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"But I Was Only Following Orders": The Government Contractor Defense in Environmental Tort Litigation

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NOTES

"BUT I WAS ONLY FOLLOWING ORDERS": THE GOVERNMENT CONTRACTOR DEFENSE IN ENVIRONMENTAL TORT LITIGATION

The government contractor defense is a federal common law defense that immunizes an independent contractor in the government's employ from strict liability in tort at the state level. Federal courts have recognized some form of the government contractor defense for over forty years.[1] In the past, courts applied this defense only in public works and military products liability settings.[2] Cases in these settings prompted several circuits to formulate individual versions of the defense with differing supportive analyses.[3] In 1988, in *Boyle v. United Technologies*

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1. The Supreme Court first used a form of the government contractor defense in Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940). Although the Court based the defense on common law agency principles, the recognition of the government contractor defense in this case led to the creation of modern formulations of the defense. *See* Case Comment, Boyle v. United Technologies Corp.: *The Turning Point for the Government Contractor Defense?*, 21 LOY. L.A.L. REV. 935, 939 (1988).

2. *See, e.g., Yearsley*, 309 U.S. at 22-23 (contractor performing engineering services for government classified as government's agent and therefore not liable for property damage caused by dikes and artificial erosion of river banks); Beaver Valley Power Co. v. National Eng'g & Contracting Co., 883 F.2d 1210, 1213, 1219 (3d Cir. 1989) (contractor hired by state department of transportation who built bridge that raised the level of the river and flooded power company's station not liable because of government contractor defense); Tozer v. LTV Corp., 792 F.2d 403, 404, 409 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988) (government contractor shielded from liability when panel on airplane came off in midflight and caused airplane to crash, killing pilot); Bynum v. FMC Corp., 770 F.2d 556, 558 (5th Cir. 1985) (government contractor defense shielded manufacturer of gun turret from liability after freely rotating turret gun injured soldier during military vehicle's fall from a bridge).

3. The Ninth and Eleventh Circuits have expressed the two primary formulations of the government contractor defense. *See* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 745-46 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). These two approaches acted as a basis for formulation of the defense in other circuits. *See, e.g., Beaver Valley Power Co.*, 883 F.2d at 1214-17 (in the Third Circuit); Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986), *aff'd*, 487 U.S. 500 (1988); *Tozer*, 792 F.2d 403 (in the Fourth Circuit); Koutsoubos v. Boeing Vertol, 755 F.2d 352, 354-55 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985); *Bynum*, 770 F.2d at 567 (in the Fifth Circuit); Ramey v. Martin-Baker Aircraft Co., 656 F. Supp. 984, 990 (D. Md. 1987), *aff'd*, 874 F.2d 946 (4th Cir. 1989); Hendrix v. Bell Helicopter Textron Inc., 634 F. Supp. 1551, 1555 (N.D. Tex. 1986); Johnston v. United States, 568 F. Supp. 351, 353-54 (D. Kan. 1983).

Corp.,[4] the United States Supreme Court resolved a split among the circuits over the elements and application of the government contractor defense in the military products liability setting.

In *Boyle*, the Supreme Court held that a government contractor could benefit from the government's sovereign immunity if the contractor could overcome certain threshold requirements and meet the three elements of the defense.[5] The Court also recognized that government contractors could use this defense in settings other than those involving military procurement contracts.[6] The Court did not elaborate, however, on the specific areas in which the defense would apply.

In 1989, citizens who lived or worked near a government-owned, contractor-operated nuclear facility brought a state tort action implicating the private government contractor for personal and property damages caused by alleged negligent operation of the facility.[7] The government contractor attempted to bar state tort liability by using the government contractor defense as defined in *Boyle*. The United States District Court for the Southern District of Ohio refused, however, to allow the government contractor to resort to this defense. The court determined that the contractor could not meet the threshold requirements of the defense in a tort action because of its violation of the duty of care that certain federal environmental statutes prescribe.[8] Although the district court disallowed the use of the government contractor defense, it recognized that the defense would be valid in other environmental tort litigation settings.[9] Many commentators also believe that the government contractor defense would be valid in such settings given the proper circumstances.[10]

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4. 487 U.S. 500 (1988).

5. *Id.* at 504, 512. For an extensive discussion of the threshold requirements and elements of the defense as explained in *Boyle*, see *infra* notes 51-86 and accompanying text.

6. 487 U.S. at 506 ("The federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction."); *see also* Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1454 (9th Cir. 1990) ("The underlying premise in *Boyle* applies to all government contracts, and is not limited to the military context.").

7. Crawford v. National Lead Co., 29 Env't Rep. Cas. (BNA) 1048, 1053 (S.D. Ohio 1989).

8. *Id.* at 1053-55. Plaintiffs in *Crawford* based their tort actions on the violation of the standards imposed by the Refuse Act of 1899, 33 U.S.C. § 407 (1988), Standards for Protection Against Radiation, 10 C.F.R. § 20 (1988), and the Nuclear Regulatory Commission's ALARA ("as low as reasonably achievable") policy, 10 C.F.R. § 20.1 (1990). *Crawford*, 29 Env't Rep. Cas. (BNA) at 1054.

9. *Crawford*, 29 Env't Rep. Cas. (BNA) at 1053 n.7.

10. *See, e.g.*, Frulla, *Using the Government Contractor Defense in an Environmental*

This Note first briefly traces the history and policy behind the government contractor defense. In determining whether a contractor can use the defense in the environmental tort setting,[11] this Note next examines the defense as the Supreme Court defined it in *Boyle* and reviews recent attempts to apply it in the environmental tort setting. This Note also attempts to pinpoint and resolve the problems involved in using the defense in the environmental tort litigation setting and to analogize the policies supporting the *Boyle* defense to the environmental tort setting. Finally, this Note discusses alternatives that may provide the government contractor with different approaches to achieve similar goals without facing the obstacles normally encountered when trying to extend the government contractor defense to the environmental tort setting.

HISTORY OF THE DEFENSE

Origins

The modern government contractor defense has its origins in two common law defenses: (1) defenses arising under principles of agency and (2) the contract specifications defense.[12] Traditionally, courts used principles of agency law to shield a contractor from tort liability, allowing the contractor to share in the government's sovereign immunity by virtue of the agency relationship.[13]

The Supreme Court used agency principles to create the first form of the government contractor defense in *Yearsley v. W.A.*

Context, 4 Toxics L. Rep. (BNA) 896 (1990); Hohenhaus, *Purpose and Policy—Further Development of the Federal Government Contractor's Defense Following* Boyle v. United Technologies Corporation 55-56 (Aug. 1990) (WESTLAW, TP database); Lee & Slaughter, *Government Contractors and Environmental Litigation*, 19 Env't Rep. (BNA) 2138, 2139 (Feb. 10, 1989); Willmore, *High Court Holds Fire on Military Contractors; Boyle in Court: Invitation for New Litigation Strategies*, Legal Times, July 18, 1988, at 16, col. 3. *But see* Stever, *Perspectives on the Problem of Federal Facility Liability for Environmental Contamination*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,114, 10,118-19 (1987).

11. For purposes of this Note, the "environmental" setting includes consideration of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (1988); the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988); the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k; and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

12. Johnston v. United States, 568 F. Supp. 351, 353-54 (D. Kan. 1983).

13. *See* Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 22 (1940).

Ross Construction Co.,[14] a public works case.[15] In *Yearsley*, the government contractor built dikes in the Missouri River and produced artificial erosion by means of large boats with paddles and pumps.[16] A riparian landowner claimed that this artificial erosion resulted in a taking without just compensation of ninety-five acres of riverfront land.[17] The Court held that the contractor acted as an agent of the government and thus could share in the government's cloak of sovereign immunity.[18] The contractor merely needed to prove the agency relationship between itself and the government. To secure this extension of the government's sovereign immunity,[19] the contractual relationship between the government and its contractor easily satisfied this element.

The contract specifications defense is a common law defense that protects contractors who reasonably follow the specifications of a third party but produce a product that later proves to be dangerous.[20] The third party may be either the government or a private party.[21] The contract specifications defense is based on the presumption that a contractor does not possess sufficient knowledge and expertise to allow it to review and evaluate every

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14. 309 U.S. 18.

15. Note, *In Defense of the Government Contractor Defense*, 36 CATH. U.L. REV. 219, 229 (1986).

16. *Yearsley*, 309 U.S. at 19.

17. *Id.* at 19-20.

18. *Id.* at 22 ("[T]here is no ground for holding [the government's] agent liable who is simply acting under the authority thus validly conferred. The action of the agent is 'the act of the government.' ").

19. Because the Federal Tort Claims Act did not exist at the time of *Yearsley*, the government had almost absolute sovereign immunity. In many situations today, however, agency principles cannot serve as a basis for the government contractor defense because Congress has waived or severely limited sovereign immunity in many settings. *See* 28 U.S.C. §§ 2671-2680 (1988). This narrowed immunity defeats any arguments for extension of sovereign immunity because the government has no immunity to extend.

20. Johnston v. United States, 568 F. Supp. 351, 354 (D. Kan. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 404 comment a (1965)). The Restatement provides:

> [O]ne who employs a contractor to make a chattel for him, like one who employs a contractor to erect a structure on his premises . . . usually provides not only plans but also specifications, which often state the material which must be used. Indeed, chattels are often made by independent contractors from materials furnished by their employers. In such a case, the contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer. The contractor is not subject to liability if the specified design or material turns out to be insufficient to make the chattel safe for use, unless it is so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe.

RESTATEMENT (SECOND) OF TORTS § 404 comment a (1965).

