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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

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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

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I. Introduction

It has been said that the Founding Fathers created a "fighting [C]onstitution."[1] The Preamble expressly provides that one of the Constitution's purposes is to "provide for the common defence [sic]."[2] While the Constitution grants Congress and the Executive clear powers for achieving this purpose,[3] the judiciary is given little or no role.[4] In recognition of this express constitutional grant of authority, the judiciary has afforded unparalleled deference to congressional and executive action in military matters.[5] On many occasions, the Supreme Court has recognized

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1. Lichter v. United States, 334 U.S. 742, 782 (1948) (quoting Honorable Charles E. Hughes, War Powers Under the Constitution, Address Before the American Bar Association (Sept. 5, 1917), *in* 42 A.B.A. REP. 232, 248 (1917)).

2. U.S. CONST. pmbl.

3. U.S. CONST. art. I, § 8, cls. 1, 11, 12, 13, 15, 16; U.S. CONST. art. II, § 2, cl. 1.

4. *See* Chappell v. Wallace, 462 U.S. 296, 300-01 (1983).

5. *See, e.g.*, *id.* at 301; Schlesinger v. Ballard, 419 U.S. 498, 510 (1975); *see also* Earl F. Martin, *Separating United States Service Members from the Bill of Rights*, 54 SYRACUSE L.

that it is the primary business of the military to prepare for and fight wars[6] and that the judiciary is simply not constitutionally empowered or competent to second-guess military matters.[7]

Soldiers and civilians are also different. Military society is constitutionally distinct from civilian society.[8] Military society requires a level of obedience, duty, and self-sacrifice not found in civilian life.[9] Many legal distinctions between servicemembers and civilians are justified by these fundamental differences and by the overriding demands of military discipline. For example, while civilians may bring claims against the United States for damages they suffer as a result of government negligence,[10] the *Feres* doctrine precludes servicemembers' suits where their injuries arise incident to their military service.[11] Similarly, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[12] the Supreme Court held that civilians may seek damages from the federal officials who violate their constitutional rights.[13] *Bivens* claims by servicemembers, however, are barred if the constitutional violation occurred incident to their military service.[14] In both instances, the Court justified different rules for civilians and servicemembers because of the constitutional allocation of military control to the political branches of government and the detrimental effects such suits might have on military discipline.[15]

REV. 599 (2004) (discussing development of "separate community doctrine," whereby the Supreme Court has interpreted constitutional allocation of military matters to political branches of government as requiring tremendous deference by the judiciary).

6. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

7. *E.g.*, Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

8. *See, e.g.*, Solorio v. United States, 483 U.S. 435, 450-51 (1987) (upholding court-martial jurisdiction, without Fifth Amendment's right to grand jury and Sixth Amendment's jury trial requirement, over armed services members at time of offense charged, even where crime has no connection to military service); Parker v. Levy, 417 U.S. 733, 756 (1974) (holding that fundamental necessity of obedience and discipline may render speech protected in the civil population unprotected in the military); Martin, *supra* note 5 (discussing Supreme Court jurisprudence in "separate community doctrine," whereby judiciary has been scrupulous not to interfere in military matters constitutionally allocated to political branches of government); *see also* Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597 (maintaining that Rehnquist Court has abdicated its responsibility to review civil claims involving military matters).

9. Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).

10. Federal Tort Claims Act, 28 U.S.C. § 2674 (2000).

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

12. 403 U.S. 388 (1971).

13. *Id.* at 392.

14. United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983).

15. *See infra* Part IV.D.1.

Likewise, the lower federal courts developed a federal common law defense, the "government contractor defense,"[16] that barred state law design defect claims by servicemembers injured incident to service against military equipment manufacturers, provided that the design conformed to reasonably precise specifications approved by the United States.[17] The defense was based upon the *Feres* doctrine and was justified for many of the same reasons. Paramount among these justifications were concerns that resolution of such suits would necessarily require the second-guessing of military

16. The courts have not been entirely uniform in their identification of the defense. Various courts have referred to the defense as the "military contractors' defense," *e.g.*, Sharkey v. United States, 17 Cl. Ct. 643 (Cl. Ct. 1989), the "government contractor defense," *e.g.*, Hercules Inc. v. United States, 516 U.S. 417 (1996), the "government contractor's defense," *e.g.*, Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 582 (1996), and the "government contractors' defense," *e.g.*, Fisher v. Halliburton, 390 F. Supp. 2d 610 (S.D. Tex. 2005). For the sake of clarity, this article refers to the defense as the "government contractor defense" except when discussing the proposed new defense limited to claims by servicemembers injured incident to service. That defense will be referred to as the "military contractor defense," as that term more accurately describes the parameters of the proposed defense.

17. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987) (defoliant); Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986) (reconnaissance aircraft); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985) (carrier-launched aircraft); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985) (tracked Army vehicle); *In re* Air Crash Disaster at Mannheim Germany, 769 F.2d 115 (3d Cir. 1985) (Army helicopter); Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985) (front-end loader); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983) (naval aircraft); Casabianca v. Casabianca, 428 N.Y.S.2d 400 (N.Y. Sup. Ct. 1980) (dough-mixing machine).

decisions and that such suits might have a detrimental effect on military discipline.[18]

Nevertheless, when the Supreme Court addressed the government contractor defense in *Boyle v. United Technologies Corp.*,[19] it rejected the appellate court's assertion that the *Feres* doctrine was the source of the unique federal interest justifying the creation of the federal common law defense.[20] Instead, the *Boyle* Court based the government contractor defense on the discretionary function exception to the Federal Tort Claims Act (FTCA).[21] Under the discretionary function exception to the FTCA, Congress refused to waive the sovereign immunity of the United States for government decisions grounded in social, economic, or political policy.[22] The Court reasoned that allowing state law products liability design defects claims would result in the United States indirectly paying the liability costs—in the form of higher prices—and that this would impermissibly interfere with the discretion of government officials.[23]

The *Boyle* Court's focus on the effect the "financial burden" of products liability judgments might have upon government discretion in procurement, rather than on avoiding judicial interference in military matters and military discipline, removed the government contractor defense from its military foundation and necessarily broadened the scope of the defense. Suits by both civilians and servicemembers have the potential to increase the financial burden on the procurement of military equipment. Accordingly, *Boyle*'s government contractor defense, based upon the discretionary function exception to the FTCA, necessarily bars claims brought by soldiers and civilians alike.[24]

In addition, lower federal courts disagree as to the proper scope of the discretionary function-based defense. If protecting government discretion is the focus of the defense, then it is not logically limited to design defects

18. *E.g.*, *Shaw*, 778 F.2d at 742 (stating that military must be free to decide risks of injury to servicemen from equipment designs it orders without judicial interference); *Bynum*, 770 F.2d at 565 (asserting that litigation involving defective designs in military products, whether against government or contractor, would allow servicemembers to "question military decisions and obtain relief from actions of military officials"); *McKay*, 704 F.2d at 449 (holding military suppliers liable for defective designs approved by United States would thrust judiciary into making military decisions).

19. 487 U.S. 500 (1988).

20. *Id.* at 501.

21. *Id.*

22. United States v. Varig Airlines, 467 U.S. 797, 814 (1984) (discussing legislative history of the FTCA).

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

24. *Id.*

specifically approved by the government[25] but should apply to all procurement decisions grounded in social, economic, or political policy. Similarly, there is a split in the courts as to whether the defense applies only to military procurement[26] or to all government procurement, including non-military products procured for non-military use.[27] Numerous cases and commentators have been critical of the ever-expanding scope of the government contractor defense under *Boyle*.[28] At some point, the Supreme Court will have to resolve the disputes in the lower courts as to the scope of the defense.

This article asserts that the Supreme Court erred when it abandoned the *Feres*-based rationale for the government contractor defense, and proposes

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25. *Compare* Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242, 245 (5th Cir. 1990) (determining defense applies only to design defect claims), *with* Snell v. Bell Helicopter Textron, Inc., 107 F.3d 744, 749 (9th Cir. 1997) (applying defense to manufacturing defect claim), Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 1003 (7th Cir. 1996) (applying defense to warnings defect claim), *and* Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1489 (C.D. Cal. 1993) (applying defense to manufacturing defect claim).

26. *In re* Haw. Fed. Asbestos Cases, 960 F.2d 806, 812 (9th Cir. 1992) (holding defense not applicable to commercially available products but is limited to specialized military equipment); Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1453-55 (9th Cir. 1990) (stating defense does not apply to non-military products).

27. Carley v. Wheeled Coach, 991 F.2d 1117, 1119 (3d Cir. 1993) (defective ambulance design); Adorno v. Corr. Servs. Corp., 312 F. Supp. 2d 505, 521 (S.D.N.Y. 2004) (assuming defense would apply in non-military context but finding it did not apply for other reasons); Yeroshefsky v. Unisys Corp., 962 F. Supp. 710, 717 (D. Md. 1997) (U.S. Post Office letter sorting machine); Fagans v. Unisys Corp., 945 F. Supp. 3, 6 n.3 (D.D.C. 1996) (U.S. Post Office letter sorting machine); Andrew v. Unisys Corp., 936 F. Supp. 821 (W.D. Okla. 1996) (U.S. Post Office letter sorting machine); Wisner v. Unisys Corp., 917 F. Supp. 1501, 1509-10 (D. Kan. 1996) (U.S. Post Office letter sorting machine); Guillory v. Ree's Contract Serv., Inc., 872 F. Supp. 344, 346 (S.D. Miss. 1994) (applying defense to claim against security company for negligent performance of security contract for federal building where plaintiff was assaulted); Richland-Lexington Airport Dist. v. Atlas Props., Inc., 854 F. Supp. 400, 422 (D.S.C. 1994) (applying defense to preclude claim for negligent performance of contract with EPA to excavate, remove, and stockpile contaminated soil); Johnson v. Grumman Corp., 806 F. Supp. 212, 217-18 (W.D. Wis. 1992) (postal vehicle); *In re* Chateaugay Corp., 132 B.R. 818, 827 (Bankr. S.D.N.Y. 1991) (postal vehicle); Silverstein v. Northrop Grumman Corp., 842 A.2d 881 (N.J. Super. Ct. App. Div. 2004) (postal vehicle); *see also* Sean Watts, Note, Boyle v. United Technologies Corp. *and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense*, 40 WM. & MARY L. REV. 687 (1999) (discussing circuit split and concluding that Congress should resolve existing confusion by crafting comprehensive government contractor defense).

28. *See* Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from* Boyle*'s Government Contractor Defense*, 63 S. CAL. L. REV. 637, 698 (1990).

a "military contractor defense" designed principally to protect federal interests in military procurement and in the unique demands of military discipline. Mooring the defense to a military-centered rationale would provide a clear and logical scope to its application and would eliminate the current division between the courts. The military contractor defense, tailored to protect both the constitutional allocation of military matters to the political branches of government and the demands of military discipline, is—to borrow the Court's own terminology from *Boyle*—simultaneously narrower and broader than *Boyle*'s government contractor defense. It is narrower because it would apply only to claims brought by servicemembers injured incident to their service and not to claims brought by injured civilians. It is broader because it is not limited to design defect claims where the government has approved the design feature at issue in the suit. Nor is the defense limited to specialized military equipment; rather, it applies to all militarily procured products. The military contractor defense precludes all products liability claims against defense contractors brought by servicemembers injured incident to service. The expansion is justified by the same rationale used by the Court to bar *Bivens* claims by servicemembers and negligence claims under the *Feres* doctrine: Military discipline is compromised when servicemembers are permitted to question the judgment, orders, and actions of fellow servicemembers, military superiors, and the political branches of the government charged with

equipping and running the military.[29]

Part II of this article traces the origins and development of the government contractor defense prior to the Court's decision in *Boyle*. Specifically, Part II examines the critical role concerns for separation of powers in military matters and military discipline played in the development of the defense. Beginning with the *Feres* decision, it follows the circuitous path of Supreme Court jurisprudence from its ill-explained beginnings in *Feres* to its later rationales of separation of powers and military discipline. It then follows the lower courts' application of the *Feres* doctrine and rationales to bar servicemembers' design defect claims against independent contractors producing military equipment. Part II pays particular attention to how a lack of clarity in *Feres* may have resulted in its rejection by the Court in *Boyle*.

Part III examines the Court's decision in *Boyle* and its deliberate foundational shift from a *Feres*-based deference in military matters to a broader discretionary function exception to the FTCA. The Court justified the shift as necessary to protect government discretion from the impact contractor liability could have upon the cost and availability of products the government needs. The focus on fiscal concerns and their impact on government discretion has produced conflicting interpretations as to the scope of the defense. Part III also provides a critical evaluation of the government contractor defense under the *Boyle* formulation, which is neither logically limited to military procurement, nor logically limited to design defects resulting from reasonably precise government specifications required by or approved by the government.

Part IV proposes an alternative federal common law military contractor defense that reunites the defense to its military foundation and recognizes the important differences between military and non-military government procurement and between civilian and military plaintiffs. After setting out the military contractor defense, Part IV explains its basis in the constitutional separation of powers and the federal interest of military discipline. The defense would displace state tort law only where the distinct federal interests of separation of powers in military matters and military discipline are most implicated. The proposed rule is broader than the *Boyle* government contractor defense in that it precludes all suits by servicemembers against military contractors based upon state products liability law. This broad preclusion serves separation of powers principles and protects military discipline even where the narrow discretionary design judgments protected by the *Boyle* test are not implicated. The rule is also

29. United States v. Stanley, 483 U.S. 669, 683-84 (1987); Chappell v. Wallace, 462 U.S. 296, 300 (1983).

narrower than the *Boyle* government contractor defense in that it would not apply to civilian suits against government contractors because military discipline is not directly affected in these cases. The narrower rule recognizes that civilians, unlike servicemembers, are not compensated by military or veterans' benefits for their injuries and do not voluntarily assume the risks of injuries associated with the use of military equipment. By adopting the military contractor defense, the Supreme Court would provide the lower courts with a clear and logical doctrine, grounded upon distinctions long recognized by the Court.

II. The Military Origins of the Government Contractor Defense

Prior to the Supreme Court's decision in *Boyle*, the government contractor defense had been firmly limited to suits by servicemembers involving claims related to military procurement because the defense was based upon the same federal interests supporting the *Feres* doctrine. Unfortunately, the Court's decision in *Feres* has been justifiably subject to wide criticism and misunderstanding.[30] Much of the misunderstanding results from the Court's failure to articulate military discipline as the primary rationale for the doctrine until some forty years after the *Feres* decision.[31] In order to understand the pre-*Boyle* government contractor defense cases and the Court's rejection of *Feres* as the basis for the government contractor defense in *Boyle*, we must thoroughly understand the origin and evolution of *Feres* and its progeny.

A. The Development of the Feres *Doctrine as a Bar to Claims Against the Government*

30. *See* Hinkie v. United States, 715 F.2d 96, 98 (3d Cir. 1983) (reluctantly following *Feres* while referring to its doctrine as "unfair"); *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246-47 (E.D.N.Y. 1984) (listing cases and commentators critical of *Feres*); Barry Bennett, *The* Feres *Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U. L.J. 383 (1984).

