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NOTES

GOVERNMENT-CONTRACTOR IMMUNITY—I'M JUST FOLLOWING ORDERS: A FAIR STANDARD OF IMMUNITY FOR MILITARY SERVICE CONTRACTORS

INTRODUCTION

For all that could be said of it, the war in Iraq has highlighted a number of substantial changes in the makeup and structure of the United States military in a theater of war. Prominent among these changes is a dramatic increase in the use of private military contractors within the war zone itself.¹ This substantial expansion of the use of service contractors within the war zone includes everything from maintenance, construction, and administration workers to armed, private, commercial soldiers or security forces.² Contractors are steadily replacing enlisted, uniformed soldiers in many aspects of the military's various missions.³

Every morning in Iraq and Afghanistan, a shadow army heads to work in numbers equal to or greater than that of the United States Armed Forces.⁴ These men and women make up the employee base of companies contracted by the military to perform any of a great variety of duties.⁵ Many of these contractors fill jobs that would have been held by soldiers fifty years ago.⁶ Today, these civilian contractors fly the planes, clean the barracks, repair the heli-

1. See CONGRESSIONAL BUDGET OFFICE, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ 12-13 (2008), available at <http://www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf> [hereinafter CONTRACTOR REPORT] (noting that the ratio of contractor-to-soldier has reached an unprecedented level for a major military operation).

2. *Id.* at 11 fig.5.

3. See *id.* at 12 (describing the change in military policy now favoring the use of contractors in support roles previously filled by soldiers). In many respects, this reflects a change in the size and model of the military in a post-Cold War world. *Id.* It appears that a specialized, volunteer army is not big enough to perform all the support tasks necessary for an operation like the war in Iraq. See *id.*

4. See *id.*

5. See *id.*

6. See *id.*

copters, and provide security for important visitors.⁷ Despite the decreased use of its own personnel, the military⁸ still has an active hand in dictating flight patterns, passenger lists, maintenance schedules, security protocols, and the job specifications for hosts of contractor jobs.⁹ This division of labor raises an important legal issue: a soldier cannot sue the United States for injuries he suffers incident to his service,¹⁰ but the soldier can sue a private contractor for such injuries. For example, during the Vietnam War, a soldier transported in a military plane flown by military pilots had no cause of action against the United States if his plane crashed.¹¹ Today, however, a soldier in Iraq who suffers injury in the crash of a civilian military contractor plane has a cause of action against the airline.¹²

While a plane crash might be a rare event, it is an unfortunate fact of war that things often go wrong and many people are hurt. Even outside of direct combat, any endeavor as large and complicated as the civilian contractor operation in Iraq is bound to produce tragedy. In some of these cases, the genesis of the incident is not in the negligent execution of a task by a civilian contractor.¹³ Absent negligent action, the legal analysis must go further back and inquire into the possibility of negligent planning. What if the maintenance on a helicopter was performed adequately but the frequency of the maintenance requested by the military is the origin of the problem?¹⁴ What if the plane was operated competently, yet the flight plan given to the contractor by the military exposed the entire flight to considerable risk?¹⁵

7. *See id.*

8. In this Note, "military" will refer to all branches of the United States Armed Forces as well as the civilian employees within the Department of Defense who assist those branches in coordinating and contracting for services in the theater of war.

9. *See, e.g.,* *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1336 (11th Cir. 2007) (noting that the military retained control over what flights would be flown, where to, and with who onboard, among other mission details); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1331 (11th Cir. 2003) (noting that the military retained control over the frequency and thoroughness of maintenance inspections on helicopters).

10. *Feres v. United States*, 340 U.S. 135, 146 (1950).

11. *See id.*

12. *McMahon*, 502 F.3d at 1352-53 (allowing claim brought by the families of deceased soldiers against military-contractor airline whose plane crashed, resulting in the soldiers' deaths).

13. *See, e.g.,* *Hudgens*, 328 F.3d 1329.

14. This example is based on the facts of *Hudgens*. *Id.* at 1332.

15. This example is based on the facts of *McMahon*. 502 F.3d at 1337.

The issue addressed in this Note is whether private military service contractors should be afforded any level of immunity because of their contractual relationship with the United States military and the United States government. Concluding that contractors are entitled to some immunity, this Note considers just how much immunity should be granted, the situations in which such immunity would apply, and the basis for such immunity in relation to existing legal concepts and policy considerations.

Ultimately, this Note argues that military service contractors should be entitled to immunity in much the same way that contractors are afforded immunity in the products liability context. This Note proposes that a version of the *Boyle v. United Technology Corp.* test, logically modified to suit the services industry, would fairly determine the applicability of this immunity.¹⁶ This test would shield contractors from liability when (1) the injury in question resulted from an order, plan, or directive from the United States military, (2) the plan or order was executed without negligence by the contractor, and (3) the contractor had disclosed to the United States any concerns or potential risks.¹⁷ This test presents a workable solution that honors the rationales that have supported military immunity and military products-liability immunity for more than fifty years while at the same time fairly leaving liability to the contractors when their negligent execution of a contractual duty has caused an injury.

Part I of this Note discusses a changing military environment, touching on the expansion of the use of military contractors and the blurring of the lines between the private and government sectors when it comes to the United States's military endeavors.¹⁸ Part II examines the doctrine of sovereign immunity and the Federal Tort Claims Act, which waived much of the government's sovereign immunity.¹⁹ Part III addresses the landmark case *Feres v. United States*, which established protection for the United States Armed Forces against suit by its soldiers. Part III also discusses the line of

16. *Boyle v. United Tech. Corp.*, 487 U.S. 500, 512 (1988); see *infra* note 139 and accompanying text.

17. See *id.*

18. See P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 217-26, 228-33 (Robert J. Art et al. eds., 2004).

19. See 28 U.S.C. § 1346 (2006); *Loeffler v. Frank*, 486 U.S. 549, 561-62 (1988) (stating that Congress partially waived sovereign immunity in the Federal Tort Claims Act).

cases that expands and refines the *Feres* doctrine.²⁰ Part IV of this Note analyzes two areas of government contracting that have established immunity standards: civilian government contracting and military contracting for products procurement. Finally, Part V argues for a limited immunity standard for military services contractors.

I. A CHANGING MILITARY

The use of military contractors in war is not a modern concept.²¹ Mercenaries were a staple of European armies until the Crimean War in 1853.²² The English army that was sent against American revolutionaries was no exception and included almost 30,000 “Hessian” Germans.²³ The United States began using military contractors in that same war, before the country was even founded.²⁴

The history of contractors in American wars is not one of steady escalation but instead has fluctuated and changed over the years.²⁵ The highest level of contractor use was in World War II,

20. See *Feres v. United States*, 340 U.S. 135, 146 (1950). See generally David Seidelson, *From Feres v. United States to Boyle v. United Technologies Corp.: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 DUQ. L. REV. 219 (1994); John Astley, Note, *United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185 (1988).