21. *Johnston*, 568 F. Supp. at 354.

design it receives "and is thus not held to the same high standard of care as is a designer."[22]

Although both agency principles and the contract specifications defense provided a valid basis for contractor immunity in the past, neither traditional defense survives as a viable defense for the modern government contractor due to federal government limitations and waivers of sovereign immunity.[23]

The Feres-Stencel *Doctrine: Interpreting the Federal Tort Claims Act*

Government contractors first sought immunity through use of a government contractor defense in public works settings.[24] Due to the increasing sophistication of military hardware, the government contractor defense soon became necessary in products liability cases in which a product that the government ordered from an independent contractor injured a member of the armed services.[25] This need led to modern formulations of the government contractor defense, the main purpose of which was to subtly extend the federal government's sovereign immunity to contractors in its employ.

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22. *Id.*; *see also* Ryan v. Feeney & Sheehan Bldg. Co., 239 N.Y. 43, 46, 145 N.E. 321, 321-22 (1924) ("A builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow, unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury.").

23. The Federal Tort Claims Act created these limitations. 28 U.S.C. §§ 2671-2679 (1988).

24. *See* Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 19 (1940); *see also* Myers v. United States, 323 F.2d 580, 581-83 (9th Cir. 1963) (holding contractor immune from liability for damages resulting from construction of highway in accordance with government specifications); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 826-27 (D. Conn. 1965) (holding contractor immune from liability for damages resulting from dredging river channel in accordance with government specifications).

25. *See, e.g.*, Boyle v. United Technologies Corp., 487 U.S. 500, 502, 511-12 (1988) (copilot drowned in helicopter crash in ocean because of alleged defect in escape hatch design); Trevino v. General Dynamics Corp., 865 F.2d 1474, 1476, 1478 (5th Cir.) (divers killed in vacuum created by improper design of diving chamber), *cert. denied*, 110 S. Ct. 327 (1989); Tozer v. LTV Corp., 792 F.2d 403, 404-07 (4th Cir. 1986) (pilot killed allegedly because panel on plane came off in midflight, causing him to lose control of plane), *cert. denied*, 487 U.S. 1233 (1988); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 738 (11th Cir. 1985) (pilot killed when airplane crashed into sea, most probably due to faulty stabilizer system), *cert. denied*, 487 U.S. 1233 (1988); Bynum v. FMC Corp., 770 F.2d 556, 558 (5th Cir. 1985) (serviceman injured by freely swinging turret gun when vehicle swerved off bridge and plunged into creek); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 446, 448-49 (9th Cir. 1983) (pilot killed by impact against plane in emergency ejection during flight), *cert. denied*, 464 U.S. 1043 (1984).

Sovereign immunity protects the government from suit unless it has given its prior consent.[26] Under the Federal Tort Claims Act[27] (FTCA), Congress waived much of the federal government's sovereign immunity, thereby subjecting the government in many cases to tort liability in the same manner and to the same extent as a private individual under like circumstances.[28]

In *Feres v. United States*,[29] the Supreme Court applied the newly enacted FTCA and held that the government was not liable under the Act for injuries to servicemen when the injuries arose out of or were in the course of activity incidental to military service.[30] The Court explained that the rationale underlying the FTCA recognized a distinctively federal character in the relationship between the government and members of its armed forces. Federal law rather than state tort law, therefore, should control that relationship.[31]

Feres prohibited servicemen or their families from suing the government for personal injuries or loss of life arising from activity incidental to military service. Logically, servicemen and their families looking for due compensation began to bring products liability suits against the contractors who supplied the military with ordered products that failed due to design or manufacturing defects.[32] As a result of the *Feres* holding, "contractors found themselves paying for the government's design defects."[33] These tort actions placed a heavy financial burden on government contractors.

In addition to the heavy burden of the *Feres* ruling, in *Stencel Aero Engineering Corp. v. United States*,[34] the Court barred government contractors from seeking indemnity from the government for damages that the state required the contractor to pay to injured military servicemen under state tort actions when injuries resulted from equipment that the government contractor

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26. *See, e.g.*, Principe Compania Naviera, S.A. v. Board of Comm'rs, 333 F. Supp. 353, 355 (E.D. La. 1971).

27. 28 U.S.C. §§ 2671-2679.

28. *Id.* § 2671.

29. 340 U.S. 135 (1950).

30. *Id.* at 144.

31. *Id.* at 143. The Court also explained that the servicemen could not be doubly compensated through use of the FTCA because they had access to an adequate compensation system. *Id.* at 140, 146. Specifically, the Veterans' Benefits Act establishes a no-fault military compensation scheme. 38 U.S.C. §§ 301-363 (1988).

32. *See, e.g.*, Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 667-68 (1977).

33. Note, *supra* note 15, at 226.

34. 431 U.S. 666.

manufactured in strict accordance with government specifications.[35] The Court reasoned that contractors could not implead the government as a third-party defendant because trial would "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."[36]

Government contractors supplying ordered equipment to the military faced an insurmountable obstacle in the *Feres-Stencel* doctrine.[37] Under this doctrine, when a law required a government contractor to adhere to government-generated specifications, the courts could hold the contractor liable for personal injury and property damage with no opportunity to seek indemnity from the government.[38] Government contractors began looking for a method by which they could benefit from the government's sovereign immunity and protect themselves from being the ultimate insurer of government designs and specifications for military hardware.

Modern Formulations: The Circuit Split

The injustice of the strict application of the *Feres-Stencel* doctrine gave rise to modern formulations of the government contractor defense at the circuit court level.[39] Although the contractor still could not seek indemnity from the government, courts extended immunity to the contractor in military products liability settings if the contractor could meet certain proof elements.[40]

The Court of Appeals for the Ninth Circuit was instrumental in fashioning one version of the defense's modern formulation. In *McKay v. Rockwell International Corp.*,[41] a navy pilot was killed

35. *Id.* at 673-74.

36. *Id.* at 673.

37. Case Comment, *supra* note 1, at 947. See *id.* at 943-48 for a general discussion of the *Feres-Stencel* doctrine. The *Feres-Stencel* doctrine was one of the primary rationales underlying the modern government contractor defense. In *Boyle*, the Court specifically rejected this doctrine, however, because it "produces results that are in some respects too broad and in some respects too narrow." Boyle v. United Technologies Corp., 487 U.S. 500, 510 (1988).

38. Case Comment, *supra* note 1, at 947.

39. *Id.* at 947-55. The modern formulations of the government contractor defense create tests that allow the extension of governmental immunity to contractors. Although the *Feres-Stencel* doctrine remained the underlying rationale for the development of these defenses, these tests afforded the courts more flexibility to soften the impact of the doctrine's strict application on government contractors. *Id.*

40. *Id.* See *infra* notes 51-86 and accompanying text for a discussion of the required proof elements.

41. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

by the impact against his plane during an emergency ejection.[42] The court held that a supplier of military equipment would not be liable for a design defect if:

> (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.[43]

The court of appeals justified this test with the standard policy considerations that accompany most military products liability cases against a government contractor.[44]

The Court of Appeals for the Eleventh Circuit, faced with a factual scenario similar to that in *McKay*, rejected the Ninth Circuit's formulation of the government contractor defense and established new standards for the use of the defense.[45] In *Shaw v. Grumman Aerospace Corp.*,[46] the court recognized the existence of varying forms of the defense in other circuits, but refused to accept any of these variations as adequate.[47] The Eleventh Circuit recognized a government contractor defense "based exclusively on the theory that the constitutional separation of powers compels the judiciary to defer to a military decision to use [certain products] designed by an independent contractor, despite its risks to servicemen."[48]

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42. *Id.* at 446.

43. *Id.* at 451.

44. See *infra* notes 87-103 and accompanying text for an explanation of the general policy considerations supporting the government contractor defense in the military products liability setting.

45. Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988).

46. *Id.*

47. *Id.* at 740. The Eleventh Circuit created a new formulation because it was not satisfied with the *McKay* standard:

> Since the military and its representatives are not before us in these suits against contractors, we may not ask them for proof that [a judgment decision by the military] was actually made. We may only require from the contractor proof of the negative proposition—that the design in question does not merely represent a judgment by the supplier.

Id. at 745.

48. *Id.* at 743. "The court's task is to inquire whether such a decision has been made and, if not, to apply the standard principles of product liability law." *Id.* at 744.

The Eleventh Circuit's formulation of the defense differed markedly from the Ninth Circuit's formulation in that to escape liability the contractor must affirmatively prove:

> (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; *or* (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.[49]

Although the courts based these two tests on differing policy considerations and presented the government contractor with differing elements of proof, both contractors achieved their objective of acquiring protection in the military products liability setting. The differing standards of *McKay* and *Shaw* formed the basis for the modern government contractor defense in other circuits.[50]

Boyle v. United Technologies Corp.: *Resolution of the Circuit Split*

In *Boyle v. United Technologies Corp.*,[51] the Supreme Court clarified the elements and the proper use of the government contractor defense and thereby resolved the confusion created by its numerous variations. In *Boyle*, a helicopter copilot drowned when his helicopter crashed off the Virginia coast.[52] The copilot was unable to escape through the designated emergency escape hatch because of the faulty design of the escape hatch system and because other equipment obstructed access to the escape hatch handle.[53] The Fourth Circuit applied a government contractor defense modelled after the standard set forth in *McKay* and absolved the contractor from liability.[54]

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49. *Id.* at 746.

50. For example, the *McKay* formulation of the defense became the basis for the *Boyle* formulation of the defense. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988); *see supra* note 3.

51. 487 U.S. 500.

52. *Id.* at 502.

53. *Id.* at 502-03.

54. Boyle v. United Technologies Corp., 792 F.2d 413, 414-15 (4th Cir. 1986), *aff'd*, 487 U.S. 500, 512 (1988). In deciding whether the contractor could raise the government contractor defense to shield itself from liability, the court relied on the test set forth in Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988). This test is an adaptation of the *McKay* test discussed at *supra* text accompanying note 43.

