2014

The Government Contractor Defense: Defending Boyle's Analysis and Extending It Beyond the Realm of Military Procurement Contracts

Eric M. Gonzalez

The Government Contractor Defense: Defending *Boyle's* Analysis and Extending It Beyond the Realm of Military Procurement Contracts

Eric M. Gonzalez[*]

I. Introduction

The government contractor defense has a long and conflicted history reaching back to the Civil War era. The defense stands for the idea that a contractor working for the government, who is provided limited discretion within its contract, should be entitled to share the government's immunity. An assortment of preceding cases ultimately prompted the Supreme Court to issue a landmark decision in 1988: *Boyle v. United Techs. Corp.*[1] This decision addressed the long-debated issue of whether or not a contractor, not an employee of the government, should be allowed to share in the government's sovereign immunity in favor of the contractor.[2] This controversial decision invites speculation as to what governmental interests could justify placing the burden of tort injuries entirely on the victims who suffer them. Not surprisingly, courts and scholars alike remain split as to how this question should be answered. The central dividing issue raised by the Supreme Court's vague decision in *Boyle* is whether or not immunity may be derived outside of the military context that shaped the *Boyle* analysis.[3]

This Comment canvasses *Boyle's* history, framing, and opinion, which are as muddled and confusing as they are lengthy. Furthermore, this Comment will argue that despite vehement criticism: 1) *Boyle* does not offend traditional notions of separation of powers, it instead upholds them; 2) the creation of federal common law in *Boyle* was justified and consistent with

---

[*] J.D. Candidate, May 2014, Seton Hall University School of Law; B.A., 2010, Bucknell University. Special thanks to Professor Marc R. Poirier and my editors on the Seton Hall Law Review who provided invaluable guidance and knowledge in the writing of this Comment.

[1] Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

[2] *Id.*

[3] John L. Watts, *Differences Without Distinctions:* Boyle's *Government Contractor Defense Fails to Recognize the Critical Differences Between Civilian and Military Plaintiffs and Between Military and Non-Military Procurement*, 60 OKLA. L. REV. 647, 650 (2007).

precedent; 3) despite strong opposition from the Ninth Circuit[4], it is important that the government contractor defense be allowed to extend beyond military procurement contracts.

Part II of this Comment will discuss and analyze the history of the defense leading up to the *Boyle* decision, including a look at the seminal case *Yearsley v. W. A. Ross Constr. Co.*[5], and ending with a discussion of two cases that were instrumental in the Court's analysis in *Boyle*. Part III will examine the *Boyle* decision itself, with extensive analysis of Justice Brennan's tenacious dissent. Part IV will argue that *Boyle* is consistent with separation of powers and federal common law principles, despite strong arguments to the contrary.

Part V will then examine the impact of the *Boyle* decision on federal courts and the resulting circuit split, looking at and analyzing both majority and minority viewpoints. Lastly, Part VI will argue that *Boyle* should be embraced in nonmilitary contexts. This section will examine the strong federal interests and conflicting state law that support the basis for this argument. Furthermore, this section will show that Congress is not best equipped to legislate on such matters, and that the Supreme Court should adopt a modified test.

II. The History of the Government Contractor Defense

The government contractor defense has roots that trace back to cases from the mid 1800s. These cases generally stand for the proposition that an agent obeying, working for, or working under the lawful command of the federal government cannot be held liable for the injuries to third parties resulting from that work. As this historical analysis will demonstrate, these early cases, which form the foundation for the Court's decision in *Boyle*, derive from both military and non-military contexts. As such, these cases are critical for a complete understanding of the arguments that follow.

[4] See *infra* note 129 and accompanying text.
[5] 309 U.S. 18 (1940).

A. Decisions pre-dating *Yearsley*

Murray's Lessee v. Hoboken Land & Improvement Co. serves as a very early example of the Supreme Court exculpating a private party for actions taken under the lawful edicts of the federal government.[6] The dispute arose after two individuals claimed title to a particular parcel of land.[7] The defendant had acquired title to the property through a levy of an execution to enforce a "distress warrant" that was issued by the United States Treasury.[8] Stressing that the defendant had acquired the land through what was found to be a valid act of Congress, the Court held that defendant could not be held judicially accountable for acquiring property that had been legally seized: "[h]e cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent."[9]

Other early cases demonstrate the inclination of the Supreme Court to provide a shield against liability and redress for those working under the orders of the federal government. For example, in *Lamar v. Browne* the Court examined orders issued by a colonel to his troops during the Civil War to seize the cotton of a neighboring farm after hostilities had ended.[10] The Court not only upheld the seizure itself, but also stressed that the soldiers involved in carrying those orders could not be exposed to civil suit.[11] Instead, the Court maintained that if there was any

[6] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856).
[7] *Id*. at 274
[8] *Id*. The distress warrant in question was issued when the federal government had learned that a previous owner was indebted to the United States government, and accordingly under an act of Congress the land was seized under that instrument to satisfy the debt and was subsequently sold to the defendant. *Id*. at 274–75. The plaintiff, who had acquired title through a levy of an execution (court order), challenged the act on constitutional grounds. *Id*. *See, e.g.*, Joshua I. Schwartz, *Nonaqcuiescence*, Crowell v. Benson, *and Administrative Adjudication*, 77 GEO. L.J. 1815, 1839 (1989).
[9] *Murray's Lessee*, 59 U.S. at 283.
[10] Lamar v. Browne, 92 U.S. 187 (1876).
[11] *Id*. at 199.

action available to the owner of the cotton for conversion, it would have to be brought against the United States and not those carrying out the orders of the sovereign they serve.[12]

This position was later affirmed in a similar case that took place at the turn of the twentieth century: *The Paquete Habana*.[13] While this case is factually similar to *Lamar* in that it involves the capture of private property during a time of war, it differs in that the actions taken by those following the orders of the federal government were not legally conferred. Nevertheless, the Supreme Court maintained that no suit could be brought against individuals taking wrongful action following the commands of their sovereign, and that instead action must be brought against the sovereign itself, if anyone: "we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued."[14]

B. The *Yearsley* decision and its application, leading up to *Boyle*

The cases above, and the principles developed therein, culminated in the seminal Supreme Court case *Yearsley v. W.A. Ross Constr. Co*.[15] This case involved the liability of a private contractor working for the government on a contract to build dikes in the Mississippi River in an effort to make the waters more navigable, as was contemplated in an act of Congress.[16] In addition to building dikes, the contractor also used paddles and pumps that consequentially eroded land belonging to the plaintiff, ultimately providing the plaintiff with a cause of action.[17] The Supreme Court succinctly stated that the named defendant, the contractor working for the government, could not be held responsible for damages sustained in pursuit of a

[12] *Id*.
[13] The Paquete Habana, 189 U.S. 453 (1903). Here soldiers were involved in the capture of fishing boats; however the Court had previously found that vessels engaged in coastal fishing for the daily market could not legally be captured. *Id*. at 464.
[14] *Id*. at 465 (citing *Lamar*, 92 U.S. at 199).
[15] Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940); *see supra* text accompanying notes 5–13.
[16] *Id*. at 19.
[17] *Id*.

lawful contract assigned by the government, and that claims, if any existed, must be brought against the government itself:

> [I]n the case of a taking by the Government of private property for public use such as petitioners allege here, it cannot be doubted that the remedy to obtain compensation from the Government is as comprehensive as the requirement of the Constitution, and hence it excludes liability of the Government's representatives lawfully acting on its behalf in relation to the taking.[18]

There are two subtle aspects to this case that must be noted here. First, the contractor working for the government was working on a service contract not related to any kind of military affair. This is important because it is crucial that the reader understand that the origins of the government contractor defense lie outside of the scope of military procurement contracts to which the Ninth Circuit believes the *Boyle* decision is limited.[19] Second, the Court stressed that the contractor was "lawfully acting on [the Government's] behalf."[20] This is an important point, because it helps bolster the argument that not only was the majority's analysis in *Boyle* correct, but also that the *Boyle* decision is a valid creation of federal common law.[21]

