law without the benefits of the usual legislative trappings. Consequently, neither side of the current circuit split can offer an approach that remains true to *Boyle* and consistent with historical notions of interpreting federal common law.

Problems with the Ninth Circuit Approach

In *Nielsen*, the Ninth Circuit best summarized its position on the application of the government contractor defense by asserting that the policy for the government contractor defense "remains rooted in considerations peculiar to the military."[127] To support its cardinal conclusion, the court cited three circuit court decisions.[128] Close examination of these decisions, however, reveals that the Ninth Circuit's reliance on them was tenuous at best and perhaps even misplaced.

Reliance on Garner v. Santoro[129]

In *Garner*, the U.S. Court of Appeals for the Fifth Circuit heard an appeal by a painter against a paint manufacturer. The painter claimed that the paint he had used to spray U.S. Navy vessels caused him to develop chronic hepatitis and pancreatitis.[130] The Fifth Circuit held that the manufacturer should be permitted to assert the government contractor defense.[131] Importantly, given the military setting of the dispute, the application

126. *See, e.g., Carley*, 991 F.2d 1117; *In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806 (9th Cir. 1992); Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450 (9th Cir. 1990).

127. *Nielsen*, 892 F.2d at 1455.

128. *See id.* (citing Garner v. Santoro, 865 F.2d 629, 634-36 (5th Cir. 1989); Trevino v. General Dynamics Corp., 865 F.2d 1474, 1483-84 (5th Cir. 1989); Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1315-16 (11th Cir. 1989)).

129. 865 F.2d 629 (5th Cir. 1989).

130. *See id.* at 632.

131. *See id.* at 644.

of the federal government contractor defense to a nonmilitary procurement was not an issue in the case.

The *Garner* court came closest to lending support to the Ninth Circuit's approach to the defense when it inquired into the military nature of the procurement in question.[132] The *Garner* court, however, did not expressly preclude application of the government contractor defense to nonmilitary equipment.[133] Rather, the court merely ended its analysis after finding that the paint was "within the parameters of military equipment" for the purposes of the government contractor defense.[134] *Garner* established, at the very most, that the government contractor defense articulated in *Boyle* precluded a claim by a civilian employee regarding a design defect in a military procurement.[135] In *Nielsen*, the Ninth Circuit therefore mischaracterized the *Garner* decision as supporting the idea that the government contractor defense is "rooted in considerations peculiar to the military."[136]

Reliance on Trevino v. General Dynamics Corp.[137]

Shortly after deciding *Garner*, the Fifth Circuit issued its decision in *Trevino v. General Dynamics Corp.*[138] In *Trevino*, a contractor asserted the government contractor defense in response to a lawsuit filed by the heirs and survivors of several Navy divers killed in a submarine's dive chamber.[139] The court ruled that the contractor could not assert the defense because the government had delegated responsibility for production of the relevant design to the contractor.[140] Consequently, the court concluded that the defendant failed to satisfy the first prong of the three-part test adopted in *Boyle*.[141]

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132. *See id.* at 637-38.
133. *See id.*
134. *Id.* at 638.
135. *See id.* at 637-38.
136. Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1455 (9th Cir. 1990).
137. 865 F.2d 1474 (5th Cir. 1989).
138. *See id.*
139. *See id.* at 1476.
140. *See id.* at 1480-81.
141. *See id.* (finding that the United States had not provided reasonably precise

As in *Garner*, the Fifth Circuit in *Trevino* did not address whether the government contractor defense applied only to the military procurement context. In contrast, the *Nielsen* court did discuss *Boyle*'s selection of the discretionary function exception as a limiting principle.[142] The *Trevino* court observed that "[c]ourts have found it 'unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception.'"[143] Importantly, the court emphasized that

> [t]he Supreme Court has held that the discretionary function exception turns on "the nature of the conduct, rather than the status of the actor," that the provision covers acts by all federal employees regardless of rank, if the challenged acts are of the "nature and quality" to fall within the exception.[144]

Trevino therefore seemed to suggest that an expanded discretionary function exception, covering a broad range of activities, was the norm, which does not offer support for the Ninth Circuit's restricted version of the discretionary function exception used in *Boyle*.[145] *Nielsen*'s reliance on *Trevino* ultimately served to embellish *Trevino*'s holding and mischaracterize its interpretation of *Boyle*.