The Court first explained that before it can fashion a "federal common law" defense, it must find the current dispute to be one in which federal law preempts state law.[55] Traditionally, courts found preemption only if a "clear statutory prescription, or a direct conflict between federal and state law existed."[56] The Court explained, however, that it would find preemption if the area involved " 'uniquely federal interests' "[57] 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 . . . so-called 'federal common law.' "[58]

The Court found preemption of state law in *Boyle* because it determined "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.*"[59] The Court also pointed to prior cases in which it had held that "obligations to and rights of the United States under its contracts are governed exclusively by federal law."[60] The Court reasoned 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 its price. Either way, the interests of the United States will be directly affected."[61] The area of government contracts was therefore an area of uniquely federal interest.[62]

In addition, the Court found preemption of state law due to a "significant conflict" between state and federal law.[63] The Court

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55. *Boyle*, 487 U.S. at 504.

56. *Id.* (citations omitted).

57. *Id.* (quoting Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

58. *Id.* (citing United States v. Kimball Foods, Inc., 440 U.S. 715, 726-29 (1979); Banco Nacional v. Sabbatino, 376 U.S. 398, 426-27 (1964); Howard v. Lyons, 360 U.S. 593, 597 (1959); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 457-58 (1942)). Although it seems as if the Court has recognized three distinct ways to demonstrate preemption, the decision in *Boyle* blends the "significant conflict" and "uniquely federal interests" prongs into one threshold test. *See infra* notes 59-70 and accompanying text.

59. *Boyle*, 487 U.S. at 505 n.1 (emphasis added).

60. *Id.* at 504 (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-94 (1973); Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947); National Metro. Bank v. United States, 323 U.S. 454, 456 (1945); *Clearfield Trust Co.*, 318 U.S. at 366-67)).

61. *Id.* at 507.

62. *Id.*

63. *Id.* Although the Court could have found preemption based solely on its recognition of a uniquely federal interest, it inexplicitly reinforced its finding through use of the significant conflict test. *See also* Dorse v. Eagle-Picher Indus., Inc., 898 F.2d 1487, 1488-90 (11th Cir. 1990) (in which the court applied the significant conflict test to find that no conflict existed and, thus, that the government contractor defense did not apply).

explained that "[d]isplacement [of state common law] will occur only where . . . a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation."[64]

Justice Scalia, writing for the Court, reasoned that the FTCA would suggest the outline of the significant conflict in the government contractor setting.[65] Under the FTCA, "Congress authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred."[66] Congress limited this consent to suit by adding the discretionary function exception, which provides absolute sovereign immunity from "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government," regardless of whether the agency or employee abused the discretion.[67]

The selection of an appropriate design for military equipment is a discretionary function within the meaning of the exception because it "involves not merely engineering analysis but [also] 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."[68] State tort suits against contractors would permit second-guessing of these judgments, producing the same effect that the FTCA discretionary function exemption sought to avoid.[69] The Court reasoned:

> The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally,

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64. *Boyle*, 487 U.S. at 507 (citations omitted). In a case involving the possible use of the government contractor defense, the Court explained that "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied.' " *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). *But see* Hohenhaus, *supra* note 10, at 11 ("Examples supplied by the Court indicate that the federal-state conflict must be clear and concrete, active not passive. The federal-state duties must be contradictory or antithetical, not simply different.").

65. *Boyle*, 487 U.S. at 511.

66. *Id.* (citing 28 U.S.C. § 1346(b) (1988)).

67. 28 U.S.C. § 2680(a).

68. *Boyle*, 487 U.S. at 511.

69. *Id.*

> 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 . . . . It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.[70]

Even if the government contractor can convince a court that federal law should preempt state law, however, the government contractor must fulfill the three-part test that the Supreme Court promulgated in *Boyle* before the court will grant immunity.[71] A court cannot impose liability on the contractor 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."[72]

In dissent, Justice Brennan argued that the majority's creation of the government contractor defense was an exercise of legislative power that the Court should leave to Congress.[73] Congress, however, has remained silent on this issue, resisting the government contractors' sustained campaign to legislate a form of the defense.[74] Brennan deduced that Congress' reluctance to legislate relief for government contractors demonstrated its intent not to extend the government's limited sovereign immunity to contractors.[75]

Even if Congress authorized the Court to create such a federal common law defense in this area, Brennan argued that it should

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70. *Id.* at 511-12.

71. *Id.* at 512-13.

72. *Id.* at 512. The first two elements of the defense assure that a government officer, not merely the contractor itself, considered the design feature in question. *Id.* The third element guards against the risk that "the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks." *Id.* This element protects the flow of information that is highly relevant to the discretionary decision. *Id.* at 512-13.

73. *Id.* at 518 (Brennan, J., dissenting) (quoting Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981)) ("The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.").

74. *See id.* at 515 n.1 (Brennan, J., dissenting) (listing six proposed bills concerning limits on government contractor liability that were defeated in Congress).

75. *Id.* at 518 (Brennan, J., dissenting).

not do so because federal law did not preempt state tort law.[76] This litigation did not affect the "obligations to and rights of the United States under its contracts"[77] because it was an action between two private parties.[78] Brennan stated that the Court's "power to create federal common law controlling the *Federal Government's* contractual rights and obligations does not translate into a power to prescribe rules that cover all transactions or contractual relationships collateral to Government contracts."[79] The Court could not find preemption because no uniquely federal interest existed in a suit between two private parties, as the claim against the manufacturer had "*no direct effect upon the United States or its Treasury.*"[80]

Brennan also pointed out that the Court has extended immunity only to a "subset of 'officials of the Federal Government' and has covered only 'discretionary' functions within the scope of their legal authority."[81] Courts should never extend immunity to a private government contractor so as to "immunize the discretionary acts of those who perform service contracts for the Government."[82] Brennan worried about extending sovereign immunity to nongovernmental entities, emphasizing that the Court had never before suggested that sovereign immunity might extend beyond the narrow class of government employees and agencies "to cover also nongovernment employees whose authority to act is independent of any source of federal law and that are as far removed from the 'functioning of the Federal Government' as is a Government contractor."[83]

Finally, Brennan explained that had this helicopter accident occurred just three miles further off the coast, the Death on the High Seas Act[84] would have provided a wrongful death cause of

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76. *Id.* at 516-30 (Brennan, J., dissenting).

77. *Id.* at 519 (Brennan, J., dissenting).

78. *Id.*

79. *Id.*

80. *Id.* at 529 (Brennan, J., dissenting) (quoting Miree v. DeKalb County, 433 U.S. 25, 29 (1977)).

81. *Id.* at 522 (Brennan, J., dissenting).

82. *Id.* at 525 (Brennan, J., dissenting). Brennan distinguished *Boyle* from *Yearsley* by explaining that, unlike the respondent in *Boyle*, "the contractor in *Yearsley* was following, not formulating, the Government's specifications . . . and followed them correctly." *Id.* This distinction insinuates that the government contractor in *Boyle* exercised discretion in fulfilling the government contract, thereby barring the contractor's claim that the FTCA should define the existence of a significant conflict as explained by the majority.

83. *Id.* at 523 (Brennan, J., dissenting) (citing Howard v. Lyons, 360 U.S. 593, 597 (1959)).

84. 46 U.S.C. §§ 761-768 (1988).

action against the government contractor.[85] Brennan therefore questioned how a state level tort suit against the same government contractor could create a significant conflict with " 'federal interests . . . in the context of Government procurement,' when federal law itself would provide a tort suit, but no (at least no explicit) Government-contractor defense, against the same designer for an accident involving the same equipment."[86]

Policy Support for the Defense

The Supreme Court provided several policy arguments for the limited extension of immunity to government contractors.[87] Other appellate courts that have considered and recognized the government contractor defense also listed policy arguments for the creation of this defense in the military products liability setting.[88] Some of these policy considerations are inapplicable in the environmental tort setting because of their narrow application to the military setting. Others, however, provide a broader base for the defense and enable the making of analogies to determine whether courts should extend this defense to government contractors in the environmental tort setting.

In *Boyle*, the Court cited three main concerns supporting the recognition of the government contractor defense.[89] First, the Court considered the effect that imposition of liability would have upon the cost of government contracts.[90] The Court feared 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

85. *Boyle*, 487 U.S. at 529 (Brennan, J., dissenting).

86. *Id.* at 529-30 (Brennan, J., dissenting).

87. *See infra* notes 89-103 and accompanying text.

88. Generally, the main policy considerations cited are: cost to the taxpayer, separation of powers, second-guessing of military decisions, destruction of military morale, and fairness. *See, e.g.*, *Boyle*, 487 U.S. at 511-12; Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741-44 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449-50 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

89. A minor concern that the Court did not consider in *Boyle* is that the strength of the relationship between the contractor and the government depends upon a free flow of information and a close interplay between the parties. The absence of the government contractor defense may sever this relationship because the contractor will attempt to protect itself from liability. Thus, "by conditioning the application of the government contractor defense on full disclosure to the government of all known risks . . . contractors would have an incentive to work closely with . . . authorities in the development and testing of equipment." Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985).

90. *Boyle*, 487 U.S. at 511.

raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs."[91]

If the government contractor must bear liability, it will either decide not to operate, precluding the government from acquiring needed services, or it will pass along tort liability risk in the form of price increases to the government and ultimately the taxpayers.[92] This pass-through of costs would defeat the practical effect of the FTCA because the government would become indirectly liable for a discretionary function and would lose these funds from the Treasury. Other courts that recognized the defense also cited this consideration as a reason for its creation.[93]

Second, the Court considered the unfairness that the government contractor would suffer if it could not resort to this defense.[94] The Court believed it unfair to allow the government to contract out "risky" work in order to avoid liability that it might otherwise encounter.[95] Liability should fall "on the wrongdoer whose act or omission caused the injury."[96] Accordingly, "in

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91. *Id.* at 511-12. But see Judge Alarcon's dissent in *McKay*:

> There is, however, no reason to believe that these costs are common, in amount and frequency, between all military equipment suppliers. Those with proven safety records may be able to secure liability insurance at much lower rates than less careful suppliers. Presumably, such cost savings enable these manufacturers to make lower bid prices and be more competitive. Because the Military is free to pursue and accept these lower bids, they help sharpen competition and keep the overall cost of bids down. Those manufacturers who do suffer liability, because of unsafe equipment, will be unable to pass on these costs freely due to the lower bids of their safer competitors. . . . The free market system . . . insures that this cost transfer will be minimized.