The *Yearsley* decision was rendered in 1940 and the Court did not reach its conclusions in *Boyle* until 1988. As such, an examination of the defense as applied in the intervening 48 years is necessary in order to paint a more complete picture of the defense as it exists today. *Ogden River Water Users' Asso. v. Weber Basin Water Conservancy* is a case that is factually similar to *Yearsley*.[22] Pursuant to a contract with the federal government, the defendant began stripping an existing dam in preparation for construction contemplated by the terms of the contract with the government.[23] The Water User's Association then brought an action claiming

[18] *Id*. at 22.
[19] *See infra* p. 23.
[20] *Id.*
[21] *See infra* p. 19–21.
[22] Ogden River Water Users' Asso. v. Weber Basin Water Conservancy, 238 F.2d 936 (10th Cir. 1956).
[23] *Id*. at 939–40.

equitable title to the dam.[24] The Tenth Circuit affirmed the lower court's decision to dismiss the claims against the defendant, finding that if granting relief against the contractor would necessarily result in the same relief against the federal government, then the federal government would be considered a necessary party and the action would not stand without the sovereign's consent.[25]

Later in *Woods v. Wright*, the Fifth Circuit, while not directly applying the government contractor defense, did affirm and apply a crucial aspect of the *Yearsley* opinion: that those acting under lawful orders of the government will not be held accountable in lieu of the sovereign that issued those orders.[26] *Woods* dealt with the decision of a public school superintendent to suspend an African-American pupil.[27] Based on this principle, that court found that the decision of the lower court to dismiss must be reversed holding that "[w]here the direction of a superior to a subordinate has been illegally given, the latter *may be* restrained without joinder of the former."[28] While immunity was ultimately not granted in this case, it is important to understand that the Fifth Circuit refused to do so because the order had been illegally given, which distinguishes this particular case from *Yearsley*. Regardless, the courts analysis is still insightful in that it otherwise acknowledges *Yearsley*.

In the decade leading up to the *Boyle* decision it became clear that the government contractor defense had developed a clear foothold in the realm of federal common law. The Third Circuit made this abundantly clear by stating that "federal common law provides a defense to liabilities incurred in the performance of government contracts."[29] *In re All Maine Asbestos*

[24] *Id*.
[25] *Id*. at 941.
[26] Woods v. Wright, 334 F.2d 369, 374 (5th Cir. 1964).
[27] *Id*. at 370–71.
[28] *Id*. at 374 (citing Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 60 (1940) (emphasis added)).
[29] Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985).

Litigation serves as another example, as a federal district court in Maine acknowledged the strong policy grounds for supporting the defense, such as assuring "efficient management of government procurement contracts", as the effect of imposing liability on these contractors would frustrate the ability of the government to acquire the products that it seeks.[30]

C. The *In re "Agent Orange"* and *McKay* decisions

In 1982 the Eastern District of New York proposed a test in *In re "Agent Orange" Prod. Liab. Litig.* that intended to specify exactly what the defendant would have to prove in order to qualify for the government contractor defense.[31] The first prong of the test required that the military have established the specifications for the product, in this case "Agent Orange."[32] The second prong of the test required the contractor's product to conform to the military's specifications in all material respects.[33] The most important policy justification for these two prongs was that the court did not want to impose a requirement on suppliers (contractors) to question the military's needs, regardless of the risks associated with that product.[34] This policy justification is buttressed by the third and final prong of the test that asks that the government know as much as the contractor, or more, about the dangers associated with the product.[35] This final prong was designed to ensure that the contractor would not be insulated from liability in

[30] In re All Maine Asbestos Litigation, 575 F. Supp. 1375, 1379 (D. Me. 1983). This court ultimately did not decide whether these policy grounds were sufficient for Maine to adopt the government contractor defense. The court was, however, careful to acknowledge countervailing policy arguments that existed at that time. *Id*. at 1380. In particular the court noted that a countervailing policy would support placing risk of loss on contractors who can acquire insurance and indemnification as opposed to innocent third parties who would now bear all the risk. *Id.* at 1381 (citing McKay v. Rockwell Int'l. Corp., 704 F. 2d 444 (9th Cir. 1983) (Alarcon, J., dissenting)). *See also* In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp 1046 (E.D.N.Y. 1982); *McKay*, 704 F.2d 444. These cases will be further discussed in section C.
[31] *In re "Agent Orange"*, 534 F. Supp at 1054.
[32] *Id*. at 1055.
[33] *Id*.
[34] *Id*. at 1054.
[35] *Id*. at 1055.

instances where it knows of dangers that the government does not, but nevertheless chooses not to disclose those dangers.[36]

The *In re "Agent Orange"* test ultimately formed the basis for the decision reached in *Boyle*. As such, two points must be noted here. First, the Eastern District of New York proposed a test that was clearly designed to fit into a military procurement mold.[37] It is therefore crucial that any change in the test made by the Supreme Court be carefully scrutinized, as this could potentially suggest a desire to apply the test outside of that particular context. Second, it is unclear why that particular court wanted to limit the test it proposed to a military procurement context, as "Agent Orange" is not a weapon in the ordinary sense of the word, and its connections with the military are thus not entirely clear. With this ambiguity in mind, it is helpful to examine the Ninth Circuit's decision in *McKay v. Rockwell Int'l. Corp.*, which also proposes an alternate test to the one proposed in *In re "Agent Orange"*.[38]

McKay, which is factually similar to *Boyle*[39], dealt with a wrongful death action arising out of two unrelated crashes of naval aircraft that were designed by the defendant contractor pursuant to a contract with the United States Navy.[40] Both aircraft utilized a particular escape system that was designed to eject passengers into the air.[41] Autopsies of both pilots revealed that their deaths were most likely the result of injuries sustained while being ejected from their respective aircrafts.[42] Utilizing the *Feres-Stencel* doctrine,[43] the Ninth Circuit proposed a four

---

[36] *Id*.
[37] For example, the requirement that the government provide product specifications appears to preclude non-procurement contracts, i.e. service contracts.
[38] McKay v. Rockwell Int'l. Corp., 704 F.2d 444 (9th Cir. 1983).
[39] *See generally infra* p. 10.
[40] *McKay*, 704 F.2d at 446.
[41] *Id*.
[42] *Id*.
[43] The *Feres-Stencel* doctrine is derived from two Supreme Court decisions, *Feres v. United States*, 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). The doctrine provides that the federal government cannot be held liable under the Federal Tort Claims Act for injuries sustained by military

prong test that would provide immunity for contactors against liability arising under section 402A of the Restatement (Second) of Torts[44] when:

> (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.[45]

This test is distinguishable from the test proposed in *In re "Agent Orange"* in two important ways. First, while the test in *McKay* appears to be very similar to the test in *In re "Agent Orange"*, the language actually used by the Ninth Circuit is materially different. For instance, while the *McKay* test would require that the government provide or *approve* reasonably precise specifications in the second prong,[46] the first prong of the *In re "Agent Orange"* test would require that the government have actually provided those specifications.[47] Second, and more importantly, the Supreme Court purports to adopt the *McKay* test in *Boyle*, so the decision to omit the first prong of that test, which invokes the *Feres*-*Stencel* doctrine, demonstrates that the Supreme Court ultimately found that limited military framework too restrictive.

III. *Boyle v. United Technologies Corporation*

In 1988 the Supreme Court finally responded to the previously discussed cases, leading to the official creation of the government contractor defense. In 1983 David Boyle, a Marine helicopter pilot, was piloting a helicopter during routine training exercises.[48] Lt. Boyle's

---

personnel that occur incident to service, nor can the federal government indemnify a contractor who has paid damages to military personnel for injuries sustained incident to service. *See* Terrie Hanna, Note, *The Government Contractor defense and the Impact of* Boyle v. United Technologies Corporation, 70 B.U.L. REV. 691, 696 (1990).

