

The Government Contractor Defense & Its Impact on Litigation Against Military Contractors

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This Memorandum addresses the history of the government contractor defense and its present-day applications in pending litigation arising from alleged misconduct by military contractors in Iraq and Afghanistan.

The government contractor defense, or GCD, is the primary defense historically used by military contractors (or Private Military Firms, aka “PMFs”). The GCD grants PMFs immunity from state tort claims against federal government contractors. While the history of civil litigation against PMFs runs along several distinct tracks of case law,¹ the most prominent track centers around traditional articulations of the GCD. The GCD is a judicially created doctrine, rooted in courts’ interpretations of the Federal Tort Claims Act (FTCA). Traditionally, the GCD has been anchored to one particular exception to the FTCA, the “discretionary function” exception.² It was typically applied to products liability claims, although the 1990s saw an expansion in both its scope and its asserted legal foundation. Current litigation tests this expansion in unprecedented ways.

Part I of this Memorandum traces early articulations of the GCD, its development after passage of the FTCA in 1945, and the modern-day justification for its expansion.³ It also considers some limitations to the GCD, and certain strategies that have been advanced for defeating it. Part II examines pending litigation arising from the use of military contractors in current military operations in Iraq and Afghanistan. The causes of action span the full range of tortious behavior, from recklessness in the operation of airplane flights and truck convoys, to torture in the Abu Ghraib prison. Their resolution will force courts to address the many new uses of PMFs by the military. It will also more fully delineate the framework of rights available to soldiers and civilians harmed by PMF

¹ Another track of litigation involves claims made by civilians while working for PMFs on military bases. The case law in these suits centers on federal preemption of claims under the Defense Base Act (DBA). The DBA is a federal statute that extends the Longshore and Harbor Worker’ Compensation Act (LHWCA), providing a worker’s compensation scheme to certain groups of individuals employed in defense work outside the United States (typically on military, air, or naval bases).CITE It is read to preempt personal injury claims by civilian contractors against their PMF-employers. Yet another track is based in an exception to the Federal Tort Claims Act, the “combatant activities” exception, which states that the US is immune from "any claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). This exception, like the “discretionary function” exception discussed in this memo, has been applied to immunize not only the government, but its military contractors, from suit, as well. *See e.g.*, *Koohi v. United States*, 976 F.2d 1328, 1333 (9th Cir. 1992).

² 28 U.S.C. § 1346(b)

³ For an comprehensive overview of the development and current scope of the government contractor defense, see also “The Government-Contractor Defense to State Product Liability Laws,” 53 A.L.R.5th 535 (2004); *and* Alison M. Levin, Note: “The Safety Act of 2003: Implications for the Government Contractor Defense,” 34 Pub. Cont. L.J. 175, 183-87 (2004) (providing detailed discussion of the history and status of the GCD).

misconduct.

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I. The Government Contractor Defense (GCD): Its initial application to military contractors in products liabilities cases & subsequent expansion

The government contractor defense “shields contractors from tort liability for products manufactured for the Government in accordance with Government specifications, if the contractor warned the United States about any hazards known to the contractor but not to the Government.”⁴ It is a federal common law defense traditionally immunizing independent government contractors from being held strictly liable in state tort actions.⁵ This Memo examines the origins of the GCD, tracing its evolution alongside the development of the *Feres* Doctrine. It also examines how these two affirmative defenses created the original foundation for military contractor immunity, under what came to be known as the *Feres-Stencel* doctrine. This doctrine was invoked by many courts until 1988, when Justice Scalia’s decision in *Boyle v. United Technology Corp.*, 487 U.S. 500 (1988) disavowed *Feres-Stencel* as the legal basis for military contractor immunity.⁶ This Memo further considers the impact of *Boyle* and its progeny on the scope of the immunity, and concludes with a final analysis of its current boundaries.

A. Early Judicial Articulation of the Government Contractor Defense & Its Application to Construction Projects

The history of the GCD is complex, as its justifications are rooted in several different doctrines, spanning over half a century of jurisprudence. Originally applied to government construction projects,⁷ it was not until the late 1970s that the GCD was broadened to include military contractors.⁸

Most courts and scholars place the origins of the GCD (in its most generic form) in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940).⁹ In that case, the Supreme Court held that a government contractor / construction company could not be held liable for washing away part of plaintiff’s land, where “authority to carry out the project was validly conferred” by the federal government and where the contractor complied with government specifications in executing the contract.¹⁰ The precise basis for the defense

⁴ *Hercules Inc. v. United States*, 516 U.S. 417, 421-22 (1996).

⁵ R. Joel Ankney, “*But I was only following orders*”: *The Government Contractor Defense in Environmental Tort Litigation*, 32 WM AND MARY L. REV. 399, 399 (1991).

⁶ Examined further in Part I, E.

⁷ *McKay v. Rockwell Intern. Corp.*, 704 F.2d 444, 448 (C.A.Cal.1983) (noting origins of GCD); *see also* *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986) (citing to *McKay*).

⁸ *McKay v. Rockwell Intern. Corp.*, 704 F.2d 444, 448 (C.A.Cal.,1983)(noting origins of GCD).

⁹ *See e.g.*, *U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146-47 (9th Cir. 2004); *Smith v. Lockheed Propulsion Co.*, 56 Cal.Rptr. 128, 139 (Cal.App. 4, 1967); R. Joel Ankney, *supra* note 7, at 401-02; R. Todd Johnson, Comment, *In Defense of the Government Contractor Defense*, 36 CATH. U.L. REV. 219, 228 (1986). *See also* *Bynum v. FMC Corp.*, 770 F.2d 556, 564 (5th Cir. 1985). *Bynum* is also interesting in that it was pre-*Boyle* case that declined to extend the GCD to military contractors, stating that “[t]he difficulty of establishing a traditional agency relationship with the government makes the derivative sovereign immunity defense ill-suited to many manufacturers of military equipment.” *Id.*

¹⁰ *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 20 (1940).

was not clear, but it seemed to rest on a combination agency theory¹¹ and, in response to petitioners' arguments, the Fifth Amendment's Takings Clause.¹²

Subsequent cases, such as *Myers v. United States*, 323 F.2d 580 (9th Cir.1963), cited to *Yearsley* in upholding that defense—based on a similar combination of agency theory and the Fifth Amendment—for government contractors performing construction work.¹³ “To the extent that the work performed by [highway construction company] McLaughlin, Inc., was done under its contract with the Bureau of Public Lands, and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by the appellants.”¹⁴

Two years later, the court in *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1965), held that the contractor in question was immune from liability for damages caused by fumes from dredged material, where the contractor performed its contract according to government specifications.¹⁵ The court cited *Yearsley*'s agency arguments:

'Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.'

However *Dolphin Gardens* also intertwined the traditional agency-based GDC theory with another defense, the “discretionary function” exception to the Federal Tort Claims Act (discussed in more detail below, in parts B & E). This exception precludes FTCA claims based upon the exercise of “a discretionary function or duty on the part of a federal agency.”¹⁶ The government (which was sued alongside the contractor) successfully raised this defense in its motion for summary judgment, inspiring the court to invoke it when applying the GCD to the contractor, as well:

To impose liability on the contractor under such circumstances would render the Government's immunity for the consequences of acts in the performance of a 'discretionary function' meaningless, for if the contractor was held liable, contract prices to the Government would be increased to cover the contractor's risk of loss from possible harmful effects of complying with decisions of executive officers authorized to make policy judgments¹⁷

Although it was not especially prominent in the debate over military contractor immunity

¹¹ *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 21 (1940) (“Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred”)

¹² “So, in the case of a taking by the Government of private property for public use such as petitioners allege here, it cannot be doubted that the remedy to obtain compensation from the Government is as comprehensive as the requirement of the Constitution, and hence it excludes liability of the Government's representatives lawfully acting on its behalf in relation to the taking.” *Yearsley*, 309 U.S. at 22.

¹³ *Myers v. United States*, 323 F.2d 580, 583 (9th Cir.1963).

¹⁴ *Id.*

¹⁵ *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965)

¹⁶ Specifically, the exemption pertains to “[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a)

¹⁷ *Dolphin Gardens, Inc.*, 243 F. Supp. at 827.

at that time, this legal justification would eventually form the basis for the defense in the late 1980s.

B. The FTCA & Immunity Arising Out Of The *Feres* Doctrine

However, this immunity was not extended to military contractors until the late 1970s, although defendants did (unsuccessfully) attempt to invoke it as early as the 1960s.¹⁸ This was in part because larger questions concerning the military's own immunity from suit loomed over courts as a result of the Federal Tort Claims Act.¹⁹

When Congress enacted the FTCA in 1945, it waived the government's immunity from suit where negligent government employees, acting within the scope of their employment, caused "injury or loss of property, or personal injury or death."²⁰ Originally, the FTCA specifically *included* the military, and acts undertaken in the line of duty.²¹

The Supreme Court initially upheld this right, albeit cautiously. In *Brooks v United States* (337 US 49 (1949)), the first case addressing service members' right to recovery to reach the Court, a soldier sued the government for injuries he sustained off-duty when his automobile collided with a negligently operated Army truck.²² The Court held that the FTCA gave service members the right to bring claims against the government, where those claims arose out of negligence.²³ Justice Murphy, writing for the majority, asserted that "[t]he statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.'²⁴

The Court did, however, limit its holding to exclude injuries sustained incident to the claimant's service.²⁵ Justice Murphy wrote:

The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We

¹⁸ See, e.g., *Littlehale v. E.I. du Pont de Nemours & Co*, 380 F.2d 274 (2d Cir. 1967) and discussion *infra* at n.54.

¹⁹ 28 U.S.C.A. §§ 1346, 2671 et seq.

²⁰ 28 U.S.C.A. § 1346(b)(1).

²¹ 28 U.S.C.A. § 2671, see also Herbert B. Chermiside, Jr., J.D. *Serviceman's Right to Recover under Federal Tort Claims Act* (28 U.S.C.A. §§ 2671 et seq.), 31 A.L.R. Fed. 146, § 2 (1977-2000). Chermiside goes on to write, "especially since another section of the Act (28 U.S.C.A. § 2680(j)) specifically excepts liability on any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war...it might be concluded that the Act authorizes all servicemen's actions except those arising from combatant activities." *Id.*

²² *Brooks v United States*, 337 US 49, 50 (1949).

²³ *Brooks*, 337 US at 51.

²⁴ *Id.*

²⁵ *Id.*, at 52.

*express no opinion as to it... that is not the case before us.*²⁶

Such a “wholly different” case did arise, just one year later in *Feres v United States*, 340 US 135 (1950). *Feres* consolidated three cases into one,²⁷ unified by fact that all three involved a claimant whom, “while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces.”²⁸ In *Feres*, the Court held that “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”²⁹

Justice Jackson, writing for a unanimous Court, noted the dearth of legislative history addressing the FTCA’s scope vis-à-vis the armed forces.³⁰ The decision turned in large part on “private parallel liability” and a reading of what Justice Jackson described as “the test of allowable claims”: text in the statute stating that “[t]he United States shall be liable...in the same manner and to the same extent as a private individual under like circumstances...”³¹ The Court understood this to mean that the FTCA was not intended to create a new cause of action where none had hereto existed; rather, it was to allow liability “under circumstances that would bring private liability into existence.”³² This reading limited claims available to the plaintiffs in question:

*One obvious shortcoming in these claims is that plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.*³³

Justice Jackson considered the analogy of the state militia, as well, finding no instances where a state allowed tort actions against it to go forward, where injuries were incident to service.³⁴

Interestingly, Justice Jackson admitted that private liability would “undoubtedly” ensue if the status of the parties were not considered.³⁵ That is to say, the three cases at hand did not consist of injuries incurred during the course of the soldiers’ duty in the most traditional sense: two cases (*Jefferson v. U.S.*, and *Griggs v. U.S.*) were medical

²⁶ Brooks, 337 US at 52-53 (1949) (internal citations omitted).