31. United States v. Johnson, 481 U.S. 681, 690-91 (1987) (citing United States v. Shearer, 473 U.S. 52, 59 (1985)).

In *Feres*, the Court considered three cases where the claimants were injured incident to their military service while on active duty, due to the negligence of other servicemembers.[32] After reviewing the history and the language of the FTCA, the Court found that Congress did not intend to extend a remedy to claims brought by military members for injuries received incident to their service.[33] To read the Act otherwise would create a novel

32. Feres v. United States, 340 U.S. 135 (1950). The Feres claim was for wrongful death resulting from a barracks fire caused by a defective heater and an inadequate fire watch. *Id.* at 136-37. The Jefferson claim involved medical negligence related to surgery performed by an Army surgeon that left a 30-inch-long towel marked "Medical Department U.S. Army" in the patient. *Id.* at 137. The Griggs claim was a wrongful death suit also based upon medical negligence. *Id.*

33. *Id.* at 140-42. First, the FTCA only provided that the United States shall be liable "to the same extent as a private individual under like circumstances." *Id.* at 141. The Court noted the paucity of guiding material available to aid the Court's task, but expressed comfort in knowing that Congress could easily correct any misinterpretations the Court might make. *Id.* at 138. The Court then held that since no private person can raise an army and no state has consented to suit by members of its militia, there can be no parallel liability on the United States for incident to service injuries. *Id.* at 141-42. Second, the distinctively federal character of the relationship between the government and its Armed Forces members must be governed by federal law. The Court indicated that it would not make sense to have a servicemember's right to recovery for incident to service injuries depend upon the geographical place of his service, over which he had no choice. *Id.* at 143. Third, the FTCA was intended to extend a remedy to

cause of action and expose the Government to "unprecedented liabilities" beyond the purpose of the Act.[34] The Court did not directly reference military discipline as a rationale justifying the defense, although separation of powers concerns and the unique federal interest in the relationship between soldiers and the government were alluded to, albeit rather obscurely.[35] *Feres*' progeny, however, drew a much more direct connection between the *Feres* doctrine and the concerns of military discipline and deference to the political branches of government in military matters.

In *United States v. Brown*,[36] decided four years later, the Court considered the *Feres* doctrine in the context of a civilian plaintiff and a military defendant. Brown brought suit for negligent treatment he received in a Veterans' Administration hospital six years after receiving an honorable discharge due to knee injuries sustained on active duty.[37] The Court held that Brown's claim was not barred by the *Feres* doctrine because his damages resulted from negligence occurring after his discharge while he enjoyed civilian status.[38] Brown's civilian status at the time of the alleged injury was critical because it minimized his claim's implications for military discipline. The Court explained as follows:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.[39]

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those who were denied compensation under sovereign immunity. Servicemembers, however, were already permitted generous compensation under the Veterans' Benefits Act and other service benefits systems. Congress, the Court concluded, would not have provided an FTCA remedy in addition to the existing comprehensive benefits without including some sort of adjustment provision to prevent a double recovery. *Id.* at 144.

34. *Id.* at 142.

35. *Id.* at 143-44 ("To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority." (quoting United States v. Standard Oil Co., 332 U.S. 301, 305-06 (1947))).

36. 348 U.S. 110 (1954).

37. *Id.* at 111-12. Brown was discharged in 1944 and the knee operations were performed by the Veterans Administration in 1950 and 1951. *Id.* at 110.

38. *Id.* at 112. Brown alleged that during the 1951 surgery he received permanent nerve damage to his leg as a result of the negligent use of a defective tourniquet. *Id.*

39. *Id.* While the Court cited *Feres*, 340 U.S. at 141-43, as support for this rationale, it

Where the injured plaintiff is a civilian, however, claims of negligence against military personnel do not directly impact military discipline because the civilian plaintiff is not subject to military discipline.[40] In subsequent cases, the Court fully embraced this shift in focus from fiscal concerns to separation of powers and military discipline considerations, describing the other factors as "no longer controlling."[41]

The focus on military discipline in the *Feres* doctrine was further refined in *United States v. Johnson*,[42] decided just one year before *Boyle*, in which the Court applied the *Feres* doctrine to a case involving a Coast Guard helicopter pilot killed as a result of the alleged negligence of a Federal Aviation Administration (FAA) civilian employee.[43] In this context—military plaintiff versus civilian government employee—the Court was required for the first time to determine whether the military status of the tortfeasor was critical to the application of the *Feres* doctrine.[44]

The Court held that *Feres* precluded FTCA suits against the government by servicemembers for injuries arising out of incident to service activity, regardless of the military or civilian status of the government tortfeasor.[45] The Court recognized that civilian employees of the government, such as FAA employees, have established working relationships with the military and often "play an integral role in military activities."[46] Although Johnson's suit did not directly allege negligence on the part of the military, such a suit would nevertheless implicate military judgments and interfere with military discipline. As the Court explained:

> [M]ilitary discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's

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would require a perceptive and creative reading of *Feres* to reach that conclusion; subsequent cases applying *Feres* acknowledge that *Brown* was the first time the Court clearly articulated this rationale. *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977) (applying *Feres* rationale to bar a cross-claim against the United States seeking indemnity for claim by pilot injured by alleged malfunction of ejection system on fighter aircraft).

40. *Brown*, 348 U.S. at 112.

41. United States v. Shearer, 473 U.S. 52, 58 n.4 (1985). In *Shearer*, the Court barred an FTCA suit seeking compensation for an Army private kidnapped and murdered by another Army private due to alleged negligent supervision by the Army. *Id.* at 54. The Court stated that *Feres* was best explained by the concerns, articulated in *Brown*, for the effects such suits might have on military discipline generally. *Id.* at 57. The other factors were described as "no longer controlling." *Id.* at 58 n.4.

42. 481 U.S. 681 (1987).

43. *Id.* at 690-91.

44. *Id.* at 686.

45. *Id.* at 692.

46. *Id.* at 691 n.11.

> country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.[47]

Focusing on the military status of the plaintiff, the Court emphasized that the military is in every respect a "specialized society."[48] Permitting claims brought by servicemembers for incident to service injuries would involve the judiciary in sensitive military matters constitutionally allocated to the political branches of government.[49] These concerns, more than any other rationale, require the military status of the plaintiff, not the tortfeasor, to be paramount to the *Feres* doctrine.

In a vigorous dissent to the *Johnson* decision, Justice Scalia attacked the *Feres* doctrine generally and its application to suits by military members against civilian government employees in particular.[50] Foremost in Justice Scalia's criticism was his conclusion that *Feres* was at odds with the congressional intent expressed in the FTCA exception disallowing "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[51] This exception clearly indicated to Justice Scalia that Congress specifically considered the special requirements of the military and crafted an exception much more limited than the incident to service exception adopted by the Court in *Feres*.[52] Justice Scalia's dissent then systematically and compellingly attacked the original rationales supporting *Feres*, before acknowledging that "the later-conceived-of 'military discipline' rationale [serves] as the 'best' explanation" for *Feres*.[53] While Justice Scalia conceded the "possibility that

47. *Id.* at 691.

48. *Id.*

49. *Id.* at 690-91 (citing Goldman v. Weinberger, 475 U.S. 503, 507 (1986); Parker v. Levy, 417 U.S. 733, 743 (1974)).

50. *Id.* at 692-702 (Scalia, J., dissenting). Justice Scalia's dissent was joined by Justices Brennan, Marshall and Stevens.

51. *Id.* at 693 (quoting 28 U.S.C. § 2680(j) (1982)) (emphasis omitted) (alteration in original). In response to Justice Scalia's dissent, the Court noted that in the forty years since the *Feres* decision, Congress had taken no action to alter "any misinterpretation" of its intent, despite the Court's invitations to do so if it erred in *Feres*. *Id.* at 688 n.9 (majority opinion).

52. *Id.* at 693 (Scalia, J., dissenting).

53. *Id.* at 698-99 (citing United States v. Shearer, 473 U.S. 52, 57 (1985); Chappell v. Wallace, 462 U.S. 296, 299 (1983); United States v. Muniz, 374 U.S. 150, 162 (1963)); *see also* Green & Matasar, *supra* note 28, at 710-11 (speculating that the Court's rejection of *Feres* as the foundation for the government contractor defense lies in Justice Scalia's dissenting opinion in *Johnson*).

some suits brought by servicemen will adversely affect military discipline," the effect was not so substantial as to justify interpreting the FTCA in a way he believed was clearly contrary to Congress's intent.[54]

Justice Scalia's dissent is not an attack on the perceived importance of military discipline or on the Court's reluctance to interfere with the political branch's military decisions. Instead, it is an attack on what Justice Scalia saw as judicial second-guessing of Congress's intent in drafting the FTCA, disregarding the plain language of the statute itself.[55] This disdain for a perceived judicial trespass on congressional intent is never raised in *Boyle*. It may, however, offer a better explanation for the Court's rejection of *Feres* as the basis of the government contractor defense than the Court's opinion in *Boyle*.[56]

B. The McKay *Test Adopts the* Feres *Rationales to Bar Claims by Servicemembers Against Government Contractors*

At the same time the *Feres* rationales were developing for claims brought directly against the government, the courts were also applying the rationales of *Feres* to bar claims brought by servicemembers against government contractors for design defects. Because the Supreme Court narrowed the *Feres* doctrine's rationales primarily to military discipline, the lower courts focused on military discipline in government contractor cases.

In *McKay v. Rockwell International Corp.*,[57] the Ninth Circuit considered consolidated maritime actions concerning two Navy pilots killed in unrelated crashes of RA-5C aircraft off the coast of Florida.[58] Both pilots were forced to eject when their aircraft caught fire during training missions.[59] Autopsies revealed that the pilots' deaths were probably caused by injuries sustained as a result of the ejections.[60] Rockwell manufactured

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54. *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting).

55. *Id.*

56. Green & Matasar, *supra* note 28, at 710-11 (noting that the best explanation for the *Boyle* Court's rejection of *Feres* can be found in Justice Scalia's dissent in *Johnson*); David E. Seidelson, *From* Feres v. United States *to* Boyle v. United Technologies Corp.*: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 DUQ. L. REV. 219, 261 (1994) (noting a cynic might conclude the Court rejected *Feres* as the foundation for the government contractor defense for reasons articulated in Scalia's dissent in *Johnson*, rather than reasons stated in the *Boyle* opinion).

57. 704 F.2d 444 (9th Cir. 1983).

58. *Id.* at 446-47. Jurisdiction of the court was alleged under both general maritime law and the Death on the High Seas Act. *Id.* at 447 & n.1 (citing 46 U.S.C. §§ 761-767 (1982)).

59. *Id.* at 446.

60. *Id.*

both the aircraft and the ejection system, and the district court held Rockwell strictly liable for design defects in the ejection system.[61]

On appeal, the Ninth Circuit reversed the judgment for the plaintiffs, finding that the government contractor defense precluded recovery by servicemembers from suppliers of military equipment for design defects approved by the government.[62] The court held that the rationales for the defense paralleled those supporting the *Feres* doctrine.[63] The court emphasized that resolving defective design claims regarding military equipment for which the government approved the design would necessarily force the judiciary to second-guess military decisions.[64] The exigencies of national defense compel the United States to push technological limits and to incur risks that would be unacceptable in ordinary consumer goods.[65] Trials to resolve such claims would require military members to testify about their actions and the decisions of their superior officers, raising concerns about the negative effect this might have on military discipline.[66] In addition, the defense protects the government from the liability costs arising from injuries to military personnel sustained within the scope of their service.[67] Allowing servicemembers' suits against a government contractor would subvert this protection, because the liability costs would be passed on to the government "through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales."[68]

To effectuate a defense addressing these concerns, the *McKay* court adopted the following test for the government contractor defense:

> [A] supplier of military equipment is not subject to . . . liability for a design defect where: (1) the United States is immune from

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61. Specifically, the district court applied the version of strict products liability found in the *Restatement (Second) of Torts*, section 402A. *McKay*, 704 F.2d at 447 (citing Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1978) (applying *Restatement (Second) of Torts*, section 402A to admiralty)).

62. *McKay*, 704 F.2d at 447.

63. *Id.* at 449.

64. *Id.*

65. *Id.* at 449-50. The court also noted that the government contractor may not be free to adopt designs that would satisfy products liability law intended to govern ordinary commercial goods. *Id.* Imposing liability exclusively on the contractor under such circumstances would unfairly allocate full responsibility on the contractor for acts partially or wholly attributable to the government. *Id.* at 450 (citing *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 794 (E.D.N.Y. 1980)).

66. *Id.* at 449.

67. *Id.* at 449 n.7.

68. *Id.* at 449.

> 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 . . . dangers involved in the use of the equipment that were known to the supplier but not to the United States.[69]

This test allows the contractor to exercise initiative and discretion in the formulation of the product design, without liability, as long as the government is involved in the process and approves the final design.[70] While this test works within the facts of a case involving a design defect claim, the court never considered whether the same rationale justified the application of the defense to other products liability claims.[71]

The *McKay* test was adopted by the Fourth Circuit Court of Appeals in *Tozer v. LTV Corp.*,[72] in which the widow of a Navy pilot brought claims under the Death on the High Seas Act and general maritime law.[73] She raised strict liability and negligent design claims regarding a maintenance access panel known as a "Buick Hood," which was alleged to have caused the crash of a Navy RF-8G reconnaissance aircraft when it came off during flight.[74] At the Navy's request, the defendant had modified the access panel to allow rapid, easy access, employing quick-fastening "camlocks" which could be released by the turn of a screwdriver.[75] Tozer contended that the design failed because the defendant did not use redundant camlocks to prevent the panel from opening during flight should a single camlock fail due to foreseeable wear, vibration, or corrosion.[76] The trial court instructed the jury that the government contractor defense precluded recovery on the basis of strict liability but that the defense did not apply to the negligent design claim. The jury returned a verdict for Tozer and the defendant appealed.[77]

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69. *Id.* at 451. The *McKay* court apparently intended to limit the application of the defense to equipment with a unique military function, but did not define that term other than to note that the line separating "military equipment" from ordinary consumer goods used by the military would be drawn somewhere between a can of beans and the reconnaissance aircraft at issue in that case. *Id.*

70. *Id.* at 450-51.

71. *See infra* Part III.C (discussing incongruity of *McKay* test and rationale for the defense).

72. 792 F.2d 403 (4th Cir. 1986).

73. *Id.* at 404.

74. *Id.*

75. *Id.*

76. *Id.* at 404-05.

77. *Id.* at 405.

On appeal, the Fourth Circuit reversed the verdict and remanded the case for entry of judgment in favor of the defendants on the basis that the government contractor defense precluded recovery on both the negligent design and strict liability claims.[78] In adopting the government contractor defense, the *Tozer* court focused almost entirely on the constitutional allocation of military matters to the political branches of government and on military discipline concerns.[79] The court noted that the close working relationship between the military and its defense contractors makes it almost impossible to contend that a contractor defectively designed a piece of military equipment without actively criticizing a military decision.[80] Litigation would require that servicemembers question military decisions in civilian courts, even where the suit is brought only against the defense contractor.[81] Appropriate civilian scrutiny over the safety and necessity of weapon systems is exerted through executive and legislative oversight, not through lawsuits by servicemembers seeking monetary damages.[82] The *Tozer* court then adopted the test for the government contractor defense applied by *McKay*, without any critical analysis as to whether the test was properly tailored to fit the federal interest justifying the defense.[83]

The history of the *Feres* doctrine demonstrates that it was not clearly explained or justified at its inception, but subsequent cases refined the analysis and clarified its underlying concerns as military discipline and separation of powers. The doctrine was then applied to servicemember suits against government contractors in design defect cases. Some thirty-eight years after *Feres*, the *Boyle* Court embarked on an entirely new direction for the government contractor defense.