44 RESTATEMENT (SECOND) OF TORTS § 402A (1965).

45 *McKay*, 704 F.2d at 451.

46 *Id*.

47 *See supra* page 7.

48 Boyle v. United Techs. Corp., 487 U.S. 500, 502 (1988).

helicopter crashed just off the coast of Virginia Beach, Virginia.[49] While he survived the initial impact, Lt. Boyle ultimately drowned when he was unable to open the hatch, which had been designed to open outward instead of inward.[50] This questionable design, coupled with the extreme pressure of the water external to the submerged helicopter, made escape impossible.[51] Lt. Boyle's father brought a wrongful death action against United Technologies Corporation, the independent contractor, under two different theories of state tort law liability: first, that the defendant had defectively repaired a device that led to the initial crash; second, that the emergency escape system was defectively designed.[52] One of the defenses raised by the defendant contractor in this case was the government contractor defense.

A. Justice Scalia's Majority Opinion

This case resulted in a 5-4 split, with Justice Scalia delivering the majority opinion and upholding the use of the government contractor defense. The petitioner challenged the defense on three grounds: 1) there is no federal common law that shields contractors working for the government;[53] 2) the reviewing appellate court (Fourth Circuit) did not formulate proper conditions for the defense to apply;[54] 3) even if the appellate court had established proper conditions for the defense to apply, the question should have been left to the jury to decide whether the conditions had been met.[55] The majority systematically dismissed these three challenges; however, only the first two will be discussed, as they are the only issues relevant to this Comment. The third argument merely served as grounds for remand.[56]

---

[49] *Id*.
[50] *Id*.
[51] *Id*. at 503.
[52] *Id.* at 503.
[53] *Id.* at 504.
[54] *Boyle*, 486 U.S. at 513.
[55] *Id*. at 514.
[56] *Id.* at 514.

With respect to the petitioner's first challenge, Justice Scalia maintained that while federal courts are reluctant to "pre-empt"[57] state law with federal common law absent clear statutory prescription, "uniquely federal interests" can justify the replacement of state law with federal law.[58] The majority found two uniquely federal interests in this case: first, that the rights and obligations of the government under its contracts be governed exclusively by federal law;[59] and second, that the federal officials working for the government be protected from civil liability.[60] Justice Scalia acknowledged that the issue before the Court did not directly contemplate either the federal government or a federal official; however he found that the principles in *Yearsley* firmly suggest that such interests extend to the contractors that work for the federal government.[61] Justice Scalia further posited that a conflict between a uniquely federal interest and state law does not need to be as extreme in degree as pre-emption doctrine would require,[62] but that a "significant conflict" with state law must nevertheless exist.[63] In this particular case, the Court found that Virginia state law imposing tort liability for failing to equip non-defectively designed escape hatches was entirely contrary to the federal interests involved in

[57] Justice Scalia's choice of words is somewhat misleading. Courts have a tendency to mix up the doctrines of displacement and pre-emption, and they are therefore sometimes used interchangeably. Kyle G. Grimm, *"Endangerment" of the Common Law: Do Rulemakings as to Greenhouse Gases Under the Clean Air Act Displace Federal Common-Law Claims for the Public Nuisance of Global Warming?*, 41 SETON HALL L. REV. 671, 679 (2011). Pre-emption occurs when a federal statute supersedes state law, whereas displacement occurs when a federal statute governs subject matter that was previously governed by federal common law. *Id*. Federal common law and state common law are considered mutually exclusive, and therefore whenever state common law is sufficient, federal common law cannot be applied. *Id.* at 680. In cases where state common law is insufficient, such as where a uniquely federal interest is at stake, courts recognize that they may apply federal common law in instances where a federal statute will not be enough to address the question at hand. *Id*. With this in mind, it would seem that displacement is the more relevant doctrine. Displacement does, of course, raise genuine separation of powers issues as federal statutes, created by the legislature, necessarily conflict with federal common law, a product of the judicial branch of government. These concerns will be addressed in Part IV.
[58] *Boyle*, 487 U.S. at 504.
[59] *Id.* at 505 (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 592–94 (1973)).
[60] *Id.* (citing Westfall v. Erwin, 484 U.S. 292, 295 (1988)).
[61] *Id*. at 505–06.
[62] Congress legislating in areas traditionally occupied by the states, for instance.
[63] *Id.* at 507. At this point the majority cites to instances where there has not been a "hard" conflict that has nonetheless proven sufficient for federal interests to prevail over state law. For instance, where federal interests would require a uniform rule, state law will be replaced by federal rules. Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1943).

setting the terms of the contracts that the government enters into; because the discretionary functions of the federal government would be impeded, a significant conflict existed.[64]

Justice Scalia elaborated by stating that there are statutory grounds for perceiving a "significant conflict" between a federal interest and state law in this case.[65] In particular, Justice Scalia points to the Federal Tort Claims Act (FTCA) which Congress enacted to authorize third parties to seek damages for the negligent harm caused by government employees except where the claim is based on the government's performance of, or failure to perform, a discretionary function.[66] Perceiving design choices to be clearly a discretionary function of the military, Justice Scalia instead focused on the policy ground for Congress's inclusion of this section of the FTCA: limiting the financial burden placed on the government in performing discretionary functions, because doing otherwise would cause harmful judicial second guessing.[67] The majority in this case reasoned that allowing suit against contractors in these kinds of cases would ultimately defeat this purpose of the FTCA, in part because contractors would pass the increased costs resulting from liability onto the government.[68] The majority therefore concluded that in the realm of discretionary governmental functions, the imposition of state tort law significantly conflicted with the federal interest of limiting financial tort liability.

The next argument raised by the petitioner is that the Fourth Circuit had failed to state or apply the proper test for the government contractor defense.[69] This contention is arguably the most important one that the petitioner raised, because it forced the Supreme Court to determine the proper test to apply, and to state the proper policy grounds behind its decision. The majority

[64] *Boyle*, 487 U.S. at 507.
[65] *Id*. at 511.
[66] 28 U.S.C. § 2680(a) (2012).
[67] *Boyle*, 487 U.S. at 511
[68] *Id*.
[69] *Id*. at 513.

began its analysis here by asserting the importance of the government contractor defense and general policy grounds in support of it. In particular, the court affirmed the test used by the Fourth Circuit in *McKay*[70]and found that the first two prongs of the test ensure that the claim is related to the performance of a "discretionary function" of the government, and not left to the discretion of the contractor performing the work.[71] The third prong of the test was justified because contractors may feel tempted to withhold knowledge of the risks associated with a project if tort liability is not a factor.[72] In other words, this prong assures, in theory, that the risks associated with a project are known by both a contractor and the government, therefore allowing the government to rethink, at its discretion, its design specifications before committing to any contract. While the Court states that this test is the same adopted by the Ninth Circuit, it must be noted that the test does not contain the *Feres* factor used by that circuit in the previously discussed *In re "Agent Orange"* decision.[73] This therefore serves as further evidence that the Court did not intend for *Boyle* to apply only to military procurement cases.

B. Justice Brennan's Dissent

In dissent, Justice Brennan attacked the decision reached by the majority of the court on several grounds. This section will critically analyze them. First, Justice Brennan attacked the decision on separation of powers grounds. Justice Brennan then proceeded to question the majority's decision on federalism principles. Third, Brennan questioned the federal interest argument raised by Scalia in the majority opinion. Lastly, Brennan criticized the majority's

[70] *See supra* p. 7. To reiterate, the three prongs of the government contractor defense are as follows: 1) the government provided reasonably precise specifications; 2) the equipment conformed to those specifications; 3) the supplier warns the government of known design defects or dangers.
[71] *Boyle*, 487 U.S. at 512.
[72] *Id*. at 512.
[73] *See supra* p. 9 and accompanying notes. The exclusion of this factor is crucial for any argument suggesting that the Supreme Court did not intend for this test to apply only to military procurement cases, as the inclusion of that prong would clearly require otherwise.

reliance on the *Yearsley* decision. These four arguments raised by Brennan will be systematically examined.