²⁷ The three cases were *Jefferson v. U.S.*, 178 F.2d 518 (4th Cir. 1949) (brought by Arthur K. Jefferson); *Feres v. U.S.*, 177 F.2d 535 (2nd Cir. 1949) (brought by Bernice B. Feres, as executrix under the last will and testament of Rudolph J. Feres, deceased); and *Griggs v. U.S.*, 178 F.2d 1 (10th Cir. 1949) (brought by Edith Louise Griggs, as executrix of the estate of Dudley R. Griggs, deceased).

²⁸ *Feres v United States*, 340 US 135, 138 (1950).

²⁹ *Feres*, 340 US at 146.

³⁰ *Id.*, at 138.

³¹ *Id.*, at 141, *citing* 28 U.S.C. § 2674 and 28 U.S.C.A. § 2674.

³² *Id.*, at 141.

³³ *Id.*, at 141-42 (footnotes omitted).

³⁴ *Id.*, at 142.

³⁵ *Id.*, at 142.

malpractice claims, while the third (*Feres v. U.S.*) arose out of a wrongful death claim based on a fire in army barracks. Although Justice Jackson drew out the analogy for readers—comparing the government to doctors and landlords, respectively—he nonetheless concluded that “the liability assumed by the Government here is that created by ‘all the circumstances,’ not that which a few of the circumstances might create.”³⁶ Finally, in addition to the “private parallel liability” argument, the Court also considered two additional rationales: the availability of alternative sources of compensation, i.e. the Veterans' Benefits Act (VBA),³⁷ and the “distinctively federal” relationship between the government and members of its armed forces, which would be otherwise subject to local tort law.³⁸

The *Feres* Court’s open-ended reading of when precisely injuries are “incident to service” has given rise to a line of controversial decisions by lower courts. Scholars³⁹ and even subsequent courts,⁴⁰ have objected to what they say are overly broad interpretations of the “incident to service” test. Other authorities merely note that the standard encompasses situations well beyond those that would fall under a comparable “disabled in line of duty”

³⁶ *Feres*, 340 US at 142. Ironically, Justice Scalia would criticize this reasoning almost four decades later in *United States v. Johnson* (481 U.S. 681 (1987)), where, contemplating the *Feres* Court’s “parallel private liability” test, he observed that “[u]nder this reasoning, of course, many of the [FTCA’s] exceptions are superfluous, since private individuals typically do not, for example, transmit postal matter, 28 U. S. C. § 2680(b), collect taxes or customs duties, § 2680(c), impose quarantines, § 2680(f), or regulate the monetary system, § 2680(i).” *United States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting).

³⁷ *Feres*, 340 US at 144. Note that this rationale has been since denominated as “no longer controlling” (*United States v. Shearer*, 473 U.S. 52, 58, n. 4. (1985)).

³⁸ *Feres*, 340 US at 144. While the *Feres* Court was primarily concerned with the fairness to the soldier (at 143), this argument has been redefined by subsequent decisions to turn on the military’s need for uniformity (See, e. g., *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672 (1977)). Note that although this reading of the decision comports with Justice Scalia’s interpretation in *Boyle*, other courts have read the *Feres* decision differently (See, e.g., *Pringle v. United States*, which replaces the “private parallel liability” argument with a later adopted “fear of damaging the military disciplinary structure” rationale. *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000), *citing* *Madsen v. United States ex rel. United States Army Corps of Engineers*, 841 F.2d 1011, 1013 (10th Cir. 1987) (quotation omitted).

³⁹ See Elizabeth A. Reidy, Comment, *Gonzalez v. United States Air Force: Should Courts Consider Rape to be Incident to Military Service?*, 13 AM. U.J. GENDER SOC. POL’Y & L. 635 (2005). Reidy discusses *Gonzalez v. United States Air Force* (88 Fed. Appx. 371, 374-75 (10th Cir. 2004)), an unpublished decision by the Tenth Circuit, where a suit for monetary relief under the FTCA “for negligence, gross negligence, and violation of statutory duties,” along with a Title VII civil rights claim, arising from the rape of one service member by another, was barred because the injury occurred on-base and while the plaintiff was on active duty and “subject to military discipline and control.” See also Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1 (2003); and John Astley, Note, *United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow*, 38 AM. U.L. REV. 185, (1988) (arguing that “[t]he Johnson Court...failed to acknowledge that a civilian’s negligence might cause an injury incident to service yet not implicate the *Feres* doctrine”).

⁴⁰ See, e.g. *Pringle v. United States*, 208 F.3d 1220, 1223-24 (10th Cir. 2000) (quoting *Persons v. United States*, 925 F.2d 292, 296 n.7 (9th Cir. 1991)) (observing that the *Feres* doctrine has been expanded “to the point where it now “encompasses, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual’s status as a member of the military”); see also *Dreier v. United States*, 106 F.3d 844, 848 (9th Cir. 1997) (“Courts applying the *Feres* doctrine have given a broad reach to *Feres*’ ‘incident to service’ test and have barred recovery by members of the armed services for injuries that at first blush may not have appeared to be closely related to their military service or status”).

test.⁴¹ Since its inception in *Feres*, the “incident to service” test has been broadened to block claims made by, among others, soldiers secretly tested with LSD,⁴² discharged soldiers held in military-run prisons,⁴³ and soldiers raped by other soldiers.⁴⁴

C. *Stencel*: Extension of the *Feres* doctrine to bar military contractors’ third party indemnifications

Feres had implications for contractors as well as service members. In *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977), the Supreme Court held that because *Feres* barred claims against the government by servicemen where injuries were “incident to duty,” it also protected the government from third party indemnity actions by military contractors, where indemnity was sought as a result of service-related law suits brought by servicemen.⁴⁵

Stencel involved the case of a National Guardsman who was injured when his egress life-support system malfunctioned during a mid-air emergency.⁴⁶ He brought suit against the United States and Stencel Aero Engineering Corporation, manufacturer of the ejection system.⁴⁷ Stencel then cross-claimed against the United States for indemnity, claiming that “any malfunction in the egress life-support system used by [the Plaintiff] was due to faulty specifications, requirements, and components provided by the United States or other persons under contract with the United States.”⁴⁸ The United States moved to dismiss the cross claim, arguing that *Feres* barred an indemnity action for damages paid to military personnel who could not otherwise recover from the government.⁴⁹

The Court agreed. Writing for the Majority, Justice Burger recalled *Feres* arguments concerning the “distinctly federal” nature of relationships between the military and servicemen:

The relationship between the Government and its suppliers of ordnance is certainly no less "distinctively federal in character" than the relationship between the Government and its soldiers. The Armed Services perform a unique, nationwide function in protecting the security of the United States. To that end military authorities frequently move large numbers of men, and large quantities of

⁴¹ This test is typically used to determine benefits for naval reservists injured during inactive duty training as provided by 10 U.S.C.A. § 6148. Herbert B. Chermiside, Jr., J.D. *Serviceman’s Right to Recover under Federal Tort Claims Act* (28 U.S.C.A. §§ 2671 et seq.), 31 A.L.R. Fed. 146, § 2 (1977-2000).

⁴² *United States v. Stanley*, 483 U.S. 669, (1987) (holding that the secret LSD drugging by the CIA of an Army sergeant was “incident to service” because it took place on an Army base, pursuant to official orders).

⁴³ *Ricks v. Nickels*, 295 F.3d 1124 (10th Cir. 2002) (claims made by ex-soldier in possession of Certificate of Discharge still subject to *Feres* doctrine)

⁴⁴ *Gonzalez v. United States Air Force* (88 Fed. Appx. 371, 374-75 (10th Cir. 2004)) (unpublished opinion) (rape included among events arising out of military recreational activities that are considered “incident to service” for the purpose of barring tort claims).

⁴⁵ *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673-74 (1977).

⁴⁶ *Stencel Aero Eng'g Corp.*, 431 U.S. at 667.

⁴⁷ *Id.*, at 668.

⁴⁸ *Id.*, at 668.

⁴⁹ *Id.*, at 669.

*equipment, from one end of the continent to the other, and beyond. Significant risk of accidents and injuries attend such a vast undertaking. If, as the Court held in Feres, it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries, it makes equally little sense to permit that situs to affect the Government's liability to a Government contractor for the identical injury.*⁵⁰

Burger's argument also considered another factor, "[t]he peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance of such suits on discipline."⁵¹ He reasoned that, regardless of whether or not a suit was allowed to be brought by a serviceman or a contractor, the effect on military discipline would be the same.⁵² It would "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions," providing another reason to bar such suits.⁵³

The resulting *Feres-Stencel* doctrine "created an insurmountable dilemma for military contractors by excusing the government both from suit by servicemen and from indemnification actions brought by the contractor."⁵⁴ As a result, military contractors turned to traditional defenses, such as the GCD.

D. Effects of the *Feres-Stencel* doctrine: courts turn to the GCD to immunize military contractors

As mentioned in Part XX above, the traditional GCD was applied to construction contracts. Although military contractors attempted to extend the immunity to cover liability arising from their own manufacture and design of military equipment, courts refused to do so until the late 1970s,⁵⁵ when it became clear that the *Feres-Stencel* doctrine would force military contractors "to pay for injuries resulting from their implementation of government specifications."⁵⁶ Interestingly, the *Feres-Stencel* doctrine was not cited in early cases that laid the groundwork for applying the GCD to military contractors.⁵⁷ However subsequent cases drew heavily on *Feres* in particular, until the

⁵⁰ *Stencel Aero Eng'g Corp.*, 431 U.S. at 672 (internal citations omitted).

⁵¹ *Stencel Aero Eng'g Corp.*, 431 U.S. at 671 (1977); *citing to* *United States v. Brown*, 348 U.S. 110, 112 (1954).

⁵² *Id.*, at 673.

⁵³ *Id.*, at 673.

⁵⁴ R. Todd Johnson, Comment, *In Defense of the Government Contractor Defense*, 36 CATH. U.L. REV. 219, 228 (1986)

⁵⁵ Johnson discusses early attempts at extending the GCD to military contractors in *In Defense of the Government Contractor Defense*, 36 CATH. U.L. REV. 219, 229-231 (1986); *citing* *Littlehale v. E.I. du Pont de Nemours & Co.*, 380 F.2d 274 (2d Cir. 1967) and *Foster v. Day & Zimmermann, Inc.* 502 F.2d 867 (8th Cir. 1974).

⁵⁶ Charles E. Cantu & Randy W. Young, *The Government Contractor Defense: Breaking the Boyle Barrier*, 62 ALB. L. REV. 403, 412 (1998).