III. Boyle v. United Technologies Corp.*: A New Rationale for the Government Contractor Defense*

78. *Id.* at 409. Although the cause of action in *Tozer* arose under federal law, general maritime law, and the Death on the High Seas Act, the court noted that the federal defense would apply equally to state law claims under diversity jurisdiction because of the paramount federal interests at issue. *Id.* at 409 n.3.

79. *Id.* at 405-06. In the absence of the defense, the judiciary would be invited to "second-guess" purely military decisions regarding the design of, in this instance, a sophisticated reconnaissance aircraft.

80. *Id.* at 406.

81. *Id.*

82. *Id.* at 406-07.

83. *Id.* at 408; *see also infra* Part III.C (discussing incongruity of *McKay* test and rationale for the defense).

A. Shifting from Military Deference to Fiscal Concerns and Government Discretion

In *Boyle v. United Technologies Corp.*,[84] a United States Marine Corps helicopter co-pilot was killed during a training exercise when his CH-53D helicopter crashed off the coast of Virginia Beach, Virginia.[85] Boyle's father brought suit against the Sikorsky Division of United Technologies, the builder of the helicopter under a contract with the United States.[86] He alleged that Sikorsky had defectively repaired a servo in the flight control system causing the crash. He further alleged that Boyle survived the impact but drowned as a result of a defectively designed co-pilot's emergency escape system.[87] Specifically, he alleged that Boyle was unable to open the co-pilot's emergency escape hatch because the escape hatch handle was obstructed by other equipment and because water pressure held the hatch closed, since the hatch was designed to open out rather than in.[88]

The Fourth Circuit reversed a jury verdict in Boyle's favor, holding that Boyle had failed to prove that repair work performed by Sikorsky caused the crash and that the defective design claims were precluded by the "military contractor defense"[89] that the Fourth Circuit first recognized the same day in *Tozer v. LTV Corp.*[90] The court did not expand upon its analysis in *Tozer* but simply applied the government contractor defense to the facts in *Boyle*.[91] Because the evidence established that the Navy and Sikorsky had worked together in the design of the helicopter and that the Navy reviewed and approved a detailed mock-up of the cockpit and escape hatch,[92] the Fourth Circuit had little difficulty applying the *McKay* test and finding that the government contractor defense precluded Boyle's claims against Sikorsky for both negligence and breach of warranty.[93]

Upon Boyle's appeal, the Supreme Court approved the creation of a federal common law government contractor defense in a five-to-four

84. 487 U.S. 500 (1988).

85. *Id.* at 502.

86. *Id.*

87. *Id.* at 503.

88. *Id.*

89. Boyle v. United Techs. Corp., 792 F.2d 413, 414 (4th Cir. 1986), *vacated*, 487 U.S. 500 (1988). Boyle alleged both negligence and breach of warranty in the design of the escape hatch. Virginia products liability law has never recognized a strict liability cause of action in products liability, but Virginia's breach of warranty cause of action is closely related to the strict liability claim recognized in the *Restatement (Second) of Torts*, section 402A. Lust v. Clark Equip. Co., 792 F.2d 436, 439 (4th Cir. 1986).

90. *Boyle*, 792 F.2d at 414 (citing Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986)).

91. *Id.* at 415.

92. *Id.*

93. *Id.* at 415-16.

decision, but rejected *Feres* as the basis for the defense.[94] Writing for the five-member majority, Justice Scalia acknowledged that federal common law may preempt state law in areas involving "uniquely federal interests" subject exclusively to federal control by the Constitution and laws of the United States.[95] Nevertheless, the Court opted not to focus on the controlling federal interests in the *Feres* doctrine: the separation of powers in military affairs and military discipline. Rather, the Court found that the imposition of liability on a government contractor for the approved design of military equipment borders upon two areas that the Court had previously found to involve "uniquely federal interests" sufficient to justify the exclusive application of federal common law. First, federal common law exclusively governs the rights and obligations of the United States under its contracts.[96] Second, the civil liability of federal officials for actions taken in the course of their duties has long been held to warrant the displacement of state law.[97] While acknowledging that Boyle's tort claim did not directly involve contractual rights and obligations of the United States or the immunity of federal officials, the Court regarded the claim as arising from performance of the defendant's procurement contract with the government and as challenging a design approved by federal officials.[98]

While the identification of these uniquely federal interests was a necessary condition for the displacement of state law, the Court held that the government contractor defense should apply only where a "significant conflict" exists between the federal interests and the operation of state law.[99] The Court then sought a limiting principle that would identify when a

94. Boyle v. United Techs. Corp., 487 U.S. 500, 510 (1988).

95. *Id.* at 504 (citing Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981); United States v. Kimbell Foods, Inc., 440 U.S. 715, 726-29 (1979); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426-27 (1964); Howard v. Lyons, 360 U.S. 593, 597 (1959); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 457-58 (1942)).

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

97. *Id.* at 505 (citing Westfall v. Erwin, 484 U.S. 292, 295 (1988); *Howard*, 360 U.S. at 597; Barr v. Matteo, 360 U.S. 564, 569-74 (1959) (plurality opinion); *id.* at 577 (Black, J., concurring)).

98. *Boyle*, 487 U.S. at 504. *But see* Green & Matasar, *supra* note 28, at 647-72 (criticizing the Court's unnecessary and confusing efforts to shoehorn the defense into government contract cases and government employee immunity, rather than simply and directly supporting creation of federal common law defense based on protection of government discretion in procurement).

99. *Boyle*, 487 U.S. at 507.

significant conflict with the federal interest was sufficiently present, justifying the imposition of federal common law.[100]

The Court first considered the *Feres* doctrine as the limiting principle to identify significant conflicts with the federal interest in procurement of military equipment, as this was the basis relied upon by the appellate court applying the *McKay* test.[101] The Court, however, dismissed the costs rationale of *Feres* as "no longer controlling" and ignored the more compelling, albeit "later conceived," rationales of military discipline and the constitutional allocation of military matters to the political branches.[102] This was particularly surprising because both the respondent's brief and the amicus brief of the United States focused upon judicial deference to the political branches of government in military matters and military discipline.[103] Nevertheless, the Court exclusively focused on *Feres*'s cost-controlling concerns. This focus resulted in the Court's rejection of *Feres* as the source of conflict for the government contractor defense because it was deemed too broad in some respects and too narrow in others.[104]

Feres was considered too narrow because it would bar servicemembers' suits but not suits by civilians. The costs of civilian suits would still be passed through to the government and impermissibly interfere with government discretion.[105] At the same time, *Feres* was considered too broad because a *Feres*-based government contractor defense would prohibit all service-related products liability claims against the manufacturer, making the three remaining criteria of the *McKay* test inexplicable.[106] For example, a *Feres*-based defense would logically bar service-related suits even where the injury was caused by a design feature of a helicopter purchased by model number from stock supplies or by any standard equipment procured by the government.[107] The Court reasoned that it would be "impossible to say that

100. *Id.* at 509.

101. *Id.* at 510-11.

102. *Id.* at 510.

103. Supp. Brief of Respondent on Reargument at 12, *Boyle*, 487 U.S. 500 (No. 86-492) (purpose of defense is to assure proper distribution of functions between judicial and political branches of government); *id.* at 4 (required inquiry in absence of defense would have negative effect on military discipline); Brief for United States as Amicus Curiae Supporting Affirmance at 18, *Boyle*, 487 U.S. 500 (No. 86-492) ("The driving forces behind recognition of a military contractor defense are the effects, both direct and indirect, of litigation in calling into question military judgments concerning equipment safety and related matters, thus impairing the federal government's constitutional authority to defend the country.").

104. *Boyle*, 487 U.S. at 510.

105. *Id.* at 511-12.

106. *Id.* at 510.

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

the Government has a significant interest in [any] particular feature" of stock or standard equipment because the government was not involved in the design of the allegedly defective product feature.[108]

After rejecting *Feres*, the Court held that the discretionary function exemption to the FTCA[109] would provide a better basis for identifying "significant conflict[s]" between state tort law and the federal interests in procurement of military equipment.[110] Under the FTCA, Congress waived sovereign immunity for damages claims against the United States for personal injury or death "caused by the negligence or wrongful act or omission of any employee of the Government"[111] acting within the scope of employment, to the extent that a private person would be liable under the law of the place where the conduct occurred.[112] Nevertheless, Congress expressly excluded from this consent to suit any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[113] Commonly known as the "discretionary function exception," the purpose of this exception is to prevent tort actions from becoming tools for judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy.[114]

While acknowledging that Boyle's claim sought to impose liability on a defense contractor, rather than to impose liability on the United States for the discretionary action of an employee, the Court nevertheless concluded that suits like Boyle's would have the same effect sought to be avoided by the discretionary function exception.[115] The Court reasoned that the selection of the appropriate design of military equipment involves the balancing of many social, political and economic concerns, including the "trade-off between greater safety and greater combat effectiveness."[116] In particular, without the government contractor defense, discretionary decisions regarding defense expenditures for the procurement of military equipment would be impacted. Judgments against contractors would be passed through to the United States, as contractors would raise prices to

108. *Id.* at 509.
109. Federal Tort Claims Act, 28 U.S.C. § 1346 (2000).
110. *Boyle*, 487 U.S. at 511-12.
111. 28 U.S.C. § 1346(b).
112. *Id.*
113. *Id.* § 2680(a); *Boyle*, 487 U.S. at 511.
114. United States v. Varig Airlines, 467 U.S. 797, 814 (1984) (discussing legislative history of discretionary function exception).
115. *Boyle*, 487 U.S. at 511.
116. *Id.*

cover the cost of such judgments or to insure against them.[117] As the Court stated, "It [would] make[] little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."[118] Although the Court rejected the lower court's reliance on the *Feres* doctrine in favor of the discretionary function exception, the Court went on to adopt the remaining three conditions of the *McKay* test as defining the appropriate scope of the federal common law government contractor defense.[119]

No doubt the *Boyle* Court intended its opinion to place the government contractor defense on a more solid foundation by removing it from the often criticized and misunderstood *Feres* doctrine. The *Boyle* decision, however, radically altered the defense and may have produced some unexpected consequences. By shifting the focus of the defense from *Feres* to the discretionary function exception, the Court removed the defense from its military foundation, expanded its application to civilian plaintiffs, and opened the door to the application of the defense to government procurement beyond the military context. These expansions have created conflicts in the courts as to the scope of the defense[120] and have received substantial criticism in scholarly literature.[121]

B. The Discretionary Function Exception Rationale Is Not Logically Limited to Military Procurement

The foundational shift away from *Feres*'s military discipline to the FTCA's discretionary function exception created uncertainty as to the scope of the government contractor defense. Under the discretionary function exception, Congress has refused to waive sovereign immunity for decisions

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117. *Id.* at 512.

118. *Id.*

119. *Id.*

120. *See supra* notes 25-27 and accompanying text.

121. *See, e.g.*, Terrie Hanna, Note, *The Government Contract Defense and the Impact of* Boyle v. United Technologies Corporation, 70 B.U. L. REV. 691 (1990) (criticizing the *Boyle* opinion as loosely worded, urging courts to interpret it narrowly and suggesting legislative intervention); *see also* David E. Seidelson, *The Government Contractor Defense and the Negligent Contractor: The Devil Made Me Do It*, 7 WIDENER J. PUB. L. 259 (1998) (criticizing *Boyle*'s defense as too sweeping in its application and proposing it should not apply where contractor fails to warn government of dangers of which contractor had constructive knowledge); Steven Brian Loy, Note, *The Government Contractor Defense: Is It a Weapon Only for the Military?*, 83 KY. L.J. 505 (1994-1995) (noting broad scope of discretionary function exception but urging defense be limited to military contractors where federal government has a unique interest).

made in all branches of the federal government that are grounded in social, economic, or political policy.[122] The exception prevents "unwarranted and potentially disruptive"[123] judicial "second-guessing" of legislative and executive decisions founded upon the balancing of competing policy considerations.[124] Given the broad purpose of the discretionary function exception, however, it would not logically be limited to military procurement but would apply to all government procurement where the government exercised discretion.[125]

The Court's focus on the discretionary function exception clearly recognized the separation of powers concerns implicated in *Boyle*.[126] Nevertheless, while the discretionary function exception protects the political branches of government from judicial second-guessing of discretionary policy decisions, it is not limited to the specific separation of powers concerns related to military matters.[127] Instead, the discretionary function exception has been applied to bar claims involving the regulation of fungicide labeling,[128] the inspection of sewer systems,[129] the prohibition of the use of a flame-retardant compound on children's sleepwear,[130] the safety and staffing of national forests,[131] the denial of patent applications,[132] the failure to prevent the importation of defective gas cylinders,[133] and the release of dam waters.[134]

The language of the *Boyle* Court's opinion added to the confusion regarding the scope of the defense. At several places in the opinion, the

122. United States v. Varig Airlines, 467 U.S. 797, 814 (1984) (discussing legislative history of discretionary function exception).

123. Avery v. United States, 434 F. Supp. 937, 943 n.7 (D. Conn. 1977) (discussing the discretionary function exception).

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

125. *See, e.g.*, Green & Matasar, *supra* note 28, at 688-97.

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

127. *See, e.g.*, Green & Matasar, *supra* note 28, at 688-97.

128. First Nat'l Bank in Albuquerque v. United States, 552 F.2d 370 (10th Cir. 1977) (involving negligent labeling claim against Department of Agriculture regarding fungicide that contained mercury).

129. Pennbank v. United States, 779 F.2d 175 (3d Cir. 1985).

130. Jayvee Brand, Inc. v. United States, 721 F.2d 385 (D.C. Cir. 1983) (involving Consumer Product Safety Commission ban on use of flame-retardant compounds by manufacturer of children's sleepwear).

131. Sharp *ex rel.* Estate of Sharp v. United States, 401 F.3d 440 (6th Cir. 2005).

132. Lindsey v. United States, 778 F.2d 1143 (5th Cir. 1985).

133. Carib Gas Corp. v. Del. Valley Indus. Gases, Inc., 660 F. Supp. 419 (D.V.I. 1987), *aff'd without opinion*, 838 F.2d 459 (3d Cir. 1987).

134. Olson v. United States, 93 F. Supp. 150 (D.N.D. 1950).

Court refers to the defense as the "military contractor defense"[135] or discusses it in terms that imply its application is limited to suppliers of military equipment.[136] At other points in the opinion, however, the Court uses the more general "government contractor defense" phrasing[137] and discusses the defense with language and examples that imply a general application to all government product procurement.[138] The *Boyle* dissent recognized the broad logical application of the defense based upon the discretionary function exception crafted by the Court and predicted that its application would not be limited to military equipment, but would be applied to any equipment purchased by the government where the government approves reasonably precise specifications.[139] The *Boyle* majority did not challenge this interpretation.[140]

Immediately after the Court's decision in *Boyle*, commentators predicted that the discretionary function exception foundation would lead to the application of the defense to cases outside of the military equipment context.[141] In the nineteen years since *Boyle*, various courts have struggled

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135. Boyle v. United Techs. Corp., 487 U.S. 500, 503, 514 (1988); *id.* at 526 n.4 (Brennan, J., dissenting).

136. *Id.* at 511 (majority opinion) ("[T]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function . . . ."). The Court then describes the three *McKay* conditions for the defense as precluding liability for "design defects in military [cases]." *Id.* at 512.

137. *Id.* at 510, 513-14; *id.* at 516 (Brennan, J., dissenting).

138. At some points, the Court speaks in general terms about the uniquely federal interest in the government "procurement of equipment." *Id.* at 507 (majority opinion). At other points, the Court speaks specifically about the procurement of "military equipment." *Id.* at 512.