Brennan began by positing that the immunity conferred by the majority in the decision is the kind that should be left to Congress, or in other words, those officials elected by the people.[74] A separation of powers argument is raised, for "'[w]hatever the merits of the policy' the Court wishes to implement, 'its conversion into law is a proper subject for congressional action, not for any creative power of [the judiciary].'"[75] In support of his argument, Brennan posited that if Congress shared the will of the majority and desired to grant immunity to contractors in such a position, then it would have legislated on the matter and not remained silent.[76] In support of this argument Justice Brennan pointed to past efforts made by lobbyists to achieve exactly what the majority has done in this case.[77] Justice Brennan missed the mark in this argument, however, as sometimes Congress will choose not to legislate in circumstances where it fears that any well-defined statute may prove to be too narrow, especially in cases where it is impossible to foresee all the possible contexts in which the issue may arise.[78] Under such circumstances, Congress may instead choose to leave broadly applicable statutes for the courts to interpret and apply, as was done here with the FTCA.[79]

Next, Justice Brennan proceeded to make a federalism argument by citing *Erie*[80] and stating that there is no general federal common law, and that displacement of state law can only

---

[74] *Boyle*, 487 U.S. at 515.
[75] *Boyle*, 487 U.S. at 515 (Brennan, J., dissenting) (quoting United States v. Standard Oil Co., 332 U.S. 301, 314–15 (1947)).
[76] *Id*. at 530. *See infra* note 96.
[77] *Boyle*, 487 U.S. at 531.
[78] *Cf.* Erin L. Massey, *Control Person Liability Under Section 20(A): Striking a Balance of Interests for Plaintiffs and Defendants*, 6 HOUS. BUS. & TAX L. J. 109, 112–13 (2005).
[79] *Id.*
[80] Erie R.R. v. Tompkins, 304 U.S. 64 (1938). This case stands for the proposition that federal courts do not have the power to create federal common law when hearing claims involving state law brought in diversity. This doctrine is not strictly adhered to, however.

be justified when the Constitution or acts of Congress are on point.[81] Brennan did, however, acknowledge precedent that allows strong federal interests to pre-empt state law without some statutory backing such as "rights and obligations of the United States, interstate and international disputes implicating conflicting rights of states or out relations with foreign nations, and admiralty cases."[82]

Justice Brennan's third contention was that the federal interests proposed under the FTCA are not justified as the FTCA is narrowly applied, primarily to the federal employees contemplated by the Act.[83] What is interesting about this point is that it boils down to statutory interpretation, and whether the will of Congress can be interpreted as placing government tort immunity above the interests of private citizens. Brennan cited numerous cases at this point that have shown a trend to place the interests of individually harmed citizens above that of the government, except in extreme circumstances.[84] But Brennan is not advocating the words of his own dissent here, for if it is for the lawmakers to frame federal immunity in statute, then these cited cases cannot supersede that will of the lawmakers.[85] If the FTCA and Congress's will can fairly be interpreted to apply to contractors, as the purpose of immunity would be frustrated otherwise,[86] then these cases lose their value in this particular context.

Lastly, Brennan criticized the majority's reliance on *Yearsley*. Brennan believed it was unlikely that the opinion was meant to extend beyond the Takings Clause context of that particular decision.[87] Brennan, however, ignores the history of the government contractor

[81] *Boyle*, 487 U.S. at 517 (Brennan, J., dissenting).
[82] *Id*. (citing Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).
[83] *Id*. at 522.
[84] *Id*. at 523.
[85] *See supra* pages 13–14.
[86] This would be the case because the costs imposed on the government through tort liability inflicted on the contractors working for the government would be vicariously raised. *See supra* page 11.
[87] *Boyle*, 487 U.S. at 524 (Brennan, J., dissenting).

defense, which clearly shows a trend to apply the defense outside of a Takings Clause context.[88] In addition, Brennan raised a point here that seems to support the broadening of the defense: "the contractor in *Yearsley* was following, not formulating, the Government's specifications, and (as far as is relevant here) followed them correctly."[89] This seems to suggest application of the defense in the realms of services, albeit with little contractor discretion, is not only plausible, but backed by precedent.[90]

IV. *Boyle* is consistent with separation of powers principles and is a valid creation of federal common law

A. Separation of powers

There are three ways in which one can articulate the separation of powers issues raised in the *Boyle* decision. First, one could argue that the Supreme Court in *Boyle* has violated notions of horizontal separation of powers by introducing federal common law in a realm that should be exclusively left to Congress. Second, one could argue that *Boyle* actually stands for vertical separation of powers[91] because it prevents state courts and legislatures from stepping on the toes of the federal government and its "unique federal interests". Lastly, and related to the first two arguments, both horizontal and vertical separation of powers arguments can be made against both federal and state courts/ legislatures based on article I, section 8 grounds.

Article I, section 8 entrusts Congress with the power to make law when necessary and proper.[92] Therefore, if the judiciary is charged with acting as a lawmaker, serious separation of powers issues are raised. It has long been accepted that while the judges are not lawmakers in

[88] *See supra* page 5–9 and accompanying notes.
[89] *Boyle*, 487 U.S. at 525 (Brennan, J., dissenting). While *Yearsley* still allowed for a possible remedy against the government, this does not materially affect this argument, as that case relied on the Takings Clause to come to that conclusion, while the FTCA, which would deny a remedy, is clearly being relied on here to come to the opposite conclusion.
[90] *See, e.g.*, Bennett v. MIS Corp., 607 F.3d 1076, 1090–91 (6th Cir. 2010).
[91] The terms vertical separation of powers and federalism will be used interchangeably in this Comment.
[92] U.S. CONST. art. I, § 8, cl. 18.

the ordinary sense, federal courts are empowered to create federal common law in areas where Congress has been found to be silent.[93] The threshold question then becomes whether this constitutes an area that Congress has been silent on.

It is argued that Congress has indeed spoken on contractor immunity in the context of working with the military, and therefore the *Boyle* majority is clearly lawmaking where Congress has already legislated.[94] In particular, 10 U.S.C. §2354 gives the secretary of the relevant military department power to grant immunity to contractors from liability against third parties in tort.[95] Numerous other statutory examples of immunity granted by the government in very particular contexts can be found.[96] The argument that these particular statutes demonstrate Congress speaking on the subject contemplated by the *Boyle* decision, however, is flawed for two reasons. First, it is evident from the these statutes that Congress has found occasion to legislate in *very particular* circumstances, and therefore because of the unique and particular consideration involved in such legislating, it would hardly make sense to claim that Congress has spoken on liability outside of such particular contexts by choosing not to legislate, especially if one considers the monumental burden placed on Congress of trying to conceive of every possible instance where immunity should be conferred.[97] Second, this point assumes that the *Boyle*

---

[93] *See generally* Milwaukee v. Illinois, 451 U.S. 304 (1981) which directly addresses this point.
[94] Terrie Hanna, Note, *The Government Contractor defense and the Impact of* Boyle v. United Technologies Corporation, 70 B.U.L. REV. 691, 714–15 (1990).
[95] 10 U.S.C. 2354(a)(1) (2012).
[96] *E.g.*, 50 U.S.C.S. 1431 (2012); 42 U.S.C.S. 2210 (2012); 42 U.S.C.S. 2212 (2012); 42 U.S.C.S. 2458(b) (2012). One focus of these statutes is to grant immunity to contractors in particular contexts ranging from ultra hazardous research and development to the use of space vehicles. For example: "Secretary shall, until December 31, 2025, enter into agreements of indemnification under this subsection with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability." 42 U.S.C.S. 2210(d)(1)(A) (2012).
[97] *See supra* note 78 and accompanying text. *See generally supra* note 94 at 716–17. Despite the fact that lobbying efforts to extend immunity to government contractors have failed multiple times, this should not be perceived as Congress making a statement that such immunity is not desirable. Instead, Congress' failure to enact legislation here should be perceived as Congress acquiescing the fact that it is not equipped to handle the myriad of contexts in which such immunity should be conferred. Congress may choose not to legislate at all, or instead to legislate broadly and have the courts handle the factual application of particular cases. This is exactly what the *Boyle* Court did when it conferred immunity through the FTCA as it did.

decision is limited to product liability in the military context, as the cited statutes, particularly 10 U.S.C. §2354, are limited to that particular realm of contract agreements. If the *Boyle* decision is to be, and was intended to be, applied outside of that particular context, then such statutes do not serve as evidence of Congress speaking on the issues addressed in the *Boyle* decision. Instead these statutes only serve as evidence of Congress finding particular instances where immunity should absolutely be granted.