21. See SINGER, *supra* note 18, at 19.

22. See *id.* at 32-33.

23. *Id.* at 33. The “Hessians” were a group of German mercenaries hired by the British during the Revolutionary War. They were given their name by American militiamen based on the majority of the mercenaries being from the Hesse-Kassel region of Germany. *Id.*

24. CONTRACTOR REPORT, *supra* note 1, at 12.

25. See *id.* at 13 tbl.2.

The following table shows the ratio of contractor personnel to military personnel in armed conflicts the United States has participated in:

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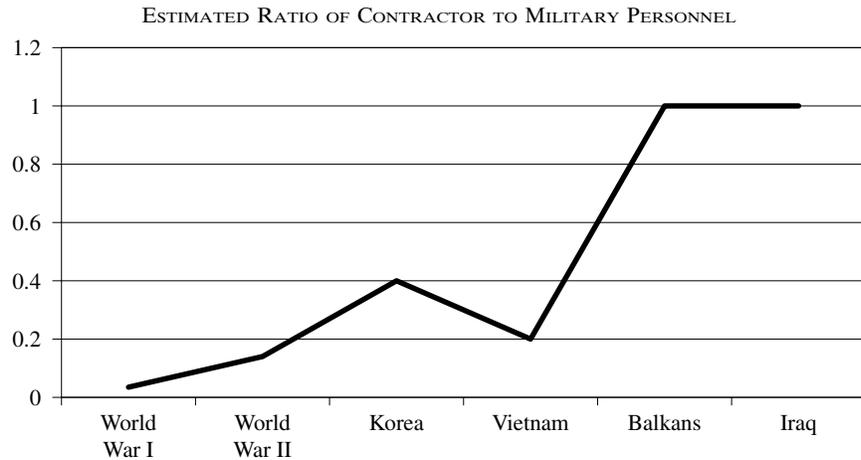
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with approximately 734,000 contractors on the ground.²⁶ To compare, there are approximately 190,000 contractors on the ground in Iraq.²⁷ The difference in the size of the conflicts, however, cannot be understated. With few variations, the ratio of contractors to en-

| Presence of Contractor Personnel During U.S. Military Operations (in thousands) | | | |
|---|----------------------|--------------------|----------|
| Conflict | Contractor Personnel | Military Personnel | Ratio |
| Revolutionary War | 2 | 9 | 1 to 6 |
| War of 1812 | n.a. | 38 | n.a. |
| Mexican-American War | 6 | 33 | 1 to 6 |
| Civil War | 200 | 1,000 | 1 to 5 |
| Spanish-American War | n.a. | 35 | n.a. |
| World War I | 85 | 2,000 | 1 to 24 |
| World War II | 734 | 5,400 | 1 to 7 |
| Korean War | 156 | 393 | 1 to 2.5 |
| Vietnam War | 70 | 359 | 1 to 5 |
| Gulf War | 9* | 500 | 1 to 55* |
| Balkans | 20 | 20 | 1 to 1 |
| Iraq Theater as of Early 2008 | 190 | 200 | 1 to 1 |

* "The government of Saudi Arabia provided significant amounts of products and services during Operations Desert Shield and Desert Storm. Personnel associated with those provisions are not included in the data or the ratio." *Id.*

Id. (modified from table 2).



See id. (Gulf War data excluded due to the omission of the Saudi contribution, which skews the data).

26. *Id.*

27. *Id.*

listed personnel has increased steadily with each conflict in which the United States has engaged.²⁸

While 5.4 million United States soldiers were deployed in World War II, only 200,000 have been deployed in Iraq.²⁹ This leaves the ratio of contractor-to-military in World War II at roughly one-to-seven.³⁰ In Iraq, however, this number has risen to approximately one to one.³¹ The use of military and government contractors in the United States's current operation in Iraq is at record levels.³² The United States currently has approximately as many contractors in the Iraq theater as it does uniformed servicemen.³³

This record use of contractors extends to security forces and armed private military forces, which account for expenditures of between \$500 million and \$1.2 billion annually.³⁴ An estimated \$32 billion worth of United States's contracts in Iraq have required the use of nonmilitary security.³⁵ The use of such security forces costs roughly the same per person as the use of a uniformed soldier, although the nature of a contracted security force makes it a more financially flexible option for peacetime.³⁶

The expanded use of contractors—especially armed contractors for security and pseudomilitary activities—frames the context within which this Note is written. Numerous concerns surround the nature of these contractors, their legal designations, their roles, and what their expanded existence means for twenty-first-century war and the twenty-first-century United States military.³⁷ Specific concerns include the lack of contractor regulation and the lack of a clear definition of a contractor's legal status.³⁸ The record level of

28. *See id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *See* Mike Mount, *Report: U.S. Using Contractors in Iraq at Unprecedented Rate*, CNNPOLITICS.COM, Aug. 12, 2008, <http://www.cnn.com/2008/POLITICS/08/12/iraq.contractors/index.html>.

33. CONTRACTOR REPORT, *supra* note 1, at 13 tbl.2.

34. *Id.* at 13-14.

35. *Id.* at 14.

36. *Id.* The full analysis of this comparison is available in Box 2 of the report. *See id.* at 16-17.

37. *See* SINGER, *supra* note 18, at 217-26, 228-33; *see also* P.W. Singer, *Warriors for Hire in Iraq*, SALON.COM, Apr. 15, 2004, <http://www.salon.com/news/feature/2004/04/15/warriors/index.html>; *cf.* Ian Traynor, *The Privatisation of War*, THE GUARDIAN, Dec. 10, 2003, <http://www.guardian.co.uk/world/2003/dec/10/politics.iraq> (providing a British perspective on the phenomenon in both the British and American armies).

38. *See* SINGER, *supra* note 18, at 228-29. Singer's primary concern is that in an unregulated market for contracted military forces, where contractors live and work in a

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outsourcing and intertwining of the military and its contractors during the Iraq war reveals a military significantly different than the one for which existing legal principles of military contractor immunity was built.