139. *Id.* at 516 (Brennan, J., dissenting) ("[The defense] applies not only to military equipment like the CH-53D helicopter, but (so far as I can tell) to any made-to-order gadget that the Federal Government might purchase after previewing plans—from NASA's Challenger space shuttle to the Postal Service's old mail cars.").

140. *See* Yeroshefsky v. Unisys Corp., 962 F. Supp. 710, 716 (D. Md. 1997). In holding that the government contractor defense applies to non-military procurement, the court in *Yeroshefsky* found it significant that the dissent's broad interpretation of the defense was not contested by the majority. *Id.* at 716.

141. Green & Matasar, *supra* note 28, at 648-89 (arguing that defense based upon discretionary function exception cannot logically be constrained to military design defect cases); JoAnne Marie Lyons, Note, Boyle v. United Technologies Corp.*: New Ground for the Government Contractor Defense*, 67 N.C. L. REV. 1172, 1189 (1989). Lyons notes that the discretionary function premise of the defense provides potential for application outside the field of military contracts, but argues for non-military application limited to instances where contractor liability would greatly inhibit the government's ability to accomplish specific goals. Without explaining what specific goals might make application appropriate outside of the military procurement arena, Lyons suggests that the defense may have application to contracts for the operation of nuclear power plants, the disposal of toxic waste, or the construction of

with the ambiguous scope of the defense and have reached divergent conclusions.[142] As expected, the majority of courts addressing the issue have applied the government contractor defense to non-military contracts.[143] These courts have focused upon the broad application of the discretionary function exception supporting *Boyle* and the undesirability of judicial second-guessing of federal policy decisions that necessarily occurs in the absence of the defense. These courts have also emphasized the concern that the contractors' liability costs would be passed through to the government in the form of higher prices.[144]

Despite the seemingly broad applicability the discretionary function exception offers the government contractor defense, a minority of courts have limited the defense to claims arising from allegations of defectively designed military equipment.[145] The Ninth Circuit Court of Appeals has

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highways. *Id.* at 1190.

142. *See generally* Watts, *supra* note 27 (discussing circuit split regarding whether *Boyle* defense applies to non-military procurement).

143. Carley v. Wheeled Coach, 991 F.2d 1117, 1121-22 (3d Cir. 1993) (holding defense available to nonmilitary contractor for alleged design defect in ambulance); *Yeroshefsky*, 962 F. Supp. at 717 (determining defense barred postal service employee's claim against manufacturer of letter sorting machine); Fagans v. Unisys Corp., 945 F. Supp. 3, 6 n.3 (D.D.C. 1996) (finding defense supports summary judgment for letter sorting machine manufacturer); Wisner v. Unisys Corp., 917 F. Supp. 1501, 1509-10 (D. Kan. 1996) (granting summary judgment for manufacturer of letter sorting machine based on defense); Richland-Lexington Airport Dist. v. Atlas Props., Inc., 854 F. Supp. 400, 422 (D.S.C. 1994) (applying defense to preclude claim for negligent performance of contract with EPA to excavate, remove, and stockpile contaminated soil); Lamb v. Martin Marietta Energy Sys., Inc., 835 F. Supp. 959, 966 (W.D. Ky. 1993) (granting summary judgment to privately run nuclear production facility based on defense); Johnson v. Grumman Corp., 806 F. Supp. 212, 217-18 (W.D. Wis. 1992) (denying summary judgment for defendant postal truck manufacturer due to disputed issues on elements of defense); Silverstein v. Northrop Grumman Corp., 842 A.2d 881, 889 (N.J. Super. Ct. App. Div. 2004) (holding that *Boyle*'s government contractor defense applied to postal delivery vehicle manufactured to United States Postal Service specifications); *see also* Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986) (affirming summary judgment based on government contractor defense in civilian context, pre-*Boyle*); Burgess v. Colo. Serum Co., 772 F.2d 844, 846 (11th Cir. 1985) (applying government contractor defense to non-military products, pre-*Boyle*); Kelly A. Moore, Recent Development, *The Third Circuit Expands the Government Contractor Defense to Include Nonmilitary Contractors*, 72 WASH. U. L.Q. 1435 (1994) (discussing and criticizing non-military application of defense in *Carley v. Wheeled Coach*).

144. *Carley*, 991 F.2d at 1121-22; *Yeroshefsky*, 962 F. Supp. at 715-17; *Fagans*, 945 F. Supp. at 6 n.3; *Wisner*, 917 F. Supp. at 1509-10; *Richland-Lexington Airport Dist.*, 854 F. Supp. at 422; *Lamb*, 835 F. Supp. at 966; *Johnson*, 806 F. Supp. at 217-18; *see also Boruski*, 803 F.2d at 1430; *Burgess*, 772 F.2d at 846.

145. *In re* Haw. Fed. Asbestos Cases, 960 F.2d 806, 812 (9th Cir. 1992) (holding asbestos insulation not military equipment entitled to protection of government contractor defense); Nielson v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1453-55 (9th Cir. 1990) (refusing

twice expressly limited the application of the government contractor defense to the procurement of military equipment.[146] In those decisions, the court focused on the highly complex and sensitive decisions the military makes in developing new equipment.[147] The court noted that these concerns are not present with other government procurement of products readily available on the commercial market and designed with consideration of the broader needs of end-users in the private sector.[148] In such cases, the court reasoned that the manufacturer will have already factored the cost of liability for ordinary torts into the product price.[149]

While the rationale of the Ninth Circuit is not unreasonable, the limitation is logical only if the defense seeks narrowly to protect the particularly acute separation of powers concerns related to military matters and not government discretion generally. Indeed, separation of powers in military matters is the particular federal interest that is the focus of *Feres*,[150] not the discretionary function exception.

C. The Discretionary Function Exception Rationale Is Not Logically Limited to Design Defects Resulting from Reasonably Precise Government Specifications

The *Boyle* Court recognized that the selection of military equipment involves the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.[151] The Court believed these considerations were sufficiently protected by the discretionary function exception and the three-part test adopted from *McKay*. Under this test, *Boyle* only applies when

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to bar, on basis of federal government contractor defense, civilian plaintiff's claim against paint manufacturer for injuries suffered from exposure to paint used to paint a civilian dam, but holding that under Idaho law paint contractor shared government's immunity for paint manufactured to government specifications); *see also In re* Chateaugay Corp., 146 B.R. 339, 351 (Bankr. S.D.N.Y. 1992) (stating government contractor defense does not apply to postal delivery vehicles manufactured for U.S. Postal Service because they are not military equipment). *But see Silverstein*, 842 A.2d at 889 (holding that *Boyle*'s government contractor defense applies to postal delivery vehicle manufactured to U.S. Postal Service specifications).

146. *In re Haw. Fed. Asbestos Cases*, 960 F.2d at 812; *Nielson*, 892 F.2d at 1453.

147. *In re Haw. Fed. Asbestos Cases*, 960 F.2d at 811; *Nielson*, 892 F.2d at 1455.

148. *In re Haw. Fed. Asbestos Cases*, 960 F.2d at 812.

149. *Id.* at 811; *see also* Hazel Glenn Beh, *The Government Contractor Defense: When Do Governmental Interests Justify Excusing a Manufacturer's Liability for Defective Products?*, 28 SETON HALL L. REV. 430 (1997) (asserting Ninth Circuit's limitation of defense to military procurement should be followed by other circuits because only in this area is usurping state law justifiable).

150. *See* United States v. Johnson, 481 U.S. 681, 688-89 (1987).

151. Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988).

design defects were specified or approved by the government and the manufacturer warned of dangers known to the contractor but not to the government. The Court stated that these requirements ensure that the government contractor defense would only apply where the suit would frustrate the policy of the discretionary function.[152]

The discretionary function exception, however, is not logically limited to design defect cases.[153] Under most states' strict liability law, a plaintiff is not required to prove that the manufacturer was negligent in the selection of the design.[154] Strict liability focuses on the objective state of the product, not the conduct of the manufacturer.[155] The manufacturer is strictly liable for injuries caused by defective products.[156] Products are defective if they

152. *Id.* at 512.

153. *See* Green & Matasar, *supra* note 28, at 702-05 (explaining, with examples, how government discretionary considerations could result in manufacturing defects that should logically be protected by discretionary function exception-based defense).

154. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965); DAVID G. OWEN, PRODUCTS LIABILITY LAW § 5.3 (2005) (noting forty-five states, District of Columbia and Virgin Islands have adopted strict liability in tort).

155. OWEN, *supra* note 154 (stating seller is liable for product defect even though he has exercised all possible care).

156. *Id.* (indicating manufacturer, distributor, retailer and all in chain of distribution are strictly liable for product defects).

are "unreasonably dangerous."[157] Generally, a product may be unreasonably dangerous because of manufacturing defects, design defects, or warning defects.[158] Under the *Boyle* Court's decision, however, contractors sued for manufacturing defects and warning defects under these principles would not have the benefit of the government contractor defense.

Manufacturing defect claims clearly have the potential to interfere with the exercise of government discretion.[159] For example, in order to keep down prices and increase the rate of production, the government may approve inspections of a random sampling of products as they roll off the assembly line rather than requiring that each product be individually inspected. If a defectively manufactured product reaches the troops and causes injury, the manufacturing defect claim is not precluded by the defense, despite the fact that the claim will result in second-guessing of this discretionary decision by the government.[160] Similarly, the government may choose to purchase ammunition from one manufacturer, rather than another, merely because of a higher rate of production. If the chosen manufacturer produces more ammunition with manufacturing defects, the government might be willing to accept this increase in defects in order to increase the availability of desperately needed ammunition. Although the government might not approve of, or even be aware of, the different manufacturing methods used by the two ammunition producers, the government still made a discretionary decision balancing quality against quantity. Again, although the goal of *Boyle*'s government contractor defense is to protect governmental discretion in procurement, the defense does not apply in these manufacturing defect situations.

Similarly, even if military equipment is designed as safely as possible and to government specifications, it is defective under most state products

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157. Under the *Restatement (Second) of Torts*, section 402A, comment i, a product is defective and unreasonably dangerous when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer." This formulation is still espoused by some courts, but many others have adopted some form of cost-benefit, risk-utility analysis. OWEN, *supra* note 154, § 5.7; *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998) (applying true strict liability only to manufacturing defects).

158. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

159. *See* Green & Matasar, *supra* note 28, at 701-03 (discussing underinclusive nature of *Boyle* test given the goal of protecting government discretion, and providing examples of manufacturing defects implicating exercise of governmental discretion).

160. *See* Bailey v. McDonnell Douglas Corp., 989 F.2d 794, 801 (5th Cir. 1993) (holding that government contractor defense only applies to manufacturing defect cases if the government approved or specified the process); Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1491 n.8 (C.D. Cal. 1993) (holding that manufacturing defect claims are barred where government asserts that suit undermines federal interest in procuring military equipment).

liability laws if it fails to warn users of hidden dangers.[161] Although *Boyle* did not specifically address warning defect claims, many courts have, to varying degrees, applied the defense to these claims. Some courts have precluded claims where the government approved the inadequate warnings.[162] Other courts have held that such claims are barred only where the government expressly dictated the content of the warnings[163] or have simply held that the defense does not apply to warnings claims.[164] In the context of military equipment, however, the government might very well choose not to warn servicemembers of all the dangers associated with the use of their equipment.[165]

Even if the *Boyle* Court believed that only certain forms of governmental discretion deserve protection, the precise parameters of the three-part *McKay* test are difficult to apply.[166] The dissent in *Boyle* foresaw difficulty with the reasonably precise specifications requirement, fearing that such approval might consist of "perhaps no more than a rubber stamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them."[167] Some courts have expressly rejected the application of the government contractor defense where government approval has amounted to a mere "rubber stamp."[168] These courts have reasoned that if the foundation of the defense is the discretionary function exception, discretion must be exercised by the

161. OWEN, *supra* note 154, § 9.1; RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(c) (1998).

162. *See, e.g.*, Kerstetter v. Pac. Scientific Co., 210 F.3d 431, 438-39 (5th Cir. 2000) (explaining the dangers of uncommanded release of pilot restraint system).

163. *See, e.g.*, *In re* Joint E. & S. Dist. N.Y. Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990) (explaining the dangers of asbestos).

164. Glassco v. Miller Equip. Co., 966 F.2d 641, 644 (11th Cir. 1992) (noting the hazards associated with use of leather linemen belt); McCormick v. C.E. Thurston & Sons, Inc., 977 F. Supp. 400, 403 (E.D. Va. 1997) (noting the hazards of asbestos exposure).

165. Green & Matasar, *supra* note 28, at 703-05.

166. *See* Colin P. Cahoon, Boyle *Under Siege*, 59 J. AIR L. & COM. 815 (1994) (discussing broad application of defense and "litigation war" over meaning and application of *Boyle*'s three-part test).

167. Boyle v. United Techs. Corp., 487 U.S. 500, 515 (1988) (Brennan, J., dissenting).

168. Trevino v. Gen. Dynamics Corp., 865 F.2d 1474, 1480 (5th Cir. 1989) (discussing the design of Navy diving chamber).

government and not by the contractor for the defense to apply.[169] Only detailed quantitative specifications—not vague qualitative specifications such as "fail-safe," "simple," or "inexpensive"—satisfy the test.[170] At the most extreme, some courts have required that the government actually choose the particular design feature alleged to have caused the injury.[171] If the government delegates the design of the disputed feature to the contractor, requiring only that the design satisfy some minimal or general government standards, ultimate government approval of the design without substantive review or evaluation will not suffice.[172] Some courts have taken this requirement quite literally.[173]

Other courts have applied the government approval of reasonably precise specifications element less rigorously. These courts have required only that the specifications evaluate the design feature in question; they need not

169. *Id.*; *see also* Larry J. Gusman, Note, *Rethinking* Boyle v. United Technologies Corp. *Government Contractor Defense: Judicial Preemption of the Doctrine of Separation of Powers?*, 39 AM. U. L. REV. 391, 434 (1990) (recommending that defense only apply where government actually designed and controlled specifications, not simply approved contractor's design and specifications).

170. Kleemann v. McDonnell Douglas Corp., 890 F.2d 698, 703 (4th Cir. 1989) (discussing the design of aircraft landing gear).

171. *Trevino*, 865 F.2d at 1489.