Furthermore, the issue addressed in *Boyle* pertains to government procurement, which is inherently different than the "typical consumer transaction for which modern products liability law was fashioned".[98] In other words, the considerations before Congress when enacting legislation on matters of tort and product liability are inherently different than the considerations before the Court in *Boyle*. These differences exist because the federal government, unlike the typical consumer, has the resources needed in order to make more informed decisions about the products it acquires.[99] In addition the federal government, unlike the typical consumer, has great bargaining power in deciding who it deals with, and how it will deal with them. [100] As such it is less likely that the Court's government contractor defense as created in *Boyle* encroaches upon tort law that is passed under vastly different considerations.

Not only is the *Boyle* decision consistent with horizontal separation of powers, it is exemplary of federalism principles as the decision aims to resolve conflict between state law and federal interests. Indeed the *Boyle* decision prevented states from interfering with Congress' express power over military affairs under article I, section 8.[101] As a preliminary matter, courts

[98] Michael D. Green & Richard A. Matasar, Article, *The Supreme Court and the Products Liability Crisis: Lessons from* Boyle's *Government Contractor Defense*, 63 S. CAL. L. REV. 637, 714 (1990).
[99] *Id*.
[100] *Id*.
[101] U.S. CONST. art. I, § 8, cl. 12.

are not entrusted with the responsibility of running the military.[102] It would therefore be entirely inappropriate for a state court, a court having nothing to do with the federal government, to impact military policy even if this impact is imposed vicariously on the contractors working for the military. This idea may not be intuitively clear and obvious, as it may be difficult to understand how a state subjecting private contractors to tort liability shapes military policy.

To elucidate, when contractors are subjected to liability for any of the military contracts that they enter into, two consequences directly impact the military: 1) contract costs will rise because contractors will need to be covered by more expensive insurance;[103] and 2) because of the amount of design, engineering, and expertise involved with military contracts, often with conflicting goals of safety and combat efficiency, contractors may feel hesitant to engage in contracts with the military where safety is second to efficiency, thus affecting cohesion between the two contracting parties.[104] While the majority uses this point to justify the use of the FTCA as a basis for conferring immunity, this point is also strongly consistent with federalism principles.[105]

B. Federal common law and unique federal interests

State laws "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."[106] Pre-emption analysis will change when there is a dominant federal interest that is so strong that there must be an

[102] Chappell v. Wallace, 462 U.S. 296, 301 (1983).
[103] These added costs would then pass onto the government causing it to second-guess its procurement contracts therefore indirectly shaping military decision making.
[104] *Boyle*, 487 U.S. at 511–12.
[105] While this discussion focused primarily on the military, this should not be taken as meaning that *Boyle* and its justifications are limited to that context, as will be discussed below in Part V.
[106] *Boyle*, 487 U.S. at 518 (Brennan, J., dissenting) (quoting United States v. Yazell, 382 U.S. 341, 351 (1966)).

assumption of preclusion of state law.[107] In other words, when there is a strong federal interest at hand, the analysis changes from one that ordinarily disallows preclusion to an analysis that allows it.[108] It is clear that in his dissent Brennan acknowledges the ability of courts to create federal common law, albeit in rare and limited circumstances. Where Justice Brennan disagrees with the majority is on whether any sufficient federal interest has been posited by the majority that justifies the creation of federal common law here.[109]

To argue this point, Justice Brennan notes that the majority does not rely on any federal interests held sufficient in the past for the creation of federal common law.[110] Instead, Brennan perceives the federal interests proposed by the majority as being a synthesis of interests arising out of two cases that predate *Erie*, seemingly limiting their relevance.[111] In particular, these interests are administering the rights and obligations of the United States in its contracts and regulating liability of federal officials performing their duties, which Justice Brennan maintains has never been extended beyond the federal government and its employees.[112] The interests cited by Justice Brennan and the majority that are criticized as being antiquated have found application in many cases long after the Court's holding in *Erie*, however.[113] The long and well-established history of such interests serve to enforce the notion that they are paramount to the

[107] RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729 (5th ed. 2003).
[108] *Boyle*, 487 U.S. at 518 (Brennan, J., dissenting).
[109] *Id*.
[110] *Id.*
[111] *Id*.
[112] *Id*. at 518–19.
[113] Priebe & Sons v. United States, 332 U.S. 407 (1947); United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1976). These two cases serve as examples of the Court upholding the federal interest of the government administering its rights and obligations under its contracts. Justice Brennan attacks the validity of this interest when it does not apply directly to the federal government, but instead to other third parties. *Boyle*, 487 U.S. at 519–20 (Brennan, J., dissenting) (citing Miree v. DeKalb County, 433 U.S. 25, 30 (1977)). The majority refutes this point convincingly, however, as allowing a remedy for the third party in *Miree* would not have burdened the federal government, unlike the situation in *Boyle*. *Id*. at 506. *See supra* p. 18. In other words the stake of indemnifying the contractor in that case was not the same.

proper operation of the federal government. Furthermore, Brennan suggests that federal interests are static notions that cannot be altered, changed, or manifested out of present necessity.[114]

Lastly, it is important to note that a unique federal interest is only the first step of justifying the creation of federal common law, as it is a necessary, but not a sufficient condition for displacing state law.[115] In order to displace state law, there must also be a conflicting federal policy or statute.[116] As has already been discussed in part, the majority uses the FTCA to establish a statutory basis, and looks primarily at the financial burden to be placed on the government in the event that contractors are held liable under their contracts with the government, which would frustrate the goals of the FTCA in conferring immunity in the first place.[117] Justice Brennan heavily criticizes the majority's reliance on this conclusion while accepting the general premise because he perceives these added costs to lack any evidentiary support.[118]

V. The impact of *Boyle* and resulting circuit split

Boyle left many questions unresolved. These questions, involving the decision's scope and applicability in different contexts, have generated several circuit splits.[119] Some may feel inclined to interpret the three-prong test established in *Boyle* as clearly limiting the ruling to military procurement contracts, but in reality the most crucial aspect of the decision is whether subjecting the contractor to liability would frustrate a uniquely federal interest.[120] Because uniquely federal interests are not limited to the military context, it follows that *Boyle* applies outside of that particular context. Acknowledging this, however, raises the question of what

[114] *Boyle*, 487 U.S. at 517–18.
[115] *Boyle*, 487 U.S. at 507–08.
[116] *Id*.
[117] *Id.* at 508–09.
[118] *Id*. at 527 (Brennan, J., dissenting).
[119] As will be discussed in the following section, the Ninth Circuit in particular has been adamant in not applying a *Boyle* analysis outside of the military framework that the Supreme Court was faced with in that decision.
[120] *See supra* note 104–116 and accompanying text.

specific test reviewing courts must apply absent the military procurement framework. Several courts have discussed these possibilities.

