1994

Ambulance Chasers Beware: Carley v. Wheeled Coach and the Questionable Expansion of the Government Contractor Defense

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Comment

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Mary Carley, an emergency medical technician with the Virgin Islands Department of Health,[1] suffered injuries[2] when the ambulance in which she was riding[3] flipped over after it swerved to avoid colliding with another vehicle.[4] Carley subsequently filed a strict products liability action against the ambulance manufacturer, Wheeled Coach, in the United States District Court for the Virgin Islands.[5] Wheeled Coach raised the government contractor defense,[6] asserting immunity from liability because the corporation manufactured the ambulance pursuant to specifications approved by the United States government.[7] The district court granted Wheeled Coach's sum-

1. In 1988, Mary Carley worked for the Virgin Islands Department of Health at St. Croix Hospital. Carley v. Wheeled Coach, 991 F.2d 1117, 1118 (3d Cir. 1993).

2. Carley suffered injuries to her knees and back, including a herniated disk, as a result of the collision. *Id.*

3. At the time of the accident, Carley was on duty, responding to an emergency as a passenger in the 1987 Ford E-350 Type II 6.9 liter diesel-powered ambulance manufactured by Wheeled Coach, a Florida Corporation. *Id.*

4. *Id.*

5. *Id.* Carley claimed that the ambulance's excessively high center of gravity rendered it unreasonably prone to overturn during its intended use. *Id.*

6. In some circumstances, the government contractor defense shields government suppliers from liability if the defectively-designed product causing injury or damage strictly complies with government-ordered or approved specifications. *See* McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983). Federal circuit courts differ on the scope and rationale of the defense. *See supra* note 14 (noting circuit split).

7. Wheeled Coach manufactured the ambulance pursuant to a contract with the United States General Services Administration (GSA). *Carley*, 991 F.2d at 1118. The parties incorporated the specifications for the ambulance into the contract. *Id.* After Wheeled Coach completed the ambulance, a GSA quality inspector examined the vehicle and concluded that it met the contract specifications. *Id.*

mary judgment motion,[8] and the United States Court of Appeals for the Third Circuit affirmed that the government contractor defense extends to manufacturers of nonmilitary products under federal common law.[9]

The Supreme Court's landmark decision in *Boyle v. United Technologies Corporation*[10] recognized the government contractor defense as a matter of federal common law.[11] Under certain circumstances, the government contractor defense immunizes contractors who supply military equipment to the government from the duties imposed by state products liability law.[12] The *Boyle* decision, however, did not specifically address whether manufacturers of nonmilitary products can also raise the government contractor defense.[13] This issue has generated a significant split in authority both before and after *Boyle*.[14] *Carley v. Wheeled Coach* illustrates the current controversy over the ap-

8. The District Court of the Virgin Islands exercised its diversity jurisdiction over Carley's suit under 28 U.S.C. § 1332(a)(1) (1988). *Id.* The district court concluded that under either Virgin Islands law or federal common law, the government contractor defense applies to nonmilitary contractors and that Wheeled Coach established the defense as a matter of law. *Id.*

9. *Id.* at 1123.

10. 487 U.S. 500 (1988).

11. *See id.* at 511. The Supreme Court established the government contractor defense as a matter of federal common law to preserve federal interests associated with decision making in federal procurement. Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from* Boyle's *Government Contractor Defense*, 63 S. CAL. L. REV. 639, 677 (1990).

12. *See In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810 (9th Cir. 1992).

13. One major criticism of *Boyle* stems from the apparent mismatch between the Court's specific holding, which limited application of the defense to military contractors, and the federal policy the Court used to justify imposing federal common law in this area: the government's discretionary function immunity. *See* Green & Matasar, *supra* note 11, at 688-89. The *Boyle* Court inexplicably limited its new federal common-law defense to military procurement. *Id.* at 690. Yet, if enhancing government decision-making immunity was the goal of the defense, nothing in the Court's opinion suggests why this rationale should not apply to civilian procurement. *Id.* at 691.

14. Before *Boyle*, the following opinions held that the government contractor defense applies to all manufacturers acting on behalf of the government: Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986); Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985); Price v. Tempo, Inc., 603 F. Supp. 1359, 1361-62 n.3 (E.D. Pa. 1985); McDermott v. Tendun Constructors, 511 A.2d 690, 696 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 526 A.2d 134 (N.J. 1986). In contrast, some pre-*Boyle* decisions held that the government contractor defense applies only to manufacturers of military products: Shaw v. Grumman Aero Corp., 778 F.2d 736, 743 (11th Cir. 1985); Johnston v. United States, 568 F. Supp 351, 356-58 (D. Kan. 1983); Jenkins v. Whittaker Corp., 551 F. Supp. 110, 114 (D. Haw. 1982).

propriate scope of the government contractor defense, and in a broader sense, the role of the courts in products liability reform.[15] In *Carley*, the Third Circuit created a whole new class of defendants who may now share the federal government's immunity from tort liability, thereby frustrating individual state's interests in protecting tort victims[16] and reversing a trend toward waiver of the government's immunity under the Federal Torts Claims Act (FTCA).[17]

This Comment explains why precedent and the policies behind *Boyle*'s government contractor defense do not support wholesale application of the defense to all government contractors. Part I outlines the origins and development of the modern

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After *Boyle*, courts continued to disagree on whether the government contractor defense is limited to military procurement. The following post-*Boyle* opinions held that the government contractor defense applies to all manufacturers: Johnson v. Grumman Corp., 806 F. Supp. 212, 216-17 (W.D. Wis. 1992); *In re* Chateaugay Corp., 132 B.R. 818, 823-27 (Bankr. S.D.N.Y. 1991), *rev'd*, 146 B.R. 339 (S.D.N.Y. 1992); Vermeulen v. Superior Court of Alameda County, 204 Cal. App. 3d 1192, 1200-01 (Cal. 1988). Other post-*Boyle* opinions expressly limit application of the government contractor defense to manufacturers of military products: *In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810-12 (9th Cir. 1992); Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1452-55 (9th Cir. 1990); *In re* Chateaugay Corp., 146 B.R. 339, 348-51 (S.D.N.Y. 1992).

15. Some critics of the *Boyle* decision point to the Court's institutional inadequacy in understanding the complexities of the procurement process relevant to fashioning an appropriate government contractor rule and advocate Congressional action in this area. *See Boyle*, 487 U.S. at 515-516 (Brennan, J., dissenting); Green & Matasar, *supra* note 11, at 715 (arguing that the Court, given its institutional role and concomitant limitations, cannot absorb and understand all of the complexities of an appropriate government contractor rule). Some modern products liability law commentators, however, call on the federal courts to address the perceived products liability crisis by federalizing products liability standards, even at the expense of states' rights. *See* RICHARD NEELY, THE PRODUCTS LIABILITY CRISIS 169 (positing that "[p]robably the best product liability bill imaginable would simply be a short authorization for the federal courts to establish a national law of product liability"). With prescient timing, the Supreme Court announced a new federal common law rule in Boyle v. United Technologies Corp., 487 U.S. 500 (1988), which protects federal military contractors, under certain conditions, from state tort law liability. *See supra* notes 58-70 and accompanying text.

16. *See Boyle*, 487 U.S. at 515-16. (Brennan J., dissenting) (arguing that the government contractor defense denies injured parties the compensation that state law assures them). Justice Brennan used a hypothetical situation to highlight the unfair aspects of the government contractor defense: "Had [the military contractor] designed such a death trap for a commercial firm, [the injured party's] family could sue under [state] tort law and be compensated for [the injured party's injuries]." *Id.* at 515.

17. 28 U.S.C. § 2674 (1946). The government contractor defense expands the exception to the FTCA's general waiver of federal governmental immunity by shielding private contractors from state tort liability, under certain conditions. *See In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810 (9th Cir. 1992)

government contractor defense before and after the *Boyle* decision. Part II examines of *Carley*'s holding and reasoning. Part III critique's the Third Circuit's decision in *Carley* and suggests an alternative approach to applying the government contractor defense to nonmilitary contractors. This Comment concludes that courts should limit the government contractor defense to procurement of products not readily available on the commercial market, thereby assuring that courts use the defense to protect federal interests associated with unique product designs and state interests in compensating tort victims.