⁵⁷ See, e.g., *Sanner v. Ford Motor Company*, 144 N.J. Super. 1, (Law Div. 1976); and *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980)

Supreme court's decision in *Boyle* in 1988.⁵⁸

The GCD was first extended to military contractors in *Sanner v. Ford Motor Company*, 144 N.J. Super. 1, (Law Div. 1976).⁵⁹ In *Sanner*, the plaintiff was injured when he was involved in an automobile accident in his military-issued Ford Jeep.⁶⁰ The Jeep lacked a roll bar and seatbelts, items that the Army had specifically requested *not* be included. The district court granted summary judgment for the defendant, holding that “[a] manufacturer is bound to comply with plans and specifications provided to it by the Government in the production of military equipment. If it does it is insulated from liability.”⁶¹

In 1980, Judge Pratt of the District Court for the Eastern District of New York considered the GCD in depth, in *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980).⁶² The litigation involved claims brought by veterans and their families against chemical companies that produced the herbicide Agent Orange (used by the military during the Vietnam War). In his initial ruling on the GCD, Judge Pratt reviewed the case law behind the affirmative defense,⁶³ evaluated *Dolphin Gardens* “discretionary function” arguments for the extension of governmental immunity to contractors,⁶⁴ and considered a recent opinion examining the role of contractors during war time.⁶⁵ He concluded that “[h]aving considered all the authorities cited and the arguments of counsel, the court is satisfied that a government contract defense exists and has possible application to the facts at bar.”⁶⁶

⁵⁸ See *In re Chateaugay Corp.* 146 B.R. 339, 347, n.14 (S.D.N.Y. 1992) (“Prior to *Boyle*, many Circuits premised the government contractor defense on the *Feres* doctrine, which provides that the Federal Tort Claims Act (“FTCA”) does not cover injuries to Armed Services personnel in the course of military service”), citing *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir.1986); *Bynum v. FMC Corp.*, 770 F.2d 556, 565-66 (5th Cir.1985); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 596-97 (7th Cir.1985).

⁵⁹ *Aff'd*, 154 N.J. Super. 407 (App. Div. 1977). See Harry A. Austin, Case Comment, *Boyle v. United Technologies Corporation: A Questionable Expansion of the Government Contract Defense*, 23 GA. L. REV. 227, 237 n.45 (1988); and R. Todd Johnson, Comment, *In Defense of the Government Contractor Defense*, 36 CATH. U.L. REV. 219, 228 (1986).

⁶⁰ *Sanner v. Ford Motor Company*, 144 N.J. Super. 1, 3-4 (Law Div. 1976).

⁶¹ *Sanner*, 144 N.J. Super. At 8.

⁶² *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980).

⁶³ See *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. at 792; citing *Yearsley*, 309 U.S. 18; *Myers*, 323 F.2d at 583; *Dolphin Gardens, Inc.*, 243 F. Supp. at 827; and *Green v. ICI America, Inc.*, 362 F. Supp. 1263, 1265 (E.D.Tenn.1973).

⁶⁴ *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. at 794.

⁶⁵ Judge Pratt quoted the following passage in *Casabianca v. Casabianca*: “A supplier to the military in time of war has a right to rely on such specifications and is not obligated to withhold from the United States armed forces material believed by the latter to be necessary because the manufacturer considers the design to be imprudent or even dangerous. His conformance, under such circumstances, to the specifications provided to him should be, and is, a complete defense to any action based on design, whether faulty or not.” *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. at 794; citing *Casabianca v. Casabianca*. 428 N.Y.S.2d 400, 401-402 (S. Ct. Bronx County 1980) (Stecher, J.). *Casabianca* is an odd case, in that the product in question was a dough mixer manufactured according to Army specifications during World War II. *Id.* at 401. The case arose almost forty years after the manufacture of the dough mixer, when a child was harmed by the mixer in his father's pizza shop. *Id.* Stating the argument quoted above, the court dismissed all claims against the manufacturer.

⁶⁶ *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. at 796.

When he returned to the question of the GCD two years later, Judge Pratt set out a three part test that would emerge as a model for future evaluation of similar applications of the affirmative defense. In *In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046 (E.D.N.Y. 1982), Judge Pratt stated that, for chemical companies to avail themselves of the government contractor defense, they must prove that: "(1) [t]hat the government established the specifications for 'Agent Orange'; (2) [t]hat the 'Agent Orange' manufactured by the defendant met the government's specifications in all material respects; and (3) [t]hat the government knew as much as or more than the defendant about the hazards to people that accompanied use of 'Agent Orange'."⁶⁷

Soon the majority of federal district courts adopted some variation of Judge Pratt's three-prong test.⁶⁸ In 1983, the Ninth Circuit reintroduced the *Feres-Stencel* doctrine into the analysis, building on the fairness rationale and policy considerations mentioned in that line of cases. *McKay v. Rockwell Intern. Corp.*, 704 F.2d 444 (9th Cir., 1983)⁶⁹ consolidated two wrongful death actions arising from accidents involving defective ejection systems in RA-5C naval aircraft.⁷⁰ Although the deaths in question were found to be caused by the ejection systems in the aircraft, the Ninth Circuit reversed the lower court's finding that the manufacturer was liable.⁷¹

The court observed that "[t]he reasons for applying the government contractor defense to suppliers of military equipment with design defects approved by the government parallel those supporting the *Feres-Stencel* doctrine."⁷² The court elaborated with four arguments: First, allowing liability against contractors in these situations would subvert the doctrine, the court argued, since military suppliers would simply pass the associated costs through to the government (this was a variation of earlier justifications).⁷³ Secondly, holding contractors liable for designs approved by the government would "thrust the judiciary into

⁶⁷ *In re "Agent Orange" Prod. Liab. Litig.*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982).

⁶⁸ Charles E. Cantu & Randy W. Young set out the following comprehensive list of cases that adopted some form of the *Agent Orange* test in *The Government Contractor Defense: Breaking the Boyle Barrier*, 62 ALB. L. REV. 403, 415, n.72 (1998): "Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746-47 (11th Cir. 1985) (denying immunity from liability, under a test slightly different from Agent Orange, to contractor who exclusively designed a defective airplane stabilizer system); Schoenborn v. Boeing Co., 769 F.2d 115, 121, 125 (3d Cir. 1985) (adopting the Agent Orange test and finding under the third prong that a contractor would not be held liable for a defect of which the government had knowledge, but nevertheless approved); Brown v. Caterpillar Tractor Co., 741 F.2d 656, 661-62 (3d Cir. 1984) (remanding for new trial in accordance with a slightly adapted government contractor defense); ...Bynum v. General Motors Corp., 599 F. Supp. 155, 158 (N.D. Miss. 1984), *aff'd*, 770 F.2d 556 (5th Cir. 1985) (denying recovery to a plaintiff who was injured in an Army cargo carrier accident because the parties to the litigation had stipulated to all three elements of the government contractor defense as set forth in Agent Orange); Hubbs v. United Techs., 574 F. Supp. 96, 98 (E.D. Pa. 1983) (applying the three-prong government contractor defense in a case involving alleged defective design of a Navy helicopter); Koutsoubos v. Boeing Vertol, 553 F. Supp. 340, 343-44 (E.D. Pa. 1982) (finding that the contractor failed to prove the third element of the Agent Orange test)."

⁶⁹ *Cert. denied*, 464 U.S. 1043 (1984).

⁷⁰ *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 446 (9th Cir.1983).

⁷¹ *McKay*, 704 F.2d at 446.

⁷² *Id.*, at 449.

⁷³ *Id.*, at 449.

the making of military decision.”⁷⁴ Third, the court stated that military needs may require “push[ing] technology towards its limits,” and incurring risks beyond those normally accepted for consumer goods.⁷⁵ Lastly, the court observed that the defense provided military contractors with incentives to work closely with the military in developing equipment.⁷⁶

As a result, the Ninth Circuit set forth its own test for determining contractor immunity. It held that immunity would result where

*“(1) the United States is immune from liability under Feres and Stencel, (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.”*⁷⁷

Although courts seemed to be building on a shared set of rationales in the adoption of similar tests, not all the circuits fell in line. For instance, in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), the Eleventh Circuit focused on a different rationale for what it termed the “military contractor defense.”⁷⁸ This defense, the court held, was an affirmative defense entirely separate from the GCD and based not on an extension of sovereign immunity, but instead rooted in separation of powers doctrine.⁷⁹ In refusing to hold the defendant military contractor responsible for the design defect implicated in the case, the court applied its own rule.

*A contractor may escape liability only if it affirmatively proves: (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.*⁸⁰

Subsequent cases applied their own combinations of tests and rationales⁸¹ until the

⁷⁴ McKay, 704 F.2d at 449.

⁷⁵ *Id.*, at 449-50.

⁷⁶ *Id.*, at 450.

⁷⁷ *Id.*, at 451.

⁷⁸ *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 740 (11th Cir. 1985)

⁷⁹ “The military contractor defense is available in certain situations not because a contractor is appropriately held to a reduced standard of care, nor because it is cloaked with sovereign immunity, but because traditional separation of powers doctrine compels the defense.” *Shaw*, 778 F.2d at 740.

⁸⁰ *Id.*, at 746.

⁸¹ See, e.g., *Tozer v. LTV Corp.*, 792 F.2d 403, 405-09 (4th Cir. 1986) and *Hendrix v. Bell Helicopter Textron Inc.*, 634 F. Supp. 1551, 1555 (N.D. Tex. 1986), which both applied the *McKay* tests, but used the *Shaw* separation of powers justification as at least one primary rationale. *Hendrix* specifically (mis)states that the *McKay* test is “based on the recognition that courts are ill-equipped to second guess military judgments and is rooted in the separation of powers doctrine in the Constitution.” *Hendrix*, 634 F. Supp at 1555-56. Both *Tozer* and *Hendrix*, as well as *Bynum v. FMC Corp.*, and *Tillet v. J.I. Case Co.*, also invoked the *Feres-Stencel* doctrine. *Tozer*, 792 F.2d, at 408; *Hendrix*, 634 F. Supp at 1555-56; *Bynum v.*

Supreme Court addressed the issue in *Boyle v. United Technology Corp.*, in 1988.

E. Foundation of The Modern-Day Defense: *Boyle v. United Technologies Corp.*

In *Boyle v United Technologies Corp.*, 487 US 500 (1988), the Supreme Court resolved the discrepancies among circuits. Writing for a split court, Justice Scalia stated that military contractor immunity was not based in the *Feres-Stencel* doctrine, nor in a vague appeal to separation of powers, but rather in a specific exception to the FTCA.⁸²

Boyle was a Virginia tort action brought by the estate of a Marine helicopter pilot who drowned when his escape hatch failed to allow him to escape his downed aircraft.⁸³ Boyle's estate sued the builders of the helicopter, the Sikorsky Division of United Technologies Corporation (Sikorsky).⁸⁴ The Fourth Circuit held Sikorsky to be immune from suit under the "military contractor defense,"⁸⁵ citing *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), in which, earlier that same day, it had recognized the defense.⁸⁶

Scalia first sought to justify the GCD. Citing to *Yearsley*, he observed that "[t]he federal interest justifying [that] holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction."⁸⁷ He elaborated with his own interpretation of the "pass-through" rationale. "The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price."⁸⁸ Scalia asserted that procurement of equipment is an area of "unique federal concern,"⁸⁹ concluding that displacement of state tort law was appropriate where a "significant conflict" exists between a federal or interest and state law.⁹⁰

Scalia went on to delineate when that interest was at odds with state-imposed duties of care. The guiding principle could not be the *Feres* doctrine, he explained, since "the *Feres* doctrine, in its application to the present problem, logically produces results that are in some respects too broad and in some respects too narrow."⁹¹ The doctrine lead to overly broad results since it would prevent *all* service-related tort claims against manufacturers.⁹² Conversely, it would also be too narrow in that it would not be available

FMC Corp., 770 F.2d 556, 565-566 (CA5 1985); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 596-597 (CA7 1985).

⁸² *Boyle v United Technologies Corp.*, 487 US 500, 511 (1988).