II. SOVEREIGN IMMUNITY AND THE FTCA

The doctrine of sovereign immunity far predates the founding of the United States. It is based on the notion that the King, as the “font of the law,” is not bound by the law; and that the King, as the “font of justice,” cannot be sued in his own courts.³⁹ In practical and modern terms, sovereign immunity shields the United States from civil suit and criminal prosecution.⁴⁰ In the United States, the federal government was immune from tort actions for more than a century before Congress passed legislation that waived the immunity for certain torts and established jurisdiction in the federal courts over certain types of claims made against the government.⁴¹ This legislation came in the form of the Federal Tort Claims Act (FTCA), which authorized suit against the government for torts

nebulous legal gray area, they become unreliable servants to the public good, no better than government organs, and potentially much worse. *Id.* It is possible that a clearly defined legal status for contractors is part of the solution to this problem. A simple and predictable system distributing liability for the various things that occur in military zones could be a very important element of accountability for these organizations.

39. *Seminole Tribe v. Florida*, 517 U.S. 44, 102-03 (1996) (Souter, J., dissenting). Sovereign immunity took form in the thirteenth century as part of English common law under the reign of Henry III. *Id.* at 103. The two-prong basis of sovereign immunity (that the King could do no wrong and that he could not be sued in his own court) existed through the Middle Ages and made its way in some form to the United States. *Id.* The version of sovereign immunity that exists in the United States today does not retain both prongs as its basis and rationale. *See id.* The idea that the King (or, in this case, the United States) can do no wrong has certainly faded if it ever truly existed. *Id.*; *see Feres v. United States*, 340 U.S. 135, 139 (1950). The United States is held accountable for numerous wrongs today in its own courts. *Feres*, 340 U.S. at 140. The element of sovereign immunity that has survived—to an extent—is that the King cannot be sued in his own court. *Id.* at 139. In many cases, the United States has consented to suit in its courts (for example, through the FTCA), but it still retains the basic presumption that, barring its consent, it cannot be sued. *See FDIC v. Meyer*, 510 U.S. 471, 475-77 (1994).

40. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941) (“The United States, as sovereign, is immune from suit save as it consents to be sued.”); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821) (“[A] sovereign independent State is not suable, except by its own consent.”).

41. *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953), *abrogated by Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957). Congress had already waived sovereign immunity for several types of claims and had a court established to hear such claims but, in general, had not waived its immunity from standard common law torts. *Id.* at 25 n.10.

which would have been in violation of the local law had they been committed by an individual.⁴² The FTCA consisted of two main components: the first was a waiver of sovereign immunity,⁴³ and the second was a list of exceptions for which the United States retained its sovereign immunity.⁴⁴ Of the many exceptions to the FTCA's waiver of sovereign immunity, the two most relevant to this Note are the discretionary-function exception⁴⁵ and the combatant-activities exception.⁴⁶ The discretionary-function exception preserves the United States's immunity from claims based on injuries attributable to the actions of federal officials making discretionary decisions, generally involving political or social policy.⁴⁷ The

42. 28 U.S.C. § 1346 (2006); *Feres*, 340 U.S. at 139-40; *Gonzalez-Rucci v. INS*, 460 F. Supp. 2d 307, 312 (D.P.R. 2006).

43. 28 U.S.C. § 1346. The language of the statute provides that the United States district courts

shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. § 1346(b)(1).

44. *Id.* § 2680. The exceptions include instances where a discretionary function was performed by a United States official; where mail was lost or negligently handled by the United States Postal Service; where taxes, fees, or detention of goods by customs agents was involved; where damages were allegedly caused by actions of the United States Treasury; where injuries were suffered in connection with combatant activities; and where claims arose in other countries. *Id.*; *see also* *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 820-21 (1984) (holding that the discretionary-function exception to the FTCA barred a claim against the Federal Aviation Administration alleging that it had negligently certified aircraft for flight); *Kandarge v. United States*, 849 F. Supp. 304, 311 (D.N.J. 1994) (holding that the discretionary function barred a suit against the United States where it had made the choice to delegate worksite safety at an excavation to a private contractor).

45. 28 U.S.C. § 2680(a). The exception applies to [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id.

46. *Id.* § 2680(j). The exception applies to “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”

Id.

47. The discretionary-function exception was intended to prevent judicial intrusion into the government's decision-making process in areas of public policy. *Riley v. United States*, 486 F.3d 1030, 1032 (8th Cir. 2007). To establish the applicability of the discretionary-function exception, the government first must demonstrate that there was

combatant-activities exception generally precludes claims arising out of wartime combat.⁴⁸

In sum, by waiving the United States's sovereign immunity, except in limited instances, the FTCA expanded the scope of claims that could be brought against the United States. Despite this waiver, however, many claims remain statutorily barred by the exceptions to the FTCA and thus will go uncompensated.⁴⁹ This protection of federal interests from the intrusion of state tort law foreshadows many of the arguments that are central to this Note. While the FTCA makes some concessions to state tort principles,⁵⁰ it carves out a reserve of federal interests that are statutorily protected.⁵¹ The conflict between the protection of federal interests and the rights of individuals to seek redress for their injuries underlies all of the conflict and controversy of the topic of this Note.⁵²

III. *FERES* AND THE FOUNDATION OF MILITARY IMMUNITY

Four years after the passage of the FTCA, the United States Supreme Court decided *Feres v. United States*.⁵³ In *Feres*, the Court held that the United States military was not liable for soldiers' inju-

an action by the United States that "involv[ed] an element of judgment or choice." *Id.* (internal quotation marks omitted). Second, it has to be shown that the action impacts social, economic, or political policy. *Id.* In *Riley*, the court dismissed a claim against the United States that alleged that the United States Postal Service's placement of mailboxes obscured the view of traffic and led to an automobile accident. *Id.* In effect, the discretionary-function exception is a statutory embodiment of the separation of powers. See *Blessing v. United States*, 447 F. Supp. 1160, 1171 (E.D. Pa. 1978) ("[T]here is evidence within the FTCA's legislative history that such fundamental separation of powers dogma is precisely what the discretionary function exception was designed to embody.").

48. See *Redmond v. United States*, 331 F. Supp. 1222, 1223-24 (N.D. Ill. 1971).

49. For example, see *Miller v. United States*, in which a woman brought a claim for infliction of emotional distress after alleged medical malpractice resulted in the death of her husband—a military officer. 73 F.3d 878, 879 (9th Cir. 1995). The claim was barred by an exception to the FTCA because it occurred in a foreign country. *Id.* at 883.

50. This concession comes in the form of making itself liable to injuries—save for those excepted—if they would be deemed tortious by the laws of the place they were committed; that is, the states. 28 U.S.C. § 1346(b)(1).

51. *Id.* § 2680. This reservation goes against the basic principle of the American legal system that an injury deserves a remedy. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that . . . every injury [must have] its proper redress.").

52. See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 808 (1984) ("The discretionary function exception . . . marks the boundary between Congress's willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.").