I. THE GOVERNMENT CONTRACTOR DEFENSE: ITS ORIGINS AND EVOLUTION

A. THE TRADITIONAL GOVERNMENT CONTRACTOR DEFENSE

Under certain circumstances, the government contractor defense allows a contractor to share the government's sovereign immunity from tort liability.[18] Many courts trace the origins of the defense to the Supreme Court's decision in *Yearsley v. W.A. Ross Construction Co.*,[19] which held that a third party cannot recover damages from a duly-authorized contractor executing the will of the government.[20] Historically, this defense avoided imposing liability on a contractor for acts properly attributable to government.[21] Because later cases interpreting *Yearsley* required contractors to have an actual agency relationship with

18. *See* Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986) (describing the rationale behind the government contractor defense as an extension of sovereign immunity) (citing Hansen v. Johns-Manville Products Corp., 734 F.2d 1036 (5th Cir. 1984) (en banc), *cert. denied*, 470 U.S. 1051 (1985)); Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985). *But see* Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986) (stating that the government contractor defense serves the "historic purpose of not imposing liability on a contractor who has followed specifications required or approved by the United States government"); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 (11th Cir. 1985) (holding that "[t]he [government] contractor defense is available in certain situations not because a contractor is appropriately held to a reduced standard of care, nor because it is cloaked with sovereign immunity, but because traditional separation of powers doctrine compels the defense").

19. 309 U.S. 18 (1940).

20. *Id.* at 21-22. The Supreme Court held that as long as the government validly conferred authority to carry out the construction project, meaning that Congress acted within its constitutional powers, the contractor faced no liability for executing Congress' will. *Id.* at 20-21.

21. *See id.* The *Yearsley* Court found no ground to hold a contractor, as "an agent or officer of the government," liable for simply acting under the direction and authority of the United States. *Id.* at 22. In other words, the law should not hold the contractor liable for injuries to third parties because "the action of the agent is [essentially] the 'act of the government,'" and the contractor's lia-

the United States,[22] independent government contractors rarely shared the federal government's sovereign immunity until the advent of the modern government contractor defense in the circuit courts.[23]

B. Shared Sovereign Immunity and the Federal Torts Claims Act

Sovereign immunity prohibits a private citizen from suing the federal government without its consent.[24] Historically, the federal government's sovereign immunity shielded its agents from liability for their tortious acts, forcing injured citizens to

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bility should instead be imputed to the government. *Id.*; *see* Shaw v. Grumman Aero. Corp., 778 F.2d 736, 739, 740 n.5 (11th Cir. 1985).

22. The Supreme Court's reference to the contractor in Yearsley as an "agent or officer of the government" indicates that the government contractor defense required an actual agency relationship with the government. *See Yearsley*, 309 U.S. at 22 (The action of the agent is the "action of the Government."); Boyle v. United Technologies Corp., 487 U.S. 500, 525 (1988) (arguing that the Yearsley holding depended on an actual agency relationship with the government) (Brennan, J., dissenting); *Shaw*, 778 F.2d at 740 (holding that "[t]o evaluate a *Yearsley* claim in the military contractor context" the court must determine "whether the contractor actually acted as an agent of the government"); Bynum v. FMC Corp., 770 F.2d 556, 564 (5th Cir. 1985) (recognizing that "the problem with applying the *Yearsley* defense in the context of the military contractor is the apparent requirement that the contractor possess an actual agency relationship with the government"); Alex Ferrer, Schoenborn v. Boeing Co.: *The Government Contractor Defense Becomes a "Windfall" for Military Contractors*, 40 U. Miami L. Rev. 287, 290 (1985).

23. The "government agency defense" differs analytically from the modern government contractor defense. *Shaw*, 778 F.2d at 739-40. Parties rarely invoked the defense because of the difficulty in establishing a government-agent relationship. *Id.* at 740; Larry J. Gusman, *Rethinking* Boyle v. United Technologies Corp. *Government Contractor Defense: Judicial Preemption of the Doctrine of the Separation of Powers?*, 39 Am. U. L. Rev. 391, 414 (1990). Government contractors who could not establish the government agency defense relied on the closely associated contract specifications defense. This defense—actually a standard of conduct applicable to contractors—provides that contractors who comply with specifications provided by a third party are not liable for design defects unless those specifications are so obviously defective and dangerous that a contractor of reasonable prudence would be put on notice that the product is likely to cause injury. *Bynum*, 770 F.2d at 563; Restatement (Second) of Torts § 404 cmt. a (1965). The contract specifications defense, however, has lost much of its vitality in the context of a modern product liability action based on strict liability principles. *See Bynum*, 770 F.2d at 563; McKay v. Rockwell Int'l Corp., 704 F.2d 444, 447 n.3 (9th Cir. 1983) (citing Restatement (Second) of Torts § 402A(2)) (stating that § 402A strict liability applies even though "the seller has exercised all possible care in the preparation and sale of his product").

24. Chris Popov, *Sovereign Immunity: The Government Contractor's Defense in* Boyle v. United Technologies Corp., 1989 Ann. Surv. Am. L. 245 n.2.

seek relief by submitting private bills to Congress.[25] As the federal government expanded, its wrongs multiplied. The growing volume of private bills and the mounting demands on congressional resources[26] spurred the government to change the scope of sovereign immunity.[27]

In 1946, Congress partially waived the federal government's immunity from suit by passing the Federal Torts Claims Act (FTCA).[28] According to the United States Supreme Court, the FTCA signified the "culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit."[29] The FTCA indicates, however, that Congress did not intend to waive sovereign immunity completely for the tortious conduct of its agents.[30] Section 2680(a) of the FTCA, for example, disallows waiver of the federal government's sovereign immunity with respect to claims based upon the performance of a discretionary function or duty on the part of a federal agent, regardless of whether the agent abused discretion.[31] In the years immediately following passage of the FTCA, federal circuit courts disagreed on whether the Act should receive a liberal or a strict construction.[32]

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25. WILLIAM B. WRIGHT, THE FEDERAL TORTS CLAIM ACT: ANALYZED AND ANNOTATED 2 (1957). Because the government can only act through its officials or employees, those who carry out governmental operations also receive immunity under most circumstances. Committee on the Office of the Attorney General, THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, SOVEREIGN IMMUNITY: THE TORT LIABILITY OF GOVERNMENT AND ITS OFFICIALS 9 (1979).

26. *See* David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act:* Dalehite *to* Varig *to* Berkovitz, 25 IDAHO L. REV. 291, 292 (1988).

27. WRIGHT, *supra* note 25, at 15.

28. 28 U.S.C. § 2674 (1946).

29. Feres v. United States, 340 U.S. 135, 139 (1950).

30. The FTCA waives governmental "immunity from recognized causes of action and [does not] visit the Government with novel and unprecedented liabilities." *Id.* at 142.

31. 28 U.S.C. § 2680(a) (1946), commonly referred to as the "discretionary function" exception, provides as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to-
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> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency, or an employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. § 2680(a) (1946)

32. WRIGHT, *supra* note 25, at 7. *Compare* Jones v. United States, 126 F. Supp. 10, 12 (D.C. 1954) ("Unlike other statutes that submit the United States to suit, the Federal Torts Claims Act should receive a liberal construction in the

C. THE *FERES-STENCEL* DOCTRINE: SAFEGUARDING MILITARY DECISIONS FROM THE FTCA

Two United States Supreme Court decisions developed the *Feres-Stencel* doctrine by strictly interpreting the FTCA to avoid undermining the principle of separation of powers.[33] In *Feres v. United States*,[34] the Supreme Court held that the FTCA does not permit suit against the United States for the injuries or death of Armed Forces personnel in the course of military service.[35] Absent evidence of specific congressional intent to the contrary, the Court refused to allow state tort law to alter the unique relationship between military personnel and the government—a relationship which always had been governed exclusively by federal

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light of its beneficent purpose.") *with* Kendrick v. United States, 82 F. Supp. 430, 431 (N.D. Ala. 1949) ("It is elementary that an act of the Legislature which purports to relinquish the immunity of the sovereign from suit ought to receive a literal and narrow construction at the hands of the courts.").

33. The Supreme Court was specifically concerned that tort suits by soldiers would disrupt military discipline and the special relationship between soldiers and superiors. *See* United States v. Brown, 348 U.S. 110, 112 (1954); Bynum v. FMC Corp., 770 F.2d 556, 562 (5th Cir. 1985).

34. 340 U.S. 135 (1950).

35. *Id.* at 146. In *Feres*, Rudolph J. Feres, a United States Army soldier, died while on active duty as a result of a fire in his barracks. *Id.* at 137. His wife, as executrix of his estate, brought an action against the United States, claiming negligence in quartering Feres in barracks that the Army knew or should have known were unsafe because of a defective heating plant, and in failing to maintain a fire watch. *Id.* The Court first considered whether the FTCA allowed Feres' claim. The provision which prescribes the test of allowable claims against the government, 28 U.S.C. § 2674, announces that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." *Id.* at 141. The Court held that this provision created no new causes of action, but represented "acceptance of liability under circumstances that would bring private liability into existence." *Id.* The Court held the government liable only under "all the circumstances," a standard which considers all the circumstances of the injury, including the status of the wronged and wrongdoer. Because no private individual has the authority to conscript or mobilize a private army, the Court could not find analogous private liability, and therefore the FTCA barred Feres' claim. *Id.* at 146.