⁸³ *Boyle*, 487 US at 502.

⁸⁴ *Id.*, at 502.

⁸⁵ *Id.*, at 503.

⁸⁶ *Tozer* cited to both the *Feres* doctrine and *Stencel*. *Tozer v. LTV Corp.*, 792 F.2d 403, 407-09 (4th Cir. 1986)

⁸⁷ *Id.*, at 506.

⁸⁸ *Id.*, at 507; *see also* 510-11.

⁸⁹ *Id.*, at 505-508.

⁹⁰ *Id.*, at 509.

⁹¹ *Id.*, at 511.

⁹² *Id.*

for tort claims made by non-service members, i.e. civilians.⁹³

The Court instead decided that the necessary framework for immunity lay instead in an exception to the FTCA. 28 U.S.C. § 2680(a) exempts from the FTCA claims based on the exercise of a discretionary function or duty on the part of a federal agency or employee of the government.⁹⁴ Scalia wrote that

*[T]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.*⁹⁵

He then set forth the test against which all future immunity claims would be measured. The resulting federal displacement of state law would be appropriate where:

*(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.*⁹⁶

Key is Scalia's explanation for each prong of the test. The first two, he noted, ensure that the suit falls within the scope of discretionary function, "that the design feature in question was considered by a Government officer, and not merely by the contractor itself."⁹⁷ The third prong is necessary to avoid providing contractors with incentives to hide dangers. If contractors withhold important knowledge of risks to avoid liability, the ensuing "discretionary decision" made by government is devoid of highly relevant information.⁹⁸

Justice Brennan's dissent (joined by justices Blackmun and Marshall)⁹⁹ criticized the Court for stepping outside its bounds, citing a past dissent by Scalia advocating judicial deferment to the legislature.¹⁰⁰ It was an astute observation, given Congress's decision to "remain[] silent [on the issue]—and conspicuously so, having resisted a sustained campaign by Government contractors to legislate for them some defense."¹⁰¹ Examining *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), *Milwaukee v. Illinois*, 451 U.S. 304 (1981)

⁹³ *Id.*

⁹⁴ Specifically, the exemption pertains to "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a)

⁹⁵ *Boyle*, 487 US at 511.

⁹⁶ *Id.*, at 512. Here the Court explicitly adopts the test set forth by the Ninth Circuit in *McCays*. See discussion, *supra* notes at 69-77, *citing* *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir.1983).

⁹⁷ *Boyle*, 487 US at 512.

⁹⁸ *Id.*, at 512-13.

⁹⁹ Justice Stevens wrote as separate dissent, arguing for deferment to the legislature in deciding "novel question[s] of policy involve[ing] a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual." *Boyle*, 487 US at 532 (Brennan's dissent).

¹⁰⁰ *Id.*, at 514 (Brennan's dissent); *citing* *United States v. Johnson*, 481 U.S. 681, 703 (1987) (dissenting opinion of Scalia, J.).

and other cases forming the jurisprudence of federal common law, Brennan observed that “our power to create federal common law controlling the Federal Government’s contractual rights and obligations does not translate into a power to prescribe rules that cover all transactions or contractual relationships collateral to Government contracts.” Never before had the immunity from suit associated with the FTCA “discretionary function” exception been approved by the Supreme Court for extension to non-governmental employees.¹⁰² Doing so “skew[ed] the balance” the Court had historically struck between facilitating effective governmental administration and protecting citizens from harm.¹⁰³

Turning to *Yearsley* (“the sole case cited by the Court immunizing a Government contractor”), Brennan argued that that case was based on a performance contract with the government, and as such was legally distinct from a case based on allegations of a design defect.¹⁰⁴

*The contractor in Yearsley was following, not formulating, the Government’s specifications, and (so far as is relevant here) followed them correctly. Had respondent merely manufactured the ... helicopter, following minutely the Government’s own in-house specifications, it would be analogous to the contractor in Yearsley, although still not analytically identical since Yearsley depended upon an actual agency relationship with the Government, which plainly was never established here. But respondent’s participation in the helicopter’s design distinguishes this case from Yearsley, which has never been read to immunize the discretionary acts of those who perform service contracts for the Government*¹⁰⁵

It was in response to this observation that Scalia argued that the justification for performance contracts was equally as valid for procurement contracts.¹⁰⁶

As the next section notes, the Court has remained otherwise silent on the distinction between contract-types, and on the larger question of precisely how broadly the GCD in *Boyle* should be interpreted. As a result, *Boyle* has been invoked to expand the government contractor defense in the military context far beyond its original design defect origins.

F. *Boyle*’s Progeny: The subsequent expansion of the GCD

The rationale in *Boyle* has served as the legal foundation for the subsequent expansion of the government contractor defense. Although the Court has yet to revisit its ruling in

¹⁰¹ *Boyle*, 487 US at 514 (Brennan’s dissent); citing H.R. 4765, 99th Cong., 2d Sess. (1986) (limitations on civil liability of Government contractors); S. 2441, 99th Cong., 2d Sess. (1986) (same). See also H.R. 2378, 100th Cong., 1st Sess. (1987) (indemnification of civil liability for Government contractors); H.R. 5883, 98th Cong., 2d Sess. (1984) (same); H.R. 1504, 97th Cong., 1st Sess. (1981) (same); H.R. 5351, 96th Cong., 1st Sess. (1979) (same).

¹⁰² *Boyle*, 487 US at 522-23.

¹⁰³ *Id.*, at 522-23.

¹⁰⁴ *Id.*, at 525.

¹⁰⁵ *Id.*, at 525.

¹⁰⁶ See Scalia’s discussion of *Yearsley*, *supra* at note 90.

Boyle in any substantive manner, some lower courts have expanded the government contractor defense, in the words of one practitioner, “vertically as well as horizontally.”¹⁰⁷ However there is a division among courts as to the precise scope of the defense, and some circuits, the Ninth Circuit in particular, have a more narrow reading of the GCD and its applicability. It is also important to note that even if the defense is allowed in a case, defendants must nevertheless meet the three part test. These issues are addressed in the following Section.

1. Boyle’s vertical expansion into failure-to-warn and manufacturing claims

The defense has been expanded vertically, beyond design defect cases and into other areas of product liability.¹⁰⁸ This includes allowing the defense in failure-to-warn tort actions¹⁰⁹ and manufacturing defect cases.¹¹⁰

In *In re Joint E. & S. Dist. N.Y. Asbestos Litig.* 897 F.2d 626 (2nd Cir.1990), the Second Circuit followed the Fifth Circuit and other federal courts in being among the first to extend the GCD to failure-to-warn claims. In that case, workers exposed to asbestos-based cement while working in Navy shipyards sued the manufacturer of the product, Eagle-Picher.¹¹¹ Eagle-Picher raised the *Boyle* military contractor defense, arguing that warnings on the product had been created in accordance with Navy specifications, and that they were therefore immune from suit.¹¹²

The Second Circuit disagreed with plaintiffs’ counter-arguments that *Boyle* was limited to design defect actions and could not be applied to a failure-to-warn claim.

*When a federal contract and state tort law give contrary messages as to the nature and content of required product warnings, they cause the sort of conflict Boyle found so detrimental to the federal interest in regulating the liabilities of military contractors. Just as with conflicting federal and state design requirements, the existence of conflicting federal and state warning requirements can undermine the Government’s ability to control military procurement. Consequently, we follow the other federal courts which already have held that Boyle may apply to a state law failure-to-warn claim.*¹¹³

Subsequent courts have followed suit, recognizing failure-to-warn claims as within the

¹⁰⁷ Interview with Robert Spohrer, of Spohrer, Wilner, Maxwell & Matthews, the law firm representing plaintiffs in the *McMahon* case. See *infra* at Part II, A.

¹⁰⁸ This reasoning has also led courts to extend *Boyle* to include negligence cases, discussed below in Part II.

¹⁰⁹ *In re Joint E. & S. Dist. N.Y. Asbestos Litig.* 897 F.2d 626, (2nd Cir.1990).

¹¹⁰ *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 801 (5th Cir. 1993) (*quoting* *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989)).

¹¹¹ *In re Joint E. & S. Dist. N.Y. Asbestos Litig.* 897 F.2d 626, 627-28 (2nd Cir.1990).

¹¹² *In re Joint E. & S. Dist. N.Y. Asbestos Litig.* 897 F.2d at 627-28.

¹¹³ *Id.*, at 630; *citing* *Garner v. Santoro*, 865 F.2d 629, 635 (5th Cir. 1989); *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1024-25 (S.D. Ill. 1989); *Dorse v. Armstrong World Indus.*, 716 F. Supp. 589, 590 (S.D. Fla. 1989); *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598, 604 (D.Conn. 1988).

parameters of the FTCA exception cited in *Boyle*.¹¹⁴

The same result emerged for manufacturing claims: in *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794 (5th Cir. 1993) the Fifth Circuit held that the defense could be applied to a particular claim—including manufacturing defect claims—if the three prong *Boyle* test was satisfied, irrespective of the “particular product feature upon which the claim is based.”¹¹⁵ *Bailey v. McDonnell Douglas Corp* concerned claims of both manufacturing and design defects as the basis of an aircraft crash.¹¹⁶ The court held that, in order to avail itself of the GCD on a summary judgment motion, McDonnell Douglas had to demonstrate that both defects emerged as result of conformity with government specifications.¹¹⁷ It found that the GCD was indeed available for manufacturing defects, but that McDonnell Douglas had not presented evidence satisfying the *Boyle* test for that particular claim, and remanded the case accordingly.¹¹⁸ Four years later, the Ninth Circuit echoed *Bailey* in its determination that “whether the defense applies to a claim based on an alleged manufacturing defect depends on whether the particular product at issue was to be manufactured in conformity with reasonably precise specifications approved by the government.”¹¹⁹

2. Boyle’s horizontal expansion beyond military contractors & procurement contracts

Boyle has also been expanded “horizontally” to shield products (and manufacturers) outside the traditional military context, encompassing items purchased by the military and resold,¹²⁰ items provided by subcontractors,¹²¹ and nonmilitary contractors.¹²² This last category is particularly interesting, because it has been read to include performance

¹¹⁴ See, e.g., *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995) (“When the government exercises its discretion and approves warnings intended for users, it has an interest in insulating its contractors from state failure to warn tort liability.”); see also *Densberger v. United Techs. Corp.*, 297 F.3d 66, 75-76 (2d Cir. 2002); *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749-50 (9th Cir. 1997); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1003-04 (7th Cir. 1996), *Perez v. Lockheed Corp.* (In re Air Disaster at Ramstein Air Base), 81 F.3d 570, 576 (5th Cir. 1996).

¹¹⁵ *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 801-802 (5th Cir. 1993).

¹¹⁶ *Bailey*, 989 F.2d at 796-97.

¹¹⁷ *Id.*, at 799-800.

¹¹⁸ *Id.*, at 799-800.

¹¹⁹ *Snell v. Bell Helicopter Textron*, 107 F.3d 744, 749 (9th Cir. Cal. 1997) (recognizing manufacturing claims fell within scope of *Boyle* test, but holding that in the suit against helicopter manufacturer, “the record [did] not permit finding as a matter of law that the government approved reasonably precise specifications for the drive shaft and its components, [and] it necessarily preclude[d] application of the military contractor defense as a matter of law to Snell’s manufacturing defect claim.”); see also *Ammend v. BioPort, Inc.*, 322 F. Supp. 2d 848, (W.D. Mich. 2004).