172. *Id.*

173. Barron v. Martin-Marietta Corp., 868 F. Supp. 1203, 1204 (N.D. Cal. 1994). The court found a genuine issue of material fact prevented summary judgment on the government contractor defense where the plaintiff was exposed to toxic fumes leaking from canisters used to store surface-to-air missiles. *Id.* The evidence established that the government approved reasonably precise specifications for the canisters, but it was not clear that these specifications would require the precise design feature the plaintiff claimed was defective. *Id.* at 1206. Similarly, in *Strickland v. Royal Lubricant Co.*, 911 F. Supp. 1460 (M.D. Ala. 1995), the court found that issues of fact precluded summary judgment on the government contractor defense where the plaintiff alleged injuries from toxic hydraulic fluid used in CH-47 Chinook helicopters which he accidentally inhaled and swallowed while performing maintenance. *Id.* at 1464. The court required the government to prospectively limit the discretion of the contractor so as to preclude the use of the plaintiff's proposed alternative design. The government had tested and approved the hydraulic fluid, finding that it satisfied the requirements of Military Specification MIL-H-83282 for hydraulic fluids. *Id.* at 1467. The specifications included twenty-five pages specifying the precise "base stock, additives, oxidation inhibitors, anti-wear agents, blending fluid, red dye concentration, finished fluid properties, specific gravity, corrosiveness and oxidation stability, solid particle contamination, foaming characteristics, flammability, high pressure spray ignition and flame propagation." *Id.* The plaintiff, however, alleged that natural Tricresyl Phosphate, rather than a synthetic Tricresyl Phosphate, would have reduced the fluid's toxicity. *Id.* Accordingly, the court concluded that the government specifications did not conflict with the plaintiff's claims of defect.

address the specific defect alleged.[174] Accordingly, approval of reasonably precise government specifications was found where the Navy approved a contractor's design for a pilot restraint system that failed and resulted in pilot deaths.[175] The Navy was not required to have rejected the plaintiff's proposed alternative safer design, but simply to have approved the contractor's design.[176] Courts have also found government approval of a design where the government had long experience with the product and decided to continue to use the component at issue.[177]

Accordingly, it appears that the *Boyle* court adopted the three-part *McKay* test without performing a detailed analysis of whether the test was properly tailored to fit the federal interest the Court sought to protect: the exercise of governmental discretion in procurement. Ironically, the Court was critical of the lower court's reliance on the *Feres* doctrine in part because the Court concluded that the three-part *McKay* test is inexplicable when applied to a *Feres*-based defense, as it would logically preclude all products liability suits by military members injured incident to service.[178] While the *McKay* test may be logically inapplicable to a *Feres*-based defense,[179] it is no more logically applicable to the discretionary function-based defense. In its eagerness to reject *Feres*, the Court failed to consider the logical extensions of the government contractor defense it adopted to replace the *Feres* doctrine.

IV. A Military Contractor Defense

The proposed alternative to the current *Boyle* government contractor defense is a "military contractor defense" based upon the constitutional allocation of control over the military to the political branches of

174. Kerstetter v. Pac. Scientific Co., 210 F.3d 431, 435 (5th Cir. 2000) (discussing pilot restraint system).

175. *Id.* at 438.

176. *Id.*

177. Lewis v. Babcock Indus., Inc., 985 F.2d 83, 88 (2d Cir. 1993) (discussing government reorder of cable used to connect crew ejection module to parachute after it was aware of cable's possible failure); Ramey v. Martin-Baker Aircraft Co., 874 F.2d 946 (4th Cir. 1989) (discussing continued use of ejection system after government was aware of dangers posed to maintenance personnel); Dowd v. Textron, Inc., 792 F.2d 409, 411 (4th Cir. 1986) (discussing twenty years of government use of helicopter rotor system) (pre-*Boyle* decision).

178. Green & Matasar, *supra* note 28, at 684-85 (discussing gap in coverage between *Boyle* Court's discretionary function rationale and its adoption of *McKay* test, and noting Court's ironic criticism of lower court's use of *Feres*-based defense because of similar gap).

179. While this author agrees with the Court's conclusion that the *McKay* test is inapplicable to a *Feres*-based defense, it does not logically follow that a *Feres*-based defense is flawed. Rather, it is the *McKay* test that should have been abandoned.

government and the demands of military discipline. These rationales provide a more solid foundation for the application of federal common law.[180] A defense founded on these federal interests recognizes the differences between military procurement and other government procurement, as well as the differences between lawsuits brought by civilians and those brought by servicemembers.

The law has often recognized substantive and procedural differences between similar claims and the creation of federal common law based upon these federal interests.[181] In *Boyle*, the Court seemed to consciously ignore the federal interests in separation of powers in military affairs and in military discipline that were relied upon as the primary basis for the *Feres* doctrine and the pre-*Boyle* government contractor cases. The *Boyle* Court reached its conclusion because it was focused on the wrong government interest—fiscal concerns and their impact on government discretion. Had the Court focused on the constitutional allocation of military matters to the political branches of government and the related concern of military discipline, a different conclusion would have been drawn. The military contractor defense proposed here accounts for these interests. At the same time, it will be easy to apply and will present clear boundaries for its application.

Specifically, the proposed military contractor defense *would not* apply to claims bought by civilian plaintiffs *but would* bar all products liability claims brought by servicemembers injured incident to service, not just design defect claims arising from government approval of reasonably precise specifications. Accordingly, in the context of suits such as *Boyle* brought by a servicemember or his beneficiaries, suppliers of military equipment should be permitted to raise a military contractor defense that would preclude any damages suit for incident to service injuries based upon state products liability law. The defense would not require any finding that the government approved or specified the design feature at issue. It would apply equally to

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180. An exhaustive critique of the Court's analysis of the justification for creating federal common law is beyond the scope of this article. Furthermore, a scholarly and detailed critique has already been undertaken by Professors Michael D. Green and Richard A. Matasar, upon which this author could not improve. *See* Green & Matasar, *supra* note 28.

181. In fact, the same year that *Boyle* was decided, the Court held as a matter of federal common law that servicemembers' *Bivens* suits are barred in order to prevent judicial interference in military matters and military discipline. *See* United States v. Stanley, 483 U.S. 669, 682 (1987); *see also infra* Part IV.D.1. Similarly, whether *Feres* is viewed as statutory interpretation of the FTCA—as the Court has treated it—or federal common law, the Court has clearly stated that it is justified by the constitutional allocation of military matters to the political branches of government and concerns for military discipline, not merely cost concerns. *See supra* Part II.

military equipment purchased off-the-shelf by model number and to equipment built to precise military specifications.

The military contractor defense eliminates the three parts of the *McKay* test adopted by *Boyle* because, as the *Boyle* Court correctly noted, these criteria are "inexplicable" if the defense is based upon *Feres*.[182] This is precisely the scope of the defense the *Boyle* Court rejected as being both too broad and too narrow.[183] The *Feres*-based military contractor defense focuses upon military discipline and preventing judicial interference with military matters. It is broader in some respects than the test articulated in *Boyle*, but not overbroad. By focusing upon the military rather than the protection of the government's fiscal discretion, it avoids the narrowness of the *Boyle* defense, which permits servicemember claims that disrupt military discipline and force judicial interference into military matters constitutionally reserved to the political branches of government.

A. The Federal Interests in Military Discipline and the Constitution's Allocation of Military Matters to the Political Branches of Government Provide a Solid Basis for a Federal Common Law Defense Limited to Military Procurement

Under the Constitution, Congress is expressly vested with the power to "declare War,"[184] "raise and support Armies,"[185] "provide and maintain a Navy,"[186] "make Rules for the Government and Regulation of the land and naval Forces,"[187] "call[] forth the Militia,"[188] and "provide for organizing, arming, and disciplining, the Militia."[189] The Constitution requires that

182. Boyle v. United Techs. Corp., 487 U.S. 500, 510 (1988).

183. *Id.* at 510-11; *see also* Green & Matasar, *supra* note 28, at 668-69. Professors Green and Matasar believe that the *Boyle* Court's criticisms of a *Feres*-based defense are more properly understood as an indictment of *Feres* itself. They maintain that *Feres* is overbroad to the extent that it bars claims that pose little threat to its core concerns of military discipline and deference to military decisionmaking, and that *Feres* is too narrow because it does not prevent civilian suits that implicate military discipline and decisionmaking. *Id.* While this author does not necessarily disagree with their analysis, the same criticism could be leveled at every bright-line prophylactic rule. *Feres*'s potential overbreadth in a given case is justifiable as a necessary precaution to prevent the disruption of military decisionmaking and discipline that would occur through the process of a case-by-case evaluation of the potential disruption. *See Stanley*, 483 U.S. at 682-83.

184. U.S. CONST., art. I, § 8, cl. 11.

185. *Id.* art. I, § 8, cl. 12.

186. *Id.* art. I, § 8, cl. 13.

187. *Id.* art. I, § 8, cl. 14.

188. *Id.* art. I, § 8, cl. 15.

189. *Id.* art. I, § 8, cl. 16.

"[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States."[190] Congress has authorized the President and his subordinates to regulate and direct many aspects of military affairs.[191] The Constitution provides little or no role for the judiciary in the running of the military,[192] and the Constitutional allocation of powers is always a consideration when courts are called upon to decide matters relating to the military.[193]

The Framers of the Constitution knew very well the rigors of military life and the inescapable demands of military discipline.[194] Centuries of

190. *Id.* art. II, § 2, cl. 1.

191. *E.g.*, Loving v. United States, 517 U.S. 748, 773-74 (1996) (stating Congress may make measured and appropriate delegations of its responsibility for task of balancing rights of servicemen against needs of the military, including delegating to the executive authority to prescribe aggravating factors that permit a court-martial to impose death penalty).

192. Chappell v. Wallace, 462 U.S. 296, 301 (1983) ("[J]udges are not given the task of running the Army." (quoting Orloff v. Willoughby, 345 U.S. 83, 93 (1953))); *see also* Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir. 1967) (per curiam) ("The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.").

193. *See, e.g.*, *Chappell*, 462 U.S. at 301.

194. *Id.* at 300. Twenty-three of the forty signers of the United States Constitution were veterans of the Revolutionary War, including: George Washington, James McHenry, Alexander

experience have taught the military establishment that the obedience to orders imperative in combat can only be developed by requiring immediate compliance with military procedure and orders—without debate or reflection—at all times.[195] Upon enlistment, a citizen's relation to the state and the public are changed and the citizen becomes a soldier. Once he has put on his uniform, he cannot, of his own accord, remove it or disregard its correlative rights and duties.[196] The Court has described the demands of military discipline in the clearest possible terms: "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."[197]

The lives of men in combat and the security of the Nation itself depend on military discipline and obedience to a command structure.[198] The need for military discipline results from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[199] To effect this mission, servicemembers must be indoctrinated to

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Hamilton, John Langdon, John Dickinson, Richard Bassett, William Blount, Richard Dobbs Spaight, Hugh Williamson, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler, William Few, Abraham Baldwin, Nicholas Gilman, Rufus King, William Livingston, David Brearley, Jonathan Dayton, Thomas Mifflin, Thomas Fitzsimons, William Jackson, and Gouverneur Morris. *See* ROBERT K. WRIGHT, JR. & MORRIS J. MACGREGOR, JR., SOLDIER-STATESMEN OF THE CONSTITUTION (2004), *available at* http://www.army.mil/cmh/books/RevWar/ss/ss-fm.htm.

195. *Chappell*, 462 U.S. at 300. In a May 1941 address to the officers and men of the Second Armored Division, General George S. Patton Jr. made the following statement describing the importance of military discipline: "You cannot be disciplined in great things and undisciplined in small things. . . . Brave, undisciplined men have no chance against the discipline and valor of other men." George S. Patton, Address to the Officers and Men of the Second Armored Division (May 17, 1941), *in* THE BOOK OF MILITARY QUOTATIONS 130 (Peter G. Tsouras ed. 2005) (omission in original).

196. United States v. Grimley, 137 U.S. 147, 153 (1890). The Court denied the habeas corpus petition of a forty-year-old man who lied about his age in order to enlist in the Army, despite the requirement that recruits be between sixteen and thirty-five years old. *Id.* at 150. He apparently regretted his decision to enlist and deserted, only to be apprehended, court-martialed and sentenced to six months of imprisonment. *Id.* at 149-50. The petitioner maintained that his enlistment was void because of his age and, therefore, he never became a soldier subject to the jurisdiction of a military court-martial. *Id.* at 150. The Court held that its review was limited to determining the jurisdiction of the court-martial over the petitioner. *Id.* The Court also held that the age requirement was for the benefit of the government, not the soldier, and therefore did not void his enlistment. *Id.* at 151.

197. *Id.* at 153.

198. Parker v. Levy, 417 U.S. 733, 759 (1974) (citing United States v. Gray, 20 C.M.A. 63 (C.M.A. 1970)).

199. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

instant and willing obedience to lawful orders.[200] But military discipline is not just obedience to orders: it more broadly encompasses a common sense of duty, commitment, unity, honor, esprit de corps, and self-sacrifice.[201] It represents "the subordination of the desires and interests of the individual to the needs of the service."[202] Studies have repeatedly established that soldiers in combat risk their lives and fight because they do not want to let their comrades down.[203] They can perform their individual tasks because they trust their fellow soldiers to do their duty and to "have their back," so that the unit functions as a single, reliable whole.[204] Unit cohesion, teamwork, and a can-do attitude are essential to an effective fighting unit.[205]

The *Boyle* Court justified the creation of the federal common law defense on the need to prevent cost increases resulting from judgments against contractors and the impermissible interference such costs would have on government discretion in procurement.[206] Nevertheless, even justified fiscal concerns have been deemed insufficient in other contexts to support the creation of federal common law.[207] As a defense to products liability claims,

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200. *See generally* United States v. Calley, 22 C.M.A. 534, 543 (C.M.A. 1973). In this My Lai Massacre case, the court commented on the need for obedience to all but the most patently illegal orders:

> The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

Id. (quoting McCall v. McDowell, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867) (No. 8673)).

201. Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

202. Orloff v. Willoughby, 345 U.S. 83, 92 (1953).

203. 2 SAMUEL A. STOUFFER, THE AMERICAN SOLDIER IN WORLD WAR II 136 (1949) (reporting that, based upon War Department surveys of soldiers, men are motivated to fight by unit cohesion); LEONARD WONG ET AL., U.S. ARMY WAR COLLEGE, WHY THEY FIGHT: COMBAT MOTIVATION IN THE IRAQ WAR (2003), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/pub179.pdf; *see also* Robert J. Rielly, *Confronting the Tiger: Small Unit Cohesion in Battle*, MIL. REV., Nov.-Dec. 2000, at 61, 62 (discussing instances during World War II in which soldiers went absent without leave from hospitals while recovering from wounds to rejoin their units entering combat because they did not want to let their friends down).

204. WONG ET AL., *supra* note 203, at 10.

205. James Griffith, *The Army's New Unit Personnel Replacement and Its Relationship to Unit Cohesion and Social Support*, 1 MIL. PSYCHOL. 17 (1989) (discussing importance of unit cohesion in combat and Army's efforts to improve unit cohesion); Rielly, *supra* note 203, at 61 (stating the most important reason men fight is the bond formed with members of their unit).

206. Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988).

207. Green & Matasar, *supra* note 28, at 663 (noting that even in cases where impact on public fisc is more certain than in *Boyle*, the Court has found this insufficient federal interest

this justification—reducing the cost of dangerous products—seems even less appropriate because it is contrary to the basic principles of strict liability law.

Strict liability ensures that a product's price reflects all the product's costs by encouraging the manufacturer to factor in the costs of injuries caused by the product.[208] The manufacturer and the government—as the primary or exclusive consumer of the product—are in the best position to evaluate the risks and spread the costs of injuries caused by a given design. Allowing liability for defective design claims could actually help facilitate the government's risk-utility analysis and aid in the informed exercise of government discretion.[209] Higher prices, resulting from compensation to persons injured by product hazards, would ensure that government officials balance a product's utility against all its costs, including the harms it causes. The *Boyle* government contractor defense forces the injured persons to bear all the expenses of the injuries caused by the product.[210] These private costs are hidden from the government official procuring products because they will not be reflected in the product's price. Accordingly, the government may unknowingly select a cheaper but more dangerous product. This is particularly true outside of military procurement where the unique "trade-off

to warrant adoption of a federal common law rule).

208. *See* OWEN, *supra* note 154, § 5.4; Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 505 (1961).