The Court gave two reasons for barring suit by military personnel against the government under the FTCA. The relationship between the government and the members of its armed forces is "distinctively federal in character." *Id.* at 143. The scope and nature of the legal incidents and consequences of this relationship, therefore, should be "fundamentally derived from federal sources and governed by federal authority." *Id.* at 143-44. In addition, the Court noted that the absence of any adjustment in the pre-existing statutory system of compensation for injuries and death of those in the armed services, such as Veteran's benefits, is persuasive support for finding no congressional intent to permit recovery under the FTCA for injuries incident to military service. *Id.* at 144.

authority.[36] Twenty-seven years later, in *Stencel Aero Engineering Corp. v. United States*,[37] the Supreme Court extended the *Feres* doctrine and held that third parties cannot seek indemnification from the United States for damages paid to injured soldiers in the course of military duty.[38] The Court feared that third party claims, much like the direct claim at issue in *Feres*, would require the United States to indirectly pay what the Veteran's Benefits Act forbids it from directly paying.[39] Further, third party claims would require civilian courts to "intervene in military matters at the possible expense of military discipline and effectiveness."[40] The *Feres-Stencel* doctrine thus preserved military decision-making immunity from the FTCA's general

36. *Id.* at 143-46. Because no American law prior to the FTCA permitted soldiers to recover for negligence, either against their superior officers or the government, the Court concluded that Congress did not intend to create "a new cause of action . . . for service-connected injuries or death due to negligence." *Id. But see* United States v. Johnson, 481 U.S. 681, 693 (1987) (Scalia, J., dissenting) (arguing that the plain language of the FTCA, 28 U.S.C. § 1346(b), renders the United States liable to *all* persons, including military personnel, injured by the negligence of government employees).

37. 431 U.S. 666 (1977).

38. *Id.* at 673-74. The Court barred Stencel's indemnity action for essentially the same reasons that the Court barred the direct claim against the government in *Feres*. Applying the first *Feres* rationale, the *Stencel* Court held that the government's relationship with its military contractors is no less "distinctively federal in character" than the relationship between the government and its soldiers. *Id.* at 672. In addition, to permit Stencel's claim would also circumvent the upper limit of liability for the government as to service-connected claims under the Veteran's Benefits Act, thereby "judicially admit[ting] at the back door that which has been legislatively turned away at the front door." *Id.* at 673. Finally, the Court turned to a third rationale, attributed to *Feres* but enunciated in United States v. Brown, 348 U.S. 110, 112 (1954), reasoning that an indemnity suit would "involve second-guessing of military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel*, 431 U.S. at 673.

39. *Id.*

40. Bynum v. FMC Corp., 770 F.2d 556, 563 (5th Cir. 1985). Since *Stencel*, the Supreme Court recognizes the separation of powers principle as the only viable factor supporting the *Feres-Stencel* doctrine. *See* Shearer v. United States, 473 U.S. 52, 58 n.4 (1985) (stating that factors mentioned in *Feres* are "no longer controlling"); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 742 (11th Cir. 1985) (discussing that the classic separation of powers theory and military discipline strand of analysis are the only factors surviving *Shearer*). Although *Stencel* holds that government contractors cannot seek indemnity from the United States for design defect actions brought by injured military personnel, military suppliers can at least factor this liability risk into their procurement bids. *See Stencel*, 431 U.S. at 674 n.8 (positing that petitioner no doubt had sufficient notice so as to take this risk into account in negotiating its contract).

waiver of sovereign immunity.[41] Given the immunities of the United States under the *Feres-Stencel* doctrine, federal circuit courts turned to the question of whether a supplier of military equipment should directly and immediately shoulder the burden of the liability to an injured service person.[42]

D. THE *FERES-STENCEL* DOCTRINE AS THE BASIS FOR THE MODERN GOVERNMENT CONTRACTOR DEFENSE BEFORE *BOYLE*

Federal circuit courts created the government contractor defense[43] as a matter of federal common law[44] to preserve the effectiveness of the government's sovereign immunity under the *Feres-Stencel* doctrine.[45] The modern government contractor de-

41. *See* Green & Matasar, *supra* note 11, at 667 (noting that courts extended *Feres* to military contractors because, "by failing to do so courts would be able to second-guess military decision making and, therefore, defeat the modern justification for *Feres*").

42. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983).

43. The "government contractor defense," also called the "military contractor defense," differs analytically from the traditional government contractor defense. *See supra* notes 22-23. Under certain circumstances, a government contractor may assert this defense, not under standard of care or agency principles, but because holding a supplier liable without regard to the extent of government involvement in fixing the product's design and specifications would subvert the government's immunity under the *Feres-Stencel* doctrine. *Bynum*, 770 F.2d at 565; Koutsoubos v. Boeing Vertrol, Div. of Boeing Co., 755 F.2d 352, 354 (3d. Cir. 1985); *McKay*, 704 F.2d at 444; Ramey v. Martin-Baker Aircraft Co., 656 F. Supp 984, 989 (D. Md. 1987). *But see* Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986) (citing Burgess v. Colorado Serum Co., 772 F.2d 844 (11th Cir. 1985) (stating that although most recent decisions limit the government contractor defense to military contracts, "[t]he rationale behind the defense is an extension of sovereign immunity: in circumstances in which the government would not be liable, private contractors who act pursuant to government directives should not be liable.")); *Shaw*, 778 F.2d at 740 ("The military contractor defense is available in certain situations not because a contractor is appropriately held to a reduced standard of care, nor because it is cloaked with sovereign immunity, but because traditional separation of powers doctrine compels the defense.").

44. *Bynum*, 770 F.2d at 568-71; *see Koutsoubos*, 755 F.2d at 354 ("It is clear that federal common law provides a defense to liabilities incurred in the performance of government contracts.").

45. Federal circuit courts feared that permitting state courts to hold government contractors liable for design defects would "undercut the effectiveness of the immunity that the *Feres* doctrine was designed to ensure . . . since military suppliers, despite the government's immunity, would pass the cost of accidents off to the United States through cost overrun provisions in equipment contracts." Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1453 (9th Cir. 1990); *see infra* note 51 and accompanying text (noting that passing on liability costs threatens the government's sovereign immunity under *Feres* and *Stencel*). These courts expressed concern that tort suits, under certain circum-

fense[46] shielded military suppliers from state products liability actions when the federal government established or approved reasonably precise design specifications and when the equipment actually conformed to those requirements.[47] A wide variety of public policy arguments support the defense; the courts consider these policies sufficiently compelling to deny recovery even when the plaintiff meets all of the elements of strict liability.[48] The federal circuit courts collectively identify four major policy justifications for the defense.

First, the government contractor defense preserves the federal government's sovereign immunity under the *Feres-Stencel* doctrine.[49] A majority of federal circuit courts reason that holding military contractors liable for design defects in strict products liability actions would subvert the *Feres-Stencel* doctrine because military suppliers would pass on the costs of their added liability to the government.[50] A second supporting policy

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stances, would place state courts in the position of "second-guessing" sensitive military decisions and threatening military discipline by allowing injured service people to use products liability actions to question the decisions of their superiors. *Bynum*, 770 F.2d at 565; *see supra* note 40 (explaining that separation of powers concerns compel the military contractor defense).

46. This Comment uses the term "modern government contractor defense" to distinguish the defense from both the earlier, traditional government contractor defenses and the later government contractor defense as recognized by the Supreme Court in Boyle v. United States, 487 U.S. 500 (1988).

47. The Ninth Circuit's version of the defense as set forth in McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), also requires the contractor to inform procurement officials about design defects known to the supplier but not to the United States. Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985). Many circuit courts adopted the *McKay* test, but other versions of the modern government contractor defense existed. *Bynum*, 770 F.2d at 566-67 n.14 (noting that the "Agent Orange" test does not explicitly require application of the *Feres-Stencel* doctrine).

48. Commander George E. Hurley, Jr., *Government Contractor Liability in Military Design Defect Cases: The Need for Judicial Intervention*, 117 MIL. L. REV. 219, 229 (1987).

49. Ramey v. Martin-Baker Aircraft Co., 656 F. Supp. 984, 989 (D. Md. 1987) (stating that "the most significant reason supporting the government contract[or] defense is to avoid subverting the underlying policies of governmental immunity established" by the *Feres-Stencel* doctrine).