McKay, 704 F.2d at 457 (Alarcon, J., dissenting).

92. "While distribution of the costs of mishaps to the consuming public may be a familiar feature of products liability law, we are loathe to grant courts and juries a similar power to swell the public costs of meeting the nation's requirements in national security." Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988); *see also* Brown, *Energy Department Contractors and the Environment: A More "Special Relationship,"* 37 FED. BAR NEWS & J. 86, 89 (Feb. 1990) ("Attempts to shift liability for the Department [of Energy's] nuclear facilities to contractors only will drive out more private concerns. The loss of private contractors would leave us with more federal employees (cloaked with sovereign immunity)—and not necessarily any more safety.").

93. *See, e.g.*, *Tozer*, 792 F.2d at 408; *Bynum*, 770 F.2d at 565-66; *McKay*, 704 F.2d at 449; Johnston v. United States, 568 F. Supp. 351, 357 (D. Kan. 1983); *In re* Agent Orange Product Liability Litig., 506 F. Supp. 762, 794 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980).

94. *Boyle*, 487 U.S. at 510-11.

95. *Id.*

96. *Agent Orange*, 506 F. Supp. at 793; *see also Bynum*, 770 F.2d at 566 ("Principles of fairness dictate that an innocent contractor should not be ultimately liable for a dangerous

situations where the contractor ably performed a manufacturing contract according to a detailed yet defective set of design specifications, any resulting liability should be assumed by the wrongdoer who authored those specifications."[97] In its interpretation and application of the government contractor defense as defined in *Boyle*, the Fifth Circuit explained that "the primary purpose behind this formulation of the [government contractor] defense is to prevent the contractor from being held liable when the government is actually at fault but is protected."[98]

Third, the Court was careful not to disturb the separation of powers doctrine by second-guessing a decision of a department of the executive branch.[99] In *Tozer v. LTV Corp.*,[100] the United States Court of Appeals for the Fourth Circuit similarly recognized the limitations on the powers of each branch and explained its reluctance to second-guess when it stated that it is not "seemly that a democracy's most serious decisions . . . be made by its least accountable branch of government."[101]

The government contractor defense not only protects the executive branch agency from judicial second-guessing, but also relieves government contractors from reassessing the government's decisions and specifications.[102] Absolving the government contractor from second-guessing the government saves time and money and ultimately protects the government from inflated contract prices.[103] These three policy considerations are readily

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design when the responsibility properly lies elsewhere."); Brown v. Caterpillar Tractor Co., 696 F.2d 246, 252-53 (3d Cir. 1982) (contractors manufacturing products pursuant to a government contract are not liable when they comply with government specifications but may be liable when they perform negligently).

97. *See* Note, *The Government Contract Defense: Is Sovereign Immunity a Necessary Prerequisite?*, 52 BROOKLYN L. REV. 495, 504-05 (1986) (citing *Agent Orange*, 506 F. Supp. at 793); *accord Johnston*, 568 F. Supp. at 358.

98. Trevino v. General Dynamics Corp., 865 F.2d 1474, 1478 (5th Cir.), *cert. denied*, 110 S. Ct. 327 (1989) (citing *Bynum*, 770 F.2d at 565). The FTCA protects the government. *Trevino* is one of the few cases interpreting and applying the government contractor defense as defined in *Boyle*.

99. *Boyle*, 487 U.S. at 511.

100. 792 F.2d 403 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988).

101. *Id.* at 405. The separation of powers concern is strong in the military setting because cases in which "government specifications are at issue would 'involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions.' These trials would raise concerns about their effect on military discipline, as well as on national security." McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984) (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977)).

102. *See* Note, *supra* note 97, at 502.

103. *See, e.g.*, *McKay*, 704 F.2d at 449.

adaptable to support creation of the defense in the environmental tort setting.

APPLICATION OF THE DEFENSE IN THE ENVIRONMENTAL TORT SETTING

Successful application of the government contractor defense in the military products liability setting naturally led to attempts to extend this defense to analogous situations. For example, an attempt to extend the defense into the environmental tort setting occurred in *Crawford v. National Lead Co.*[104] *Crawford* involved a federally owned uranium metals production plant which a private contractor operated for the government from 1951 through 1985.[105] Fourteen thousand people who lived or worked near the plant brought a $300 million lawsuit alleging that the government contractor failed to prevent the emission of uranium and other harmful materials[106] from the plant and that such failure caused emotional distress and diminished property values.[107] The contractor "repeatedly informed the Energy Department of pressing, potentially life-threatening problems at the . . . plant."[108] The government was aware of the problems as early as 1951, even as the facility was being built, but ignored the problems because of the high cost of fixing them.[109]

The contractor sought a motion for summary judgment on the

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104. 29 Env't Rep. Cas. (BNA) 1048 (S.D. Ohio 1989).

105. *Id.* at 1049.

106. Officials of Westinghouse Materials Corp., which replaced National Lead Co. as operator of the facility in 1985, admitted that "the 1,050 acre site [was] contaminated with many hot spots, including 8,800 tons of radioactive waste stored in silos and nearly 1,000 tons of thorium stored in leaking barrels." *Judge rules against government in Fernald suit*, United Press Int'l, Feb. 14, 1989, BC cycle (Domestic News).

107. *Crawford*, 29 Env't Rep. Cas. (BNA) at 1049.

108. Reynolds, *At Ohio Uranium Plant, A Cloud of Fear and Anger*, Boston Globe, Oct. 25, 1988, at 3 ("Dustbags designed to filter uranium particles from the air were known to explode once a month, expelling a thick blanket of contaminated air over the towns surrounding the plant. Heavy rains regularly swept uranium particles from the plant into the nearby Great Miami River.").

109. *Id.* The government admitted to having knowledge of the hazardous environmental problems at the plant. Sherman, *Atom-Plant Disclosure: Knowledge as a Sword?*, Nat'l L.J., Nov. 28, 1988, at 3, col. 2. The government may have made these admissions to protect the contractor from liability under the theory that if the contractor could show that it complied with the government's specifications and warned the government of known defects and the government continued to approve the contractor's operating procedures, the contractor would be absolved of liability under the government contractor defense as defined in Boyle v. United Technologies Corp., 487 U.S. 500 (1988). Sherman, *supra*, at 22, cols. 1-2.

basis that the government contractor defense, as defined in *Boyle*, barred state law tort claims against a government contractor that was merely following the government's directives.[110] The court denied this motion, stating that although the government contractor defense may be applicable in the environmental tort setting, it was not applicable under these specific circumstances.[111]

Interpreting *Boyle*, the court held that state tort law, under which courts would find the contractor liable, would "be displaced when (1) the subject matter involves 'uniquely federal interests'; and (2) 'a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law" . . . or the application of state law would "frustrate specific objectives" of federal legislation.' "[112] If these two threshold requirements for displacement are met, then a consideration of the three limiting elements as explained in *Boyle* will determine the scope of such displacement.[113]

The court in *Crawford* determined that no significant conflict existed between federal and state laws or interests because "[the government contractor's] actions giving rise to the state law tort claims also violated applicable [federal] environmental laws."[114] Federal law did not preempt state law because the government contractor had a duty to comply with the environmental laws during the operation of the plant.[115] The imposition of a state tort law duty was not an additional duty placed upon the contractor, but merely an alternative way of ensuring that the contractor would meet this duty to the public.[116]

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110. *Crawford*, 29 Env't Rep. Cas. (BNA) at 1050.

111. *Id.* at 1053-54. The court noted that "[a]lthough the *Boyle* court discussed the government contractor defense within the context of a procurement contract, the defense is viable with regard to performance contracts." *Id.* at 1053 n.7 (citing *Boyle*, 487 U.S. at 506; Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 18 (1940)).

112. *Id.* at 1053 (citing *Boyle*, 487 U.S. at 507 (citations omitted)).

113. *Id.* The court in *Crawford* briefly listed these three factors as:

1. government approved specifications,
2. conformity to specifications, and
3. contractor warning of dangers it knew of which were unknown to the government.

Id. (citing *Boyle*, 487 U.S. at 512).

114. *Id.* The court found that the government contractor violated the Atomic Energy Commission's ALARA ("as low as reasonably achievable") policy, 10 C.F.R. § 20.1 (1990); the Refuse Act of 1899, 33 U.S.C. § 407 (1988); and the Standards for Protection Against Radiation, 10 C.F.R. § 20.1-20.601 (1988). *Crawford*, 29 Env't Rep. Cas. (BNA) at 1054.

115. *Crawford*, 29 Env't Rep. Cas. (BNA) at 1053.

116. *See Boyle*, 487 U.S. at 509. The court in *Crawford* also hinted that even "[i]f the

Obstacles in the Environmental Tort Setting: Meeting Threshold Requirements

The court in *Crawford* refused to allow the government contractor to resort to the government contractor defense because it determined that the contractor could not meet the threshold requirements of the defense.[117] In *Boyle*, the Supreme Court stated that before a contractor could raise the federal common law defense, it would have to prove that federal law preempted state law.[118]

Preemption of State Law

M'Culloch v. Maryland[119] established the principle "that the States may not exercise their sovereign powers so as to control those instrumentalities of the United States which have been judged necessary and proper to carry into effect federal laws and policies."[120] Chief Justice Marshall, famous for his comments concerning federalism, explained that:

> The American people have declared their constitution and the laws made in pursuance thereof, to be supreme . . . .