Reliance on Harduvel v. General Dynamics Corp.[146]

Finally, the *Nielsen* court cited *Harduvel v. General Dynamics Corp.* to support its restriction of the government contractor defense to the military context.[147] In *Harduvel*, the Eleventh Circuit heard a claim filed by the wife of a deceased Air Force fighter pilot against the manufacturer of the airplane flown by the

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specifications for the submarine's design).

142. *See* Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1453-54 (9th Cir. 1990).

143. *Trevino*, 865 F.2d at 1484 (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813 (1984)).

144. *Id.* (citing *Varig Airlines*, 467 U.S. at 813).

145. *See id.* at 1484 (demonstrating that although an expanded discretionary function exception might be the norm, the exception does not cover all decisions made by government employees).

146. 878 F.2d 1311 (11th Cir. 1989).

147. *See Nielsen*, 892 F.2d at 1455.

pilot when he crashed.[148] The court allowed the manufacturer to assert the government contractor defense against the plaintiff's claims.[149] Although the court in *Harduvel* took notice of *Boyle*'s concern for protecting military decisionmaking and procurement from judicial second-guessing,[150] it never limited the government contractor defense to the military context as the Ninth Circuit did in *Nielsen*.[151] In fact, after discussing the need to protect military decisionmaking, the court examined *Boyle*'s choice of grounding the defense in the discretionary function exception.[152] The *Harduvel* court did not mention any particular aspect of the discretionary function exception as "peculiar to the military" context.[153] Indeed, in *Harduvel*, given the close factual parallels to *Boyle*,[154] the parties did not even ask the court to address the scope of the government contractor defense.[155] As such, *Harduvel* did not provide an adequate foundation for the Ninth Circuit's assertions.

Summary of Ninth Circuit Analysis

An examination of the federal appellate case law cited by *Nielsen* reveals that the Ninth Circuit did not base its conclusion on previous interpretations of *Boyle*; rather, it formulated an entirely novel approach. As the *Nielsen* court noted, *Boyle* adopted a significant portion of the government contractor defense as articulated by the Ninth Circuit in *McKay v. Rockwell International Corp.*[156] In *Nielsen*, however, the Ninth Circuit only reluctantly acknowledged *Boyle*'s departure from *McKay*[157]

148. *See Harduvel*, 878 F.2d at 1314.
149. *See id.* at 1315.
150. *See id.* at 1316.
151. *See id.* (contrasting the Ninth Circuit's assertions in *Nielsen*).
152. *See id.*
153. Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1455 (9th Cir. 1990).
154. *Compare Harduvel*, 878 F.2d 1311 (involving a products liability claim against the manufacturer of airplane parts for government contracts), *with* Boyle v. United Techs. Corp., 487 U.S. 500 (1988) (involving a similar claim).
155. *See Harduvel*, 878 F.2d at 1314.
156. *See Nielsen*, 892 F.2d at 1453 (citing McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983)).
157. *See id.*

and failed to recognize the possible consequences of the new rationale for the government contractor defense under *Boyle*.[158]

The *Nielsen* court's conclusion that changing the "intellectual mooring" of the defense from the *Feres* doctrine to the discretionary function exception of the FTCA did not mean that the defense would apply outside the military context[159] was erroneous. Justice Scalia's majority opinion in *Boyle* rejected the *Feres* doctrine as a limiting principle for the defense precisely because *Feres* was restricted to the military context and excluded civilian injuries.[160] To address this concern, *Boyle* adopted the discretionary function exception that historically had protected an extremely broad range of government activities from liability.[161] The Ninth Circuit's assertion that this choice showed that "the policy behind the defense remains rooted in considerations peculiar to the military,"[162] cannot be reconciled with the Supreme Court's articulation of the government contractor defense in *Boyle*.