50. *Bynum*, 770 F.2d at 565-66; *McKay*, 704 F.2d at 449. Both the *McKay* dissent and the majority in Shaw v. Grumman Aero. Corp., 778 F.2d 736 (11th Cir. 1985), doubted that holding military contractors liable for design defects would subvert the federal government's immunity under the *Feres-Stencel* doctrine solely because contractors would pass their added liability costs to the government. *See Shaw*, 778 F.2d at 741-42 ("[W]e are not convinced that the cost pass-through rationale is economically sound."); *McKay*, 704 F.2d at 457-58. In *Shaw*, the Eleventh Circuit refused to adopt the leading version of the government contractor defense as the Ninth Circuit set forth in McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983). *Shaw*, 778 F.2d at 742. The

justification for the government contractor defense involved preserving the special relationship of the military to the courts under the constitutional principle of separation of powers.[51] Trials dealing with design defects involving government-supplied specifications would require courts to do that which *Stencel* forbids: second-guessing military judgments and intervening on behalf of injured military personnel at the possible expense of military discipline and effectiveness.[52]

A third policy justification for the government contractor defense springs from the reality that the "United States is required by the exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that

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Shaw majority posited that "to the extent that any competition obtains in the market for defense products . . . contractors with defective designs may be deterred from passing through the cost of liability for defective design by competition from contractors with better safety records." *Id.* at 741-42 (footnotes omitted).

The *Shaw* court also reasoned that, "economically sound or not, the cost pass-through rationale is based on a strained reading of *Stencel* and an outdated interpretation of *Feres*." *Id.* *Stencel* prevented the United States from indemnifying military contractors who were sued by injured military personnel. *See supra* note 38 and accompanying text. (discussing the Court's holding in *Stencel*). *Stencel*, however, did allow contractors to pass on their liability insurance costs to the government by internalizing these expenditures in their original contract bids. *See Stencel*, 431 U.S. at 674 n.8 (reasoning that because relationship between military suppliers and the United States was based on a commercial contract, contractor had sufficient notice to risk not being indemnified by the United States in negotiating its procurement contract). Judge Alarcon's dissent in *McKay* pointed out that this reasoning implied that the Court was aware of Stencel's liability for the design defect, but declined to restrict it or to preclude it. *McKay*, 704 F.2d at 457.

51. *See Shaw*, 778 F.2d at 740 (holding that traditional separation of powers doctrine compels the defense).

52. *McKay*, 704 F.2d at 449. One court explained its justification of the military contractor defense:

> The purpose of a government contract defense in the context of this case is to permit the government to wage war in whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and should be exempt from review by civilian courts.

Id. at 449-50; *In Re* Agent Orange Prod. Liab. Litig., 534 F. Supp. 1046, 1054 n.1 (1982); *In Re* Diamond Shamrock Chemicals Co., 725 F.2d 858 (2d Cir. 1989).

According to the *Bynum* court, "there are few areas of government activity in which courts have less competence or that raise such significant separation of powers concerns." *Bynum*, 770 F.2d at 565. It is difficult, for example, to imagine a more purely military matter than the design of a sophisticated jet fighter aircraft. *See* Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986).

would be acceptable for ordinary consumer goods."[53] Without the government contractor defense, the law might discourage contractors from cooperating with the government to develop and produce dangerous but necessary equipment.[54] Simple fairness considerations provide the fourth major policy argument favoring the government contractor defense: ultimately, a contractor should not face liability for a dangerous design when its only role in causing the injury to a third party was the production of a design supplied by the government.[55]

The government contractor defense, in large measure, creates an incentive for military contractors to produce military equipment which is inherently dangerous by nature.[56] In applying the defense, however, federal circuit courts have encountered problems defining "military equipment." As one court noted, "the line . . . lies somewhere between an ordinary con-

53. The *McKay* court discussed that imposing liability on contractors who federal law compelled to produce a weapon of war without the ability to negotiate specifications, contract prices or terms would unfairly force the supplier into the "untenable position of choosing to supply products necessary to conduct a war, and procuring what the government requires but at a contract price that does not internalize potential liability for design flaws." *Id.* at 450. Furthermore, product liability law ordinarily deters manufacturers from producing unreasonably dangerous products. *See generally* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (discussing strict liability for sellers of products that cause physical harm). When military equipment is at issue, however, there is a strong governmental interest in encouraging the military contractor to supply potentially dangerous products for the government and to comply strictly with government design specifications. *Bynum*, 770 F.2d at 572. Military procurement "often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat-effectiveness." Boyle v. United Technologies Corp., 487 U.S. 500, 511 (1988).

54. *See Ramey*, 656 F. Supp. at 990 (stating that imposing liability on a government contractor for design defects in military equipment "would have a chilling effect on businesses willingness to contract with the government and supply necessary goods and equipment"). Brian Shipp, *Torts:* Boyle v. United Technologies Corp.: *The United States Supreme Court Accepts the Government Contractor Defense*, 42 OKLA. L. REV. 359, 369 (1989). "[M]any technologically advanced consumer products are developed despite the fact non-governmental manufacturers enjoy no immunity from state tort liability." *Id.* at 369 n.73.

55. Ramey v. Martin-Baker Aircraft Co., 656 F. Supp 984, 990 (D. Md. 1987). The compensation of victims rationale underlying strict liability is less compelling in the military context because the Veteran's Benefits Act provides a "swift, efficient remedy" for injured military personnel. *Tozer*, 792 F.2d at 407, (citing Stencel Aero. Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977).

56. Application of ordinary tort law to military design and procurement decisions is not appropriate because the exigencies of defense efforts require the government to "push technology toward its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods." *McKay*, 704 F.2d at 449-50.

sumer product purchased by the armed forces—a can of beans for example—and the escape system of a Navy RA-5C reconnaissance aircraft."[57] In 1988, the Supreme Court attempted to resolve the circuit court split over the scope of and justification for the defense by addressing the legitimacy of military contractor immunity under federal law.

E. *Boyle v. United Technologies Corp.*: The Supreme Court Recognizes the Defense

In *Boyle v. United Technologies Corp.*,[58] the Court considered whether federal common law necessitated the government contractor defense. The Court held that a government contractor's civil liabilities arising out of the performance of a federal procurement contract involve uniquely federal interests. These interests are so committed to federal control that federal common law will preempt and replace state law.[59]

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57. *Id.* at 451.

58. 487 U.S. 500 (1988).

59. *Id.* at 505-06. According to the *Boyle* majority, civil liabilities of government contractors arising out of the performance of a federal procurement contract border on two areas that involve uniquely federal interests. First, federal law governs the rights and obligations of the United States under its contracts. *Id.* at 504. Although this case "[did] not involve an obligation to the United States under its contract, but rather liability to third persons," that liability still "[arose] out of performance of the contract." *Id.* at 505. In addition, the civil liability of federal officials for actions taken in the course of their duty implicates uniquely federal interests as well. *Id.* Although *Boyle* involved "an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee," the case implicated the same interest in getting the government's work done. *Id.*

To support its finding of a federal interest in procurement contracts as well as performance contracts, the Court cited Yearsley v. W.A. Ross Const. Co., 309 U.S. 18 (1940), in which the Court "rejected an attempt by a landowner to hold a construction contractor liable under state law for the erosion of 95 acres caused by the contractor's work in constructing dikes for the Government." *Boyle*, 487 U.S. at 506. The majority reasoned that although the suit involved private parties, the imposition of liability on government contractors would directly impact the terms of government contracts, either through higher contract prices or by creating a disincentive for suppliers to manufacture the product specified by the government. *Id.* at 506-07.

The *Boyle* dissent and products liability law commentators claim that there are serious flaws in the majority's federal common-law analysis. Green & Matasar, *supra* note 11, at 644; *see Boyle*, 487 U.S. at 519 ("[O]ur 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.") (Brennan, J., dissenting). One major criticism of the majority's common law analysis is that it "needlessly tries to shoehorn the government contractor defense into existing federal common-law precedents." Green &

The exclusive federal interest in the procurement of equipment by the United States, however, "merely establishes a necessary, not a sufficient, condition for the displacement of state law."[60] Consequently, the Court held that before federal law displaces state tort law in a products liability action involving an alleged design defect, courts must determine that a "significant conflict" exists between the federal interests associated with government procurement contracts and the operation of state law.[61]

The *Boyle* Court rejected the *Feres-Stencel* doctrine as a viable approach to identifying state claims against government contractors which raise a "significant conflict" with federal interests in the context of federal procurement.[62] The *Feres-Stencel* doctrine immunizes the contractor from tort liability for injuries suffered by military personnel in situations in which the mili-

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Matasar, *supra* note 11, at 644. "Neither government employee immunity nor the government contract cases is sufficient to justify a federal government contractor common-law defense." *Id.* at 646-47. As the dissent points out and as the majority acknowledges, *Boyle* presented "simply a suit between two private parties. [This Court has] steadfastly declined to impose federal [common] law on relationships that are collateral to a federal contract, or to extend the federal employee's immunity beyond federal employees." *Boyle*, 487 U.S. at 519 (Brennan, J., dissenting); *see* Green & Matasar, *supra* note 11, at 657-660 (arguing that *Boyle*'s analysis distinguishing prior private party cases is unconvincing on the basis that those cases involved effects on federal interests too speculative to warrant extension of federal common law, but *Boyle* does not).