Boyle threshold requirements were met, the contractor defense could be defeated on grounds that [the contractor] did not conform to government approved specifications for operation of the [facility]." *Crawford*, 29 Env't Rep. Cas. (BNA) at 1055 n.13. The court declined to decide this question, however, because the defendant's inability to meet the threshold requirements convinced the court to disallow the defense. *Id.*

As a result of the court's ruling, the Department of Energy (DOE) reached an out-of-court settlement with the complaining citizens for $73 million. *Radioactive Waste: DOE to Settle Fernald Class-Action Claims by Establishing $73 Million Citizens Fund*, 20 Env't Rep. (BNA) 532 (July 14, 1989). The settlement places the money in a fund to pay for medical monitoring of individuals and to settle the claims of individuals who have suffered emotional distress. *Id.* The fund also compensates residents who claim that their property values have diminished. *Id.* This is the first time that DOE agreed to make money available for such purposes. *Id.* DOE agreed to make this settlement on behalf of its government contractor under the stipulation that the settlement agreement not fix liability or blame, as DOE consistently maintained that the plant operations did not harm anyone. *Id.*

117. *Crawford*, 29 Env't Rep. Cas. (BNA) at 1055 n.13.

118. *See Boyle*, 487 U.S. at 504.

119. 17 U.S. (4 Wheat.) 316 (1819).

120. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 186-87 (1988) (White, J., dissenting). In *Goodyear Atomic Corp.*, Justice Marshall, writing for the majority, noted that "a federally owned facility performing a federal function is shielded from *direct* state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation." *Id.* at 181 (emphasis added). The Court believed that Congress could "reasonably determine that incidental regulatory pressure [by the states] is acceptable, whereas direct regulatory authority is not." *Id.* at 186.

> . . . .
> . . . The result is a conviction that the states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.[121]

Under the supremacy clause,[122] the proper focus in an analysis of the relationship between state and federal law is not the state's purpose for adopting a given provision, but rather the provision's actual effect on the operation of a federal instrumentality and its ability to achieve the objectives of federal law and policy for which it was created.[123]

In *Silkwood v. Kerr-McGee Corp.*,[124] the Court explained that federal law can preempt state law in either of two general ways:

> [1] If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [2] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, *when it is impossible to comply with both state and federal law*, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[125]

In *Silkwood*, the government contractor argued that the state-authorized award of punitive damages for harm caused by radiation exposure was a form of indirect state regulation in a prohibited field because it would punish and deter safety-oriented conduct related to radiation hazards.[126] After reviewing the legislative history of the Atomic Energy Act,[127] the Court rejected this argument and held that the contractor was subject to punitive damages because the imposition of these damages did not

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121. *M'Culloch*, 17 U.S. (4 Wheat.) at 432, 436.

122. U.S. CONST. art. VI, cl. 2.

123. *Goodyear Atomic Corp.*, 486 U.S. at 188 (White, J., dissenting) (citing Perez v. Campbell, 402 U.S. 637, 651-52 (1971)).

124. 464 U.S. 238 (1984).

125. *Id.* at 248 (citations omitted) (emphasis added). The second technique for finding preemption that the Court described in *Silkwood* constitutes the significant conflict approach used in *Boyle*. *See supra* notes 63-70 and accompanying text.

126. *Silkwood*, 464 U.S. at 249. The contractor contended that federal law and policy barred the state from regulating the nuclear facility in any way, direct or indirect. *Id.*

127. 42 U.S.C. §§ 2011-2296 (1988); *see Silkwood*, 464 U.S. at 250-56.

conflict with federal regulation.[128] The Court did not suggest, however, that no instance could ever exist in which federal law would preempt the recovery of damages based on state law.[129] Instead, it described the test that courts must apply when determining whether state law frustrated compliance with federal law:

> [P]re-emption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on *whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.*[130]

According to Justice Powell's dissent, the majority's decision "authorize[d] lay juries and judges in each of the States to make regulatory judgments as to whether a federally licensed nuclear facility is being operated safely."[131] In addition, the decision in *Silkwood* came less than one year after the Court explicitly held that "federal law has 'pre-empted' all 'state safety regulation' [in the atomic energy field] except certain limited powers 'expressly ceded to the States.' "[132]

Boyle: *Preemption in the Government Contractor Setting*

In *Boyle v. United Technologies Corp.*,[133] the Supreme Court again attempted to explain the narrow instances in which federal law would preempt state law. When attempting to apply the government contractor defense, a court may find preemption in either of two circumstances: (1) if a clear statutory prescription existed, or (2) if federal law directly conflicted with state law.[134] The Court also explained that in a few areas of uniquely federal

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128. *Silkwood*, 464 U.S. at 249, 256-57. The Court explained that "[p]aying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme." *Id.* at 257.

129. *Id.* at 256.

130. *Id.* (emphasis added).

131. *Id.* at 274 (Powell, J., dissenting).

132. *Id.* (quoting Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983)). In *Pacific Gas*, the Court concluded that federal nuclear safety regulations preempted state safety regulations. *Pacific Gas*, 461 U.S. at 205.

133. 487 U.S. 500 (1988).

134. *Id.* at 504.

interest it could preempt state law and create "federal common law."[135] The Court held that federal law preempts state tort law in the military products liability setting because (1) military decisions concerning equipment specifications are within an area of uniquely federal interest, *and* (2) a significant conflict exists between federal and state law.[136]

In *Crawford*, the court applied the government contractor defense as defined in *Boyle* and disqualified the contractor's use of the government contractor defense because the contractor could not meet the specific technique used to find preemption in *Boyle*.[137] The court failed to consider the overall threshold question of whether federal law, regulation, policy, or interest preempted state law *in any way*. If the contractor can prove that use of any of the Supreme Court-approved approaches to preemption should preempt state law, then a court should allow it to use the government contractor defense to shield itself from environmental tort liability.

Overcoming Obstacles

Commentators and courts have recognized that the evolution of the preemption doctrine has resulted in a strong presumption against preemption.[138] *Boyle* represents a small minority of tort

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135. *Id.* These areas of uniquely federal interest include those 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 . . . by the courts—so-called 'federal common law.' " *Id.*

136. *Id.* at 507-12. In *Boyle*, the Court confused the preemption analysis through its cloudy application of preemption doctrine. Although it first explained that federal law would preempt state law if *either* a significant conflict between federal and state law existed, *or* a uniquely federal interest existed over which the federal government should have exclusive control, the Court combined these two distinct thresholds into one threshold requirement. *Id.* at 504, 507. According to the Court, the government contractor can prove preemption by showing either that Congress expressly preempted state law through clear statutory language, or that Congress impliedly preempted state law by a showing of a significant conflict *and* a uniquely federal interest. The Court gave no explanation for its departure from standard preemption doctrine. This extra obstacle will increase the heavy burden on the government contractor of showing preemption.

On the other hand, the Court in *Boyle* may not have been confused in its analysis but may simply have shown that preemption can be found in two distinct and independent ways. Courts applying the *Boyle* formulation of the defense, however, have required that the contractor prove both elements before federal law will preempt state law. *See, e.g.*, Crawford v. National Lead Co., 29 Env't Rep. Cas. (BNA) 1048, 1053 (S.D. Ohio 1989).

137. *Crawford*, 29 Env't Rep. Cas. (BNA) at 1053-55.

138. *See, e.g.*, Darling v. Mobil Oil Corp., 864 F.2d 981, 986 (2d Cir. 1989) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) ("In areas traditionally regulated by

cases in which courts found preemption. *Silkwood*, more representative of the majority of tort cases, suggests that even if the imposition of state tort law punitive damages upon a federal instrumentality results in indirect regulation, no preemption of state law will occur.

Expressed Preemption

The easiest and most obvious way to overcome the preemption problem is to show that Congress or a federal agency clearly expressed that federal law is to preempt state tort law in the specific area. To prove expressed preemption, the contractor must find a statutory provision or some other evidence of legislative intent that clearly mandates preemption.[139] Unfortunately, few environmental statutes have such clear provisions.[140] If fed-

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state law, 'we start with the assumption that the historic police powers of the States were not [sic] superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "); *see also*, Rotunda, *Sheathing the Sword of Federal Preemption*, 5 CONST. COMMENTARY 311, 311-12 (1988) ("[T]he Supreme Court . . . had already anticipated its strong presumption against preemption.").

139. *Boyle*, 487 U.S. at 504.

140. *See* Bieneman v. City of Chicago, 864 F.2d 463, 471 (7th Cir. 1988) ("Statutes [that have antipreemptive provisions] . . . save common law remedies even when federal law exclusively determines the content of substantive rules."), *cert. denied*, 490 U.S. 1080 (1989).

Many environmental statutes do not have a clear preemption provision but instead explicitly provide that federal law should not preempt state law. Congress first used the broad language of these savings clauses in the following passage of the CWA: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek other relief (including relief against the Administrator or a State agency)." Clean Water Act § 505(e), 33 U.S.C. § 1365(e) (1988). This language served as the basis for similar savings clauses in subsequent environmental statutes. *See, e.g.*, Surface Mining Control and Reclamation Act of 1977 § 520(e), 30 U.S.C. § 1270(e) (1988); Marine Protection, Research, and Sanctuaries Act of 1972 §§ 105(g)(5), 106(g), 33 U.S.C. §§ 1415(g)(5), 1416(g) (1988); Public Health Service Act § 1449(e), 42 U.S.C. § 300j-8(e) (1988); Solid Waste Disposal Act § 7002(f), 42 U.S.C. § 6972(f); Clean Air Act Amendments of 1977 § 304(e), 42 U.S.C. § 7604(e); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 309(a)(2), 42 U.S.C. § 9658(a)(2).