A. The limits of the *Boyle* analysis

In *Hudgens v. Bell Helicopter/Textron*, the Eleventh Circuit was faced with a set of facts not entirely dissimilar from *Boyle*.[121] Two navy pilots brought a negligence action against a maintenance company that the United States had contracted with to maintain its helicopters.[122] The maintenance crew had failed to uncover cracks in the tail fin, which led to an accident.[123] What should first be noted about this case is that while it still applies in a military context, it deals with service instead of procurement. The *Hudgens* court treats the ruling in *Boyle* as not being an "all-or-nothing" set of rules regarding what kinds of contracts the analysis applies to.[124] The court instead asks whether subjecting the defendant to liability would interfere with a unique federal interest.[125] The court holds that the defense applies to a service contract where a contractor is tasked with following maintenance protocols when working on military aircraft, or in other words, where the government has dictated the protocol to be followed.[126] This court restructures the test to fit maintenance procedures instead of design specification, thus demonstrating the malleability of the test.

The Eleventh Circuit placed great emphasis on the fact that the federal interest was the same as it was in *Boyle*, and that this federal interest directly conflicted with state law.[127] In particular, the court believed that subjecting contractors working for the government on service contracts to liability would threaten the government's discretion in determining how its fleets are

[121] Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329 (11th Cir. 2003).
[122] *Id*. at 1330.
[123] *Id*.
[124] *Id.* at 1334.
[125] *Id.*
[126] *Id*. at 1335.
[127] *Hudgens*, 328 F.3d at 1334.

to be maintained. This is because the contractor would, in theory, question or disobey government orders regarding how maintenance is to be conducted if that individual contractor perceives what it thinks is a better, or safer, method, even if the government believes it is justified in requiring its methods. Therefore the Eleventh Circuit stated that a contractor in a services contract will possess immunity if: 1) the contractor utilized reasonably precise maintenance procedures; 2) the contractor's performance conformed to those specified procedures; 3) the United States was warned of any dangers that the contractor knew regarding the specified procedures.[128] This test is very similar to the *Boyle* test in that it assures that the contractor has limited discretion when working with the government.

The Ninth Circuit has taken a position that is entirely opposed to that of the Eleventh Circuit and its advocates. In *Nielsen v. George Diamond Vogel Paint Co*. Ronald Nielson, employed by the United States Army Corps of Engineers, was tasked with painting a dam in Idaho.[129] Thereafter, Mr. Nielson experienced changes in behavior, depression, and various other pains, all attributable to permanent brain damage. He sued the paint manufacturer alleging that the paint caused his brain damage.[130] In short, this case dealt with injuries sustained by a civilian using a product that was not designed for any particular military use.[131] In considering the question of immunity, the Ninth Circuit viewed the displacement of a federal interest by state law as a necessary condition, but not a sufficient one.[132] The Ninth Circuit focused on the importance of the *Feres* doctrine in the Supreme Court's analysis in *Boyle* and determined that *Boyle* was limited to military procurement contracts: the "reasons for shielding. . . are the same

[128] *Id*. at 1335. Because this test still emphasizes the importance of government discretion, it remains consistent with the FTCA which only immunizes the government from tort liability only in cases where discretionary functions are performed. *See supra* note 66.
[129] Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1451 (9th Cir. 1990).
[130] *Id*.
[131] *Id*. at 1453.
[132] This point refers to Justice Scalia's insistence in *Boyle* that there must also be a conflicting federal policy or statute. *See supra* p. 20.

as those underlying the Feres doctrine. These are considerations peculiar to the military field."[133]

The Ninth Circuit's reasoning, however, is misguided. The mere fact that the Court used a doctrine related to the military field in its analysis of an issue related to the military should not be considered evidence that the analysis was limited.[134] The use of the *Feres* doctrine in *Boyle* was limited and only useful in framing the analysis, becayse *Nielsen* dealt with a military matter. In addition, it must again be stressed that the Supreme Court molded its test after the test proposed in *McKay*, but rejected the *Feres* prong. The Ninth Circuit's reliance on *Feres* in any application of the government contractor defense is therefore misplaced.

Carley v. Wheeled Coach, a case decided by the Third Circuit, was the first to truly support expansion of the *Boyle* analysis beyond the military context.[135] This case dealt with a plaintiff who sustained injuries when an ambulance that he was inside of tipped over.[136] The defendant contractor in this case built the ambulance according to specifications set out by the United States General Services Administration.[137] This plaintiff alleged that the design of the vehicle made it top-heavy and prone to tipping.[138] The Third Circuit understood *Boyle* to stand for the idea that federal interests exist in all government contracts of limited discretion, and not just those within the military field.[139] The court proceeded to highlight federal interests that it

---

[133] *See supra* note 43.
[134] As the Eleventh Circuit pointed out, the primary question is whether there is a related unique federal interest. *See supra* p. 22. In addition, the statute primarily relied on by the Court in *Boyle* was the FTCA, and the Court's reliance on the *Feres* doctrine is clearly intended to be limited, as is evidence by the exclusion of *Feres* from the *Boyle* Court's three prong test. *See supra* note 73 and accompanying text. It was this same circuit that decided *McKay* and proposed the inclusion of *Feres* in a government contractor defense analysis, and it was that portion of the analysis that the Supreme Court expressly rejected in *Boyle*.
[135] Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir. 1993).
[136] *Id*. at 1118.
[137] *Id*.
[138] *Id*.
[139] *Id*. at 1120. (citing *Boyle*, 487 U.S. at 507).

believed exist outside the zone of military procurement that nevertheless merit the defense.[140] The Third Circuit also concluded that, in couching its decision in the military context, the Supreme Court was merely answering the narrow question before it, as opposed to precluding application of the defense in other contexts.[141] The court also affirmed the use of deference in *Boyle* as being a necessary prerequisite in order to justify using the FTCA for statutory backing.[142]

Judge Becker submitted an opinion, concurring in part and dissenting in part., suggesting that the extension of *Boyle* outside of that military context would be an encroachment upon both Congress and the states.[143] While Judge Becker agreed that there are strong federal interests in contracts outside the military context, he emphasized that this was only the first question to be asked, and that a significant conflict with state law must be found.[144] Judge Becker believed that the question was ultimately one of degree, and that conflict in nonmilitary contracts with state law would not prove significant enough to warrant displacing state law.[145] Other academic authorities have since agreed with Judge Becker and insist that without a federal policy as strong as the national security concerns implicated in military matters, the government contractor defense cannot be found applicable.[146] These criticisms, however, lose focus of the fact that the FTCA serves as a statute implicating strong policy concerns, namely the importance in unfettered governmental discretion, which justify immunity. In addition the case was ultimately

---

[140] *Id*. at 1124. For instance, the defense is useful in preventing judicial second-guessing for the government's public policy decisions, and limited the government's financial burdens. *Carley*, 991 F.2d at 1124.
[141] *Id*. at 1124–25.
[142] *Id.* at 1125.
[143] *Id*. at 1128 (Becker, J., concurring in part and dissenting in part). Essentially this dissent raises separation of powers and federalism issues.
[144] *Id*. at 1129 (Becker, J., concurring in part and dissenting in part).
[145] *Carley*, 991 F.2d at 1130. Judge Becker came to this conclusion because state tort law conflicting with the military would essentially boil down to a conflict of safety v. national security. *Id*. Judge Becker would suggest that without national security concerns offsetting safety, safety would weigh in favor of imposing state tort law.
[146] Thomas S. Deibert, *Recent Decision: Products Liability – The Third Circuit Extends Scope of Immunity Provided by Federal Government Contractor Defense*, 67 TEMP. L. REV. 1421, 1435–36 (1994).

remanded, suggesting that strong policy concerns could later be raised once the facts were revisited.[147] A failure to provide strong policy concerns in this case should not be viewed as meaning none could ever exist outside of the national security concerns implicated by military affairs.