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

ries suffered incident to service.⁵⁴ The original *Feres* complaint alleged that the military's negligence in housing Feres in barracks with a defective heating plant and failure to maintain adequate fire-prevention measures resulted in his death.⁵⁵ In barring Feres's claim, the Court gave broad immunity to the military for injuries arising in the course of a soldier's duties, whether those duties were performed in peacetime or wartime and whether the duties were pedestrian or high risk.⁵⁶

The rationale for the decision in *Feres* was originally two pronged.⁵⁷ The first prong—or “*Feres* factor,” as referred to by later courts⁵⁸—was based on the notion that the military is an entirely federal concern and required uniform policies independent of the state where the soldier served.⁵⁹ The second *Feres* factor was the recognition that federal statutes already provided “simple, certain, and uniform compensation for injuries or death of those in armed services.”⁶⁰ The Court has held that these compensation schemes

54. *Id.* at 146.

55. *Id.* at 137. *Feres* was actually a decision for three separate cases; the opinion also included *Jefferson v. United States* and *Griggs v. United States*. *Id.* at 136-37. The actual *Feres* case came about after Rudolph Feres was required by his superior officers to live in a barracks in Pine Camp, New York. *Feres v. United States*, 177 F.2d 535, 536 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950). The barracks had a defective heating plant, which the complaint alleged was known or should have been known by the superior officers. *Id.* The complaint also alleged negligence on the part of the barracks's fire watch and its supervisors. *Id.*

The *Jefferson* claim stemmed from a surgery performed by an Army surgeon at Fort Belvoir, Virginia. *Jefferson v. United States*, 178 F.2d 518, 519 (4th Cir. 1949), *aff'd sub nom.* *Feres v. United States*, 340 U.S. 135. A towel was left in Jefferson's body, resulting in serious injuries. *Id.* The claim brought on behalf of Dudley Griggs's widow in *Griggs v. United States* was similar; it alleged that the Army Medical Corps at Scott Field Air Base, Illinois negligently executed a surgical procedure—a procedure that proved to be fatal. *Griggs v. United States*, 178 F.2d 1, 2 (10th Cir. 1949), *rev'd sub nom.* *Feres v. United States*, 340 U.S. 135.

56. *See* *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1341 (11th Cir. 2007).

57. *See Feres*, 340 U.S. at 142-45.

58. *See, e.g.,* *Mossow v. United States*, 987 F.2d 1365, 1370 (8th Cir. 1993).

59. *Feres*, 340 U.S. at 143-44.

60. *Id.* at 144. For injuries, the disability plan allows for an increasing monthly compensation based on a percentage rating of disability. 38 U.S.C. §§ 1114, 1131, 1134 (2006). For example, someone rated ten percent disabled is entitled to \$117 per month; someone rated fifty percent disabled is entitled to \$728 per month; and a fully (one hundred percent) disabled person is entitled to \$2,527 per month. *Id.* § 1114. There are other, more specific provisions, which can further increase this amount. *Id.* In instances of death, the military compensation scheme provides for a \$100,000 death gratuity paid out to the family of the deceased. 10 U.S.C. §§ 1475-79. The military can also pay various expenses associated with death, including the cost of cremation, the purchase of a casket, and others. *Id.* § 1482. Subsequently, the surviving spouse can

represent a cap on the military's liability to its soldiers and constitute the only means of relief for injured servicemen.⁶¹ These two factors formed the basis of the decision in *Feres* and the initial backbone of military immunity jurisprudence.

Feres has not been without its opponents. Critics have raised many arguments against it over time, the strongest perhaps over the inequity of the process it entails.⁶² In terms of both compensating the injured and deterring future negligence, the *Feres* decision is often found to be lacking.⁶³ Despite the complaints, the *Feres* doctrine has been reaffirmed in subsequent cases and is still good law.⁶⁴

A. Brown, Johnson, and the Third *Feres* Factor

The Supreme Court added a third factor four years later in *United States v. Brown*.⁶⁵ There, the Court expressed concern about the dangers posed to military discipline by the litigation of claims brought by servicemen and servicewomen.⁶⁶ In *Brown*, a discharged soldier alleged medical negligence at a Veterans' Administration Hospital during his surgery to correct an injury incurred during military service.⁶⁷ The Court read into the *Feres*

receive monthly payments that vary based on the rank of the deceased soldier, starting at \$1,091 per month. 38 U.S.C. § 1311. There are other available per-month increases, including for disabled surviving spouses and dependent children. *Id.*

61. *Feres*, 340 U.S. at 144; see *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 (1980) (stating that the Veterans' Benefit Act is believed to represent the exclusive route of compensation to injured servicemen); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977) (holding that the existing benefits package represents a limitation on recovery); see also *United States v. Johnson*, 481 U.S. 681, 690 (1987) (reaffirming these positions and noting the lack of a statutory amendment by Congress in over four decades in response to this interpretation).

62. Edwin F. Hornbrook & Eugene J. Kirschbaum, *The Feres Doctrine: Here Today—Gone Tomorrow?*, 33 A.F. L. REV. 1, 11-15 (1990).

63. See *id.* at 11-15 (listing in a point-counterpoint method the arguments over the inequitable nature of the *Feres* doctrine). While soldiers lose the right to win large judgments in state court, they do have a benefits system set up to compensate them. *Id.* at 12. While it "pale[s] next to multimillion dollar judgments, the military benefits system compares favorably to other benefits programs." *Id.* One of the more lasting and practical complaints against *Feres* has been the preclusion of medical malpractice claims by active-duty soldiers. See *id.* at 16-18 (detailing legislative efforts to change the *Feres* doctrine as applies to medical malpractice claims); see also Rob Perez, *Active Duty Military Can't Sue for Malpractice*, HONOLULU ADVERTISER, Feb. 7, 2006, available at <http://the.honoluluadvertiser.com/article/2006/Feb/07/lh/FP602070329.html> (showing that this is still a concern today).

64. See *Johnson*, 481 U.S. 681.

65. *United States v. Brown*, 348 U.S. 110, 110-12 (1954).

66. *Id.* at 112.