60. *Boyle*, 487 U.S. at 507. The Court disregards the distinction between preempting state law and the displacement of federal-law reference to state law for the rule of decision, claiming there is no practical consequence. *See id.* at 507 n.3. As a result, the Court's analysis allows no room for weighing the costs to federal and state relations and for consideration of whether the less restrictive alternative of borrowing state law might preserve federal interests. *See* Green & Matasar, *supra* note 11, at 676-83; *Boyle*, 487 U.S. at 518 ("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 state law is applied.'") (Brennan, J., dissenting).

61. *Boyle*, 487 U.S. at 507. The Court defines "significant conflict" by example, as one where a state-imposed duty of care precisely contradicts the duty imposed by the government contract. *Id.* at 509. In other words, "the fact that the area in question is of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." *Id.* at 507-08.

62. *Id.* at 509-10. The *Boyle* Court rejected the *Feres-Stencel* doctrine as both overprotective and underprotective of federal interests associated with military procurement contracts. *Id.* at 510. By adopting the FTCA's discretionary function exception as the proper basis for the government contractor defense, the Court aimed at protecting the federal interest in preserving the government's discretion to balance safety and performance needs. *See id.* at 511; *infra* text accompanying note 68; Green & Matasar, *supra* note 11, at 669-70, 683.

tary had merely ordered standard military equipment and had exercised no judgment at all in the design specifications.[63] At the same time, the *Feres-Stencel* doctrine arbitrarily limits the government's immunity to suits brought by military personnel against the federal government.[64] If the *Feres-Stencel* doctrine forbids military personnel from challenging military decisions through tort actions against contractors, it makes little sense to permit civilian plaintiffs to use state tort law to effect the same result.[65]

In place of the *Feres-Stencel* doctrine, the *Boyle* Court relied on the discretionary function exception to the FTCA[66] to determine when a "significant conflict" exists between federal interests and state law in the context of government procurement.[67]

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63. The government contractor defense, under a *Feres* doctrine rationale, would prevent suit against the government for products that the government purchased as well as designed. *Boyle*, 487 U.S. at 510.

64. *Id.* at 510-11; *see supra* notes 34-40 and accompanying text (noting that *Feres-Stencel* applies only to direct or indemnity claims of injured military personnel).

65. *Id.* at 511. The manufacturer of an allegedly defective fighter plane, for example cannot invoke the *Feres* doctrine to prevent a suit in which a civilian claims wrongful death to his or her decedent resulting from injuries arising out of the alleged defect. *See id.* at 510-11.

66. *See supra* notes 30-31 (discussing the FTCA).

67. *Boyle*, 487 U.S. at 511; *see* 28 U.S.C. § 2680(a) (1988). The purpose of the discretionary function exception is "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium" of a tort suit. Fishback & Killefer, *supra* note 26, at 298 (quoting United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984)). The Court defined the "discretionary function or duty" that cannot form the basis for suit under the FTCA as follows: "[w]here there is room for policy judgment and decision there is discretion." Dalehite v. United States, 346 U.S. 15, 36 (1953). The discretionary function exception does not apply to ordinary or "run-of-the-mill" accidents, which involve no policy considerations. Fishback & Killefer, *supra* note 26, at 299. Yet, the discretionary function exception applies if the accident could be traced back to when a policy decision was made or susceptible of being made. *Id.* Thus, the discretionary function exception protected the Army's failure to place warning labels on an explosive product, even if the Army failed to consider the policy pros and cons of applying labels to these products. *Id.* at 299 n.51.

The Court's reliance on the discretionary function exception to suggest the outlines of "significant conflict" between federal interests and state law creates unintended results. *Boyle* requires that the government consciously consider reasonably precise design specifications for the government contractor defense to apply. *See supra* note 70 (describing *Boyle*'s adoption of the *McKay* three-prong test for determining when to displace state tort law). The government may have inadvertently omitted the challenged design defects from the specifications, indicating that federal procurement officials may never have made a policy judgment with respect to that particular design defect. Matasar &

The *Boyle* Court stated that the federal government's selection of the appropriate design for military equipment amounts to a discretionary function within the meaning of the discretionary function exception: it involves "not only engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat-effectiveness.[68] To permit state courts to second-guess these military judgments through state tort suits, *Boyle* reasoned, would unduly impinge on the military's decision-making process, by allowing contractors to pass on their added liability costs to the federal government.[69] State laws that hold government contractors liable for design defects in military equipment, therefore, produce a "significant conflict" with federal policy under some circumstances and must be preempted.[70]

F. The Circuit Split Involving Applicability of the Defense to Non-Military Contractors

After *Boyle*, federal circuit courts have been unable to agree on whether the government contractor defense applies exclusively to military procurement contracts.[71] In *Johnson v. Grumman Corp.*,[72] the United States District Court for the Western District of Wisconsin held that the government contractor defense, as announced in *Boyle*, applies to all government procurement, including nonmilitary contracts.[73] Although the *Boyle*

Green, *supra* note 11, at 692. In this case, *Boyle* operates to immunize contractors from liability for design defects that are not deliberately considered by government procurement officers. *Id.* at 693.

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

69. *See id.* at 511-12; *In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 811 (9th Cir. 1992).

70. *Boyle*, 487 U.S. at 511. The *Boyle* Court adopted *McKay*'s three-pronged test to limit the scope of state tort law displacement to instances in which a government officer considered the challenged design feature. *Id.* at 512. Under the *McKay* text, courts cannot impose state tort liability for design defects in military equipment when, "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.*

71. *See supra* note 14 (noting the post-*Boyle* circuit split).

72. 806 F. Supp. 212 (W.D. Wis. 1992).

73. *Id.* at 217. The *Johnson* court considered whether the government contractor defense extended to an alleged design defect in the manufacture of United States Postal Service vehicles. *Id.* at 216. The *Johnson* court cited a pre-*Boyle* decision that applied the government contractor defense to a civilian setting. *Id.* In Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986), the Seventh Circuit extended the government contractor defense to a civilian

opinion contained language such as "military contractor" and "military equipment" instead of the broader "government contractor" and "government procurement," *Johnson* interpreted *Boyle*'s reliance on the discretionary function exception to the FTCA to apply in both civilian and military contexts.[74] The court in *Johnson* concluded that both civilian and military suppliers can invoke the defense as long as they satisfy each element of the government contractor defense set forth in *Boyle*.[75]

In contrast, the Ninth Circuit in *Nielsen v. George Diamond Vogel Paint Co.*,[76] held that only military contractors can invoke the defense.[77] Although *Boyle* recognized that uniquely federal interests inhere in the potential liabilities that arise out of all government contracts, regardless of their military or civilian nature,[78] *Nielsen* placed great reliance on the *Boyle* majority's focus on the military context of that case in defining where a

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drug manufacturer who had developed a defective vaccine. *Id. Boruski*, relying on another pre-*Boyle* decision extending the defense to civilian manufacturers, stated that "[t]he rationale behind the [government contractor] defense is an extension of sovereign immunity: in circumstances in which the government would not be liable, private contractors who act pursuant to government directives should not be liable." *Id.* (internal quotations omitted) (quoting Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985)). Both the *Burgess* and the *Boruski* courts, however, applied state law versions of the government contractor defense. *See* Carley v. Wheeled Coach, 991 F.2d 1117, 1130 n.2 (3d Cir. 1993). Thus, these courts did not face the same federal common law analysis involved in formulating new federal common-law rules to displace state law. *Id.* at 1130 n.2; *see supra* notes 58-59 and accompanying text (explaining the *Boyle* court's resolution of the government contractor defense and federal common law).

74. *Johnson*, 806 F. Supp. at 217.

75. *Id. Johnson*'s holding rests on finding no conflict between the scope of the defense in *Boruski* and the subsequent *Boyle* decision. *Id.*

76. 892 F.2d 1450 (9th Cir. 1990).

77. *See id.* at 1454. Ronald Nielsen, a civilian employee of the United States Army Corps of Engineers, painted a dam in Idaho over the course of many years. *Id.* at 1451. Nielsen sued the manufacturer of the paint he used in the course of his job, claiming that many years of inhaling the paint caused permanent brain damage. *Id.* The district court granted the defendant, George Diamond Vogel Paint Co., summary judgment under Idaho law, using the contract specifications defense. *Id.* Nielsen appealed, claiming that the district court erred in finding that the contract specifications defense applies to defendants as a matter of Idaho law. *Id.* at 1452. Following the district court's ruling, and before Nielsen's appeal, the United States announced its decision in Boyle v. United Technologies, 487 U.S. 500 (1988). *Id.* at 1453. Defendants then urged on appeal that they were entitled judgment as a matter of federal, and not state law, and that the Ninth Circuit need not reach any of appellant's contentions with regard to Idaho law. *Id.*

78. *See id.* at 1454; *see supra* text accompanying note 60 (describing the limits of the unique federal interests).