¹²⁰ *Miller v United Technologies Corp.* 233 Conn. 732 (1995) (US military contractor- manufacturer of air craft eligible for *Boyle* immunity on all three types of product liability claims, even where air craft was resold to foreign government)

¹²¹ *Maguire v Hughes Aircraft Corp.* 912 F.2d 67 (3d Cir. 1990)

¹²² See, e.g., *Lamb v. Martin Marietta Energy Sys.*, 835 F. Supp. 959 (W.D. Ky. 1993) (“the Supreme Court’s rationale for applying the government contractor defense in *Boyle* is equally applicable in non-military as well as military settings”); citing *See Carley v. Wheeled Coach* 991 F.2d 1117, 1119 (3d Cir. 1993).

contracts—services—as within the purview of the GCD. As such, the GCD has come full circle to include *Yearsley*-like immunity for services performed in the course of performance contracts, for both military and non-military contractors alike.¹²³

Boyle's vague and ill-defined grant of immunity left many courts grappling with the question of whether or not the GCD it recognized could be applied to nonmilitary contractors. The courts were split on the issue, as noted in 1993 by the Third Circuit in *Carley v. Wheeled Coach*, 991 F.2d 1117 (3rd Cir. 1993):

*In Boyle, the Court specifically applied the government contractor defense in the context of a military procurement contract...The Court, however, did not address whether the government contractor defense is also available to manufacturers of nonmilitary products, an issue which has generated a significant split in authority.*¹²⁴

The court in *Carley* addressed a manufacturer's liability in a personal injury action based on an alleged design defect in an ambulance.¹²⁵ In deciding that the nonmilitary contractor / manufacturer was eligible for the GCD, the court focused on two *Boyle* rationales. First, it observed that there was a "unique federal interest" in "in all contracts in which the government procures equipment, not just those with military suppliers."¹²⁶ Second, it noted that the justification cited in *Boyle* was not the decidedly military-oriented *Feres* doctrine, but the "discretionary function" exception to the FTCA.¹²⁷ "Instead of relying on *Feres*, which applies only to torts arising out of military service, the Court instead relied on the discretionary function exception of the FTCA, which applies to government action in both military and nonmilitary matters."¹²⁸ The court also noted

¹²³ *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. 2003) ("the government contractor defense recognized in *Boyle* is applicable to the service contract between the Army and DynCorp").

¹²⁴ *Carley v. Wheeled Coach*, 991 F.2d 1117, 1119 (3rd Cir. 1993). The court cited the following cases as examples of where the GCD was made available to nonmilitary contractors: *Boruski v. United States*, 803 F.2d 1421, 1430 (7th Cir. 1986); *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846 (11th Cir. 1985); *Johnson v. Grumman Corp.*, 806 F. Supp. 212, 217 (W.D. Wis. 1992); *Price v. Tempo, Inc.*, 603 F. Supp. 1359, 1361-62 n.3 (E.D. Pa. 1985); *In re Chateaugay Corp.*, 132 Bankr. 818, 823-27 (Bankr. S.D.N.Y. 1991), rev'd, 146 Bankr. 339 (S.D.N.Y. 1992); *Vermeulen v. Superior Court of Alameda County*, 204 Cal. App. 3d 1192 (Cal. Ct. App. 1988); *McDermott v. TENDUN Constructors*, 511 A.2d 690, 696 (N.J. Super. Ct. App. Div.), cert. denied, 107 N.J. 43, 526 A.2d 134 (N.J. 1986). *Carley v. Wheeled Coach*, 991 F.2d 1117, 1119 (3rd Cir. 1993).

It also cited the following cases where the GDC has not been extended to nonmilitary contractors: *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 810-12 (9th Cir. 1992); *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1452-55 (9th Cir. 1990); *In re Chateaugay Corp.*, 146 Bankr. 339, 348-51 (S.D.N.Y. 1992); *Johnston v. United States*, 568 F. Supp. 351, 356-58 (D. Kan. 1983); *Jenkins v. Whittaker Corp.*, 551 F. Supp. 110, 114 (D. Haw. 1982); *Pietz v. Orthopedic Equip. Co.*, 562 So. 2d 152, 155 (Ala. 1989), cert. denied, 498 U.S. 823, 111 S. Ct. 75, 112 L. Ed. 2d 48 (1990); *Dorse*, 513 So. 2d at 1269; *Reynolds v. Penn Metal Fabricators, Inc.*, 550 N.Y.S.2d 811, 812 (N.Y. Sup. Ct. 1990); *In re New York City Asbestos Litig.*, 542 N.Y.S.2d. 118, 121 (N.Y. Sup. Ct. 1989). *Carley v. Wheeled Coach*, 991 F.2d 1117, 1119 (3rd Cir. 1993).

¹²⁵ *Carley*, 991 F.2d at 1117-18.

¹²⁶ *Id.*, at 1120.

¹²⁷ *Id.*, at 1120.

¹²⁸ *Id.*, at 1121.

the Supreme Court's own reference to *Yearsley*, a nonmilitary contractor case,¹²⁹ and its belief that the *Boyle* Courts' policy reasons also all applied equally to the case at hand (with the exception of considerations for combat effectiveness).¹³⁰

For some courts, the same justifications for extending the GCD to nonmilitary contractors applied to the defense's extension outside the realm of procurement contracts. In *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959 (W.D. Ky. 1993), the court agreed with the Third Circuit's logic in *Carley*,¹³¹ holding that "[s]imilarly, this Court finds no reason to limit *Boyle* to procurement contracts, as opposed to performance contracts as is involved in the case at bar."¹³² Quoting Scalia's position in *Boyle* that "the federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction,"¹³³ the *Lamb* court circled the logic back around to justify GCD's for performance contracts.¹³⁴ Other courts have essentially followed suit.¹³⁵

Given the direction of courts' logic, it should be no surprise that before long military contractors began to avail themselves of the GCD for performance contracts, also termed service contracts. In *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003), the Eleventh Circuit held that GCD applied to service contracts between the Army and DynCorp, a military contractor.¹³⁶ Dyncorp¹³⁷ had a service contract with the Army to maintain its helicopters, and it was sued by two pilots injured in a crash resulting from a tail fin separation.¹³⁸ The plaintiffs claimed that DynCorp was negligent in its maintenance of the helicopter, and DynCorp moved for summary judgment on the basis of the GCD.¹³⁹ DynCorp argued that it satisfied the three part *Boyle* test in its adherence to specific Army protocol concerning helicopter maintenance, and that the Army was aware of the dangers inherent in its maintenance protocol.¹⁴⁰ In response to plaintiffs' arguments that the GCD applies only to design defects, the court stated,

Although Boyle referred specifically to procurement contracts, the analysis it requires is not designed to promote all-or-nothing rules regarding different classes of contract. Rather, the question is whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique

¹²⁹ *Id.*, at 1120.

¹³⁰ *Carley*, 991 F.2d at 1129.

¹³¹ *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 966 (W.D. Ky. 1993).

¹³² *Lamb*, 835 F. Supp. at 966 & n.7.

¹³³ *Id.*, at 966 & n.7; *citing Boyle*, 487 US at 506.

¹³⁴ *Id.*, at 966 & n.7.

¹³⁵ *See Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994) (GCD "applies to performance contracts, not just procurement contracts" in a negligence case involving a nonmilitary contractor / security provider; *see also Crawford v. National Lead Co.*, 784 F. Supp. 439, 445-46 n.7 (S.D. Ohio 1989); *Richland-Lexington Airport Dist. v. Atlas Prop., Inc.*, 854 F. Supp. 400, 422-23 (D.S.C. 1994).

¹³⁶ *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. Ala. 2003)

¹³⁷ Bell was granted summary judgment in the district court, below. *Hudgens*, 328 F.3d at 1330 (11th Cir. 2003)

¹³⁸ *Id.*, at 1330.

¹³⁹ *Id.*, at 1332.

¹⁴⁰ *Id.*, at 1335-37.

*federal interest. We would be exceedingly hard-pressed to conclude that the unique federal interest recognized in Boyle, as well as the potential for significant conflict with state law, are not likewise manifest in the present case. The formulation of design specifications and the articulation of maintenance protocols involve the exercise of the very same discretion to decide how a military fleet of airworthy craft will be readied. Holding a contractor liable under state law for conscientiously maintaining military aircraft according to specified procedures would threaten government officials' discretion in precisely the same manner as holding contractors liability for departing from design specifications... We thus hold that the government contractor defense recognized in Boyle is applicable to the service contract between the Army and DynCorp.*¹⁴¹

The court found that DynCorp satisfied the the defenses three elements and accordingly affirmed summary judgment on its behalf.¹⁴²

G. Challenges to raising a *Boyle* government contractor defense

Not all courts have fallen in line with the jurisprudence espoused by the Eleventh and Third Circuits. As mentioned above in the discussion concerning nonmilitary contractors, there is somewhat of a split among courts on the issue of whether or not such defendants qualify for the GCD.¹⁴³ The Ninth Circuit, in particular, has adopted a relatively narrow reading of *Boyle*, limiting the defense to military contractors *and* to claims arising from allegedly defective military equipment. Even in Circuits that have adopted a more expansive reading of *Boyle*, merely being eligible to qualify for the defense is not enough to obtain immunity from suit—defendants nonetheless still carry the burden of proving that they meet the three conditions set forth in the *Boyle* test.

1. Limiting Boyle—the Ninth Circuit’s more restricted application of the GCD

Among those circuits to take a more restricted view on the scope of the GCD, the Ninth Circuit is possibly the most stringent in limiting the defense. In fact, the Ninth Circuit does not even call the defense the “government contractor defense,” rather it is called the “military contractor defense.”¹⁴⁴ The distinction is more than simple semantics, since “[i]n the Ninth Circuit [the defense] is only available to contractors who design and manufacture military equipment”¹⁴⁵—as noted above, it is not available to nonmilitary

¹⁴¹ *Id.*, at 1334.

¹⁴² *Id.*, at 1345.

¹⁴³ See discussion *supra* note 125.

¹⁴⁴ *Snell v. Bell Helicopter Textron*, 107 F.3d 744, 746 (9th Cir. 1997)

¹⁴⁵ *Snell*, 107 F.3d at 746, *citing* *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990). There is some disagreement about the applicability of the defense to failure-to-warn claims, but those would also appear to be included. *See, e.g.*, *Nguyen v. Allied Signal*, 1998 U.S. Dist. LEXIS 15517, *5 (N.D. Cal. 1998) (“The Ninth Circuit noted that the government had no contractual requirements preventing the placement of warnings on the defendants' products. Therefore, in a failure to warn case, “the military contractor defense would . . . be no defense at all”), *citing* *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 813 (9th Cir. 1992); *but see* *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749-50 (9th Cir. 1997) (evaluating failure-to-warn claim in wrongful death action arising out of helicopter crash); *Butler v. Ingalls Shipbuilding*, 89 F.3d 582 (9th Cir. 1996) (personal injury case alleging, among other claims, failure-to-warn was subject to GCD, but only where, in making decision whether or not to provide warning,

contractors. Furthermore, it can only be applied to military equipment, as the Ninth Circuit stated in *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992):

*[C]oncerns [raised in Boyle] do not exist in respect to products readily available on the commercial market. The fact that the military may order such products does not make them 'military equipment.' The products have not been developed on the basis of involved judgments made by the military but in response to the broader needs and desires of end-users in the private sector...the military contractor defense does not apply to 'an ordinary consumer product purchased by the armed forces.'*¹⁴⁶

In *In re Hawaii Federal Asbestos Cases*, the court refused to consider the GCD for an asbestos insulation manufacturer, where the plaintiffs were the estates of deceased Naval workers.¹⁴⁷ In an earlier case, *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990), the court similarly refused to extend the defense to a paint manufacturer, where the product was not designed for a special military purpose.¹⁴⁸ While the “military equipment” test may not be the highest hurdle,¹⁴⁹ it is nonetheless a standard defendants must meet before attempting to raise the GCD in the Ninth Circuit.