67. *Id.* at 110. In *United States v. Brown*, Brown alleged that a defective tourniquet was used on him in an operation by the Veterans' Administration that occurred

decision a recognition of both the special nature of military discipline and the potential untoward results of litigating allegedly negligent command decisions or orders.⁶⁸ The Court found that the *Feres* Court had read the FTCA to exclude claims that involved the “peculiar and special relationship of the soldier to his superior.”⁶⁹ The *Brown* Court ultimately decided that *Feres* did not control in that case and thus provided little analysis of what eventually became the predominant *Feres* factor: military discipline.⁷⁰

The Court more fully addressed the third factor in 1977 in *Stencel Aero Engineering Corp. v. United States*.⁷¹ *Stencel Aero* involved a fighter pilot who suffered serious injury when his aircraft malfunctioned.⁷² The case presented a new situation for the Court because the pilot also sued the manufacturer, a military contractor, who then cross-claimed against the military.⁷³ The district court ruled in favor of the United States on the claims of both the officer and Stencel Aero.⁷⁴ *Stencel Aero* appealed this decision and in doing so provided the Court an opportunity to address the *Feres* factors in relation to nonmilitary claimants.⁷⁵ Notably, the Court analyzed the third factor, military discipline, and found no practical difference to the military-discipline question if the claim came from a serviceman or a third party.⁷⁶ The Court found that “[t]he litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government’s agents and the effect upon the serviceman’s safety.”⁷⁷ In

after his discharge from the military. *Id.* He suffered from severe and permanent nerve damage in his leg because of the alleged negligence. *Id.* at 110-11.

68. *Id.* at 112.

69. *Id.*

The *Feres* decision . . . [held] that the Tort Claims Act does not cover injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.

Id. (citations and internal quotation marks omitted).

70. *See id.*

71. *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666 (1977).

72. *Id.* at 667.

73. *See id.* at 668.

74. *Id.* at 668-69.

75. *Id.* at 669-70.

76. *Id.* at 673.

77. *Id.*

practical terms, the Court noted that no matter who brought the suit, the trial would inherently involve questioning military decision making and officers testifying to their decisions and the decisions of other officers.⁷⁸ The Court's decision to reject the third-party claim is another in a line of cases in which the relief is precluded for the purpose of protecting the national interests of the United States—in the form of its military.⁷⁹

In contrast, Justice Marshall's dissenting opinion in *Stencel Aero* did not recognize any military-discipline issues at play.⁸⁰ Justice Marshall argued that, because it was a third-party claim and not one by a soldier, there was no risk to military discipline.⁸¹ He further argued that the majority's position created inconsistent results because a civilian could bring a claim while a soldier's claim would be barred when both of their injuries stemmed from the exact same event.⁸² Justice Marshall's conception of the military-discipline factor appeared to be rooted in an older view of the military-discipline factor that was concerned primarily with the dangers of a subordinate bringing suit against a superior officer.⁸³ Over time,

78. *Id.* "The trial would, in either case, 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." *Id.*

79. *See id.* at 673-74. The Court found the claim barred because the same factors justifying the barring of *Feres*-type claims were present and potent in *Stencel Aero*'s claim. *Id.* Here the Court showed judicial flexibility—the kind that will be called for by this Note—to protect important federal interests.

80. *Id.* at 676 (Marshall, J., dissenting). Justice Marshall stated,

It is clear that the basis of *Feres* was the Court's concern with the disruption of "[t]he peculiar and special relationship of the soldier to his superiors" that might result if the soldier were allowed to hale his superiors into court. That problem does not arise when a nonmilitary third party brings suit.

Id. (citation omitted).

81. *Id.*

82. *Id.*

Had the same malfunction in the pilot eject system that caused the serviceman's injuries here also caused that system to plunge into a civilian's house, the injured civilian would unquestionably have a cause of action under the Tort Claims Act against the Government. He might also sue petitioner, which might, as it has done here, cross-claim against the Government. In that hypothetical case, as well as in the case before us, there would be the same chance that the trial would involve second-guessing military orders, and would . . . require members of the Armed Services to testify in court as to each other's decisions and actions. Yet there would be no basis, in *Feres* or in the Tort Claims Act, for concluding that the suit is barred because of the nature of the evidence to be produced at trial.

Id. (internal quotation marks omitted).

83. *See id.* at 674-77.

and notably in the cases that follow, the military-discipline factor firmly takes on an evolved role in military-immunity doctrine.

Subsequent cases have reaffirmed and refined the usage of this factor as a policy basis for the *Feres* ruling and military immunity.⁸⁴ In *United States v. Shearer*, the Court further underscored the importance of this factor by articulating the way that such claims, by their very nature, would involve the judiciary in military affairs in a way that could compromise military discipline.⁸⁵ Two years later, in *United States v. Johnson*, the Court expanded and developed this notion, stating that “[e]ven if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.”⁸⁶ In *Johnson*, a Coast Guard officer died during a rescue mission, and his wife brought a claim against the government.⁸⁷ The Court reaffirmed the *Feres* ruling and held that the government was not liable for the death of the Coast Guard officer during his service.⁸⁸ The Court also noted that “[b]ecause Johnson was acting pursuant to standard operating procedures of the Coast Guard, the potential that [the] suit could implicate military discipline [was] substantial.”⁸⁹

The Court also addressed the military-discipline and command factor in *United States v. Stanley*.⁹⁰ In the long line of cases in which

84. See *United States v. Johnson*, 481 U.S. 681 (1987); *United States v. Shearer*, 473 U.S. 52 (1985).

85. *Shearer*, 473 U.S. at 59.

The plaintiffs in *Feres* and *Stencel Aero Engineering* did not contest the wisdom of broad military policy; nevertheless, the Court held that their claims did not fall within the Tort Claims Act because they were the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.

Id.

86. *Johnson*, 481 U.S. at 691. As well, the *Johnson* Court quotes its past decisions in categorizing the military as “a specialized society.” *Id.* (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)) (internal quotation marks omitted). The Court noted that “[t]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.” *Id.* (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)) (internal quotation marks omitted).

87. *Id.* at 683.

88. *Id.* at 692.

89. *Id.* at 691-92. Also in light of the *Feres* factors, namely that of the existing statutory-benefits scheme, the Court pointed out that the decedent’s wife had received—and continued to receive—benefits from the government because of her husband’s death. *Id.* The wife was receiving \$868 per month for dependency and compensation benefits. *Id.* at 683 n.1.