"significant conflict" exists between federal and state law.[79] Thus, *Nielsen* held that applying state tort liability to a nonmilitary contractor raises no significant conflict with federal policy requiring the preemption of a state law.[80] The *Nielsen* court did not interpret *Boyle* to require that nonmilitary contractors "enjoy an immunity from tort liability as a matter of federal law that they did not enjoy before *Boyle*."[81]

II. *CARLEY v. WHEELED COACH*

On September 2, 1988, Mary Carley, an emergency medical technician, was on duty and riding as a passenger of an ambulance manufactured by Wheeled Coach, a Florida corporation.[82] While en route to the scene of an emergency, the ambulance flipped over as it swerved to avoid a car that failed to properly yield the right-of-way.[83] As a result, Mary Carley injured her knees and back.[84] Wheeled Coach manufactured the ambulance pursuant to a contract with the United States General Services Administration (GSA).[85]

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79. *Nielsen*, 892 F.2d at 1454-55.

80. *Id.* at 1455; *see also In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 811 (9th Cir. 1992) (reasoning that state tort liability would not unduly impinge on the military's decision-making process with respect to products "readily available on the commercial market"). In In Re *Hawaii Fed. Asbestos Cases*, the Ninth Circuit refused to extend *Boyle*'s government contractor defense to asbestos manufacturers because the insulation "does not represent military equipment entitling its manufacturers to the protections of the [government] contractor defense." *Id.* at 812. The Ninth Circuit interpreted *Boyle* as limiting the defense to procurement of products "ordered by the military [that were not] readily available, in substantially similar form, to commercial users . . ." *Id.* at 811.

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

82. Carley v. Wheeled Coach, 991 F.2d 1117, 1118 (3d Cir. 1993).

83. *Id.* A police officer witnessing the accident reported that the ambulance driver operated the vehicle in a "reasonable and safe manner for an emergency situation." *Id.*

84. *Id.*

85. *Id.* at 1125. "The General Services Administration solicited bids for the construction of an ambulance pursuant to the terms of GSA Solicitation No. FCAP-X6-70785-N-12-9-86." *Id.* The GSA's solicitation required that the ambulance comply with the Federal Specifications for the "Star-of Life Ambulance," KKK-A-1822B, dated June 1, 1985, as specified in the contract. *Id.* The procurement contract specified that Wheeled Coach locate the ambulance's center of gravity, making sure that it complied with the center of gravity parameters set by the manufacturer, Ford Motor Company. *Id.* Ford's guidelines for an incomplete 1987 E-350 6.9 liter diesel van chassis state "that the vertical distance from the ground to the completed vehicle center of gravity should not exceed 43 inches for vehicles equal to or greater than 8,000 pounds." *Id.* After Wheeled Coach built the ambulance in question, a GSA quality assurance inspector examined it, and found it in compliance with contract specifications. *Id.*

On April 4, 1989, Carley filed a strict products liability suit against Wheeled Coach in the District Court of the Virgin Islands.[86] Wheeled Coach affirmatively raised the government contractor defense,[87] and moved for summary judgment.[88] The district court granted the motion, concluding that under both federal common law and Virgin Islands law, the government contractor defense applied to nonmilitary procurement.[89] Carley appealed to the Third Circuit and that court affirmed the summary judgment, holding that the government contractor defense, as formulated in *Boyle*, applies to manufacturers of nonmilitary products as a matter of federal common law.[90]

The *Carley* court considered *Boyle*'s express rejection of the *Feres-Stencel* doctrine and its reliance instead on the discretionary function exception to the FTCA as the strongest reasons for applying the defense to all government contractors.[91] *Carley* noted that although federal government contracts for nonmili-

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at 1126. Robert Carlton, mechanical engineering supervisor for Wheeled Coach, stated that Wheeled Coach manufactured the ambulance according to government specifications and that after testing and measuring the vehicle, the center of gravity measured 36.5 inches above the ground, well within the government's requirement that it be under 43 inches. *Id.*

86. *Id.* at 1118. Carley alleged that "the ambulance was unreasonably prone to turn over during its intended use because of an excessively high center of gravity." *Id.*

87. Wheeled Coach claimed immunity from liability under the government contractor defense because it built the ambulance in the performance of its obligations under a contract with the United States government. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1125. Carley moved for reconsideration on the grounds that Florida law applied, and that Florida does not recognize a government contractor defense for nonmilitary contractors. *Id.* at 1128. The Third Circuit's holding, however, makes the government contractor defense available as a matter of federal common law. Carley's conflict of laws question, therefore, remained undecided on remand in order to determine whether Wheeled Coach would be able to establish the federal government contractor defense. *Id.* at 1128 n.7.

On appeal, the Third Circuit remanded the case, concluding that Wheeled Coach failed to establish the absence of a genuine issue of material fact with respect to the third prong of the defense. *Id.* at 1127-28. This third element, as set forth by the Supreme Court in *Boyle*, requires a supplier to warn the United States about dangers in the use of its product that were known to the supplier but unknown to the United States. *Boyle*, 487 U.S. 500, 512 (1988). Although Wheeled Coach offered evidence sufficient to satisfy the first two prongs of the three-part test, the corporation produced no evidence on record "showing that Wheeled Coach warned the GSA about dangers in its ambulance that were known to Wheeled Coach but not to the GSA." *Carley*, 991 F.2d at 1126.

91. *Carley*, 991 F.2d at 1120. Because the discretionary function exception to the FTCA indicates the scope of the defense, *Carley* had to determine whether the procurement of a nonmilitary product with known safety risks involves a discretionary function as well. *Id.* at 1122.

tary products do not involve considerations of combat effectiveness, the policy considerations cited by *Boyle* for determining whether the Armed Forces have exercised a discretionary function apply equally to military and nonmilitary procurement.[92] When the federal government balances safety concerns against technical and social considerations in nonmilitary procurement, the government exercises its discretionary function and the government contractor defense extends to protect these federal policy decisions.[93]

III. *BOYLE*'S GOVERNMENT CONTRACTOR DEFENSE SUPPORTS ONLY LIMITED APPLICATION TO CIVILIAN PROCUREMENT

The *Carley* decision drastically alters the scope of *Boyle*'s government contractor defense by extending coverage to all nonmilitary contractors as well as to military suppliers. *Carley*'s sweeping holding invites criticism for encroaching on the domain of Congress as the nation's sole law maker,[94] and for frustrating state's interests in compensating tort victims.[95] *Boyle*'s government contractor defense should be properly limited to the procurement of products that are not readily available in the commercial market.

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92. *Id.* at 1121. *But see supra* note 62 (noting that government's selection of military equipment amounts to a discretionary function because it specifically involves the "tradeoff between greater safety and greater combat-effectiveness). *Carley* dismissed the dissent's claim that *Boyle* "soundly establishes that the government contractor defense is premised on concerns unique to the military." *Carley*, 991 F.2d at 1121 n.3. The *Carley* majority claimed that the language and examples in *Boyle* illustrate that concerns about combat effectiveness were on an equal footing with other policies, such as engineering analysis, technical, and social considerations. *Id.* at 1122 n.3.

93. *Id.* at 1123. *Carley* held that the federal government's use of its discretionary function, not the product's military or nonmilitary nature, determines the appropriateness of the government contractor defense. *Id.* at 1124.

94. Justice Brennan's dissent in *Boyle* applies equally to *Carley*'s new rule of federal common law. He argues: "The Court—unelected and unaccountable to the people—has unabashedly stepped into the breach to legislate a rule denying [Mary Carley] the compensation that state law assures [her]." *Boyle*, 487 U.S. at 515-16. Congress has considered but has never legislated a federal government contractor defense. *Carley*, 991 F.2d at 1133 n.7.

95. *See id.* at 1128 (Becker, J., dissenting) (arguing that the majority's extension of *Boyle* impinges on the domain of Congress and that of the states).

A. Most Civilian Contractor Liability Creates No "Significant Conflict" With Federal Interests

The *Carley* decision misreads *Boyle*, ignoring its explicit language and reasoning by expanding the government contractor defense to cover all federal procurement. Justice Scalia, speaking for the *Boyle* majority, narrowly framed the issue by using specific terms: when can "a contractor providing military equipment to the Federal Government . . . be held liable under state tort law for injury caused by a design defect."[96] The *Boyle* Court repeatedly described the government contractor defense in terms that limit it to those who supply military equipment to the federal government.[97] Throughout the opinion, Justice Scalia used terms such as "military equipment" and the "military contractor defense" to describe the scope and nature of the defense.[98]

Carley dismissed *Boyle*'s specific holding as merely answering the narrow question before the Court rather than foreclosing the possibility of a government contractor defense for all nonmilitary contractors.[99] *Carley* reached this conclusion by incorrectly applying *Boyle*'s common-law analysis. *Boyle* held that before a court applies state tort law in a products liability action involving the government contractor defense, it must determine whether state law "significantly conflicts" with an identifiable federal policy or interest associated with the federal procurement contract.[100] The *Boyle* majority focused on the federal government's interest in preserving its discretionary function immunity as the limiting principle for identifying situations in which a significant conflict arises requiring the displacement of state law.[101] *Carley*, however, misread *Boyle* in its finding of a "significant conflict" whenever the federal government exercises discretion in procuring a nonmilitary product with the aware-

96. *Boyle*, 487 U.S. at 502.