The Supreme Court had the opportunity to interpret the effect of the broad language in the CWA savings clause in International Paper Co. v. Ouellette, 479 U.S. 481 (1987). Although the CWA would preclude suits that may require standards of control "that are incompatible with those established by the procedures set forth in the Act[,] . . . nothing in the Act bars aggrieved individuals from bringing a nuisance claim." *Id.* at 497. An action brought against the contractor/operator would not frustrate the goals of the federal environmental statute. *Id.* at 498; *see also* Ogden Envtl. Servs. v. City of San Diego, 687 F. Supp. 1436, 1444 (S.D. Cal. 1988) (Congress, by way of a savings clause in the Resource Conservation and Recovery Act, clearly mandated that the federal statute would not preempt state law); Donnelly & Van Ness, *The Warrior and the Druid—The DOD and*

eral statutes or actions do not contain expressed or implied preemption, the contractor must resort to the uniquely federal interests or significant conflict test that the Court laid out in *Boyle*.[141]

Uniquely Federal Interest

In *Boyle*, the Court did not give a clear-cut definition of a uniquely federal interest, but it did give several examples to illustrate this principle. First, the federal government's procurement of equipment is an area of uniquely federal interest.[142] Second, a dispute between a military victim of a products liability accident and the private manufacturer that the federal government contracted to make the product implicates the interests of the United States.[143] Finally, federal law exclusively governs the United States' rights and obligations under its contracts.[144]

Under this last example, the government contractor should try to convince the court that a contract requiring the government contractor to perform an environmentally sensitive operation without significant independent discretion is a uniquely federal interest because it involves the rights and obligations of the federal government. This argument for recognizing a uniquely federal interest is especially strong if the contractor can show that the authority to enter into the contract and regulate the operations of the facility has its origin in the Constitution and the statutes of the United States and in no way depends upon the laws of any state.[145]

The Court also has found that the "civil liability of federal officials for actions taken in the course of their duty" is another area of federal concern warranting the displacement of state

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statutes passed since 1970, Congress has included provisions that abandon protection of federal facilities for state rules); Hill, *Preemption of State Common Law Remedies by Federal Environmental Statutes:* International Paper Co. v. Ouellette, 14 ECOLOGY L.Q. 541 (1987) (noting the Court's reasoning in *Ouellette* that the permit scheme of the CWA would not be undermined if the nuisance law of the state where the discharge occurred were applied to a given case, but would be undermined if the conflicting standards of multiple states where injuries occurred were applied).

141. *See supra* notes 57-70 and accompanying text.

142. *Boyle*, 487 U.S. at 506.

143. *See id.* at 502-03, 507.

144. *Id.* at 504 (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-94 (1973)).

145. *See* Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943).

law.[146] Again, the Court emphasized that even though *Boyle* involved an independent contractor performing its obligation under a procurement contract rather than an official performing his duty as a federal employee, "the same interest in getting the Government's work done" is obviously implicated.[147] If the contractor cannot demonstrate a uniquely federal interest, the contractor's last hope for preemption lies in demonstrating that a significant conflict exists between the application of state law and the proper functioning of federal law.

Significant Conflicts

Courts must recognize preemption if compliance with both state and federal law is impossible.[148] A significant conflict exists "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[149] If compliance with both state and federal law is not physically impossible, however, no conflict exists.[150] State law must present "fairly high" obstacles to the proper operation of federal law before courts will infer preemption.[151] The Supreme Court determined that in the government contractor setting, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption when Congress legislates 'in a field which the States have traditionally occupied.' "[152]

Although the contractor's proof of the existence of a significant conflict may seem difficult, the Court in *Boyle* explained that the contractor could satisfy the significant conflict requirement by showing that the government officer(s) or agency that had ultimate control over the government contractor had exercised authorized discretion in judgments concerning the orders given to

146. *Boyle*, 487 U.S. at 505.

147. *Id.* "[T]he liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest." *Id.* at 505 n.1.

148. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

149. *Id.*

150. *See* Rotunda, *supra* note 138, at 317 ("If dual compliance is not 'physically impossible,' as in *Silkwood*, there is no 'actual conflict.' " (citing *Silkwood*, 464 U.S. at 248)); *see also* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) ("A holding of federal exclusion of state law is inescapable . . . where compliance with both federal and state regulations is a physical impossibility . . . .").

151. Rotunda, *supra* note 138, at 318.

152. *Boyle*, 487 U.S. at 507 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). The Court offered no explanation for this relaxed degree of conflict in the government contractor setting.

the contractor.[153] If the discretionary function exception of the FTCA would render the government officer immune,[154] the courts should not allow the state to second-guess or intrude upon his discretionary decisions concerning the control of the government contractor and the government-owned facility.[155] Congress specifically provided for immunity when a government official exercised authorized discretion to give the official the capacity to make these important decisions without fear of state tort liability.[156]

When the governmental activity complained of involves conduct rooted in policy matters, the discretionary function exception will bar tort suits unless the plaintiff can establish a violation of specific and mandatory requirements that restricted the discretion or judgment of the governmental employees who performed the task.[157] Unfortunately, most environmental statutes restrict the government's ability to act contrary to their mandates.[158]

The government's decision to award a contract to a particular contractor is a discretionary function in that "[d]eciding to award a government . . . contract to a particular manufacturer involves weighing various facts and policies and this is discretionary in nature."[159] Even if the government retains a generalized role in monitoring contractor compliance with safety requirements, the discretionary function exception bars suit.[160] Courts have found government involvement in such matters actionable only when "government inspections of private entities involved situations in which highly specific, mandatory obligations involving no judgment were flatly disregarded."[161]

Although one may argue that a significant conflict exists based on the fact that the government employees controlling the contractor and the project exercised authorized discretion, the Court

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153. *Id.* at 511-12.

154. 28 U.S.C. § 2671 (1988).

155. *Boyle*, 487 U.S. at 511-12.

156. *Id.*

157. Berkovitz v. United States, 486 U.S. 531, 535-36 (1988).

158. *See infra* note 207. The government contractor in Crawford v. National Lead Co., 29 Env't Rep. Cas. (BNA) 1048 (S.D. Ohio 1989), encountered this problem and could not use the government contractor defense. Thus, "[t]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for [a government] employee to follow. In this event, the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. at 536.

159. McMichael v. United States, 751 F.2d 303, 307 (8th Cir. 1985).

160. Feyers v. United States, 749 F.2d 1222, 1226-27 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

161. Fishback & Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act*: Dalehite *to* Varig *to* Berkovitz, 25 IDAHO L. REV. 291, 309 (1988).

in *Boyle* furnished an example that seems to preclude an extension of this argument into the environmental tort setting. The Court stated that if the contractor could comply with both its contractual obligations and the state-prescribed duty of care, federal law generally would not preempt state law.[162] The Court used the example of a federal government contract for the purchase and installation of an air conditioning unit to illustrate this principle.[163] The government contract in this example specified the cooling capacity but not the precise manner of construction, and a state law imposed a duty of care upon the manufacturer of such units to include a certain safety feature.[164] This state-imposed duty was neither identical nor contrary to anything that the contractor promised the government.[165] In this situation, the contractor had to live up to both federal contract and state law standards because each standard could operate independently without interference from the other.[166] The contractor, therefore, could not use compliance with one duty as a defense for noncompliance with the other duty.

In *Miree v. DeKalb County*,[167] a private plaintiff did not seek to impose upon the government contractor a duty contrary to that which the government contract imposed, but rather sought to enforce the contractual duty itself.[168] An intermediate situation existed "in which the duty sought to be imposed on the contractor [was] not identical to one assumed under the contract, but [was] also not contrary to any assumed."[169] Like the contractor in the Court's air conditioner purchase example in *Boyle*, the contractor in *Miree* could comply with both its contractual obligations and the state-prescribed duty of care without compromising either duty.[170] The Court therefore suggested that federal law generally would not preempt state law in this context.[171] By contrast, in

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162. Boyle v. United Technologies Corp., 487 U.S. 500, 509 (1988).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* This example seems similar to the holding in *Silkwood*, which required the contractor to comply with federal as well as state duties even though federal control was pervasive. *See supra* note 128 and accompanying text.

167. 433 U.S. 25 (1977).

168. *Boyle*, 487 U.S. at 508.

169. *Id.* at 509. An example of this intermediate situation is the air conditioning unit purchase contract hypothetical that the Court presented in *Boyle*. *See supra* notes 162-66 and accompanying text.

170. *Boyle*, 487 U.S. at 509.

171. *Id.*

Boyle, the state-imposed duty of care that formed the asserted basis of the contractor's liability was precisely contrary to the duty that the government contract imposed.[172]

Under certain environmental laws, specific provisions mandate that the federal government comply with these statutes to protect human health and welfare.[173] A state-imposed duty to cease and desist from harming the health and personal or real property of others is not contrary to the statutory duty that Congress has seen fit to impose upon all branches of the federal government. Even though compliance with environmental laws may hinder or present an almost insurmountable obstacle for the accomplishment of a federal government policy or objective, the courts will most likely not find a significant conflict because Congress has decided that the protection of human life and the environment should take precedence over the accomplishment of certain governmental objectives.[174] In this sense, the state-imposed duty and the statutorily-imposed duty are identical and the government contractor's request to use the government contractor defense amounts to nothing more than a request by a surrogate of the federal government to be exempt from duties that the federal government has imposed upon itself.

Policy Arguments for an Extension of the Defense into the Environmental Tort Setting

The arguments for finding federal preemption of state law in order to authorize extension of the government contractor defense into the environmental tort setting are tenuous at best. To aid in the argument for recognition of the defense, the government contractor should emphasize the necessity for the defense as supported by the traditional policy reasons underlying the existence of the defense in the military products liability setting.

Even though contractors encounter difficulties in meeting the defense's threshold requirements in the environmental tort setting, the courts should still allow the government contractor to resort to the defense to avoid injustice. One can analogize three main policy arguments from the military products liability set-

172. *Id.* The state-imposed duty was "the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary," whereas the contractual duty was "the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications." *Id.*

173. *See infra* note 207.

174. *Id.*

ting: the fairness of the defense, the separation of powers problem, and the cost considerations.