90. 483 U.S. 669 (1987).

no remedy has been available because of the priority given to federal interests, *Stanley* may be the most egregious example. James Stanley, a Master Sergeant in the United States Army, was deceived and used as an experimental subject by the Army in its process of testing the effects of lysergic acid diethylamide (LSD).⁹¹ At the time of the experiments, Stanley was unaware that he was a test subject.⁹² Over time, Stanley's personality changed, resulting in the deterioration of his work performance, the subsequent discharge from the Army, and a divorce from his wife.⁹³ Stanley suffered from hallucinations, memory loss, and became violent towards his family.⁹⁴ Despite the inhumane treatment by the United States Army and the way in which its actions completely destroyed Stanley's life, the Court still held in favor of the government.⁹⁵

In *Stanley*, the Court stated that making the applicability of *Feres* dependent on case-by-case analysis of how seriously a claim would threaten military discipline would not work. Such a test would inherently require the Court to intrude on military matters in the process of evaluating the potential interference.⁹⁶ Notably, the court held that "the mere process of arriving at correct conclusions would disrupt the military regime."⁹⁷ The Court went on to note that such uninvited intrusions were inappropriate.⁹⁸ It is ultimately the concerns about military discipline, military decision making, and the unique nature of the military that form the basis of the decision in *Stanley*; the other *Feres* factors are not nearly as pronounced.⁹⁹ This result shows the importance the Court places on

91. *Id.* at 671.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 686. The gravity of the injuries was not lost on the Court, as evidenced by the opinions of Justices Brennan and O'Connor. *See id.* at 686-708 (Brennan, J., concurring and dissenting); *id.* at 708-10 (O'Connor, J., concurring and dissenting).

96. *Id.* at 682 (majority opinion).

A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands.

Id. at 682-83.

97. *Id.* at 683.

98. *Id.*

99. *Id.* at 683-84; *see* *Bynum v. FMC Corp.*, 770 F.2d 556, 562 (5th Cir. 1985) ("Since *Stencel*, it has become clear that the third factor described above [concern for

protecting federal interests—specifically in the context of the military.

While the deference to the government provided by the *Feres* doctrine is very strong, the question remains as to how it could be applied to the same interests (military decision making and discipline) present in military-contractor relations. To answer this question, an analysis of government-contractor immunity is necessary.

IV. GOVERNMENT-CONTRACTOR IMMUNITY AND DERIVATIVE SOVEREIGN IMMUNITY

Outside of the military realm, there is an extensive history of derivative sovereign immunity for those acting at the will of the government.¹⁰⁰ In *Yearsley v. W.A. Ross Construction Co.*, the Supreme Court held that an agent of the government was not amenable to suit when carrying out the will of Congress.¹⁰¹ In such cases, the Court held, the only way for the agent to be liable would be if he acted outside the bounds of his authority or if there was no legitimate power to give that authority.¹⁰²

military discipline] is the principal justification for the *Feres-Stencel* doctrine.”). For a discussion on the emergence of military discipline as the primary category for consideration of *Feres* doctrine positions, see Seidelson, *supra* note 20, at 226-30.

100. See *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) (holding that, on citizen’s action against government contractor who had damaged part of citizen’s land in the process of performing its duties, contractor could not be sued if it satisfactorily carried out the contractual obligations set by the United States); see also *Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963) (holding that no liability could be imposed upon a government contractor for damage done to the property of the appellant when appellee was acting within the terms of its contract with the United States); *Green v. ICI Am.*, 362 F. Supp. 1263, 1265 (E.D. Tenn. 1973) (holding that the government contractor operating a United States-owned TNT plant shared the United States’s sovereign immunity in claims related to the plant and thus could not be sued).

101. *Yearsley*, 309 U.S. at 20-21 (“[I]f this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will.”); see also *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283 (1855) (cited in *Yearsley* and holding that a public agent acting within his bounds “cannot be made responsible in a judicial tribunal for obeying the lawful command of the government”).

102. *Yearsley*, 309 U.S. at 20-21; see also *Myers*, 323 F.2d at 583 (holding that a contractor building roads for the government within the parameters of its instructions was not liable for any claims). An important element of contractor immunity is the consistent requirement that the contractor be acting within its bounds. The courts have held that a contractor should never be immune from suits based in injuries caused by the contractor’s own fault. See *Foster v. Day & Zimmermann Inc.*, 502 F.2d 867, 874 (8th Cir. 1974) (“The doctrine of sovereign immunity may not be extended to cover the fault of a private corporation, no matter how intimate its connection with the government.”).

An interesting example of derivative immunity was presented in the Fourth Circuit case *Butters v. Vance International, Inc.*¹⁰³ In *Butters*, the Saudi government rejected the female plaintiff's application for full-time employment as a security guard.¹⁰⁴ The Saudi government rejected her because it would have violated its Islamic principles to have a female security officer.¹⁰⁵ Butters then brought a claim of gender discrimination against the United States security company.¹⁰⁶ The court ultimately found that, because the decision not to hire Butters was made by the Saudi government and was a noncommercial decision particular to the sovereign, the security company derived the sovereign immunity of Saudi Arabia and was thus immune from suit by Butters.¹⁰⁷ The court noted that it is "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity."¹⁰⁸ While this "well-settled law" applied generally to government contractors, contractor immunity tailored specifically to military contractors developed in the area of military products procurement.

A. *Military Contractor Immunity—Products Liability*

The Fourth Circuit established military-contractor immunity in *Tozer v. LTV Corp.*¹⁰⁹ *Tozer* was another case of military aviation disaster, involving a crashed Navy airplane.¹¹⁰ A substantial portion of the court's argument was based in a concern for the separa-

103. *Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000).

104. *Id.* at 464.

105. *Id.*

106. *Id.*

107. *Id.* at 465-67.

108. *Id.* at 466. The court went on to state,

Sovereign immunity exists because it is in the public interest to protect the exercise of certain governmental functions. This public interest remains intact when the government delegates that function down the chain of command. As a result, courts define the scope of sovereign immunity by the nature of the function being performed—not by the office or the position of the particular employee involved. Imposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work. As a result, courts have extended derivative immunity to private contractors, "particularly in light of the government's unquestioned need to delegate governmental functions."

Id. (citation omitted) (quoting *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996)); see Daniel G. Murphy et al., *Parallel Proceedings: Moving into Cyberspace*, 35 INT'L LAW. 491, 504-05 (2001).

109. 792 F.2d 403 (4th Cir. 1986).

110. *Id.* at 404.

tion of powers.¹¹¹ The court noted that “[t]he judicial branch is by design the least involved in military matters” and that “[i]n the face of a ‘textually demonstrable’ commitment of an issue to ‘a coordinate political department,’ judicial caution is advisable.”¹¹² The court quoted from *Gilligan v. Morgan*, a 1973 Supreme Court decision, stating that “[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.”¹¹³ The court also pointed out that even if there was no separation of powers mandated by the Constitution, separation remains sound policy because judges are inherently less suited to evaluate military decisions than the military and civilian-military personnel.¹¹⁴ The court noted that such serious decisions should not be made by the “least accountable branch of government.”¹¹⁵

In outlining the merits of the military-contractor defense, the *Tozer* court strongly dismissed the notion that there would be a difference in impact on the military if the claim were brought against a contractor as opposed to against the military itself.¹¹⁶ The court noted that contractors are so intertwined with the military that it is virtually impossible to criticize them without simultaneously criticizing, or at least questioning, the military in the same matter.¹¹⁷ The court then recognized the importance of evaluating military decision making but left such evaluation firmly in the hands of the executive and legislative branches, not the courts.¹¹⁸ The court also argued that the relationship between the military and its contractors and the collaborative process of their work requires military

111. *Id.* at 405.

112. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

113. *Id.* (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)) (internal quotation marks omitted).

114. *Id.* (“The judicial branch contains no Department of Defense or Armed Services Committee or other ongoing fund of expertise on which its personnel may draw.”); see also *In re “Agent Orange” Product Liability Litigation*, 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982) (“Considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and should be exempt from review by civilian courts.”).

115. *Tozer*, 792 F.2d at 405.

116. *Id.* at 406.

117. *Id.*

118. *Id.* at 406-07.

contractor immunity both to maintain quality and limit costs.¹¹⁹ On the basis of these concerns, the court decided to recognize a military version of government-contractor immunity established in *Yearsley*.¹²⁰

The Supreme Court would take up the issue of military-contractor immunity in *Boyle v. United Technologies Corp.* where it recognized and established the test for military-contractor immunity for products liability.¹²¹ *Boyle* centered on the death of a United States Marine helicopter pilot and the subsequent suit the pilot's father filed against the helicopter manufacturer.¹²² A primary focus of the Court's decision was the tension between the wholly federal role of military contractors and the fundamental concepts of state tort law.¹²³ *Boyle* held that federal law can supersede state tort law, even without statutory authorization, in cases that represent a "uniquely federal interest[]."¹²⁴ Two uniquely federal interests were presented in *Boyle*: "obligations to and rights of the United States under its contracts"¹²⁵ and "the civil liability of federal officials for actions taken in the course of their duty."¹²⁶ Despite the fact that the suit was nominally against the contractor, it was sufficiently related to a contract involving the United States to be considered within the first interest.¹²⁷ As well, the policy

119. *Id.* at 407-08; see also *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 450 (9th Cir. 1983) (detailing the benefits to the military's relationship with contractors that a contractor immunity would bring).

120. See *Tozer*, 792 F.2d at 409.

121. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512-14 (1988). For a general discussion of *Boyle*, its rationales and significance, see William C. Buckhold & Lisa D. Goekjian, *The Government Contractor's Defense to Products Liability Claims*, 99 *COM. L.J.* 64 (1994), and John J. Michels, Jr., *The Government Contractor Defense: The Limits of Immunity After Boyle*, 33 *A.F. L. REV.* 147 (1990).

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

123. *Id.* at 504-06.

124. *Id.* at 504. In general, preemption of state law is primarily handled by explicit language of preemption on the part of Congress. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation*, 461 U.S. 190, 203 (1983). Preemption is not limited to those cases, however. State law can also be preempted where there is a scheme of federal regulation so complete that it is reasonable to assume that Congress intended it not to be supplemented by state law. *Id.* at 204. Further, state law can be preempted where there is federal law on a topic of dominant federal interest or where the Congress reveals its intent to preempt otherwise. *Id.*

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

126. *Id.* at 505.

127. *Id.* at 505-06.

goals of the second interest are maintained whether a federal official is involved directly or not.¹²⁸

Though the Court acknowledged that suits between private parties unrelated to the United States are left to state tort law, it distinguished *Boyle*, pointing out that because “[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts . . . the interests of the United States will be directly affected.”¹²⁹ The Court went on to note the necessity of a “significant conflict” to justify the imposition of federal law over state tort policies.¹³⁰ It found this significant conflict in the “discretionary function” exception of the FTCA.¹³¹

The Court also raised the issue of costs, noting that allowing contractors to be sued would likely raise the costs of contracting with the government.¹³² The cost of liability would ultimately be passed onto the government in its contract pricing.¹³³ This transfer of costs creates an inconsistency that the court noted: “It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.”¹³⁴ This concern—interference with the government’s ability to contract—is a major element of the *Boyle* Court’s decision to preempt state tort law.¹³⁵

A test ultimately emerged from *Boyle* that allows for immunity from suit for contractors in situations in which (1) the United States approved design specifications, (2) the materials produced by a ci-

128. *Id.* at 505 (“The present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government’s work done.”).

129. *Id.* at 507.

130. *Id.* at 507-11.

131. *Id.* at 511-12. The discretionary-function exception excludes “[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,” from the broad consent to suit established in the FTCA. 28 U.S.C. § 2680(a) (2006).

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

133. *Id.*

134. *Id.* at 512.

135. See John Watts, *Differences Without Distinctions: Boyle’s Government Contractor Defense Fails to Recognize the Critical Differences Between Civilian and Military Plaintiffs and Between Military and Non-Military Procurement*, 60 OKLA. L. REV. 647, 679 (2007) (“The *Boyle* Court justified the creation of the federal common law defense on the need to prevent cost increases . . . and the impermissible interference such costs would have on government discretion in procurement.”).

vilian contractor met those specifications, and (3) the contractor warned the United States about any dangers in the use of the materials of which it was aware but the United States was not.¹³⁶ The third element of the test, the Court stated, was necessary to create disincentives for contractors to withhold information from the military about potential dangers.¹³⁷ In designing this test, the Court rejected a test proposed by the Eleventh Circuit,¹³⁸ which would have required either (1) that the contractor not participate substantially in the design or (2) that the contractor warn the government and present alternative designs but be told to proceed with the original specifications anyway.¹³⁹ *Boyle*'s broad use of the discretionary-function exception has led to inconsistent use of the standard, including its use in situations not directly called for in *Boyle*, such as nonmilitary government contracting.¹⁴⁰

The *Boyle* standard was used in a progressive way by the Eleventh Circuit in *Hudgens v. Bell Helicopters/Textron*.¹⁴¹ As a departure from the typical *Boyle* fact scenario, *Hudgens* involved a services contract, not a products-procurement contract.¹⁴² The negligence alleged in *Hudgens* concerned the maintenance of United States Army helicopters.¹⁴³ The *Hudgens* court held that the true thrust of *Boyle* is not that manufacturers should be protected in military-procurement contracts, but rather that state tort law can be displaced by the unique federal interest of control over government

136. *Boyle*, 487 U.S. at 512. The Court's specific language for the test read, Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id.

137. *Id.* at 512-13.

138. See *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985).

139. *Boyle*, 487 U.S. at 513. The Court did not want to discourage active involvement by the contractor in the design process. See *Shaw*, 778 F.2d at 746.