209. Green & Matasar, *supra* note 28, at 718.

210. *See* DAN B. DOBBS, THE LAW OF TORTS § 353 (2000) (discussing rationales supporting strict liability).

between greater safety and greater combat effectiveness" is not implicated.[211]

In contrast, the military contractor defense stands upon a more solid foundation because it focuses not on cost concerns but upon the Constitution's express allocation of the responsibility for equipping the military to Congress and, through delegation, to the Executive. In modern conflicts, military success may depend almost as much upon weapons and equipment as it depends upon the quality of the servicemembers involved.[212] The importance and the limitations of superior technology and lethality have become readily apparent during numerous conflicts over the last century and particularly during the two most recent conflicts in Iraq and Afghanistan.[213]

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

212. Max Boot, *The Paradox of Military Technology*, NEW ATLANTIS, Fall 2006, at 13 [hereinafter Boot, *Paradox*], *available at* http://www.thenewatlantis.com/archive/14/TNA14-Boot.pdf (discussing how technological superiority has allowed the U.S. military to become the most powerful military in world history, but correctly noting that superior equipment is intimately dependant upon high quality long-term professional soldiers rather than short-term conscripts); *see also* MAX BOOT, WAR MADE NEW (2006) (discussing how advances in military technology have shaped course of history).

213. Boot, *Paradox*, *supra* note 212, at 13-14 (noting that while technology and sophisticated weapon systems have allowed the U.S. military to become the most powerful force ever, it is still vulnerable to low tech car bombs and high tech terrorist attacks using

In numerous cases, the Supreme Court has recognized the critical constitutional separation of powers limitations on the judiciary with regard to military matters,[214] including weapons and equipment procurement.[215] The Court has even invoked the political question doctrine[216] to preclude judicial review of some military matters.[217] The political question doctrine excludes from judicial review those cases involving policy choices assigned by the Constitution to Congress or the executive branch for resolution.[218] In *Gilligan v. Morgan*, a student at Kent State University sought injunctive and declaratory relief regarding the training and equipping of the Ohio National Guard after use of the Guard to restore civil order on the Kent State

unconventional tactics and weapons).

214. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 304 (1983).

215. Gilligan v. Morgan, 413 U.S. 1 (1973) (finding no justiciable controversy in § 1983 action seeking judicial review of training, weapons, and orders of Ohio National Guard).

216. *See* Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031 (1985) (discussing application of doctrine and possible justification for it).

217. *Gilligan*, 413 U.S. at 10; *see also* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). Professor Henkin challenges the basic premise of the political question doctrine—that there are areas of the Constitution not subject to judicial interpretation—as being contrary to *Marbury v. Madison*. He proposes, as an alternative explanation for the Court's deference, an interpretation that the Constitution grants an affirmative power to a coordinated branch of government without any constitutional limitation. Accordingly, the only challenge available to constitutionally permissible action is political. *Id.* at 607-17.

218. *E.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974).

University campus resulted in injury and death to several students.[219] The suit sought judicial intervention to ensure that the Guard's training and equipping fostered the use of nonlethal force, rather than lethal force, where nonlethal force was sufficient to suppress civilian disorder.[220] The following passage from the opinion explains why the Court concluded that the case sought the adjudication of a political question, and accordingly, did not present a justiciable controversy:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.[221]

While not often invoking the political question doctrine, the Court has frequently relied upon the Constitution's repetitive and occasionally superfluous allocation of military control to political branches[222] in refusing to interfere with military matters.[223]

The discretionary function exception adopted by the *Boyle* Court as the foundation for the government contractor defense seeks to protect separation of powers concerns but is not limited to military matters where the

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219. *Gilligan*, 413 U.S. at 3; *see also, e.g.*, Bancoult v. McNamara, 445 F.3d 427, 433 (D.C. Cir. 2006).

220. *Gilligan*, 413 U.S. at 4.

221. *Id.* at 10-11.

222. United States v. Stanley, 483 U.S. 669, 682 & n.6 (1987) (observing that had the Constitution not expressly granted Congress power "to make Rules for the Government and Regulation" of the military, U.S. CONST. art. I, § 8, cl. 14, Congress would still have had the authority under the Necessary and Proper Clause, U.S. CONST. art I, § 8, cl. 18).

223. *E.g.*, *id.* at 682; Chappell v. Wallace, 462 U.S. 296, 301 (1983).

Constitution has so clearly left little role for the judiciary and no role for state tort law. The military contractor defense, however, focuses upon this specific constitutional allocation of military control to the political branches of government, rather than the broad discretionary function exception, and clearly limits the defense to military procurement.

B. The Military Contractor Defense Is Not Limited to Design Defects from Reasonably Precise Government Specifications

The military contractor defense, based upon the constitutional allocation of military matters to the political branches of government and the demands of military discipline, applies the same incident to service test applied in the *Feres* doctrine. This has proven to be a workable test and both the courts and the military are familiar with its parameters. The incident to service rule eliminates the problematic application of the *McKay* factors and more accurately reflects the actual procurement process, as well as the realities of products liability litigation.

Although the incident to service test was first applied in the *Feres* doctrine, it has been applied to preclude constitutional tort claims by servicemembers as well. In *United States v. Stanley*, the Court clearly articulated how such claims by servicemembers would interfere with military discipline, even though not all the plaintiff's claims were directed against members of the military.[224] In *Stanley*, an enlisted serviceman sought damages for the effects of lysergic acid diethylamide (LSD) secretly administered to him without his permission as part of an Army study of its effects.[225] Stanley's complaint included claims against unknown defendants that the Court was willing to assume might be civilian employees.[226] Accordingly, the potential interference with the officer-subordinate relationship and military discipline were not as directly implicated.

Nevertheless, the Court barred Stanley's claim because of the potential effects such suits could have on military discipline.[227] The Court rejected a case-by-case analysis in favor of the same incident to service rule applied by *Feres* to FTCA claims.[228] The Court acknowledged that this rule represented a "policy judgment" reflecting how "harmful and inappropriate" it found judicial intrusions upon military discipline.[229] As the Court explained, a case-by-case analysis into whether a particular claim impacts upon military

224. *Stanley*, 483 U.S. at 682-83.
225. *Id.* at 671.
226. *Id.* at 680.
227. *Id.* at 681-83.
228. *Id.* at 683-84.
229. *Id.* at 681.

discipline and decisionmaking would itself negatively affect military discipline:

> *A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters*. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime. The "incident to service" test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.[230]

Accordingly, Justice Scalia, writing for the majority of the Court, found that the potential for interference with military discipline compelled the Court to deny Stanley's damages suit because the injury occurred incident to his military service.[231] More importantly, the Court adopted a prophylactic rule because judicial inquiry into the extent a particular suit would impede military discipline was itself too destructive of military discipline.[232]

Given the rationale and holding in *Stanley*, it is difficult to understand why in *Boyle* the Court failed to apply the *Feres* and *Bivens* incident to service rule to suits by servicemembers against military contractors for allegations of defectively designed military equipment. Under *Boyle*, the government contractor rule only applies when the United States specifies or approves reasonably precise design specifications and the equipment conforms to those specifications.[233] Yet, ascertaining whether the government approved reasonably precise specifications for the design feature in question will involve depositions and trial testimony by military officers concerning the details of their military commands, the needs of the missions, and the trade-off between safety and military effectiveness. Military contractors work closely with the military, and in most instances it will be difficult to criticize the contractor's design without directly or

230. *Id.* at 682-83 (emphasis added).

231. *Id.* at 684.

232. *But see generally* Kellman, *supra* note 8 (criticizing Rehnquist Court's judicial abdication in civil cases involving military security establishment).

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

indirectly criticizing a military decision.[234] The incident to service rule is much better suited to assist in these circumstances.

A similar prophylactic rule is necessary to prevent judicial interference in military matters constitutionally allocated to the political branches of government and to prevent the detrimental effect servicemembers' products liability lawsuits would have upon military discipline. Civil litigation for incident to service injuries is the antithesis of the subordination of self-interest and desire essential to the needs of the service. Military discipline demands that servicemembers push themselves to accomplish their duty regardless of the hardships and their injuries. Servicemembers are rewarded and honored for courage and determination to accomplish their missions despite the difficulties. In stark contrast, personal injury litigation creates perverse incentives for malingering and emphasizes the victim status of the plaintiff.[235] Indeed, the process of litigation may exacerbate psychological distress and result in "secondary traumatization" that impedes the recovery process.[236] Even where a military plaintiff is not exaggerating his disability, the defendant's attorney is likely to seek evidence of malingering through the deposition testimony of his comrades, commanding officer and military doctors. The process of developing this evidence may undermine the confidence of fellow soldiers in the integrity, honor, and reliability of their comrades, which in turn could undermine the unit cohesiveness and trust necessary for combat effectiveness.[237]

C. The Military Contractor Defense Reflects and Protects the Actual Procurement Process, Including Commercial Off-the-Shelf Products

Since the *Boyle* decision, there have been numerous changes to government acquisition that have implications for the military contractor defense. The rapid progress of technology—with private industry at the cutting edge—now requires streamlined procurement procedures that allow

234. Tozer v. LTV Corp., 792 F.2d 403, 406 (4th Cir. 1986).

235. *See* Steven I. Friedland, *Law, Science and Malingering*, 30 ARIZ. ST. L.J. 337 (1998) (discussing problem of malingering in personal injury suits, defined as intentional production of false or exaggerated symptoms for obtaining financial compensation and advocating an expanded role for experts in detecting malingering).

236. Edward J. Hickling et al., *The Psychological Impact of Litigation: Compensation Neurosis, Malingering, PTSD, Secondary Traumatization, and Other Lessons from MVAs*, 55 DEPAUL L. REV. 617 (2006) (discussing malingering and effects of litigation on plaintiff's psychological recovery).

237. *See supra* notes 203-05 and accompanying text; *see also* John L. Watts, *To Tell the Truth: A* Qui Tam *Action for Perjury in a Civil Proceeding Is Necessary to Protect the Integrity of the Civil Judicial System*, 79 TEMP. L. REV. 773, 779-81 (2006) (discussing erosion of religious, social, and moral incentives for truthfulness under oath in today's litigation climate).

the military to rapidly incorporate the latest technological innovations.[238] Congress has responded by approving several legislative changes to the acquisition process.[239] These changes have implications for the *Boyle* government contractor defense because the government often purchases off-the-shelf consumer equipment or is otherwise uninvolved in the product's design.[240] Accordingly, the government contractor defense is unavailable for many of these products under the *Boyle* test.

Yet, even where the military purchases a product off-the-shelf and takes no part in its design, the military may have made numerous decisions that would be implicated in a servicemember's products liability suit against the supplier. The government may have compared the selected product with numerous other competitive off-the-shelf products and evaluated and compared the cost, weight, durability, and safety of the competing products. The design feature subject to the servicemember's claim for defective design may never have been expressly considered, but allowing such a claim still involves judicial second-guessing of military matters constitutionally allocated to the political branches of the government charged with equipping and running the military.

An example used by the *Boyle* Court itself seems to justify a broader application of the defense than the *McKay* test allows. The Court noted that if the government ordered an existing product by model number, such as a quantity of stock helicopters, the defense would not apply because it would be "impossible to say that the [g]overnment has a significant interest" in a particular feature alleged to be defective, because the helicopter's design

238. *See, e.g.*, Harold Kennedy, *Military Procurement Guide Being Revamped*, NAT'L DEF., July 2000, at 22, *available at* http://www.nationaldefensemagazine.org/issues/2000/Jul/Military_Procurement.htm (discussing changes to Defense Department's acquisition directives and instructions to aid in prompt acquisition of advanced technology for troops).

239. Clinger-Cohen Act of 1996, Pub. L. No. 104-106, 110 Stat. 647 (codified as amended in scattered sections of 41 U.S.C.); Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-335, 108 Stat. 3243 (codified as amended in scattered sections of 10 U.S.C.); *see also* Jeff Bingaman, *The Origins and Development of the Federal Acquisition Streamlining Act*, 145 MIL. L. REV. 149 (1994) (discussing the Federal Acquisition Streamlining Act of 1994); Ross W. Branstetter, *Acquisition Reform: All Sail and No Rudder*, ARMY LAW., Mar. 1998, at 3 (discussing success and failures of the "storm of reform" in government acquisition during 1990s); Robert F. Hedrick, *The New Single Process Initiative Threatens to Erode the* Boyle *Military Contractor Defense*, 24 TRANSP. L.J. 129 (1997).

240. *See* Hedrick, *supra* note 239 (discussing Single Process Initiative, whereby the contractor can make block changes to existing contracts using commercial practices and performance standards rather than detailed military specifications, and the government, accordingly, is often not directly involved in development or approval of design; predicting government contractor defense frequently will not cover such block changes).

was not expressly considered by the government.[241] Nevertheless, it is difficult to understand why the Court's example should not fall within the government contractor defense if the defense is principally aimed at protecting governmental discretion in procurement. The FTCA discretionary function exception clearly states that it applies whether the suit is based upon governmental exercise of discretion or the "failure to exercise or perform a discretionary function or duty."[242] Where the government does not specifically approve or specify the design of a product feature alleged to be defective—for example, purchasing stock helicopters for military use—it still seems to fit nicely within the language of the discretionary function exception.[243]

The decision to purchase helicopters for military use from an existing stock certainly involves the exercise of discretion or the failure to exercise that discretion, regardless of the level of government participation in, or approval of, the design.[244] In the example used by the Court, the government may have made a policy decision to buy stock helicopters based upon the cost, rapid availability, and track record of commercial success. This decision may have been deemed preferable to the alternative of embarking upon the expensive and time-consuming development of an alternative, albeit safer and more battlefield-capable, design. Despite these considerations, the government contractor defense as formulated by *Boyle* does not apply.

Moreover, even where equipment is off-the-shelf and available for civilian use, military use of the product may involve applications that greatly increase the potential risk of harm and that are simply not present in civilian use. For example, body armor is available on the civilian market for non-military use.[245] Many companies market their products to police, security

241. Boyle v. United Techs. Corp., 487 U.S. 500, 509, 512 (1988).

242. 28 U.S.C. § 2680(a) (2000).

243. *See* Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257 (1991) (failure to consider particular feature does not demonstrate lack of interest but rather a decision that cost of bargaining about that feature is not warranted).

244. Green & Matasar, *supra* note 28, at 692 ("[I]nstances may exist in which the decision to purchase a stock product is driven by one or more aspects of that product deemed essential to its military function.").

245. Manufacturers include Point Blank Body Armor, Inc., Pompano Beach, Florida (manufactures current Interceptor body armor used by most U.S. military; also makes many models of body armor sold to civilians and police); Second Chance Armor, Inc., Central Lake, Michigan; Pinnacle Armor, Inc., Fresno, California (maker of Dragon Skin, a product that competes with Point Blank's Interceptor model); and American Body Armor, Ontario, California. For a listing of manufacturers of civilian body armor, see Police Body Armor

guards, armored car operators and others in need of protection. These civilian uses may result in some exposure to liability, but the potential for liability is greatly increased when the body armor is purchased by the military and issued to hundreds of thousands of troops exposed to constant and varied attacks under extreme combat conditions.[246]

This does not mean that the political branches are not answerable for their decisions regarding military matters: Congress and the Executive are always answerable to the People.[247] Not only are elected officials often voted in or out of office based upon their decisions regarding military matters, but policy regarding military procurement is often changed in response to political pressure. For example, recently there have been numerous reports of servicemembers being injured or killed by shrapnel and bullets piercing the sides of the torso, an area not protected by the currently issued body armor.[248] The resulting media and public outcry has resulted in the military purchasing side-protective replacement armor.[249] Similarly, reports of injuries received by troops in inadequately armored Humvees led to increased armoring of Humvees by government contractors and to the procurement of vehicles better designed to survive the improvised munitions explosions prevalent in urban combat in Iraq.[250] Other cases where the judiciary has refused to interfere in military matters, despite the apparent

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Company Directory, http://www.policeoneproducts.com/police-products/tactical/body-armor/manufacturers/ (last visited Jan. 14, 2008).