It is also indicative of the Ninth Circuit’s alternative interpretation of *Boyle*. As one district court in Washington recently described it in *Westmiller v. IMO Indus.*, 2005 U.S. Dist. LEXIS 29371 (W.D. Wash. 2005),

*In this circuit, the government contractor defense applies to displace state tort law only “when the Government, making a discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion.” In other words, “stripped to its essentials, the military contractor's defense under Boyle is to claim, The Government made me do it.”*¹⁵⁰

This approach to the defense also raises the bar for defendants who wish to remove cases filed in state court based on the federal officer removal statute.¹⁵¹ The *Westmiller* court, for instance, remanded the case back to state court after it found that defendant asbestos

manufacturer was “acting in compliance with 'reasonably precise specifications' imposed on [it] by the United States.” (internal cites omitted).

¹⁴⁶ *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 811-812 (9th Cir. 1992)

¹⁴⁷ *In re Hawaii Federal Asbestos Cases*, 960 F.2d at 808, 811-812.

¹⁴⁸ *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1453 (9th Cir. 1990)

¹⁴⁹ *Butler v. Ingalls Shipbuilding*, 89 F.3d 582 584 (9th Cir. 1996). While the court in *Butler* held that an accommodation ladder qualified as military equipment, it nonetheless reiterated the standard: we have little difficulty characterizing the accommodation ladder in issue as “military equipment.” In *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), this Court observed that the line lay “somewhere between an ordinary consumer product purchased by the armed forces - a can of beans, for example - and the escape system of a Navy RA-5C reconnaissance aircraft.” We believe the accommodation ladder falls within the term's meaning while the can of beans does not. It is used by sailors, marines, or other naval personnel to access other ships, docks, or piers

¹⁵⁰ *Westmiller v. IMO Indus.*, 2005 U.S. Dist. LEXIS 29371, *7-8 (W.D. Wash. 2005).

¹⁵¹ The federal officer removal statute provides for removal by “the United States or any agency thereof or an officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office.” 28 U.S.C. § 1442(a)(1). It can be used to remove a case based on an asserted defense. *Id.*

manufacturer failed the first prong of the *Boyle* test.¹⁵²

2. Hurdles to passing Boyle's three prong test—where plaintiffs have had the most success fighting the GCD

Even where the defense *is* allowed, courts are mindful that it is the defendant's burden to prove that it meets the three prong *Boyle* test. To re-cap, the test asks defendants to prove three conditions:

- (1) the United States approved reasonably precise specifications;
- (2) the equipment conformed to those specifications; and
- (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.¹⁵³

Legal commentators have observed that the first prong is where most plaintiffs stand the best chance of overcoming defendants' assertions of the defense.¹⁵⁴ *Boyle* itself excludes cases where the government orders stock from a manufacturer, with no "significant interest" in the design defect alleged by plaintiffs.¹⁵⁵ Subsequent courts have interpreted the "reasonably precise specifications" requirement to mandate an inquiry into whether or not the government "adequately exercised its discretion and 'thereby limited the contractor's ability to accommodate safety in a different fashion.'"¹⁵⁶ The resulting inquiry is meant to exclude cases where the government "merely 'rubber stamps' a design."¹⁵⁷ A "'continuous back and forth' review process" concerning the alleged design defect satisfied this test.¹⁵⁸

As a result, Charles E. Cantu and Randy W. Young, in *The Government Contractor Defense: Breaking the Boyle Barrier*, argue that

*If the surrounding facts permit, the plaintiff's best option is to show that the government's approval involved little substantive review and was merely a "rubber stamp." The discovery process will quickly show whether the government was intimately involved in the design process of the product in question. If the government's involvement was minimal, the plaintiff has a strong weapon with which to resist the Boyle defense.*¹⁵⁹

They also note the difficulty in challenging the GCD on prongs two and three, if prong

¹⁵² Westmiller, 2005 U.S. Dist. LEXIS 29371, at *7-8 (Remanding failure-to-warn product liability case based on asbestos related death back to state court because federal officer removal was not warranted. By failing to pass the first prong of the *Boyle* test, defendant had not established a colorable federal defense.)

¹⁵³ *Boyle*, 487 U.S. at 512.

¹⁵⁴ Charles E. Cantu & Randy W. Young, *The Government Contractor Defense: Breaking the Boyle Barrier*, 62 ALB. L. REV. 403, 412 (1998).

¹⁵⁵ *Boyle*, 487 U.S. at 509.

¹⁵⁶ *Lewis v. Babcock Indus., Inc.*, 985 F.2d 83, 87 (2nd Cir. 1993).

¹⁵⁷ *Lewis*, 985 F.2d at 87; *citing Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480, 1486 (5th Cir. 1989).

¹⁵⁸ *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1154 (6th Cir. 1995); *citing Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989) (quoting *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir. 1985).

¹⁵⁹ Charles E. Cantu & Randy W. Young, *The Government Contractor Defense: Breaking the Boyle Barrier*, 62 ALB. L. REV. 403, 435 (1998).

one cannot be proven: “because most of the evidence used in analyzing Boyle's first element is relevant to the second and third elements, a plaintiff who cannot disprove the first prong will have difficulties defeating the contractor through the second or third prongs of the test.”

In *Trevino v. General Dynamics Corp.*, 865 F.2d 1474,(5th Cir. 1989), the Fifth Circuit held that final approval of a design, as indicated by a federal employee’s signature on an “approval line” on a contractor’s designs, was not sufficient to pass the first prong of the *Boyle* test.¹⁶⁰ *Trevino* was a products liability action brought by the families of five Navy divers killed in a Navy submarine diving chamber.¹⁶¹ Defendant General Dynamics Corp. was the designer of the chamber, and it attempted to raise the then-newly minted *Boyle* GCD in response to plaintiffs’ design defect claims.¹⁶² The court stated that allowing a cursory signature on an approval line to pass the first prong of the *Boyle* test would encourage both the contractor and the government to circumvent the purposes of the test.¹⁶³

*Such a provision likely would be agreed to by the government because it would come at absolutely no cost. Actual review and evaluation of design decisions, however, does come at a cost to the government. That is why the government must decide whether to exercise the design discretion itself or to delegate that discretion to the government contractor.*¹⁶⁴

“Rubber stamping” designs by the government does not equate to an exercise of its discretionary function as conceived of by *Boyle*.

Densberger v. United Techs. Corp., 297 F.3d 66 (2d Cir. 2002), involved a helicopter crash resulting from a loss in control during a landing, killing four officers and injuring two others.¹⁶⁵ In this case the court was reluctant to consider the GCD at all, noting that defendants were attempting to use it to absolve themselves of responsibility to warn the *government* of a danger.¹⁶⁶ However, even if it could be applied, the Second Circuit held that defendant’s arguments were “meritless,” regardless, because defendants could not prove the first condition necessary for the defense:

*[F]or the government contractor defense to succeed, the contractor must show "that the Government itself 'dictated' the content of the warnings meant to accompany the product," and further, "that the Government controlled or limited the ability of contractors . . . themselves to warn those who would come into contact with its product." Unless the defendant demonstrated that control, the defense would not preclude recovery.*¹⁶⁷

The Second Circuit thus denied defendant’s motion for a judgment as a matter of law.¹⁶⁸

¹⁶⁰ *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989)

¹⁶¹ *Trevino*, 865 F.2d at 1476.

¹⁶² *Id.*, at 1478.

¹⁶³ *Id.*, at 1478.

¹⁶⁴ *Id.*, at 1480, n.5 .

¹⁶⁵ *Densberger*, 297 F.3d at 69.

¹⁶⁶ *Id.*, at 75 .

¹⁶⁷ *Id.*, at 75 .

¹⁶⁸ *Id.*, at 75 .

Finally, another (very) recent case also touches on the level of government discretion defendants' must prove in passing the *Boyle* test. In *Ruth v. A.O. Smith Corp.*, 2005 U.S. Dist. LEXIS 23235 (N.D. Ohio 2005), the court ruled against defendant's motion for summary judgment based on the GCD, despite what it called the "relatively lenient case law in this Circuit."¹⁶⁹ *Ruth* addresses tort claims (including product liability claims) arising from neurological injuries sustained by welders due to welding fumes.¹⁷⁰ Despite the court's own lenient standard for consideration of the GCD (it held that the GCD was available to defendant manufacturer whether or not the plaintiff used the product—welding rods—on military or civilian vessels),¹⁷¹ the court refused to grant summary judgment where the first (and, indeed, third) elements in *Boyle* were not clearly satisfied.

*[R]easonable jurors could find in favor of either the plaintiffs or the defendants with respect to the level of discretion exercised by the Navy in the formulation and approval of the relevant warnings, and also on the question of whether the defendants warned the Navy of information in their possession about which the Navy was unaware.*¹⁷²

The outcome of the plaintiff's claims are still pending, but they will, as a result, proceed to trial.

As these cases hopefully show, the burden posed by the GCD is a high one, but it is not impossible to defeat. Unfortunately, courts are quite divided as to the *Boyle* Court's intended scope of the defense, and as such plaintiffs in certain federal circuits are bound to fare better than others. Yet cases continue to be filed against military contractors, despite these challenges. Part II summarizes some currently pending law suits, considering their claims and the role of the GCD in defendants' litigation strategies.

H. Conclusion to Part I

Despite the considerable amount of activity by lower courts contemplating the GCD, the Supreme Court has not acted to delineate the boundaries of the defense. Post-*Boyle* references to the GCD by the Court instead involve general observations that "[w]here the government has directed a contractor to do the very thing that is the subject of the claim, we have recognized this as a special circumstance where the contractor may assert a defense."¹⁷³ As such, it is impossible to determine the Court's intended scope in *Boyle*.

However, even where *Boyle* is not cited to directly, the framework established by *Boyle*'s rationale—applying FTCA exceptions to immunize contractors from liability—continues to be utilized. This is despite the fact that many of the pending, high-profile cases against PMFs are far removed from the type of claim that gave rise to *Boyle*: these current suits allege torture, civil rights abuses, and reckless operation of aircraft, to name a few.

¹⁶⁹ *Ruth v. A.O. Smith Corp.*, 2005 U.S. Dist. LEXIS 23235, *25 (N.D. Ohio 2005).

¹⁷⁰ *Ruth*, 2005 U.S. Dist. LEXIS 17667, at 24.

¹⁷¹ *Id.*, at *27.

¹⁷² *Id.*, at *27.

¹⁷³ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74, n.6 (2001) (finding the defense not available in the case at hand); *citing Boyle*, 487 U.S. 500.

II. Select Summary of Currently Pending Cases Against Military Contractors

Part II gives a brief overview of some cases currently pending against military contractors. The focus is tortious liability arising out of contractors' misconduct / negligence in Iraq. While the *Boyle* defense is not the only one raised by defendants, it does feature prominently in most of their litigation strategies. Additionally, *Boyle*-like analysis is also employed by defendants, where they attempt to apply other FTCA exceptions to their cases.