The imposition of tort liability benefits society because it forces the reallocation of resources from the tortious actor to the innocent victim, but "[b]efore any societal benefit can be derived from the deterrent effects of tort liability, . . . the party in a position to correct the tortious act or omission must be held accountable for the damages caused and thus motivated to prevent future torts."[175] When the government compels the contractor to comply with its performance specifications and thereby to commit a tort, the government rather than the contractor is ultimately at fault; thus, tort liability should properly fall upon the government rather than the innocent contractor.[176] The burden of tort liability should follow the benefit that the government receives from the private operation of a federally owned facility.[177] Principles of tort liability "seek to impose liability on the wrongdoer whose act or omission caused the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government."[178]

If the FTCA shields the government from liability, it should likewise shield the contractor in the employ of the government. The courts should not allow the government to commit a tort by contracting out its duty of care to another party, thus escaping liability, if it could not commit the action on its own without escaping liability.[179]

Ultimately, government contractor tort liability will fall upon an innocent party not responsible for the tort, namely, the tax-

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175. *In re* Agent Orange Product Liability Litig., 506 F. Supp. 762, 793-94 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980).

176. The victim of the tort will argue that the court should regard him, and not the contractor, as the truly innocent party. The court may wish to characterize the contractor as having "dirtier" hands because it manufactured the defective product or carried out the government's faulty instructions. If the contractor had no input or discretion in the design or manufacturing stages, the court should only hold it liable in proportion to its responsibility, which would be none. *See* Johnston v. United States, 568 F. Supp. 351, 358-59 (D. Kan. 1983).

177. *See* AMERICAN BAR ASSOCIATION, THE GOVERNMENT CONTRACTOR DEFENSE: A FAIR DEFENSE OR THE CONTRACTOR'S SHIELD? 62 (J. Madole ed. 1986).

178. *Agent Orange*, 506 F. Supp. at 793.

179. *See* Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988) ("It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.").

payer.[180] If the courts bar the contractor's use of the government contractor defense, the government contractor will ultimately pass the costs awarded to plaintiffs on to the taxpayers in the form of cost overruns or price increases on subsequent jobs.[181] This problem may not be recognizable at first because the government will receive low bids from contractors that have not yet been subject to liability. In the long run, however, if suits against contractors continue, either large payments in damages or high costs of liability insurance will affect all contractors. These concerns should prompt the judiciary[182] to extend this immunity to the government contractor in environmental tort situations, as it has already done in the military products liability setting.

The concern of second-guessing the military in the products liability setting also exists in the environmental tort setting. The federal agency should be free from judicial second-guessing when making decisions concerning the accomplishment of congressionally authorized objectives.[183] In the environmental setting, courts have shown a reluctance to second-guess Environmental Protection Agency decisions concerning the environment, deferring to the executive branch Agency's statutory interpretations and implementations as long as the Agency can show a reasonable basis for its actions.[184] Courts should recognize the applicability of the

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180. The innocent party may be the consumer in the products liability setting or the taxpayer in the government contracts setting.

181. *See Boyle*, 487 U.S. at 511-12; Tozer v. LTV Corp., 792 F.2d 403, 407 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988); 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), *cert. denied*, 464 U.S. 1043 (1984). The taxpayer, however, ultimately will bear the costs regardless of whether the government bears liability directly or whether the contractor bears the liability and passes these liability costs on to the government. The government contractor defense simply removes one step in this cost passing process. Assuming that the government's actions are immune, and that this immunity can be extended to the government contractor, the victim of the tort will bear all costs. Although this result seems inequitable, Congress possesses the authority to declare such policy through the FTCA.

182. Or, preferably, the legislature will respond to these concerns. *See infra* notes 193-200 and accompanying text.

183. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984). Although Congress expresses agency objectives through legislation, federal environmental laws limit the agency's means to accomplish these objectives. *See infra* note 207. The role of the reviewing court, therefore, is not to second-guess the agency's decisions, but rather to determine whether the agency's actions comply with federal statutory law.

184. For example, in *Chevron*, the Court stated:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy prefer-

government contractor defense in the environmental setting to avoid these separation of powers concerns.

ALTERNATIVES TO AVOID THE USE OF THE DEFENSE

Preemption may be an incorrect argument in the environmental tort setting. The mechanical determination of whether federal law preempts state law should not dictate fairness in the allocation of liability. Courts should recognize the extension of the government contractor defense as a policy matter based on fairness to the contractor, who is not responsible for the federal government's actions.

If the government were to deny all sovereign immunity, the courts would recognize the government as the liable party in the environmental tort setting due to its breach of duty towards private citizens injured as a result of its faulty operation plans and procedures. Because the government has unilaterally decided to limit its consent to tort suits through the discretionary function exception of the FTCA, the government contractor bears the ultimate consequences of the government's decisions dictating the proper plans and procedures that the contractor must follow.[185] When Congress decided that the federal government would not be responsible for the consequences flowing from discretionary functions, it merely decided that the loss should fall somewhere else. In circumstances involving only the private citizen and the government, the loss would fall upon the private citizen injured by the tortfeasor's actions. Plaintiffs' lawyers, however, sniffed out the money in the deep pockets of the government contractors like a hound seeking the weary fox.

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ences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. . . .

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.

Chevron, 467 U.S. at 865-66.

185. See *Boyle*, 487 U.S. at 504, 511-13, for a discussion of the threshold requirements of the defense. This legal maneuvering involves the application of legal reasoning developed centuries ago to situations that the creating jurists had not contemplated. Although preemption doctrine may be an eternal truth of American legal thought, its application in this setting creates sufficient injustice to warrant carving out an area of extended sovereign immunity for certain contractors.

In the military products liability setting, the government felt comfortably insulated under the FTCA and the *Feres-Stencel* doctrine because plaintiffs could not sue the government either directly or indirectly.[186] The government, however, soon realized that government contractors would not tolerate submitting themselves to actions in tort and insuring products they did not design. Like all smart businessmen who have gained control over a lucrative market, the contractors decided to pass along the costs of litigation and judgments to the government and eventually the taxpayer, thereby subjecting the government to indirect tort liability and defeating the purpose of the *Feres-Stencel* doctrine and the FTCA. Once the contractors discovered this tactic, the government realized the trouble it had created. Now, the government was paying not just for the occasional tort claim, but also was paying indirectly for all judgments that the contractor suffered and any risk that the contractor foresaw.[187] This consequence would eventually raise all contract prices to the government, regardless of whether a tort action was the result of the ordered product or the service of a particular contractor.[188]

To reduce the price of its procurement contracts and to protect the taxpayers,[189] the government extended its sovereign immunity to government contractors in the very narrow area of military products liability actions brought by servicemen or their families.[190] Other government contractors will soon line up to take advantage of this defense to avoid the costs of litigation and cost pass-through to the government.[191] Currently, however, the government will not allow the contractor who involuntarily caused a tort through violation of environmental laws to seek protection under this defense, even if the contractor had obeyed the government's orders. The defense is unavailable not because widely differing policy considerations would prohibit use of the defense, but because contractors have been unable to successfully manipulate the legal reasoning behind the preemption doctrine

186. *See supra* notes 24-38 and accompanying text.

187. *See Boyle*, 487 U.S. at 507.

188. *Id.* at 506.

189. Or perhaps the government's motivation was to protect its political positions by not overly taxing the private citizen.

190. *See, e.g., Boyle*, 487 U.S. at 510; Trevino v. General Dynamics Corp., 865 F.2d 1474, 1479 (5th Cir.), *cert. denied*, 110 S. Ct. 327 (1989); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

191. *See, e.g.*, Crawford v. National Lead Co., 29 Env't Rep. Cas. (BNA) 1048 (S.D. Ohio 1989); *see also* sources cited *supra* note 10.

to extend the immunity to the contractor in the environmental tort setting.[192]

Although some may argue that the environmental tort setting involves different policy considerations, in all fairness, courts should not permit the federal government to order the contractor to operate in a certain manner and reap the benefits of this illegal operation and then to disassociate itself completely from the contractor as soon as the contractor is caught violating the law and "brought to justice." To promote fairness, courts should extend the government contractor defense, not only to the environmental tort setting, but also to any other setting involving government contractors. The confusing principles of the preemption doctrine and the convenient antipreemptive or savings provisions in all major federal environmental laws block this extension in the environmental tort setting.

Legislative Extension

The preemption doctrine will stand as an insurmountable obstacle in the path of a federal court trying to extend the defense to the environmental tort setting.[193] Instead of expending energy to persuade a court that preemption exists, the contractors should follow Justice Brennan's suggestion in *Boyle v. United Technologies Corp.*[194] In his dissent, Brennan argued that fashioning a government contractor defense is a legislative duty that the judiciary must not usurp.[195] This statement, however, is only partially correct. The legislature appears to have authorized implicitly the courts' fashioning of this federal common law defense in the military products liability setting because of the relative ease of demonstrating preemption.[196] In the environmental setting, however, legislative action may be the only way to extend the government contractor defense due to the combination of modern American jurisprudence and the antipreemptive provisions of the statutes involved.

This legislative action to obtain the desired result of extending immunity to the government contractor may take two forms. First, Congress could simply amend the environmental statutes

192. *See supra* notes 137-72 and accompanying text.
193. *See supra* note 172 and accompanying text.
194. 487 U.S. 500 (1988).
195. *Id.* at 515-16 (Brennan, J., dissenting).
196. *See id.* at 504; Bynum v. FMC Corp., 770 F.2d 556, 567 (5th Cir. 1985).

to abolish the antipreemptive provisions or to limit antipreemption to circumstances not involving government contractors that operate without independent discretion in obedience to the government's directives. This alternative does not seem realistic based on Congress' track record of including antipreemptive provisions in the majority of the major environmental statutes, beginning with the CWA.[197]

Traditionally, antipreemption has been an excellent method of establishing and promoting two separate systems that serve to realize the same objective. Nevertheless, one might inquire whether antipreemptive provisions are necessary. If such provisions did not exist, federal law would only preempt state law if the suit involved uniquely federal interests or if the operation of federal law conflicted significantly with the application of state law. Otherwise, when state law and federal law were in harmony rather than in conflict, the preemption issue would not even arise because resort to either court system would achieve the same objective. Realistically, Congress probably would be extremely reluctant to amend the host of environmental laws to promote fairness to this very narrow class of government contractors.