Problems with the Third Circuit Approach

In contrast to the Ninth Circuit's restriction of the government contractor defense to only those contractors providing military products, the Third Circuit's decision in *Carley v. Wheeled Coach* expanded the defense to nonmilitary government contractors.[163] Accordingly, the *Carley* decision provided a more convincing interpretation of the Supreme Court's preference for the discretionary function exception as a limiting principle. *Boyle*'s narrow wording and context, however, forced the *Carley* court, in its effort to give a logical meaning to the scope of the discretionary function exception, to take an expansive approach toward feder-

158. *See id.* at 1454.
159. *See id.*
160. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 510-11 (1988).
161. *See, e.g.*, United States v. Gaubert, 499 U.S. 315 (1991) (applying the exception to federal regulators in operational positions); United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984) (protecting aviation activity under the discretionary function exception).
162. *Nielsen*, 892 F.2d at 1454-55.
163. *See* Carley v. Wheeled Coach, 991 F.2d 1117, 1125 (3d Cir. 1993).

al common law.[164] The Third Circuit departed from the traditional notion that the courts should formulate federal common law only in limited situations.[165] Further, the *Carley* court offered a flawed analysis of the case law employed by the Supreme Court to posit a federal common-law response in *Boyle*.[166] Consequently, *Carley*'s expansion of the government contractor defense departed from traditional treatment of federal common law and did not provide an entirely satisfactory discussion of the proper scope of the defense.

Carley, Wallis v. Pan Am Petroleum,[167] *and Federal Common Law*

As Judge Becker's concurring and dissenting opinion in *Carley* noted, the *Carley* decision is difficult to square with traditional notions of the appropriate situations in which the courts may fashion federal common law.[168] In *Wallis v. Pan Am Petroleum*, the Supreme Court examined the Mineral Leasing Act of 1920,[169] which fixed certain rights and obligations between private mining interests and the Secretary of the Interior.[170] The question before the Court was whether federal law should supplant existing state law in dealings between two private parties in a dispute over a lease issued under the Mineral Leasing Act of 1920.[171] Recognizing that the Act did not fix rights between private parties, the Court held that the narrow wording of the statute was not a "reason for creating at large a federal common law

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164. *See id.* at 1122.

165. *See generally* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (recognizing that the courts can formulate federal common law in some limited areas); Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963) (stating that "the instances where we have created federal common law are few and restricted").

166. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 505-07 (1988). The Court examined and cited *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), to support its use of federal common law in extending immunity from liability to government contractors.

167. 384 U.S. 63 (1966).

168. *See Carley*, 991 F.2d at 1128-29 (Becker, J., concurring and dissenting).

169. Pub. L. No. 66-146, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181-287 (1994)).

170. *See Wallis*, 384 U.S. at 65.

171. *See id.*

of . . . contracts among private interests."[172] The Court noted that federal common law should be used only in rare circumstances in which there is a significant conflict between federal and state law.[173] Further, the Court held that "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress."[174] That *Wallis* and *Boyle* both settled rights between private parties in a federal common-law context begs for a consistent, limited interpretative approach not employed in *Carley*.

The *Carley* court's expansive reading of *Boyle* conflicted with *Wallis*. Specifically, the Court in *Wallis* held that the judiciary should decline to generate federal common law for the purpose of extending statutory governmental relationships to private parties,[175] whereas the *Carley* decision expanded federal common law to achieve this exact task.[176] Granted, *Boyle* broke the ground ahead of *Carley* in this respect, yet the federal common law, as crafted by *Boyle*, seemed purposely to stop short of the step taken by *Carley*.[177] Indeed, the Third Circuit's approach in *Carley* contrasted with the Ninth Circuit's approach in *In re* Hawaii Federal Asbestos Cases, which seemed predicated on *Wallis*'s more limited approach to interpreting federal common law.[178]

Carley's *Interpretation of* Yearsley v. W.A. Ross Construction Co.

To bolster its expansion of the government contractor defense, the Third Circuit in *Carley* noted that in *Boyle*, the Supreme Court had "relied heavily on *Yearsley v. W.A. Ross Construction Co.*"[179] The *Carley* court argued that *Yearsley* supported the ex-

172. *Id.* at 70.
173. *See id.* at 68.
174. *Id.*
175. *See id.* at 70.
176. *See* Carley v. Wheeled Coach, 991 F.2d 1117, 1120 (3d Cir. 1993).
177. *See id.* at 1124 (interpreting *Boyle* in a way that allowed the court to designate nonmilitary design specifications and decisions as "federal interests").
178. *See In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810 (9th Cir. 1992) (noting *Boyle*'s reliance on *Wallis*).
179. *Carley*, 991 F.2d at 1120 (citation omitted).

tension of sovereign immunity to civilian contractors performing obligations to the United States.[180]