B. Additional federal interests

The previous section and related cases focused primarily on the application of *Boyle* outside a military procurement context, while the following case discusses federal interests that were not contemplated by the Supreme Court in *Boyle*, but are nonetheless compelling. *McCue v. City of New York* involved injuries sustained by construction workers, firefighters, policeman, and others involved in cleaning up the aftermath of the September 11, 2001 attacks.[148] In their complaint, the parties alleged that they contracted respiratory diseases resulting from the exposure to toxic fumes and gases.[149] The Second Circuit used the federal interest of coordinating federal disaster relief as sufficient to justify the use of the government contractor defense in favor of the defendants.[150] In addition, the court diverged from the *Boyle* analysis even further in that it applied a unique statutory basis: The Stafford Act.[151] The Second Circuit was concerned that imposing liability on those tasked with undertaking cleanup initiatives led by federal agencies would cause those entities to disregard orders of those federal agencies for fear of being exposed to liability.[152] The *McCue* court modified the *Boyle* test to apply to the particular circumstances. According to the test, a government contractor following the instructions of a federal agency will be accorded immunity if: 1) the agency, in its discretion

[147] Certiorari was ultimately denied by the Supreme Court and the case was not revisited. Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir. 1993), *cert. denied*, 510 U.S. 868 (1993).
[148] *Id*. at 173.
[149] *Id*.
[150] McCue v. City of New York, 521 F.3d 169 (2d Cir. 2008).
[151] 42 U.S.C.S 5148 (2012). This act confers immunity on the federal government in disaster relief scenarios where the government was exercising a discretionary function. *Id*.
[152] *McCue*, 521 F.3d at 197.

approved reasonably precise specifications regarding the management of a recovery site; 2) the agency supervised and controlled an entity charged with implementing those specifications; and 3) the entity warned the agency about any dangers known to it but not the agency.[153] Ultimately this court concluded that more facts would be needed and that summary judgment would not be appropriate, but the court did acknowledge that the defense may be raised nonetheless.[154]

VI. Applying *Boyle* outside the military context

The Supreme Court, as well as all circuits that have addressed the government contractor defense after the *Boyle* decision, agree that the *Boyle* analysis requires two conditions to be met in order to justify displacing state law. First, there must be a strong federal interest at stake if state law were to be enforced. Second, there must be a significant conflict between federal policy and state law. In this section the Comment will analyze these two conditions outside of the military context and argue that courts are ultimately best suited for determining the application of immunity beyond the federal government to the contactors whom they employ, as Congress is ill-equipped to legislate in such a diverse and fact-intensive area of the law.

A. Strong Federal Interests

Despite its limiting interpretation of the *Boyle* decision, the Ninth Circuit recognized that that there are potentially identifiable federal interests any time the government enters into a contract with a third party contractor.[155] The Ninth Circuit's main qualm with expansion of the *Boyle* analysis was its doubt that federal interests would ever "significantly conflict" with state law outside of the military context of the *Boyle* decision. The Third Circuit refutes the Ninth Circuit most capably by simply acknowledging that while a significant conflict must exist, there is nothing in the Supreme Court's decision that would suggest that there are no federal interests

[153] *Id*.
[154] *Id*.
[155] *Nielsen*, 892 F.2d at 1454.

outside a military context that can significantly conflict with state law for purposes of the *Boyle* test.[156]

A strong federal interest should be relatively easy to ascertain, especially within the context of the FTCA, which aims, in part, to spare the government from expensive tort liability.[157] Therefore, at the very least increased contract costs resulting from tort liability will always pose a federal interest under this analysis. While this increased burden may be nothing more than trivial at times, there are situations where the cost of tort litigation would result in a significant financial burden on the government, therefore impairing its ability to enter into contracts with parties who fear indemnification.[158] This burden is most palpable when the effects of increased contract costs both small and large are viewed cumulatively. One important concern with this analysis is that a universally bright-line test like the *Boyle* test would burden innocent third parties who have sustained injuries related to the work done under contract with the government no matter the cost of that particular case while immunizing contractors in all cases where the test is met.[159]

Other examples of strong federal interests with respect to the government contractor defense have been posed since the Supreme Court's *Boyle* decision. One such example is the interest proposed by the Second Circuit in *McCue* to coordinate federal disaster relief.[160] The federal government is the only entity substantial enough to be tasked with coordinating national

---

[156] *Carley*, 991 F.2d at 1124.
[157] 28 U.S.C.S. 2680(a) (2012).
[158] *See generally* Mark Schleifstein, *Hurricane Katrina damage judgment against Army Corps of Engineers is reversed by federal appeals court*, THE TIMES-PICAYUNE, Sept. 24, 2012, *available at* http://www.nola.com/katrina/index.ssf/2012/09/katrina_damage_judgement_again.html#incart_river. In this particular case, the FTCA saved the army corps billions of dollars in damages resulting from the Hurricane Katrina disaster. *Id*. In situations where contractors are hired to perform such work, this level of indemnification would greatly deter the willingness of contractors to accept the work.
[159] *See generally* Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 289–90 (1991).
[160] McCue v. City of New York, 521 F.3d 169, 197 (2d Cir. 2008).

disaster relief in a country that is composed of largely independent states. When disasters on the scale of September 11th, Hurricane Sandy, and Hurricane Katrina befall the United States, the federal government holds a unique position in providing aid and coordinating relief efforts, particularly when such disasters spread beyond the borders of a single state. It is difficult, however, to conceive of a sustainable system where the federal government is tasked with handling these duties entirely by itself, without the aid of private parties who would otherwise be reluctant to provide assistance for fear of any judicial repercussions.[161] Even when private parties agree to this kind of work, the possibility of second-guessing government orders would prove disastrous in a situation where the ability to quickly control and coordinate work is essential.

Carole A. Loftin provides another example of a strong federal interest in her note entitled *Expansion of the Government Contractor Defense: Applying* Boyle *to Vaccine Manufacturers*.[162] Her stated federal interest is combating serious childhood disease.[163] Loftin proposes that manufactures of the DTP vaccine[164] be allowed the defense and be immune from tort liability stemming from the distribution and use of the vaccine.[165] Loftin astutely perceives the unique role of the federal government in this context: "[D]iseases… present a serious and continuing threat to public welfare, they do not respect state borders."[166] This argument is further buttressed through use of Article I Section 8 of the constitution, which grants Congress the power to provide for the general welfare of the United States.[167] Should these vaccine manufacturers be

[161] *See supra* note 159.
[162] Carole A. Loftin, *Expansion of the Government Contractor Defense: Applying* Boyle *to Vaccine Manufacturers*, 70 TEX. L. REV. 1261, 1283 (1992).
[163] *Id*.
[164] The DTP vaccine is used on children to combat diphtheria, whooping cough, and tetanus.
[165] *Id*.
[166] *Id*. This thought emphasis the important role of the federal government in providing for public welfare when such a need extends beyond the borders of a single state.
[167] U.S. CONST. art. I, § 8, cl. 1.

susceptible to tort liability, production would suffer, as would the government's ability to provide for the general welfare of the United States.[168] This therefore serves as another example for why contractor immunity is so crucial in areas where strong federal interests exist. As such, it should be clear that serious and significant federal interests exist outside of the realm of military procurement.

B. Significant Conflicts

As was made evident in its *Boyle* decision, the Supreme Court clearly requires that there be a conflict of federal policy and state law significant enough to justify displacing that state law.[169] Courts agree on this point. Courts do, however, disagree as to what amounts to a significant conflict.[170] The Supreme Court in *Boyle* concluded that there was a significant conflict because state law would upset discretionary governmental functions.[171] The Court's decision here to reject *Feres* as the grounds for finding a significant conflict cannot be overlooked, especially when arguing whether the *Boyle* test applies outside of a military framework.[172] What has been paramount in subsequent applications *Boyle* is the effect that imposition of state law would have on the discretionary functions of the federal government. Whether one is concerned with the financial burdens imposed on the government, or the possibility of third party or judicial second-guessing of government contracts, the true underlying concern is whether the federal government will be able to maintain discretion with respect to its contracts. There is nothing in this analysis that would require application of *Feres* principles, or involvement with the military, as the Ninth Circuit would suggest.