246. Because of safety concerns, the Army and Marine Corps recently banned troops from wearing off-the-shelf body armor purchased at the soldier's own expense, commonly Pinnacle Armor, Inc.'s Dragon Skin, instead of the military issued product. John Hoellwarth, *Corps Bans Off-the-Shelf Body Armor*, MARINE CORPS TIMES, Apr. 23, 2007, http://www.marinecorpstimes.com/news/2007/04/marine_bodyarmor_ban_070419/.

247. *E.g.*, Chappell v. Wallace, 462 U.S. 296, 302 (1983) (national defense and military affairs are constitutionally left to political branches directly responsible to the electoral process).

248. *See, e.g.,* Michael Moss, *Pentagon Acts on Body Armor*, N.Y. TIMES, Jan. 21, 2006, at A6 (reporting Pentagon study indicated as many as eighty percent of Marines who died in Iraq of upper body wounds could have been saved by side armor protection).

249. Joe Pappalardo, *Researchers, Manufacturers Search for Better Body Armor*, NAT'L DEF., Aug. 2004, at 46, *available at* http://www.nationaldefensemagazine.org/issues/2004/Aug/Researchers.htm (discussing problems with Interceptor vests' lack of side coverage and rapid acquisition of armor protection enhancement systems to help provide additional protection); Christian Lowe, Army Fields New Body Armor Design (Apr. 3, 2007), http://www.military.com/NewsContent/0,13319,130937,00.html (discussing Improved Outer Tactical Vest's advantages over prior Interceptor vest, including increased coverage and lighter weight).

250. *See, e.g.*, W. Thomas Smith, Jr., *The "Ultimate Betrayal"?: Humvee Realities*, NAT'L REV. ONLINE, Dec. 21, 2005, http://www.nationalreview.com/smitht/smith200512210805.asp (discussing development of armored Humvee and other more heavily armored vehicles, including the Buffalo and the Cougar).

injustices and poor judgment of the political branches, have also resulted in policy changes driven by political pressure.[251]

The military contractor defense would not be limited to the weapons of war.[252] All military equipment providers would be protected by the defense, as long as the plaintiff was a military member injured incident to service. An army travels on its stomach,[253] and a soldier is just as dependant on his food, boots, and poncho to accomplish his mission as he is on his rifle, ammunition, and radio. If such distinctions were allowed, the line between military equipment and non-military equipment used by the military would

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251. In Goldman v. Weinberger, 475 U.S. 503, 507 (1986), the Court held that the Constitution's Free Exercise Clause did not require that the Air Force allow an orthodox Jewish officer to wear a yarmulke with his uniform. In refusing to interfere with military regulations, the Court noted that the judiciary is "ill-equipped" to assess the needs of military discipline and that the judiciary must show great deference to the political branches constitutionally authorized to determine appropriate military policy. *Id.* at 507-08. Congress responded by enacting legislation that allows the wearing of "an item of religious apparel" with a military uniform unless it "would interfere with the performance of the member's military duties" or is not "neat and conservative." 10 U.S.C. § 774(a)-(b) (2000). Similarly, the courts refused to interfere with military policy that required inductees into the military to answer questions about their sexual orientation before being allowed to enter the Armed Forces. *See, e.g.*, Rich v. Sec'y of Army, 735 F.2d 1220, 1223 (10th Cir. 1984) (dismissing medical specialist from the Army under Army Reg. 635-200, ch. 14 (1973) for fraudulent enlistment because he represented on reenlistment forms that he was not a homosexual but later admitted that he was). In response to considerable pressure from the press, the public, and President Bill Clinton, Congress enacted legislation implementing the "don't ask, don't tell" policy that precludes questioning applicants about their sexual orientation or conduct. *See* Chad C. Carter & Antony Barone Kolenc, "*Don't Ask, Don't Tell:" Has the Policy Met Its Goals?*, 31 U. DAYTON L. REV. 1 (2005) (discussing the development of "don't ask, don't tell" policy and continuing controversy surrounding it).

252. *See* Green & Matasar, *supra* note 28, at 691 (criticizing *Boyle* Court for failing to explain why government contractor defense applies to "guns, but not butter"). *But see* Cass & Gillette, *supra* note 243 (maintaining that whether immunity should be extended to government contractor should depend upon nature of product or service contracted for). Dean Cass and Professor Gillette would distinguish between off-the-shelf products already available in the unregulated civilian market and goods that have a unique military use. They maintain normal tort rules should apply to the commercially available off-the-shelf products because the contractor is already facing liability for the product sold in the private sector. As to unique military products, immunity might be appropriate to ensure willing producers at acceptable prices. *Id.* at 276-320. While their article is very thoughtful, it assumes that military use of a civilian product will not greatly increase the contractor's exposure to liability. As explained above, this author does not accept this premise. More importantly, Dean Cass and Professor Gillette fail to give sufficient weight to the effect litigation has upon military discipline and the constitutional allocation of military matters to the political branches of government.

253. Press Release, Mary Mott, Dep't of the U.S. Army, Dining Facility Boosts Soldier Morale in Iraq (Oct. 24, 2006), *available at* http://www.trackpads.com/magazine/publish/article_1807.shtml (crediting Napoleon Bonaparte with originating classic statement on importance of supply lines).

be an issue likely to be challenged and litigated in many cases.[254] It is the litigation process itself—and servicemembers invoking that process for incident to service injuries—that must be avoided to protect the federal interest in military discipline. All claims that require testimony from servicemembers undermine military discipline, whether the controversy involves *E. coli* infections caused by poor field mess conditions or a contractor's contaminated canning facility, or a rifle malfunction caused by poor military maintenance or poor contractor design.

Whether the claim involves an unreasonably dangerous design selected by the military or military equipment purchased off-the-shelf from an existing supply, the judiciary should not invite juries to second-guess military decisions that rest on difficult trade-offs balancing mission effectiveness and safety considerations.[255] Often the proposed reasonable alternative designs required in products liability cases are the designs of existing competing products.[256] The discovery of the military's decisionmaking process in choosing between two available products—common in products liability suits—increases the likelihood that military discipline will be directly implicated, every bit as much as *Bivens* actions. Further, in many products liability claims the defendant will seek to reduce or avoid liability by proving product modification or misuse by the plaintiff or a third party.[257] In the military context this will necessarily involve discovery of product maintenance, training, modification, application, and use—all directly implicating the military decisions of superiors.

Similarly, products liability claims brought by members of the Armed Forces injured incident to service may undermine military discipline regardless of the government's role in approving the design. The very act of bringing the suit necessarily challenges the government's decision to equip the military with the product. Much of the discovery process will involve review of government documents and the testimony of government employees to determine the level of government involvement in the design

254. *See, e.g.*, McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983) (without defining the term "military equipment," the court notes that the term lies somewhere between a can of beans and a reconnaissance aircraft).

255. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988); Tozer v. LTV Corp., 792 F.2d 403, 406 (4th Cir. 1986).

256. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998) (requiring that plaintiff present evidence of reasonable alternative design in order to establish design defect); Harvey S. Perlman, *Delaware and the Restatement (Third) of Torts: Products Liability*, 2 DEL. L. REV. 179, 196 (1999) (discussing option of presenting design of existing competitor's product as reasonable alternative design).

257. *See* OWEN, *supra* note 154, § 13.5 (discussing defenses to products liability claims).

or approval of the design.[258] As the Court observed in *Stanley*, the mere process of arriving at correct conclusions would disrupt military discipline.[259] Government employees will be required to testify as to the extent of their consideration of the particular product feature at issue in the litigation. If the government approved the defective design, the claim is barred under *Boyle*; however, even the process of reaching this decision necessarily involves questioning the wisdom of that approval by one subject to military discipline. A case-by-case inquiry into the government's decision to procure the product, as is required under *Boyle*, always has the potential to adversely impact military discipline.

Under *Boyle*, if the court determines that the government did not specify or approve the allegedly defective design, then the suit is permitted to proceed. Although the suit is brought against a private manufacturer, such a suit will still often require detailed inquiry into the conduct of the servicemember, his comrades, his superiors, and the military as a whole. In most jurisdictions the plaintiff's recovery is reduced or precluded by his comparative fault or misuse of the product.[260] Establishing misuse of the product will require inquiry into the sufficiency and competency of military training and the conduct of the plaintiff or his fellow soldiers. For example, if a soldier's hand is injured in an allegedly premature explosion of a diversionary hand grenade due to an allegedly defective delay fuse assembly, the defense is likely to contend that the soldier misused the grenade.[261] His fellow soldiers and the military personnel who investigated the accident will be questioned:[262] Was the soldier properly trained in the use of the grenade; had the soldier removed the grenade safety pin at the time of the explosion; how was the grenade carried on the soldier's combat vest; could the pin have been inadvertently pulled when the grenade was removed from the vest?

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258. *See, e.g.*, Tate v. Boeing Helicopters, 55 F.3d 1150, 1155 (6th Cir. 1995) (discussing development of design for hook and sling system used for lifting heavy loads on military helicopters).

259. United States v. Stanley, 483 U.S. 669, 682-83 (1987).

260. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 17 (1998); OWEN, *supra* note 154, § 13.5.

261. *See* Jorden v. Ensign-Bickford Co., 20 S.W.3d 847, 855 (Tex. App. 2000) (defendant maintained that misuse or alteration of diversionary grenade it manufactured was cause-in-fact of Army sergeant's injuries received when grenade prematurely exploded).

262. *See* Szigedi v. Ensign-Bickford Co., No. 1:00CV00836, 2002 WL 32086774, at *3-4 (M.D.N.C. July 15, 2002) (after Army Master Sergeant special forces team leader sued for injuries incurred when a diversionary grenade prematurely exploded due to alleged product defect, defendant deposed plaintiff, special forces team members, and Army investigators in an effort to establish that grenade pin was removed or grenade was otherwise misused or altered).

Such testimony forces soldiers to question the judgment and actions of their comrades and superiors at the insistence of another soldier. This is contrary to all of their military training. Soldiers are trained to trust their comrades and follow the orders of their superiors—without second-guessing their decisions. In the context of products liability litigation, however, soldiers are encouraged to doubt the abilities of their comrades, the quality of their training, and the judgment of their superiors.

Other issues will also arise in litigation that will require the questioning of military practices, procedures, training, and judgment. Product manufacturers are only liable for defects in the product that existed at the time of sale.[263] Consequently, one of the issues often litigated is the extent to which the product was modified after the sale.[264] Discovery and testimony on this issue will force military personnel to testify as to their training, maintenance, and modification of equipment: Was a warning on the product painted over by the military when changing from woodland to desert camouflage; was a safety device disabled because it interfered with the combat effectiveness of the equipment; who ordered it to be disabled; were the actions of that soldier authorized by military regulations and superior orders; was the order lawful?

The military contractor defense, by precluding all suits by servicemembers injured by allegedly defective products incident to service, would provide a clear line of demarcation with little inquiry into military matters and even less disruption to military discipline.[265] It is a rule that respects the unique disciplinary structure and culture of the military and the Constitution's express and specific allocation of military affairs to the political branches of government, and cautions against judicial second-guessing of military decisionmaking. The military contractor defense incorporates these considerations and provides a defense with a logical scope to preserve them.

D. The Military Contractor Defense Distinguishes Between Civilian and Military Plaintiffs

The *Boyle* court reasoned that the government contractor defense should apply to both civilian and servicemember claims because both suits could indirectly increase procurement costs that might interfere with government

263. RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965); OWEN, *supra* note 154, § 5.3.

264. *Jorden*, 20 S.W.3d at 855 (defendant suggested that diversionary grenade could have been altered after delivery to military because "ready tent" where grenades and weapons were stored was left unguarded fifteen hours a day).

265. *See* United States v. Stanley, 483 U.S. 669, 683 (1987) (discussing incident to service test in context of servicemember's *Bivens* claim).

discretion.[266] This rationale, however, fails to recognize the important differences between civilians and servicemembers that have often provided the basis for distinct substantive and procedural rules.

1. The Differences Between Soldiers and Civilians

Congress has exercised its constitutional authority for plenary control over the military by establishing the Uniform Code of Military Justice,[267] a distinct system of justice applicable only to those serving in the Armed Forces.[268] This system functions without many of the procedural protections constitutionally required for the prosecution of civilians in Article III Courts, including the Fifth Amendment right to a grand jury and the Sixth Amendment right of trial by jury.[269] Members of the Armed Forces are subject to this unique system of justice even for crimes unrelated to their military service.[270] The judiciary may inquire into the jurisdiction of military courts-martial and the constitutionality of court-martial actions, but the judiciary does not interfere with military justice when jurisdiction is proper and the action is constitutionally permissible.[271] This distinct system of justice is necessary because the military is a specialized community governed by a doctrine of discipline separate from that of civilian life.[272] "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress."[273]

This fundamental necessity for military discipline "may render permissible within the military that which would be constitutionally impermissible outside it."[274] The unique requirements of military discipline and the separation of powers in military matters have been held sufficiently important to justify limitations on military members' basic constitutional and legal rights, including

266. Boyle v. United Techs. Corp., 487 U.S. 500, 511-12 (1988).

267. 10 U.S.C. §§ 801-946 (2000).

268. *Id.* § 802; *see also* Gosa v. Mayden, 413 U.S. 665, 673 (1973) (plurality opinion).

269. Solorio v. United States, 483 U.S. 435, 450 (1987) (upholding court-martial jurisdiction, without Fifth Amendment's right to grand jury and Sixth Amendment's jury trial requirement, over members of Armed Services at time of offense charged even where crime not connected to military service).

270. *Id.* (overruling O'Callahan v. Parker, 395 U.S. 258 (1969)). *O'Callahan* limited military tribunal jurisdiction to crimes with service connection.

271. United States v. Grimley, 137 U.S. 147 (1890).

272. Chappell v. Wallace, 462 U.S. 296, 301 (1983) (quoting Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953)).

273. Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion) (footnote omitted).

274. Parker v. Levy, 417 U.S. 733, 758 (1974).

fundamental rights such as freedom of speech[275] and the free exercise of religion.[276] Servicemembers are, as a matter of law, subject to stricter discipline and have less freedom than civilians. As just one example, most civilians are at-will employees. Civilians are free to quit their jobs without giving any notice and for any reason.[277] If a civilian refuses to do what his employer tells him to do, he may receive a poor raise or performance evaluation, or perhaps lose his job. Even contract employees are, at most, subject to civil damages for breaching their employment contracts.[278] Servicemembers, however, are subject to criminal conviction and imprisonment for desertion if they refuse to honor

275. *Id.* The Court upheld the court-martial conviction and sentencing of an Army physician who urged African-American soldiers to refuse to fight in Vietnam because they were denied their constitutional rights in the United States and because the war was unjust. He was convicted of, among other charges, conduct unbecoming an officer and conduct to the prejudice of good order and discipline under the Uniform Code of Military Justice. *See generally* Kellman, *supra* note 8 (criticizing Rehnquist Court for abdicating its responsibility to review civil claims involving military matters).

276. Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (Air Force regulations may preclude wearing of yarmulke despite servicemember's religious beliefs), *superseded by statute*, 10 U.S.C. § 774(b) (2000); United States v. Burry, 36 C.M.R. 829, 831 (C.G.B.R. 1966) (holding soldier may be ordered to work on Sabbath); United States v. Chadwell, 36 C.M.R. 741, 749-50 (N.B.R. 1965) (holding constitutional protection not extended to servicemembers' refusal, on religious grounds, to obey a legal and necessary order to receive inoculations); *see also* Thomas R. Folk, *The Military, Religion, and Judicial Review: The Supreme Court's Decision in* Goldman v. Weinberger, ARMY LAW., Nov. 1986, at 5.