In *Yearsley*, the Supreme Court ruled that a construction company was immune from a suit brought by private land owners for erosion to land adjacent to levy work performed pursuant to government supervision.[181] The Court held that "if [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."[182] In fact, the government directed the contractor's work and specifically authorized the construction through an act of Congress,[183] making the contractor an agent of the government rather than an independent contractor.[184] The Court predicated its decision to grant immunity from liability on the idea that the contractor was "an agent or officer of the Government purporting to act on its behalf."[185]

The *Boyle* decision used *Yearsley* solely as support for the narrow proposition that a federal interest is at stake when those who perform federally mandated work face civil liability.[186] The majority in *Boyle* carefully qualified the Court's reliance on *Yearsley* in its response to Justice Brennan's dissent, which alleged that the majority opinion would extend the immunity of government officers to all government contractors.[187] The majority explained that it relied on *Yearsley* "merely to demonstrate that the liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest."[188]

Citing *Boyle*'s use of *Yearsley*, the Third Circuit in *Carley* argued that the extension of the government contractor defense to

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180. *See id.*

181. *See Yearsley*, 309 U.S. at 19-21.

182. *Id.* at 20-21. It is important to note that the construction company given immunity in *Yearsley* was not an independent contractor. *See id.* at 20.

183. *See* Act of Jan. 21, 1927, 44 Stat. 1010, 1013.

184. *See Yearsley*, 309 U.S. at 20.

185. *Id.* at 21 (quoting Philadelphia Co. v. Stimson, 223 U.S. 605, 619-20 (1912)).

186. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 505-06 (1988) (explaining the federal concerns that warrant displacement of state law).

187. *See id* at 523 (Brennan, J., dissenting).

188. *Id.* at 505 n.1.

an independent contractor was a logical conclusion.[189] The *Carley* court reiterated *Boyle*'s use of *Yearsley* as evidence that imposing liability on an independent contractor implicates a significant federal interest in both military and nonmilitary procurements.[190] Nonetheless, the Third Circuit exceeded the Supreme Court's intended use of *Yearsley* and confused the requirements for establishing the defense.[191] The *Carley* court seemingly ignored *Boyle*'s implication that a uniquely federal interest is a necessary, but not sufficient, condition for displacing state law.[192] The *Boyle* decision required a "significant conflict" between a federal interest and the operation of state law to displace state law.[193] The *Carley* court, perhaps purposely, mixed its terminology by suggesting that a "*significant* federal interest,"[194] rather than a "*uniquely* federal interest" was implicated and was sufficient for the government contractor defense to apply.[195] As a result, the *Carley* court overemphasized Justice Scalia's use of *Yearsley* and distorted the conditions required to apply the government contractor defense.

Although superior to the Ninth Circuit's approach to interpreting *Boyle*'s basis for the government contractor defense, the *Carley* decision rested on questionable grounds and provided an overly expansive interpretation of federal common law.

Criticism of Boyle *as the Source of the Federal Government Contractor Defense*

The fact that neither the Third nor the Ninth Circuit was able to craft an application that was consistent both with *Boyle* and traditional notions of the judiciary's limited lawmaking function, suggests that *Boyle* may not be the answer to the government contractor defense dilemma. *Boyle*'s shortcomings are especially pronounced given that, as federal common law, the decision is

189. *See* Carley v. Wheeled Coach, 991 F.2d 1117, 1120 (3d Cir. 1993).
190. *See id.*
191. *See id.* at 1129 (Becker, J., concurring and dissenting).
192. *See Boyle*, 487 U.S. at 507.
193. *See id.*
194. *Carley*, 991 F.2d at 1120 (emphasis added).
195. *Id.* (emphasis added).

the only articulation of the federal government contractor defense. When interpreting federal common law, litigants and judges alike must discern the scope, meaning, and intent of the law without the more elaborate trappings that accompany legislation.[196] Recognizing this limitation and other concerns such as separation of powers, courts typically have restricted the scope of legitimate federal common law.[197] The remainder of this Note explores the parameters of federal common law and the extent to which *Boyle* complied with them.

Parameters for Federal Common-Law Decisions

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law."[198]

Scholarly writing on federal common law in recent years has produced a broad spectrum of views.[199] "These range from the prohibitive view, founded on the Rules of Decision Act, through a broad middle ground, emphasizing the need for authorization, that permits a range of federal common law, to an inclusive view under which the federal courts enjoy, presumptively, the same lawmaking powers as Congress."[200] According to Professor Thomas Merrill, four principles limit the federal courts' lawmaking powers: federalism, separation of powers, electoral accountability, and the Rules of Decision Act.[201] Professor Merrill argues further that federal common law is most legitimate under four

196. *See, e.g.*, Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981).