97. For example, the Court reasoned "that state law which holds government contractors liable for design defects in *military equipment* does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id.* at 512 (emphasis added).

98. *Boyle*, 487 U.S. at 502, 511-12; *see In Re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810-11 (9th Cir. 1992).

99. *Carley*, 991 F.2d at 1124-25.

100. *See supra* note 61 and accompanying text.

101. *See Boyle*, 487 U.S. at 511; *supra* notes 62-70 and accompanying text (rejecting the federal government's interest in preserving its immunity under the *Feres-Stencel* doctrine as an appropriate limiting principle because it is both underinclusive and overinclusive in safeguarding the integrity of military decision-making immunity).

ness of its dangers.[102] *Boyle* did not go that far.[103] Rather, *Boyle* held that a government contractor's state tort liability presents a "significant conflict" with the federal government's discretionary function immunity only in some circumstances.[104]

The *Carley* court correctly concluded that *Boyle*'s three-pronged test specifically distinguishes military procurement contracts which involve the particular type of governmental discretionary functions that *Boyle* sought to protect in the military context, from those which it did not.[105] The *Boyle* Court, however, adopted this test as the appropriate scope of state law displacement in the military procurement context.[106] A military contractor's state tort liability is very likely to "significantly conflict" with the federal government's discretionary function immunity when military contractors either withdraw from the procurement market or pass on their added liability to the government through higher contract prices, producing the same effect sought to be avoided by the FTCA.[107] This assumption is questionable in the area of civilian procurement.

In *Carley*, the Third Circuit posited that two factors contribute to substantial interference with the federal government's discretionary function immunity if state tort liability is imposed on the civilian contractor. The court reasoned that imposing liability on government contractors for design defects in government-ordered equipment will directly affect the terms of government contracts: contractors will either pass on the finan-

102. *See Carley*, 991 F.2d at 1122 (concluding that the government performs a discretionary function whenever it procures a nonmilitary product with an awareness of its dangers).

103. Although *Boyle* adopted the discretionary function exception as the basis for the contractor defense, the defense does not apply whenever the government exercises its discretionary function immunity in the federal procurement context. *See infra* note 103 and accompanying text (distinguishing discretionary functions protected by *Boyle* from those unprotected).

104. *Boyle*, 487 U.S. at 512. In other words, the integrity of the federal government's discretionary function immunity is threatened, *in some circumstances*, when state law holds the contractor liable for design defects in federally procured equipment. These circumstances only include instances in which contractors are likely to pass the financial burden of their state tort judgments onto the United States despite the government's immunity from the tortious effect of its policy judgments. *See id.*

105. *Carley*, 991 F.2d at 1124. *But see supra* note 67 (arguing reliance on FTCA's discretionary function exception as the basis for the defense creates unintended results).

106. *See Boyle*, 487 U.S. at 512 (adopting the Ninth Circuit's *McKay* test, which the circuit developed for military contractors, as the appropriate scope of displacement for design defects in *military* equipment).

107. *See Boyle*, 487 U.S. at 511-12.

cial burden of state tort law judgments to the United States to cover contingent liability costs, or will decline to manufacture designs specified by the government.[108] The *Boyle* Court articulated this concern, however, only to support its preliminary conclusion that uniquely federal interests in potential civil liabilities arise out of the performance of all federal procurement contracts.[109] The Court in *Boyle* was concerned that passing liability costs for design defects from military contractors to the government would substantially interfere with highly sensitive military decisions and would disturb the delicate balance between equipment safety and combat effectiveness.[110] These same problems do not exist for products readily available on the commercial market. Usually, such products "have been developed in response to the broader needs and desires of end-users in the private sector."[111] Civilian contractors generally will not change their marketing behavior or pricing because they do not enjoy immunity from tort liability with respect to the goods sold to one of their customers, the federal government.[112]

In addition, *Carley* reasoned that state tort law will empower authorities to "second-guess" and significantly interfere with federal policy decisions respecting the design of products for use in civilian projects unless nonmilitary contractors have immunity for design defects.[113] This assumption, however, holds true only when a government contractor's collateral liability to an injured third party impinges on the federal government's decision making by forcing the contractor to either raise its product prices or withdraw from the procurement market.[114] Unlike the modern government contractor defense cases, courts have little reason to fear that civilian contractors will refuse to manufacture most products for the federal government if state

108. *Carley*, 991 F.2d at 1120.

109. *See Boyle*, 487 U.S. at 506; *supra* note 59 and accompanying text. The sole dissenter on the *Carley* court, Judge Becker, states that the majority's cost theory proves too much because liability costs are factored into the price of all products sold to the federal government. *Carley*, 991 F.2d at 1132. Indeed, the Supreme Court's *Stencel* decision implicitly endorsed the practice of factoring potential liability costs into procurement contracts. *See* Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666, 674 (1977); *supra* notes 40, 50.

110. *See supra* note 62.

111. *See In re* Chateaugay Corp., 146 B.R. 339, 350-51 (S.D.N.Y. 1992).

112. *See In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 811 (9th Cir. 1992).

113. *Carley*, 991 F.2d at 1122.

114. *See supra* note 103; *supra* notes 69-70 and accompanying text.

courts "second-guess" their product designs.[115] To the extent that market forces bear on the civilian procurement sector, state tort liability and competitive bidding encourages nonmilitary contractors to keep their contract prices low by producing safer designs.[116] Therefore, holding nonmilitary contractors liable for design defects under state law, in some circumstances, fails to "significantly conflict" with the federal government's discretionary function immunity.

B. The Ninth Circuit Demonstrates a Better Understanding of the *Boyle* Defense

The Ninth Circuit's opinion in *Nielsen v. George Diamond Vogel Paint Co.*,[117] offers a more coherent view of *Boyle*'s government contractor defense as applied to civilian procurement contracts. *Nielsen* addresses whether a contractor who manufactured paint according to federal specifications can invoke *Boyle*'s defense.[118] Although *Nielsen* conceded that *Boyle*'s underlying premise applies to all government contracts, the court stated that *Boyle* does not require civilian contractors to "enjoy an immunity from tort liability as a matter of federal law that they did not enjoy before *Boyle*."[119] According to the *Nielsen* court, the policy behind *Boyle* remains "rooted in considerations peculiar to the military."[120] Thus, a government contractor's state law liability, in most instances, fails to raise a significant conflict with the federal government's discretionary function immunity.[121]

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115. Whether contractors will withdraw from the federal procurement market depends on "how significant their liability exposure is in relationship to suppliers' profits. These are crucial questions in analyzing the impact of a contractor defense on the health of the supplier market, but they are also questions beyond the competence of the Court to explore and assess." Green & Matasar, *supra* note 11, at 717. The *Carley* court nowhere discussed whether or how the GSA exercised its policy judgment immunity by incorporating the defective center of gravity specifications set by Ford Motor Co. into the procurement contract. *See supra* note 85.

116. *See* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 457 (9th Cir. 1983) (Alarcon, J. dissenting).

117. 892 F.2d 1450, 1451 (9th Cir. 1990).

118. *See supra* notes 76-81 and accompanying text (discussing the *Nielsen* decision).

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

120. *Id.* at 1454-55.

121. *See id.* at 1455 ("Under *Boyle*, we can find no reason to hold that application of state law would create a 'significant conflict' with federal policy requiring a displacement of state law.").

C. Extending *Boyle* to All Civilian Procurement Frustrates Public Policy

The Third Circuit's decision in *Carley* uses *Boyle* as a springboard to create a sweeping new rule of federal common law. In so doing, the court creates bad policy and frustrates individual state's interests in compensating its tort victims.[122] The policy justifications supporting the government contractor defense in the military procurement context do not wholly apply to nonmilitary contractors. Strict liability usually vindicates the reasonable expectations of consumers that the products they utilize are not unreasonably dangerous.[123] Military personnel, however, recognize exposure to danger as an immutable feature of their profession.[124] Moreover, the potential users of federally-procured civilian equipment usually do not voluntarily expose themselves to high risks or grave dangers as military personnel do. The government contractor defense, as applied in *Carley*, works an injustice on unsuspecting civilians and broadens the exception to the FTCA's general waiver of federal immunity by withdrawing a remedy from those who deserve protection.[125]

Strict liability also provides a remedy for victims of defective products.[126] The military's generous compensation scheme under the Veteran's Benefits Act at least partially mitigates the unfairness of military contractor immunity.[127] Although the

122. *Carley*, 991 F.2d at 1128 (Becker, J., dissenting); *see supra* notes 15-17 and accompanying text.