277. *See* PAUL WEILER, GOVERNING THE WORKPLACE 89-104 (1990) (discussing mutual lack of obligation in at-will employment where employee can quit at any time and for any reason, and employer can fire employee at any time and for any reason).

278. *See, e.g.*, Handicapped Children's Educ. Bd. of Sheboygan County v. Lukaszewski, 332 N.W.2d 774, 779 (Wis. 1983) (ordering employee to pay damages employer incurred to find her replacement when she quit in violation of her contract).

their contracts.[279] If a soldier fails to follow a lawful order he is subject to prosecution, imprisonment, or—in cases of desertion in time of war—execution.[280] Civilians can protest the United States' decision to wage war or the way in which it is being conducted, whereas the same conduct by a soldier may subject him to discipline and punishment.[281]

279. United States v. Grimley, 137 U.S. 147 (1890) (denying habeas corpus petition of forty-year-old man convicted of desertion by military court-martial, although he lied about his age at time of enlistment in order to circumvent thirty-five-year maximum age limit; enlistment not voided by his deceit and defendant subject to exclusive jurisdiction of court-martial).

280. 10 U.S.C. § 885 (2000). On January 31, 1945, Army private Edward Slovik was executed by firing squad for desertion during World War II. Private Slovik was the last soldier executed for desertion, but the penalty of death remains available for the crime of desertion in time of war. *See generally* WILLIAM BRADFORD HUIE, THE EXECUTION OF PRIVATE SLOVIK (1954); Scott Sylkatis, *Sentencing Disparity in Desertion and Absent Without Leave Trials: Advocating a Return of "Uniform" to the Uniform Code of Military Justice*, 25 QUINNIPIAC L. REV. 401 (2006) (discussing wide range of punishments authorized for crimes of desertion and absent without leave under Uniform Code of Military Justice, and proposing return to sentencing uniformity to ensure sentencing abuses and disparate treatment of similar cases do not occur).

281. *See* Parker v. Levy, 417 U.S. 733 (1974) (denying habeas relief to Army doctor court-martialed and sentenced to three years hard labor for telling enlisted African-American soldiers that they should refuse to go to Vietnam because they were denied their freedom at home).

The *Feres* doctrine precludes members of the military from bringing claims for injuries they receive incident to their military service.[282] These suits are precluded because allowing military members to question the decisions of other military and government employees could "undermine the commitment essential to effective service and . . . disrupt military discipline in the broadest sense of the word."[283] While civilians may bring civil actions seeking damages from federal government actors who violate their constitutional rights,[284] members of the Armed Forces may not.[285] The Court has refused to entertain servicemembers' claims seeking money damages for constitutional violation against both military[286] and civil[287] superiors where such claims might interfere with the political branch's military decisions.[288]

To the extent that civilian claims arise from injuries caused by military equipment, such cases could implicate military discipline, but not to the same extent as those brought by servicemembers themselves.[289] Moreover, there are additional policy reasons for allowing such claims even where the same claims would be precluded if brought by military members. These are the same rationales articulated by the Court in *Johnson* and *Feres*, including the lack of alternative compensation for civilian plaintiffs and the fact that civilian plaintiffs do not assume the risks associated with military activities, as do military personnel.

2. Fundamental Fairness Requires that the Military Contractor Defense Not Apply to Civilian Claims

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

283. United States v. Johnson, 481 U.S. 681, 691 (1987) (applying *Feres* doctrine but clarifying military discipline and separation of powers with regard to military matters as primary rationales justifying doctrine).

284. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing cause of action for damages for violation of Fourth Amendment protections against unreasonable searches and seizures by federal agents).

285. United States v. Stanley, 483 U.S. 669, 681 (1987); Chappell v. Wallace, 462 U.S. 296 (1983).

286. *Chappell*, 462 U.S. at 305 (holding that enlisted military personnel may not bring a damages suit against superior officers for alleged constitutionally prohibited racial discrimination).

287. *Stanley*, 483 U.S. at 683-84. The plaintiff alleged that without his consent or knowledge he had been given lysergic acid diethylamide (LSD) as part of a secret Army study of the effects of the drug on humans. *Id.* at 671. The Court held that no damages remedy was available, even as to constitutional claims not involving an officer-subordinate relationship, if the injury arose out of incident to service activity. *Id.* at 684.

288. Although suits for monetary damages are not allowed, the Court may enjoin ongoing constitutional violations. *Id.* at 691 (Brennan, J., concurring in part and dissenting in part).

289. *See supra* notes 282-83 and accompanying text.

Civilians are occasionally injured or killed as a result of allegedly defectively designed military equipment. Unlike military members, civilians are not compensated through any military or veterans' benefits. In the absence of a civil suit, civilians may well be left without any compensation for their injuries. Civilians may sue under the FTCA if there was negligence on the part of a government employee, but this claim will be barred if the government's negligence involves decisions protected under the *Boyle* discretionary function exception.[290] It is unnecessarily harsh to deny all compensation to civilians injured because of dangerous military equipment.[291] While we all enjoy the benefits of our nation's military superiority, *Boyle* forces the injured civilian to bear a grossly disproportionate share of the costs of equipping the military. Allowing civilian suits might increase the cost of military equipment purchased by the government, but it is not unduly burdensome to have the taxpayers as a whole pay the cost, rather than the unfortunate injured civilian.[292]

Some will object to the application of *Feres*'s incident to service rule to the military contractor defense because it will result in the denial of tort compensation to servicemembers who have made personal sacrifices while serving the United States. Unlike civilians, however, servicemembers will receive compensation for incident to service injuries caused by defective equipment through their extensive military and veterans' benefits; therefore, their exclusion under the military contractor defense does not impact them as

290. 28 U.S.C. § 2680(a) (2000); Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

291. *Boyle*, 487 U.S. at 515-17 (Brennan, J., dissenting) (discussing unfairness of rule that denies compensation available under state tort law to military personnel and to civilians lacking other sources of compensation who are injured by contractor's negligent design).

292. *See generally* Virginia E. Nolan & Edmund Ursin, *Enterprise Liability and the Economic Analysis of Tort Law*, 57 OHIO ST. L.J. 835 (1996) (discussing theory, history and development of strict products liability, including policies of victim compensation and loss spreading).

harshly.[293] Tort law generally provides compensation for past and future medical expenses, lost wages, and pain and suffering.[294] With regard to each of these categories of damages, servicemembers either receive some compensation outside of the tort system or are otherwise not as harshly impacted as civilians by the denial of a tort claim.

Unlike most civilians, all servicemembers receive free medical care.[295] While many civilians have some form of health insurance, they must pay premiums for it and incur some out-of-pocket expenses for deductibles and co-payments.[296] If civilians recover damages in a tort claim for medical expenses paid by their healthcare, they often must reimburse their health insurance carrier through subrogation provisions in their insurance policies.[297] Civilians injured by accidents involving military equipment who are unable to return to work may qualify for some benefits through Social Security, but these do not approach the military benefits available to servicemembers. In contrast, military members permanently unable to resume their military duties because of incident to service injuries will be discharged with lifetime disability pay and free medical care at veterans' hospitals.[298]

It is true that the military contractor defense would deny military members the potentially large pecuniary awards for pain and suffering allowable under most state tort laws. However, these damages are, at least in part, consumed by the transactional cost of attorney fees and litigation expenses. Almost all products

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293. *See, e.g.*, Feres v. United States, 340 U.S. 135, 140 (1950) (discussing broad package of benefits available to servicemembers and their families); *see also* CHRISTOPHER P. MICHEL, THE MILITARY ADVANTAGE (2006).

294. RESTATEMENT (SECOND) OF TORTS §§ 905-906 (1965).

295. All active duty personnel receive free healthcare through the TRICARE system. Additionally, dependants and retirees have the choice of three healthcare plans that best fit their needs. Your TRICARE Benefits Explained, http://www.military.com/benefits/tricare/understanding-your-tricare-benefits (last visited Jan. 14, 2008).

296. According to the U.S. Census Bureau, 15.9 percent of the population—46.6 million Americans—have no health insurance. Press Release, U.S. Census Bureau, Income Climbs, Poverty Stabilizes, Uninsured Rate Increases (Aug. 29, 2006), *available at* http://www.census.gov/Press-Release/www/releases/archives/income_wealth/007419.html. Of those with health insurance through their employment, workers pay an average of $2064 annually in premiums in addition to the $7080 contributed by their employers. TOWERS PERRIN, 2008 HEALTH CARE COST SURVEY 1 (2007), *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=HRS/USA/2008/200801/hccs_2008.pdf.

297. *See* Paul R. Thomson III, Note, *A Subrogation Clause in a Health Insurance Policy Is Enforceable Even Though the Insured Has Not Been Made Whole:* Higginbotham v. Arkansas Blue Cross & Blue Shield*, 312 Ark. 199 (1993)*,16 U. ARK. LITTLE ROCK L. REV. 475 (1994) (discussing health insurance subrogation generally, as well as its sometimes harsh consequences on tort compensation for injured parties).

298. 10 U.S.C. § 1201 (2000) (retirement or separation for physical disability); 38 U.S.C. § 1110 (wartime disability compensation); *id.* § 1131 (peacetime disability compensation).

liability suits are handled on a contingency fee basis, commonly in the thirty-three percent to forty percent range.[299] Moreover, the expenses associated with litigating a products liability claim can be tremendous.[300] Consequently, a large pain and suffering award often proves not to be as large as it first appears.

Military members' benefits do not include compensation for pain and suffering, but military members are honored by society for their sacrifice in the service of their country. While some may scoff at this intangible form of compensation, it is valuable to many, if not all, of the veterans who bear the physical marks and scars of their service.[301]

In addition, civilians do not agree to assume the risks of military activities as do the members of our all-volunteer military.[302] Every member of the military

299. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(a), (c) (2006) (allowing contingency fee agreements so long as charge does not result in "unreasonable fee"); *see also* Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339 (1996) (criticizing ABA for rarely finding contingency fee contracts unreasonable, even when case involves little risk or work for attorney).

300. Richard L. Cupp, Jr., *Believing in Products Liability: Reflections on* Daubert*, Doctrinal Evolution, and David Owen's* Products Liability Law, 40 U.C. DAVIS L. REV. 511, 518-19 (2006) (discussing tremendous expenses associated with expert witnesses, particularly given alternative reasonable design requirement of *Restatement (Third) of Torts*).

301. It is not hard to imagine that a person injured from military equipment during training or combat might feel less shame, humiliation, and loss than a person similarly injured by a defective lawn mower, golf cart, or wood chipper. Certainly, it makes for a better story to tell friends, future employers or grandchildren. Consider two candidates for office, one who lost his arm ejecting from his military aircraft and the other who lost his arm when it was caught in a wood chipper. One will be regarded as a hero, the other as careless, regardless of the success of his products liability claim against the manufacturer of the chipper.

302. The United States has relied upon an all-volunteer force since the draft was eliminated in 1973. According to many experts, the all-volunteer force is better-educated, more intelligent, dedicated, and professional, and more representative of the population as a whole than was the conscripted military. *See, e.g.*, BERNARD ROSTKER, I WANT YOU!: THE EVOLUTION OF THE ALL-VOLUNTEER FORCE (2006). However, some believe that there are benefits to a draft. Congressman Charles Rangel has introduced legislation to renew the draft in order to ensure sufficient troops for a military overtaxed by the demands of prolonged deployments in Iraq and Afghanistan. He also believes a draft is necessary to ensure that the entire nation—including the sons and daughters of elected officials, and not just lower socio-economic class members—faces the possibility of service and sacrifice when the country goes to war. *See* Press Release, Congressman Charles Rangel, Congressman Charles Rangel Renews Call for Military Draft (May 26, 2005), *available at* http://www.house.gov/list/press/ny15_rangel/CBRStatement Draft05262005.html. In the event that a draft is reinstated, it would not affect the proposed scope of the military contractor defense. Although conscripted members of the military would not have voluntarily assumed the risks of military service, their loss of the right to sue military contractors seems minor when compared with the other restrictions on their freedoms and rights that accompany conscripted military service.

presumably understood the risks associated with military service when they volunteered. In most jurisdictions, products liability law recognizes assumption of the risk as either a complete bar to recovery or as a factor that reduces recovery.[303] The concept of assumption of the risk supports common law doctrines such as the Fireman's Rule, which precludes suits by firefighters, police officers, and others who are injured in the course of confronting dangers inherent in their employment.[304] While this rule was originally limited to premises claims, it has been expanded to bar even products liability claims by firefighters injured fighting fires caused by a defective product.[305] The dangers of fighting fires are risks the firefighter undertakes as an inherent part of that employment. Members of the public injured in such fires are free to bring claims for their injuries because they did not undertake the risk. The same rationale supports a distinction permitting claims by civilians injured by defective military equipment while barring claims by military members who assume these risks as part of their military service.

Similarly, civilians injured within the scope of their employment are often precluded from suing their employer and others deemed to be statutory employers under state workers' compensation statutes.[306] Statutory employers include those subcontractors that perform work which is a part of the employer's business.[307] While this bar is seldom applied to products liability claims, it is not difficult to conceive of military equipment suppliers as subcontractors performing work which is part of the business of the military. To the extent that servicemembers receive benefits similar or superior to workers' compensation benefits, the bar to suits against military contractors is similar to the preclusive effect of state workers' compensation statutes.[308]

Finally, civilian suits are not likely to seriously impact the government's ability to purchase the military equipment it needs to perform the military's important functions. Civilians are less likely to be injured by military equipment than are military members, by virtue of exposure to the danger alone. Even if civilian claims increase the cost of military equipment, the cost increases can be spread to all taxpayers and should not adversely impact the ability of the government to acquire the equipment it needs.

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303. OWEN, *supra* note 154, § 13.4 (discussing application of assumption of risk to products liability law).

304. DOBBS, *supra* note 210, § 285 (discussing scope and theory of Firefighters Rule and concluding that most plausible rationale is based upon assumption of risk principles).

305. *Id.* § 278 (listing cases).

306. ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 111.04 (2000) (discussing statutory employers' immunity).

307. *Id.*

308. *See, e.g.*, United States v. Johnson, 481 U.S. 681, 690 (noting injured servicemembers receive benefits that compare favorably to workers' compensation schemes).

V. Conclusion

There are important differences between servicemember and civilian plaintiffs and military and non-military procurement, but *Boyle* fails to make necessary and useful distinctions recognizing these differences. The government contractor defense approved by the Court in *Boyle* separated the defense from its military mooring and created a split in the lower courts regarding the scope of the defense. Tethered only by the broad discretionary function, *Boyle* expanded the application of the government contractor defense and created a logical incongruity between the broad rationale and the limiting test approved by the Supreme Court. This incongruity has led to disagreement in the lower federal courts as to the proper scope of the defense and has resulted in a divide between the goals of the defense and the realities of modern military procurement.

Ultimately, the Court must clarify the scope of the government contractor defense to allow its consistent and straightforward application. The military is constitutionally and fundamentally different from civilian society, and the Court must recognize those differences by making distinctions between civilian and military plaintiffs and the procurement of military and non-military products. The military contractor defense provides a strong basis for the creation of federal common law, results in a defense that reflects the actual procurement process, and eliminates the current split in the courts by providing a clear and logical scope to the defense.