The cases have been broken down into three categories: suits by soldiers (or their estates) against PMFs;¹⁷⁴ suits by contractors (or their estates) suing their employer PMF; and suits by non-military, non-contractor civilians (or their estates) suing PMFs. The following sections examine one example from each category, followed by references to other, similar cases.

A. Soldiers (or their estates) suing contractors / PMFs: *McMahon et al. v. Presidential Airways Inc. et al*¹⁷⁵

Three soldier's widows have brought a wrongful death action against the PMF Presidential Airways, alleging that its poorly equipped airplane and unprepared and inexperienced flight crew are responsible for an aviation accident in the mountains of Afghanistan.¹⁷⁶ Five of the six individuals on board (including two of the soldiers) were killed instantly, while another survived for several hours—even retrieving survival gear—before succumbing to his wounds. Plaintiffs filed their Complaint in state court on June 10, 2005,¹⁷⁷ and asserted claims pursuant to the Florida Wrongful Death Act, § 768.16, et seq., Fla. Stat.¹⁷⁸ Defendants filed a notice of removal on July 6, removing the case to the US District Court for the Middle District of Florida. Discovery is proceeding while the parties await the court's ruling on Plaintiffs' motion to remand the case back to state court. The GCD figures prominently in both parties arguments on the matter.

Defendant's Memorandum in Opposition to Plaintiff's Motion To Remand argues that removal was proper because the court has federal question jurisdiction.¹⁷⁹ The three grounds cited for this jurisdiction are federal officer removal, complete preemption doctrine, and the argument that plaintiffs' claims turn on substantial questions of federal

¹⁷⁴ Henceforth, the corporations conducting military contract work will be referred to in the more modern term, "private military firm" (PMF). Their employees will be referred to as "military contractors."

¹⁷⁵ *McMahon et al. v. Presidential Airways Inc. et al.*, No. 05CV11601, complaint filed (Fla. Cir. Ct., Brevard County June 10, 2005). Currently cited as *McMahon et al. v. Presidential Airways Inc. et al*, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.).

¹⁷⁶ Pls.' Compl. at ¶¶ 33, 39, 40-42, *McMahon et al. v. Presidential Airways Inc. et al*, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.).

¹⁷⁷ *McMahon et al. v. Presidential Airways Inc. et al*, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.)

¹⁷⁸ *Contractors Sued Over Afghanistan Plan Crash*, 23 No. 11 *Andrews Aviation Litig. Rep.* 13 (July 19, 2005).

¹⁷⁹ Defs.' Mem. In Opp'n to Pls.' Mot. to Remand at 7, *McMahon et al. v. Presidential Airways Inc. et al*, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.).

law.¹⁸⁰ As discussed previously,¹⁸¹ the federal officer removal statute provides for removal by “the United States or any agency thereof or an officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office.”¹⁸² It can be used to remove a case based on an asserted defense, and Defendants claim that they have “asserted plausible federal defenses, including the Government Contractor Defense (“GCD”), the Combat and Foreign Country Exceptions to the FTCA (28 U.S.C. § 2680(j), (k)), and the Feres Doctrine (as announced by *Feres v. United States*, 340 U.S. 135 (1950), and its progeny).”

¹⁸³

Plaintiffs argued in their Motion to Remand that, among other defects, Defendants failed to meet any of the three *Boyle* conditions necessary to raise the GCD. Citing the modified test for service contracts articulated by the Eleventh Circuit in *Hudgens v. Bell Helicopters*, 328 F.3d 1329 (11th Cir. 2003),¹⁸⁴ Plaintiffs observed that Defendants failed all three elements of the test, but especially the second prong:

*The Complaint alleges, among other things, that the Defendants breached their duty because they did not follow the proper procedure outlined in 32 C.F.R. § 861 (2005) (DoD Commercial Air Transportation Quality and Safety Review Program). (Complaint ¶ 39). This contradicts the Defendants’ unsupported assertion in their Motion to Remand ¶ 29 that they complied with the reasonably precise specifications of the Government.*¹⁸⁵

Defendants replied by briefly elaborating that they had “made out a plausible claim” to the GCD in their adherence to government specifications, and that, in any event, the issue was not whether or not they would ultimately prevail on the GCD—it was merely that they had plausibly asserted the defense.¹⁸⁶

The legacy of the GCD spills over into other defenses, as well. In their arguments that Plaintiffs’ claims are barred by the Combat and Foreign Country Exceptions to the FTCA (28 U.S.C. § 2680(j), (k)), Defendants rely heavily on the only two cases to have ever extended the *Boyle* analysis beyond the Discretionary Function Exception. Pointing out that the Combat Exception “has been applied to immunize government contractors whose products have caused injury in combat,” Defendants cite *Koohi v. United States*, 976 F.2d

¹⁸⁰ Defs.’ Mem. In Opp’n to Pls.’ Mot. to Remand at 8, 13, 14, McMahon et al. v. Presidential Airways Inc. et al, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.).

¹⁸¹ See *supra* note 152.

¹⁸² 28 U.S.C. § 1442(a)(1).

¹⁸³ Defs.’ Mem. In Opp’n to Pls.’ Mot. to Remand at 11, McMahon et al. v. Presidential Airways Inc. et al, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.).

¹⁸⁴ “The Court held that, in order to benefit from the government contractor defense, a contractor must prove (1) the United States approved reasonably precise procedures; (2) the contractor’s performance conformed to those procedures, and (3) the contractor warned the United States about dangers arising out of compliance with those procedures that were known to the contractor but not the United States.” Pls.’ Mot. to Remand, at ¶ 37, McMahon et al. v. Presidential Airways Inc. et al, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.); *citing* *Hudgens*, 328 F.3d at 1335.

¹⁸⁵ Pls.’ Mot. to Remand, at ¶ 39, McMahon et al. v. Presidential Airways Inc. et al, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.).

¹⁸⁶ Defs.’ Mem. In Opp’n to Pls.’ Mot. to Remand at 11, McMahon et al. v. Presidential Airways Inc. et al, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.).

1328, 1336 (9th Cir. 1992) and *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993), claiming that they will seek its application to the aviation services in question in *McMahon*.¹⁸⁷

Finally, *Boyle* reasoning also emerges in Defendant's argument that Plaintiffs' claims are preempted by federal law. Here, Defendants turn to *Boyle*'s interpretation of the FTCA:

*Congress has shown its intent that a case such as this be litigated in federal court through its sweeping legislation respecting both aviation and military operations and its provision for exclusive federal jurisdiction over tort claims against the United States. 28 U.S.C. § 1346(b)(1). The Supreme Court has by analogy applied provisions of the FTCA to government contractors. See Boyle, 487 U.S. 500 (applying FTCA's Discretionary Function Exception to government contractor).*¹⁸⁸

Thus the reach of *Boyle* is being applied far beyond its intended application—the GCD based on the Discretionary Function Exception to the FTCA. It remains to be seen how the court will rule on the matter, although at least one court has already considered similar arguments—discussed below.

Two other cases have emerged in this category: *Lessin v. Kellogg Brown & Root*, Case No. H-05-1853 (S.D. TX filed May 23, 2005) and *Webster, et al v. Halliburton Co., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc.*, Case No. H-05-3030 (S.D. TX filed May 26, 2005). Both of these cases involve an automobile collision in Iraq, where plaintiffs allege negligence on behalf of KBR employees driving a convoy. KBR filed Motions to Dismiss in both cases. In its Notice of Removal for the *Webster* matter, KBR cited the following defenses: “government contractor defense, the ‘combatant activities’ exception to the FTCA, the political question doctrine, the state secrets doctrine, and the Defense Productions Act of 1950”¹⁸⁹ While *Lessin* has been stayed, it appears that *Webster* is moving forward—a motion hearing has been set for January 20, 2006.

B. Contractors (or their estates) suing PMFs: *Richard P. Nordan v. Blackwater Security Consulting, LLC*¹⁹⁰

Perhaps one of the most high profile cases involves the suit arising from the March 21, 2004 murder and mutilation of four military contractors in Fallujah, Iraq.¹⁹¹ This case is interesting not only because it deals with highly publicized events, but also because it presents a prime example of defendants (unsuccessfully) attempting to extend *Boyle* reasoning to avoid liability.

¹⁸⁷ Defs.’ Mem. In Opp’n to Pls.’ Mot. to Remand at 12, *McMahon et al. v. Presidential Airways Inc. et al*, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.).

¹⁸⁸ Defs.’ Mem. In Opp’n to Pls.’ Mot. to Remand at 13-14, *McMahon et al. v. Presidential Airways Inc. et al*, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.).

¹⁸⁹ Def.’s Notice of Removal, at ¶ 19, *Webster, et al v. Halliburton Co., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc.*, Case No. H-05-3030 (S.D. TX filed May 26, 2005):

¹⁹⁰ *Richard P. Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C.,2005)

¹⁹¹ Pls.’ Compl. at ¶ 12, *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C. 2005).

On January 5, 2005, the estates for the four deceased men brought suit against the contractors employer, a PMF called Blackwater Security Consulting, alleging wrongful death and fraud.¹⁹² More specifically, Plaintiffs claimed that the deaths were a result of a “deliberate and reckless disregard for the health and safety” of the contractors, evinced by the fact that they were sent into a high risk area without many of the security precautions promised them in their employment contracts.¹⁹³ When the ill-prepared contractors drove into a hostile region, they were ambushed by insurgents, shot at close range, and “[t]heir bodies were pulled into the streets, burned and their charred remains were beaten and dismembered. Ultimately, two of the burnt bodies were strung up from a bridge over the Euphrates River for all of the world to see.”¹⁹⁴

The case was removed by Defendants, who argued that a workers compensation scheme called the Defense Base Act preempted Plaintiffs’ claims, and, alternatively, that the case raised a “unique federal interest” mandating federal jurisdiction.¹⁹⁵ In formulating the second argument, Defendants relied heavily on *Boyle’s* discussion of “unique federal interests” and a subsequent case, *Caudill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir.1993), which (controversially) extended *Boyle’s* analysis to justify removal of cases based on federal employees’ health insurance benefits.¹⁹⁶ Defendants stated that the government had a “unique federal interest” regarding remedies available to contractors supporting government efforts in war-zones, and that that interest conflicted with Plaintiffs’ efforts to litigate their case in state court.¹⁹⁷ Interestingly, Defendants failed to raise the standard GCD at all in their Opposition to Defendant’s Motion to Remand and in their own Motion to Dismiss.

The court disagreed with Defendants on both accounts. Speaking to their argument concerning unique federal interests, the court pointed out that the case did not pass the test established in *Caudill*, because it did not involve the direct interpretation of a federal contract, “such that ‘federal common law’ supplants state law.”¹⁹⁸ The asserted federal interest in remedies dealt with the Defense Base Act,

*which is not a federal contract, but rather a federal statute. While there is no doubt that there exists a federal interest in uniform application of the DBA, this interest is not sufficient to provide removal jurisdiction.*¹⁹⁹

The court remanded the case back to state court, but Defendants subsequently filed a writ

¹⁹² Pls.’ Compl. at 21, 24, *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C.,2005).

¹⁹³ Pls.’ Compl. at ¶ 69, *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C.,2005).

¹⁹⁴ Pls.’ Compl. at ¶ 61, *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C.,2005).

¹⁹⁵ *Blackwater Def’s Mem. in Opp. to Remand*, p. 17, *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C.,2005).

¹⁹⁶ *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C.,2005) (discussing Defendant’s arguments and reliance on *Caudill*).

¹⁹⁷ *Blackwater Def’s Mem. in Opp. to Remand, Part A & B, Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C.,2005).