197. *See* Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 344 (1992) (noting that federal courts restrict use of federal common law and often adopt an apologetic tone or sense of guilt when they must resort to its use).

198. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that federal courts must apply state substantive law when exercising diversity of citizenship jurisdiction).

199. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 60, at 412 n.5 (5th ed. 1994).

200. George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New)* Erie *Problem?*, 12 PACE L. REV. 229, 260 (1992).

201. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 47 (1985).

circumstances: 1) when it merely involves a rule of judicial procedure or internal court governance; 2) when conducting direct analysis of specific intentions of the drafters of authoritative federal text; 3) when a federal rule is necessary to effectuate some federal policy that can be derived from specific intentions; and 4) when there is specific evidence that lawmaking power has been delegated to federal courts in a reasonably prescribed manner.[202] Professor Merrill states that a negative answer to inquiries two, three, or four indicates that the use of federal common law is inappropriate and that relevant state law must provide the rule instead.[203]

Most likely, *Boyle* will pass Professor Merrill's test, if at all, under the third inquiry. That is, it must qualify as a federal rule necessary to preserve some federal policy derived from the intentions of the draftsmen of a federal text.[204] As noted earlier, the Supreme Court found that the discretionary function exception to the FTCA limited the use of the government contractor defense.[205] The Court's rationale for preempting state law was to preserve the discretionary authority of government procurement officials as articulated in the FTCA.[206] A contractor therefore might employ the *Boyle* government contractor defense by arguing that it is federal common law necessary to preserve the discretionary function exception to the FTCA.

Given the federal interest in preserving the discretionary function exception, legitimate questions arise with respect to the appropriateness of the response chosen by the Court. In his dissenting opinion, Justice Brennan asserted that the power to create federal common law to effectuate some articulated federal interest "does not translate into a power to prescribe rules that cover . . . relationships collateral to Government contracts."[207] Justice Brennan argued that although the majority opinion articulated a legitimate federal interest, the Court chose to pre-

202. *See id.* at 46-47.
203. *See id.* at 47.
204. *See id.*
205. *See supra* text accompanying notes 47-56.
206. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988) (citing 28 U.S.C. §§ 1346(b), 2680(a) (1994)).
207. *Id.* at 519 (Brennan, J., dissenting).

scribe a rule affecting a relationship between private parties in an area only collateral to the federal interest cited.[208] As mentioned earlier, the Court passed on an opportunity to draft federal common law to resolve the dispute between the private parties in *Wallis*.[209] Although *Boyle* complied with Professor Merrill's requirement that federal common law be rooted in an authoritative federal policy,[210] the *Boyle* decision protected federal policy in a collateral or indirect manner by extending immunity in cases that do not involve the United States as a party.[211] Justice Brennan asserted that federal common law "exists only in such narrow areas as those concerned with the rights and obligations *of the United States*."[212] By thus extending the rule of immunity to a party not anticipated by the drafters of the FTCA, *Boyle*'s compliance with Professor Merrill's third factor may be called into question.

Appropriate Lawmaking Body?

Given that federal common law may be appropriate only under limited circumstances, commentators have suggested that in the context of empirical products liability decisions, the judiciary is not the appropriate lawmaking body.[213] In the *Boyle* opinion, Justice Scalia concluded that "[t]he 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."[214] The legitimacy of such a measure therefore depends entirely on the degree to which tort immunity for government contractors affects the ability of government procurement officials to perform their functions.[215]

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208. *See id.* at 521 (Brennan, J., dissenting).
209. *See supra* text accompanying notes 172-74.
210. *See Boyle*, 487 U.S. at 512.
211. *See id.* at 516 (Brennan, J., dissenting) (discussing possible broad-based applications of the majority's opinion).
212. *Id.* at 518 (Brennan, J., dissenting) (emphasis added).
213. *See* Green & Matasar, *supra* note 11, at 714.
214. *Boyle*, 487 U.S. at 511-12.
215. *See id.* at 523-24 (Brennan, J., dissenting) (arguing that private contractor im-