---

[168] *See supra* note 162.
[169] Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988).
[170] *See supra* p. 20–21 and accompanying notes.
[171] *Boyle*, 487 U.S. at 507.
[172] *See supra* note 163 at 1284.

The most difficult aspect of these cases has always been the factual application of the defense to particular circumstances. Even straightforward application of the FTCA has proven difficult in terms of ascertaining when the government is working in a discretionary capacity.[173] Nevertheless, it is clear that a significant conflict will exist whenever there is discord between state law and the discretionary functions of the federal government. For this reason alone, it seems apparent that *Boyle* should apply outside a military framework. As such, when an appropriate case presents itself, the Supreme Court should resolve the current circuit split in favor of application outside of a military context.

C. Modifying the third prong of the government contractor defense

The test for governmental immunity should be modified in order to better reflect the fact that innocent third parties are ultimately the ones who will bear the full costs of injuries sustained in relation to the contracts contemplated by the defense.[174] This is perhaps the biggest criticism and most disconcerting aspect of the government contractor defense, as the faultless injured are unable to seek recompense from the parties responsible for their injuries. In consideration of this inherent inequity, the third prong of the test should be changed from requiring contractors to inform the government of "known dangers" to requiring the contractors to inform the government of dangers that they knew about or "should have known" about.

This altered language would better reflect negligence principles as this modified prong would require the contractor to perform its due diligence in learning about the dangers of the product to be fabricated or service to be performed. It would impose a duty on contractors to uncover defects and dangers where they would otherwise be content to perform the work at hand

[173] *E.g.* In re Katrina Canal Breaches Consol. Litig., 2011 U.S. Dist. LEXIS 95037 (E.D.La. 2011)
[174] *See supra* note 159 at 260. But again the interests of these injured parties must be balanced against the need for the federal government to maintain discretion and low cost in its dealings with private contractors.

and warn of dangers only if they are actually and presently known.[175] As the test currently stands, it makes an assumption that the government itself is just as knowledgeable as those it contracts with in terms of the dangers involved with the products or services that it seeks.[176] In reality, while the government is more than able to dictate design requirements or cleanup operations providing for little or no contractor discretion, the fact is those who contract with the government carry special knowledge and expertise that may put them in a position to potentially know more about the risks involved. The effect of this modified test would be to give innocent third parties a chance at recovery in situations where a contractor is truly negligent.

It must be emphasized that this modification of *Boyle's* third prong ensures that the government will gain the benefit of contractor expertise by requiring these entities to perform their due diligence. This benefit, however, will come with associated costs, as due diligence necessarily entails further expense on the part of the contractor. The added cost of due diligence, which would theoretically be passed onto the government through heightened contract cost, would still be negligible in comparison to subjecting these government contractors to liability. This is especially true when the nature of the contractor's work is inherently dangerous, and the risk of tort litigation, and by extent insurance cost, is reflectively high. It has been suggested that a contractor's liability, or an insurer's ability to predict contractor liability, can play a critical role in the determination of whether or not that contractor will participate or even stay in the public marketplace.[177] Because liability plays a central role in contractor decision-making, one could conclude that heightened contract costs through due diligence would pale in comparison to

[175] This does in part make an assumption that a contractor would be primarily concerned with profits and not with public welfare. Responsible contractors would undoubtedly do their best to uncover any potential risks, however at a certain point the cost of uncovering these risks may cause contractors to turn a blind eye to knowable dangers and instead take solace in the fact that there work comes with immunity.
[176] *Id*. at 291.
[177] *See supra* note 98 at 717.

contract costs raised to insure against tort liability. For this reason, the FTCA's aim of reducing costs on the government would still not be frustrated.

Due diligence does pose other potential problems. In the event that a contractor's due diligence does uncover potential risks with a particular product or service, one may wonder if the contractor would bother to disclose these risks, or if the contractor would bother to take the contract at all. With respect to the first issue, it must be remembered that this altered third prong still requires the contractor to inform the government of dangers that it should have known about in order to gain the benefit of immunity; it would not be enough for the contractor to simply uncover these dangers and then not disclose them. With respect to the second issue, the point of the government contractor defense is to supply immunity to contractors who are tasked with assuming contracts that are sometimes as dangerous as they are lucrative. In order to maintain governmental discretion with such work, immunity must be conferred on those tasked with performing the work. With such immunity granted, the profits associated with the contract would serve as a sufficient incentive.[178]

D. Why the courts should handle questions of contractor immunity

As has been made clear in Part IV of this Comment, *Boyle* is often criticized as offending separation of powers principles in that it puts unelected court officials in the role of the lawmakers. In reality, however, the courts are best situated to handle questions of contractor immunity. It is crucial that the reader remember that a court's *Boyle* analysis is almost always going to be framed by reference to a relevant statute, most likely the FTCA, as the source conferring immunity and creating significant conflict. Congress is bombarded by the requests of

[178] *Id*. Not only are profits likely to be higher for government contractors as opposed to their private counterparts, but they are also less likely to leave that particular market as they dedicate capital to serving the public market.

contractors to amend laws to confer immunity in their favor.[179] Most of the time these contractors will be working out of pure self-interest and it should therefore come as no surprise that Congress has been reluctant to legislate on their behalf. It would be an insurmountable obstacle for Congress to consider and then legislate on the notion of conferring immunity on a contractor in so many different contexts and contracts. Instead, Congress should enact general acts that confer immunity on the government, as it has done with the FTCA, and leave the interpretation and application of its will to the courts, who have historically been concerned with notions of equity and fairness, and who are equipped to handle application of the law to particular facts or contexts.

Admittedly courts have little expertise when it comes to government contracts or procurement, and it has been argued that for this reason Congress is best equipped to handle "fashioning an appropriate government contractor rule", as it has the "time, resources, and institutional capacity" to do so.[180] But this narrow view makes the assumption that expertise is required to effectively shape, and more importantly apply, an adequate rule governing contractor immunity. Contract and procurement expertise should not be viewed as a necessary requisite for the courts to be able to adequately address the kinds of issues raised in *Boyle*. It is the federal government and those it contracts with that ultimately carry the relevant expertise, and it is the courts that should be tasked with heeding this expertise and applying it in a fair and impartial way, much as they would in cases of medical malpractice where courts must rely heavily on the testimony of experts. As a political body, Congress cannot adequately or impartially address the

[179] *See supra* note 96.
[180] *See supra* note 98 at 717.

need to confer governmental immunity on contractors who operate largely out of self-interest.[181] Unlike Congress, courts are not political institutions, and would not thusly be limited.

VII. Conclusion

The long and conflicted history of the government contractor defense put the Supreme Court in a position to settle what could only be viewed as over 150 years of loosely applied federal common law in its *Boyle* decision. The majority in that case created a defense that was not only consistent with separation of power principles, but was also representative of federalism ideals and was a valid creation of federal common law. Unfortunately that somewhat ambiguous decision resulted in more confusion, which has since led to a circuit split that the Supreme Court should evenrually resolve in favor of clear expansion of the defense beyond the realm of military procurement contracts. The Supreme Court should acknowledge the viewpoints of those who fear further expansion of the defense, however, and remember that the interests of innocent third party tort victims are at stake. By modifying the test set out in *Boyle* to require contractors to warn the government not only of dangers it knows, but dangers it should have known, the Supreme Court would be able to finally achieve a defense that better balances the protection of these third parties with the strong federal interests at stake.

[181] *See supra* note 97