Second, if Congress refuses to amend environmental statutes to exclude or limit antipreemptive provisions as a means of rectifying the unfair situation in which government contractors find themselves, Congress may consider the tactic of legislating a form of the government contractor defense and defining the situations in which a contractor may use it.[198] Legislating a form of the defense would promote the fairness that is due any government contractor that carries out the government's will without discretion.

Some may argue that regardless of the inherent unfairness that contractors may suffer in some circumstances, all contractors should bear some responsibility for their individual actions. Otherwise, contractors could "get away with murder" simply by relying on this defense. Although this theory could gain support in the abstract, the legislature could largely avoid this undesirable result by putting realistic constraints on the contractors'

197. The CWA was the first major federal environmental statute that Congress passed. Congress patterned many provisions within subsequent federal environmental statutes after, and sometimes even adopted provisions verbatim from, the CWA. *See, e.g., supra* note 140.

198. The legislature could define the defense in much the same way that the Court defined it in *Boyle*, 487 U.S. at 512, or it could take into consideration the peculiarities of general categories of situations and thereby modify the defense.

use of the government contractor defense, thereby increasing contractor responsibility and accountability.[199]

Pragmatically, drastic legislative changes such as those suggested above will have a small chance at survival in the chambers of Congress.[200] When someone brings a government contractor into litigation for consequences of illegal environmental actions that the federal government authorized and ordered, the contractor finds itself in a no win situation. The contractor loses if it tries to resort to the judicially defined government contractor defense and argues that a court should extend the defense into the environmental tort setting because it cannot overcome the traditional, deep-rooted preemption doctrine, a necessary threshold before a court will even consider application of the defense. The contractor also loses if it decides to focus its efforts on Congress because of congressional reluctance to legislate a form of the defense.

Contractual Protection

A second method to protect the government contractor that performs environmentally sensitive actions may be to develop preventative measures that would ensure, as well as possible, that potential liability would shift away from the government contractor, preferably to the government, through contractual provisions such as indemnification provisions. Realistically, however, the government will be extremely reluctant to give up its sovereign immunity and assume tort liability through indemnification agreements. The federal government will therefore probably summarily dismiss this technique for shifting liability to the actual wrongdoer.

Contribution

Finally, the contractor may wish to enter into a performance contract with the government and forego any attempt at negotiations for an express indemnification provision for environmental torts resulting from the government's negligent designs or operations plans. Instead, the contractor may wait until someone

199. See *supra* note 72 and accompanying text for an example of limitations of a judicially created government contractor defense.

200. See, for example, *Boyle*, 487 U.S. at 515 n.1, for a list of the contractors' failed attempts to lobby Congress to codify some form of the defense.

brings an environmental tort action against it and then implead the government as a third-party defendant, seeking contribution or indemnification from the government for its negligent or wrongful conduct.

At first glance, the rationale behind the narrowly defined government contractor defense may seem to bar the contractor from seeking indemnity or contribution from the government.[201] For example, because *Boyle* involved fatal injury to a serviceman, the *Stencel* prohibition against indemnification or contribution would bar the contractor's action in this limited setting.[202] Environmental torts, however, affect many people, and if no servicemen are involved as victims, the *Stencel* prohibition does not apply, leaving the door cracked for a contractor to seek some compensation from the government.

Even though the contractor may have a potential way to hold the government accountable for its harmful actions, the government may attempt to bar the indemnity/contribution action through use of the FTCA and its discretionary function exception. The FTCA subjects the government and its employees to liability similar to that of an individual acting in like circumstances.[203] Nevertheless, this waiver of sovereign immunity is not absolute, as Congress specified certain circumstances in which sovereign immunity would not shield the government.[204] Under the discretionary function exception, the waiver of sovereign immunity shall not apply to:

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[205]

This provision provides absolute immunity, regardless of whether the government employee abused his discretion.[206]

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201. *See, e.g.*, Stencel v. Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977).
202. *See id.*
203. 28 U.S.C. § 2674 (1988).
204. *Id.* § 2680.
205. *Id.*
206. *See id.* § 2680(a); *see, e.g.*, Dickerson, Inc. v. United States, 875 F.2d 1577, 1581 (11th Cir. 1989); Dube v. Pittsburgh Corning, 870 F.2d 790, 798 (1st Cir. 1989); Golden Pacific Bancorp v. Clarke, 837 F.2d 509, 511 (D.C. Cir.), *cert. denied*, 488 U.S. 890 (1988); C.P. Chem. Co. v. United States, 810 F.2d 34, 38 (2d Cir. 1987).

The only salvation for the contractor's wallet is the argument that the government's specifications regarding orders and designs of operation plans that it knows may result in environmental torts do not trigger the discretionary function exception. This situation does not trigger this exception because the government employee or agency does not have the discretion to order the contractor to violate federal environmental law.[207]

Discretionary Function Exception

To determine whether the discretionary function exception bars a suit against the government, the reviewing court must examine the nature of the challenged conduct, rather than the status of the actor.[208] The court should not view the conduct as discretionary if it does not involve an element of judgment or choice.[209] Justice Marshall explained in the majority opinion of *Berkovitz v. United States*[210] that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive."[211]

Federal environmental statutes and regulations apply equally to the federal government and to private citizens and industries due to the high priority Congress has placed on a clean environment.[212] These statutes and regulations specifically explain which actions agencies must take at federal facilities, as well as which actions are prohibited, to ensure protection of the environment and human welfare. Congress has expressed its intention to hold all offenders accountable for environmental harm by mandating broad application of these laws. Neither government agencies nor employees can escape the duties that these laws set forth,[213]

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207. To the contrary, many federal environmental statutes contain provisions requiring federal facility compliance. *See, e.g.*, Clean Water Act (Title XIV) § 313, 33 U.S.C. § 1323 (1988); Public Health Service Act § 1447, 42 U.S.C. 300j-6 (1988); Solid Waste Disposal Act § 6001, 42 U.S.C. § 6961; Clean Air Act § 118, 42 U.S.C. § 7418; Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 120, 42 U.S.C. § 9620. In special circumstances, however, the President may waive compliance. *See* Donnelly & Van Ness, *supra* note 140.

208. Berkovitz v. United States, 486 U.S. 531, 536 (1988).

209. *Id.*

210. 486 U.S. 531.

211. *Id.* at 536.

212. *See supra* note 207.

213. *Id.*

and therefore no discretion in judgment is involved in actions that trigger the application of these statutes and regulations. The government has placed upon itself the absolute duty to obey.

Even if the challenged conduct involves an element of judgment, a court still must determine "whether that judgment is of the kind that the discretionary function exception was designed to shield."[214] In creating the discretionary function exception, Congress intended to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[215] The exception's protection is therefore limited to governmental actions and decisions based on consideration of public policy. The primary question in an action in which the government raises the discretionary function exception and shows the existence of an element of judgment is whether the government can characterize the challenged judgment as a "permissible exercise of policy judgment."[216]

Clearly, Congress has expressed its intention that the federal government must obey environmental laws. This expression removed the policy judgment from any agency or official. Because Congress made this policy decision, the government will fail in its efforts to bar an indemnification/contribution action by claiming that the government employee's challenged action was discretionary and hence protected under the FTCA. If the government contractor cannot convince the court to extend the government contractor defense into the environmental tort setting or persuade Congress to either change existing environmental laws or legislate a form of the defense, an indemnification/contribution action against the government may be the contractor's only realistic recourse for recovery of unjust damage awards for wrongful acts for which it is not responsible.[217]

CONCLUSION

In *Crawford v. National Lead Co.*,[218] the district court recognized that the government contractor may use the government

214. *Berkovitz*, 486 U.S. at 536.

215. *Id.* at 536-37 (quoting United States v. Varig Airlines, 467 U.S. 797, 814 (1984)).

216. *Id.* at 539.

217. Even if the contractor succeeds in obtaining indemnification or contribution from the government, the FTCA may limit this recovery. *See* 28 U.S.C. § 2674 (1988) (The United States is not "liable for interest prior to judgment or for punitive damages." If the Court awards only punitive damages, the United States "shall be liable for actual or compensatory damages.").

218. 29 Env't Rep. Cas. (BNA) 1048 (S.D. Ohio 1989).

contractor defense to shield itself from state tort liability in an environmental tort setting.[219] Unfortunately, courts have not provided any guidelines concerning how a contractor can take advantage of the defense in this setting.

At present, the threshold requirement described in *Boyle v. United Technologies Corp.*[220] seems impossible for the government contractor to overcome in an environmental tort setting due to the construction of the majority of federal environmental laws, which generally include an antipreemptive provision. Simply stated, to extend the defense into a new setting, the contractor must show that federal law preempts state law. Proving preemption places a heavy burden on the contractor because of the strong presumption against preemption. Even though a contractor may advance some arguments through creative interpretation of recent Supreme Court decisions concerning preemption, these arguments have a slim chance at success.

To overcome the adverse evolution of legal analysis in the government contractor defense area, courts should consider and weigh heavily the policy considerations that fueled the creation of the defense. General fairness in the allocation of tort liability, cost concerns to the taxpayers, and the separation of powers doctrine should prompt the judiciary to fashion a less stringent threshold requirement in the environmental tort setting to ensure that the government contractor does not suffer injustice for its diligent obedience to the controlling government officials.

Realistically, the contractor should focus its energy away from arguing for judicial extension of the government contractor defense and towards other alternatives that will accomplish the same objectives. These alternatives may take the form of lobbying for legislative creation of the defense or abolition of statutory obstacles to judicial extension. Additionally, the contractor may seek indemnification provisions during contract negotiations or may forego any preventative measures and risk the chance of litigation against the government for judgments incurred during the period of the contract. Whatever alternative the contractor chooses, its chances of avoiding any costs are slim.

R. Joel Ankney

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219. *Id.* at 1053-54.
220. 487 U.S. 500 (1988).