¹⁹⁸ *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801, 813 (E.D.N.C.,2005); *citing Caudill*, 999 F.2d at 77.

¹⁹⁹ *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801, 813 (E.D.N.C.,2005).

of mandamus with the Court of Appeals, as well as a regular appeal to the Fourth Circuit. In the Appellate Brief, Defendants slightly switched tact, arguing that the case deserved to be removed under the Federal Officer Removal Statute.²⁰⁰ And while they did not make a straightforward appeal to the GCD, they did argue for immunity for “battlefield casualties” as the logical consequence of a combination of separation of powers doctrine and the political question doctrine, citing both *Feres* and *Boyle*.²⁰¹

Plaintiffs attacked the appeal on several grounds, including the fact that Defendants had switched the basis for removal after the district court’s decision. The court is set to rule on the matter in January, 2005.

Two other cases, *Fisher v. Halliburton*, 390 F.Supp.2d 610 (S.D. TX, 2005) and *Johnson v. Halliburton et al.*, No: EDCV05-265 (C.D. Cal. filed Mar. 29, 2005) also involve suits brought on behalf of contractors against their employees. As with the automobile accident case discussed in Part 1, these cases also both center on the same event: alleged use of convoy drivers as a decoy for another convoy in Iraq, which resulted in the deaths of at least six drivers, and injuries to eleven others.²⁰² Defendants in *Fisher* removed the case to federal district court, citing both the Federal Officer Removal Statute and federal question jurisdiction.²⁰³ For its colorable defense, it cited both the Defense Base Act (as in *Nordan*) as well as the Combatant Activities Exception to the FTCA and the GCD (arguing that the government exercised detailed control over the convoys).²⁰⁴ These arguments were repeated in the motion to dismiss.²⁰⁵ However, the court in *Fisher* denied Defendant’s motion, observing that the second defense, the Combatant Activities Exception, relied on a Ninth Circuit case cited only once, by a district court in California.²⁰⁶ It also refused to extend the Ninth Circuit’s application of the Combatant Activities Exception to cases beyond product liability claims.²⁰⁷ It concluded that

*Plaintiffs’ claims in this case do not involve any allegation that Defendants supplied equipment, defective or otherwise, to the United States military. The Court concludes that extension of the government contractor defense beyond its current boundaries is unwarranted and the FTCA does not bar Plaintiffs’ claims.*²⁰⁸

This conclusion is welcomed by many of the plaintiffs examined here, as it clearly strikes down an expansion of *Boyle* heavily cited by many Defendants.

C. Civilians (or their estates) suing contractors / PMFs: The Abu Ghraib Cases

²⁰⁰ Appellants Opening Brief at 12-13, *Nordan v. Blackwater Security Consulting, LLC*, No. 05-2033 and 05-2034 (4th Cir. filed Oct. 31, 2005).

²⁰¹ Appellants Opening Brief at 29, *Nordan v. Blackwater Security Consulting, LLC*, No. 05-2033 and 05-2034 (4th Cir. filed Oct. 31, 2005).

²⁰² Pls.’ Complaint, at ¶¶ 48-65, *Fisher v. Halliburton*, 390 F.Supp.2d 610 (S.D. TX, 2005).

²⁰³ Def.’s Notice of Removal at ¶ 8, *Fisher v. Halliburton*, 390 F.Supp.2d 610 (S.D. TX, 2005).

²⁰⁴ Def.’s Notice of Removal at ¶ 31, *Fisher v. Halliburton*, 390 F.Supp.2d 610 (S.D. TX, 2005).

²⁰⁵ Def.’s Mot. to Dismiss, at 8-9, *Fisher v. Halliburton*, 390 F.Supp.2d 610 (S.D. TX, 2005).

²⁰⁶ *Fisher v. Halliburton*, 390 F.Supp.2d 610, 615 (S.D. TX, 2005).

²⁰⁷ *Id.*, at 615-16.

²⁰⁸ *Id.*, at 616.

This category has perhaps the two most prominent cases—they consist of causes of action rooted in the Abu Ghraib torture scandal. *Ibrahim v. Titan Corp.* 391 F.Supp.2d 10 (D.D.C. Aug 12, 2005) and *Saleh v. Titan Corp.*, 361 F.Supp.2d 1152, (S.D.Cal. Mar 21, 2005) are both brought by plaintiffs who were detained in the infamous prison or, in the case of deceased detainees, by their estates. Because *Ibrahim* is farther along in the litigation, it will be the primary focus of this section.

In *Ibrahim*, plaintiffs are suing two PMFs, CACI Premier Technology, Inc. and Titan Corp., that provided interrogation services at the Abu Ghraib prison.²⁰⁹ Plaintiffs initially alleged a broad range of claims, from common law torts such as assault and battery and wrongful death, to violations of RICO.²¹⁰ Defendants filed a motion to dismiss, arguing that Plaintiffs lacked jurisdiction, that their claims presented non-justiciable political questions, and that they were preempted by the GCD.²¹¹ The court dismissed many of Plaintiffs' claims, but retained the common law tort claims, noting that "Plaintiffs' allegations describe conduct that is abhorrent to civilized people, and surely actionable under a number of common law theories."²¹²

In explaining its ruling, the court flatly rejected Defendants' argument that "plaintiffs' claims are non-justiciable because they implicate political questions."²¹³ After finding that Defendants had failed to meet the factors set forth in *Baker v. Carr*, 369 U.S. 186 (1962),²¹⁴ it examined separation of powers arguments, including those set forth in *Koohi v. United States*, 976 F.2d 1328 (9th Cir.1992). *Koohi* was the case that radically extended *Boyle* to an entirely new FTCA exception, the Combatant Activities Exception.²¹⁵ It is also the case relied on by virtually every PMF currently in litigation over misconduct undertaken in Iraq or Afghanistan. So the court's statement that "[t]he

²⁰⁹ Pls.' Sec. Amend. Complaint, at ¶ 9-14, *Ibrahim v. Titan Corp.* 391 F.Supp.2d 10 (D.D.C. 2005).

²¹⁰ *Ibrahim v. Titan Corp.* 391 F.Supp.2d 10, 12 (D.D.C. 2005). The court gives a summary of the allegations and the claims arising from them:

Plaintiffs' allegations are broad and serious. They assert that defendants and/or their agents tortured one or more of them by: beating them; depriving them of food and water; subjecting them to long periods of excessive noise; forcing them to be naked for prolonged periods; holding a pistol (which turned out to be unloaded) to the head of one of them and pulling the trigger; threatening to attack them with dogs; exposing them to cold for prolonged periods; urinating on them; depriving them of sleep; making them listen to loud music; photographing them while naked; forcing them to witness the abuse of other prisoners, including rape, sexual abuse, beatings and attacks by dogs; gouging out an eye; breaking a leg; electrocuting one of them; spearing one of them; forcing one of them to wear women's underwear over his head; having women #oldiers order one of them to take off his clothes and then beating him when he refused to do so; forbidding one of them to pray, withholding food during Ramadan, and otherwise ridiculing and mistreating him for his religious beliefs; and falsely telling one of them that his family members had been killed. Plaintiffs assert claims under the Alien Tort Statute, RICO, government contracting laws, and the common law of assault and battery, wrongful death, false imprisonment, intentional infliction of emotional distress, conversion, and negligence.

Id.

²¹¹ *Ibrahim*, 391 F.Supp.2d at 13.

²¹² *Id.*, at 15.

²¹³ *Id.*

²¹⁴ *Id.* (articulating six *Baker* tests), *citing Baker v. Carr*, 369 U.S. 186, 217 (1962).

Constitution's allocation of war powers to the President and Congress does not exclude the courts from every dispute that can arguably be connected to 'combat,'"²¹⁶ is useful to plaintiffs in the other cases mentioned in this Section, as well. The court went on to distinguish the case at hand from those that did raise non-justiciable questions: "An action for damages arising from the acts of private contractors and not seeking injunctive relief does not involve the courts in 'overseeing the conduct of foreign policy or the use and disposition of military power.'"²¹⁷

The court also turned to the GCD itself, albeit once again in the context of *Koohi*'s extension of immunity to combatant activities. After reviewing the Ninth Circuit's justifications for immunity rooted in that FTCA exception, the court recognized the extent of the expansion Defendants advocated:

*Defendants want me to expand Boyle's preemption analysis beyond Koohi's negligence/product liability context to automatically preempt any claims, including these intentional tort claims, against contractors performing work they consider to be combatant activities. This would be the first time that Boyle has ever been applied in this manner. Boyle explicitly declined to address the question of extending federal immunity to non-government employees, and I will not extend that immunity here.*²¹⁸

The court did not dismiss the option of applying a *Koohi*-based GCD in *Ibrahim*, but it did observe that a host of questions remained to be answered before the Defendants could begin to meet their burden in asserting the defense.²¹⁹ Concluding that the full discovery necessary to determine the issue was not appropriate at that time, the court put off the question until the summary judgment stage.

D. Conclusion to Part II

The *Boyle*-based GCD is not the sole obstacle faced by plaintiffs intending to sue military contractors, or PMFs. As this Part demonstrates, a similar, *Koohi*-based GCD builds on *Boyle*'s logic, and its extension of immunity to Combatant Activities is another defense broadly employed by defendant PMFs. *Boyle*, and even *Feres*, rationale is also cited in less direct ways, for instance by *Blackwater* defendants, in their attempt to invoke separation of powers doctrine and political question doctrine.

The cases considered in this Part are still in the early stags of litigation, but (fortunately for our analysis) that is precisely where *Boyle* immunity is most dangerous to the plaintiffs here. If the GCD is successfully used by defendants to dismiss cases prior to trial or even discovery, crucial information concerning the conduct of *both* PMFs and the government will be lost. Courts have hereto been wary of allowing such developments,

²¹⁵ "The waiver of sovereign immunity enacted in the FTCA contains an explicit exception for "[a]ny claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). We believe that exception applies here..." *Koohi v. United States*, 976 F.2d 1328, 1333 (9th Cir.1992).

²¹⁶ *Ibrahim*, 391 F.Supp.2d at 15; *citing* *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2645-51, (2004).

²¹⁷ *Id.*, *citing* *Luftig v. McNamara*, 373 F.2d 664, 666 (D.C.Cir.1967).

²¹⁸ *Id.*, at 17 .

²¹⁹ *Id.*, at 19 .

at least prior to discovery. As shown in *Ruth v. A.O. Smith Corp.* (Part I, above), even circuits with lenient standards send cases to jurors where the government's level of discretion is in doubt.

Future efforts at using the *Boyle*-based GCD by defendants will have the burden of establishing that either the alleged misconduct did not occur, or that it was the result of conformity with reasonably specific instructions by the government. For some cases, that may be impossible—for instance, in the *McMahon* case, a Collateral Investigation Board jointly conducted by the Army and Air Force after the aviation accident faulted Presidential Airways “in the staffing, equipping, training, and conduct of the flight.”²²⁰ In other cases, the Abu Ghraib lawsuits, for instance, it seems unlikely that the government is willing to admit to directly specifying torture in its directives to PMF interpreters.

In conclusion, accountability through private litigation is possible, and, although the weight of past case law leans in favor of defendant PMFs, current cases force courts to consider applications of the GCD to alleged misconduct that goes well beyond *Boyle*'s original product liability context. The next few years will be definitive in the legal development of the GCD, with far-reaching implications that promise to influence not only the cases at hand, but military outsourcing, as well.

²²⁰ Spohrer, *Blackwater: Legal Consequences of Outsourcing Warfare* (2005), text of speech emailed Oct. 31, 2005.