123. Bynum v. FMC Corp., 770 F.2d 556, 572 (5th Cir. 1985); *see* Restatement (Second) of Torts § 402A, comment i (1965) (defining an "unreasonably dangerous" product as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary common knowledge to the community as to its characteristics").

124. To regard members of the Armed Forces as ordinary consumers "would demean and dishonor the high station in public esteem to which, because of their exposure to danger, they are justly entitled." Tozer v. LTV Corp., 792 F.2d 402, 407 (4th Cir. 1986).

125. The FTCA waives all immunity from recognized causes of action, it does not withdraw remedies from those who once had one. *See supra* notes 28-32 and accompanying text (explaining scope and nature of the FTCA).

126. Restatement (Second) of Torts § 402A, comment c (1965) (stating that "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained . . .").

127. *See supra* notes 35, 55 (describing that Veteran's Benefits Act benefits provided to injured military personnel in the course of military service); *see also* Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1451 (9th Cir. 1990) (stating that appellant, a federal civilian employee, received partial compensation for his injuries under the Federal Employee Compensation Act).

Boyle defense leaves civilian plaintiffs with no alternative compensation, countervailing separation of powers concerns prevent courts from second-guessing military decisions.[128] Nonmilitary contractor immunity, in most circumstances, will return the nation to the pre-FTCA era by forcing some injured citizens to lobby Congress for relief from the unjust consequences of the government contractor's shared immunity from tort liability.[129]

Civilian contractor immunity also externalizes the deterrent function of strict liability by reducing the incentive to market safe products.[130] Furthermore, contractors that successfully sell goods to both the government and commercial markets may turn their immunity into a competitive advantage over their rivals in the private market by reflecting their lower liability costs through lower product prices on the commercial market. As a result, government contractor immunity will somewhat subsidize the competitive advantage of larger manufacturers, who have the resources to supply both commercial and government markets, over smaller commercial contractors.

D. *Boyle*'s Defense Should Only Extend to Products Not Readily Available in the Commercial Market

Although the Third Circuit's decision in *Carley* extended *Boyle* far beyond its logical limits, the *Boyle* decision supports limited application of the defense to civilian procurement. *Boyle* arguably permits all government contractors to invoke the defense, as long as the operation of state law in federal procurement contracts creates a "significant conflict" with federal interests in preserving the government's discretionary function immunity.[131] In the military context, "significant conflict" occurs whenever the military makes highly complex and sensitive decisions regarding the development of new military equipment. A significant conflict may also arise when contractors begin to withdraw from government procurement or significantly raise their prices to insure against their potential liability for the gov-

128. *See supra* notes 51-52 and accompanying text (noting separation of powers concerns and judicial competence warrant the contractor defense).

129. *See supra* note 29 and accompanying text (explaining the FTCA was designed to mitigate the unjust consequences of the federal government's sovereign immunity from suit).

130. *See* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 452 (9th Cir. 1983) ("A second reason for imposing strict liability is to deter manufacturers from marketing unsafe products by encouraging the use of cost-justified safety features.").

131. *See supra* notes 103-104 and accompanying text.

ernment's designs.[132] When this happens, *Boyle*'s federal common law defense displaces state tort law to protect the federal interests in preserving integrity of the government's decision-making immunity under the FTCA.[133]

Most government procurement in the civilian context fails to raise this "significant conflict" because contractors develop most products in response to the broader needs and desires of the end-users in the private sector.[134] The government procures ambulances, paint and other civilian products commonly available in the commercial market, without the highly complex level of decision making that goes into military procurement, in which the government balances national security against product safety.[135] In *Carley*, for example, the government supplied specifications merely incorporated the center of gravity specifications set by Ford Motor Co.: a specification set by a private manufacturer for all vehicles of that same class. In *Nielsen v. George Diamond Vogel Paint Co.*,[136] the Army Corps of Engineers procured allegedly defective paint products without any special military purpose in mind.[137] As the Ninth Circuit noted in that decision, applying state law would not significantly interfere with any uniquely federal interest.[138] In addition, *Boyle*'s rejection of *Feres* as the triggering mechanism, in favor of the discretionary function, clearly indicated that the government contractor defense did not apply to stock or standard equipment

132. *See supra* note 114.

133. *See* Green & Matasar, *supra* note 11, at 683.

134. *See supra* notes 110-111 and accompanying text.

135. No other case better evidences this than *Carley*. *Carley* expanded Boyle's contractor defense to protect the GSA's decision to incorporate the center-of-gravity specifications supplied by Ford Motor Co. into its procurement contract with Wheeled Coach. *See supra* note 87 and accompanying text. This is hardly the level of discretionary function decision making that *Boyle* intended to protect. *See supra* note 62. *But see supra* note 67 (*Boyle* creates unintended consequences in relying on the FTCA as a basis for the defense). *Carley* expands the reach of *Boyle*'s common law defense based on a dubious assumption that holding Wheeled Coach liable under state tort law will significantly conflict with the GSA's discretionary function immunity.

The federal government procures some civilian products—such as NASA's space shuttle—with careful attention the needs and desires of the ultimate end-user in mind, and state law will substantially interfere with the government's discretionary function immunity in this instance if liability forces NASA contractors to withdraw from the federal procurement market or raise their prices. *See supra* note 103.

136. 892 F.2d 1450 (9th Cir. 1990).

137. *Id.* at 1455 (noting that this case involved a "product designed to further civilian rather than military objectives").

138. *Id.*

purchased by the government.[139] Fashioning the appropriate scope for the government contractor defense requires a far greater understanding of the procurement process than the courts can institutionally command.[140] *Carley*'s government contractor defense envisions a model of government procurement that may not reflect reality. The way in which contractor liability would inhibit the decision making of government contracting officials remains difficult to assess.[141] The infrequency of contractual indemnification also suggests that liability costs do not powerfully influence suppliers' willingness to participate in the market.[142]

In addition, the *Carley* defense assumes that the government makes design decisions involving the trade-off between product safety and special matters of public policy. Most government procurement involves design decisions based on standard risk-benefit decisions and may not implicate policy judgments the government's discretionary function immunity was intended to protect.[143] Furthermore, the *Carley* defense assumes that federal procurement officials scrupulously review all design specifications submitted to the government for approval. Instead, officials make many design decisions implicating product safety without serious review. Government can more efficiently obtain the requisite product safety it desires by imposing liability on the contractors rather than by relying on government employees to critically review design specifications.[144] Congress has the institutional capacity to test these procurement assumptions and to balance end-user expectations against protection of the federal interests associated with discretionary function immunity.[145]

Carley's new rule of federal common law unnecessarily upsets federal and state relations by withdrawing strict liability remedies from a whole new class of citizens, without a strong

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

140. The Supreme Court's decision in *Boyle*, as well as the Third Circuit's opinion in *Carley*, bases a federal common-law defense on the assumption that in the absence of contractor immunity, increased costs to government will harm government decision making. *See* Green & Matasar, *supra* note 11, at 660. *Boyle* fails to explain why the effect of increased liability costs on other private party cases is speculative while the present case presents a "significant conflict" with federal interests in decision making. *Id.*

141. *See* Green & Matasar, *supra* note 11, at 716-17.

142. *Id.* at 718 n.297.

143. *See id.* at 718, 718 n.300.

144. *Id.* at 718.

145. *See supra* note 134 and accompanying text.

showing that federal interests will suffer major damage if courts apply state law.[146] *Carley*'s defense reverses the historical trend favoring waiver of the government's sovereign immunity, and does so without really understanding the complexities of government procurement. Before federal courts create a new doctrine "to answer 'questions of policy on which Congress has not spoken', [they] have a special duty to identify the proper decisionmaker before trying to make the proper decision."[147]

CONCLUSION

Carley misread the *Boyle* decision to create a new rule of federal common law which, in turn, frustrates public policy by withdrawing firmly established state tort law remedies and expanding the scope of the federal government's immunity under the FTCA. *Carley* failed to demonstrate how imposing tort liability on an ambulance manufacturer for alleged design defects significantly impedes federal policymaking immunity other than by potentially transferring an undetermined amount of tort liability costs onto the government. Congress has the superior institutional capacity to test policy assumptions in support of government contractor immunity and to define the protected scope of federal policymaking authority, as it did with the FTCA. Meanwhile, courts should limit the government contractor defense outside the military context to products having no substantial commercial market component. This limitation ensures that the defense is precisely tailored to protecting the delicate balance between the individual state's interests in protecting tort victims and preserving government decision-making immunity.

146. *See supra* note 61 (describing *Boyle* dissent's criticism of the Court's federal common law analysis).

147. *Boyle*, 487 U.S. at 531 (Stevens, J., dissenting).