Professors Green and Matasar argue that "[t]he only lawmaking branch of government with the potential to craft an appropriate government contractor defense is the Congress."[216] They suggest that the branch equipped to conduct a thorough investigation, and to make realistic value judgments between costs, safety, and liability must study the anticipated effects that suits against government contractors will have on government procurement decisions, costs, and bargaining power.[217] Professors Green and Matasar point out that only months earlier the Court declined to issue its own rule in an immunity case, stating "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether . . . immunity is warranted in a particular context."[218]

Boyle's *Legacy*

General federal common-law analysis aside, perhaps the best measure of a federal common-law decision's legitimacy is its jurisprudential legacy and progeny.[219] If federal common law is to be successful or legitimate, it should inspire a judicial legacy that is consistent and capable of being expanded to address the myriad factual situations that courts must confront. *Boyle* has not adequately succeeded in this respect. Narrow opinions are appropriate for a court that restricts itself to cases and controversies.[220] When engaging in substantive lawmaking and attempting to be the federal government's sole voice on a subject, however, the Court must express itself more broadly or at least render a decision equipped to address a broader range of factual variations. When the Court finds itself unable to craft such a decision, or the Court decides that this type of broad pronouncement would be inappropriate, the Court should resign itself to judicial restraint and defer to the legislature.

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munity is not necessary to preserve the effective functioning of the federal government).

216. Green & Matasar, *supra* note 11, at 715.

217. *See id.* at 714-15.

218. *Id.* at 715 n.287 (quoting Westfall v. Erwin, 484 U.S. 292, 300 (1988)).

219. *See* Merrill, *supra* note 201, at 11 (discussing the Supreme Court's internal norm of legitimacy).

220. *See* U.S. CONST. art. III, § 2, cl. 1 (stating that "[t]he judicial power shall extend to all cases . . . [and] to Controversies").

In Lieutenant Boyle's case, the Court's ruling might have been more effective had the Court been able to look to a definitive law for its answer. Put simply, Congress provided no immunity for Sikorsky, leaving the matter to the states.[221] Although *Boyle* might seem intuitively less desirable and even inconsistent with many popular notions of important federal interests, the decision may spur action by Congress in a manner anticipated by a government relying on separation of powers.

CONCLUSION

The Supreme Court's decision in *Boyle v. United Technologies Corp.* has proved unsatisfactory as a source of federal law for lower courts faced with defendants invoking the government contractor defense. The current circuit split over the intended scope of the defense illustrates *Boyle*'s inadequacies. Lower courts that have interpreted *Boyle* narrowly, and limited it to the facts presented, have issued opinions that conflict with *Boyle*'s rationale.[222] Those courts that have expanded *Boyle* have had to defend the merits of their decisions about a federal interest that has not been enacted or codified by Congress, resulting in an unsatisfactory state of law.

The obvious question posed by *Boyle* and those courts strictly interpreting its language is that if the federal interest in protecting the discretionary function exception were so strong that the Court must intervene in the operation of state law to protect

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221. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 518 (1988) (Brennan, J., dissenting).

222. *See, e.g.*, Snell v. Bell Helicopter Textron Inc., 107 F.3d 744 (9th Cir. 1997) (denying the defendant's motion for judgment as a matter of law because it failed to establish that a government official and not just Bell itself considered the design feature in question); Mitchell v. Lone Star Ammunitions, 913 F.2d 242 (5th Cir. 1990) (holding the government contractor defense does not apply to defective manufacture of mortar shells); Dorse v. Eagle-Picher Indus., Inc., 898 F.2d 1487 (11th Cir. 1990) (holding that the government contractor defense does not apply to failure to warn cases when there is no conflict between state law and the federal contractual duty). *But see, e.g.*, Tate v. Boeing Helicopters, 140 F.3d 654 (6th Cir. 1998) (holding that *Boyle* applies to failure to warn cases as well); Oliver v. Oshkosh Trucking Corp., 96 F.3d 992 (7th Cir. 1996) (ruling that the fact that manufacturers may have retained some discretion does not, by itself, defeat the government contractor defense), *cert. denied*, 520 U.S. 1116 (1997).

it, why is it simultaneously so weak that it is not protected by enacted law?[223] Although the *Boyle* decision offered what is perhaps an intuitively attractive answer to the dilemma presented by imposing liability on manufacturers of government-designed equipment, its legacy has shown that the judiciary lacks the expertise, the mechanisms, and, arguably, the authority to craft a legitimate and comprehensive answer.

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223. *See* Merrill, *supra* note 197, at 352-53.