140. See *Watts*, *supra* note 135, at 668-69 ("[T]he majority of courts addressing the issue have applied the government contractor defense to non-military contracts. These courts have focused upon the broad application of the discretionary function exception supporting *Boyle* and the undesirability of judicial second-guessing of federal policy decisions that necessarily occurs in the absence of the defense." (footnote omitted)). This arguably overbroad interpretation of the discretionary function was first pointed out by the dissent in *Boyle*, which argued that the FTCA itself was not even applicable to the situation and, therefore, one of its exceptions could not be invoked in any reasonable way. *Boyle*, 487 U.S. at 526-28 (Brennan, J., dissenting).

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

142. *Id.* at 1330.

143. *Id.*

contracts and protection of the government's ability to get its work done.¹⁴⁴ The court decided that the determination of specifications for product designs involves the same type of discretion as the decision of how to maintain a military air fleet, thus justifying the invocation of the discretionary-function exception.¹⁴⁵ Based on this broad reading, the court held that the *Boyle* rationale and test could be used in the case presented to them, even though it was a service contract.¹⁴⁶

For the purpose of the *Hudgens* analysis, the elements of the *Boyle* test were modified to suit the service contract.¹⁴⁷ The court's new test was tailored specifically to the maintenance contractor facts and allowed for immunity "if (1) the United States approved reasonably precise maintenance procedures; (2) [the contractor's] performance of maintenance conformed to those procedures; and (3) [the contractor] warned the United States about the dangers in reliance on the procedures that were known to [the contractor] but not to the United States."¹⁴⁸ This expansion of products-liability immunity to the services context is unique to the Eleventh Circuit and has not been followed in any other jurisdiction.¹⁴⁹

144. *Id.* at 1333-34. "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 federal interest." *Id.* at 1334.

145. *Id.*

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 liable for departing from design specifications.

Id.

146. *Id.* at 1333-34.

147. *Id.* at 1335-38.

148. *Id.* at 1335; *see supra* note 136.

149. *See Fisher v. Halliburton*, 390 F. Supp. 2d 610, 615-16 (S.D. Tex. 2005) (discussing the courts' hesitance to apply the *Boyle* test to service contracts and rejecting an effort to expand that immunity); *see also Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326, at *5 (S.D. Tex. Aug. 30, 2006) (discussing the limited history of military service-contractor immunity); *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1329-31 (M.D. Fla. 2006) (explaining the argument for the application of *Boyle* only to products-procurement contracts), *aff'd*, 502 F.3d 1331 (11th Cir. 2007).

B. *Claims for Derivative Feres Immunity and Further Developments in Military-Contractor Immunity*

The first federal appellate court to hear a case arguing for derivative *Feres* immunity for military contractors was the Ninth Circuit Court of Appeals in *Chapman v. Westinghouse Electric Corp.*¹⁵⁰ *Chapman* involved an on-duty serviceman who was injured when a platform collapsed at a government-owned nuclear facility run by Westinghouse Corp.¹⁵¹ The court rejected the notion of derivative *Feres* immunity and instead sought to apply the *Feres* doctrine directly, which required testing to see if Westinghouse qualified as a government employee.¹⁵² Because the *Feres* doctrine only applies to suits against the government and its employees, Westinghouse would have had to be an employee of the United States for immunity to apply.¹⁵³ Noting that the government contract clearly defined Westinghouse as a contractor seeking its own profit, the Ninth Circuit found the corporation was not a government employee and thus held *Feres* inapplicable.¹⁵⁴ The court dismissed the claim for *Feres*-based immunity and instead focused on the *Boyle* test, based in the discretionary-function exception.¹⁵⁵ The court noted that *Boyle* had a broader potential reach than *Feres* because *Boyle* could bar suits against private parties.¹⁵⁶ Because the court could not find any evidence of precise specifications for the platform, it found the *Boyle* test also to be inapplicable.¹⁵⁷

The various issues of contractor immunity discussed above converged in *McMahon v. Presidential Airways, Inc.*, in which the Eleventh Circuit Court of Appeals heard a claim for derivative *Feres* immunity in a case involving a service contract.¹⁵⁸ Presidential Airways had contracted with the United States to fly military

150. *Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267 (9th Cir. 1990); *see McMahon*, 502 F.3d at 1341 n.10. In seeking derivative immunity, a defendant is attempting to assert that its relationship to an immune entity (for the purpose of this Note, the United States) affords it the immunity of the United States. *See* Murphy, *supra* note 108, at 504-05.

151. *Chapman*, 911 F.2d at 268.

152. *Id.* at 271.

153. *Id.*

154. *Id.*

155. *Id.* at 270-72.

156. *Id.* at 271.

157. *Id.* This analysis represents an example of the application of *Boyle*. The court made it through only one prong of the three-part test but did seek to apply the *Boyle* test and looked for precise specifications that would justify immunity. *Id.*

158. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1338-57 (11th Cir. 2007).

officers and personnel to and from various locations in the Middle East.¹⁵⁹ One of its trips unfortunately ended in a crash that proved fatal to three United States servicemen.¹⁶⁰ The survivors brought suit against Presidential Airways on behalf of the deceased soldiers in Florida state court, alleging that it had caused the wrongful death of the soldiers.¹⁶¹

Presidential Airways argued that it should be immune under the *Feres* doctrine, but the Eleventh Circuit disagreed.¹⁶² Unlike *Chapman*, however, the court did not base its decision on the notion that *Feres* could not apply to suits against nongovernment entities.¹⁶³ Instead, the Eleventh Circuit engaged the concept of derivative *Feres* immunity presented by Presidential Airways.¹⁶⁴ First the court analyzed Presidential Airways's claim that, as a common law agent, it was entitled to the government's sovereign immunity.¹⁶⁵ The court never decided whether Presidential Airways was a common law agent, but it did disagree with Presidential Airways's position that, if it was, it would be entitled to derivative sovereign immunity.¹⁶⁶ To the *McMahon* court, common law agency was not dispositive but instead a part of the derivative-immunity analysis.¹⁶⁷ Without deciding the agency question, the court assumed *arguendo* that the airline was a government agent and analyzed Presidential Airways's assertion that it was entitled to some measure of *Feres* immunity.¹⁶⁸

The court then considered the *Feres* doctrine and found that it was simultaneously too broad and too narrow to be applied in the claim against Presidential Airways.¹⁶⁹ The doctrine was too broad, the court held, because it allowed immunity for any injury "incident to service," which would protect contractors from things well

159. *Id.* at 1336.

160. *Id.*

161. *Id.*

162. *Id.* at 1356.

163. *Id.* at 1338; *see Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267, 271 (9th Cir. 1990).

164. *McMahon*, 502 F.3d at 1338.

165. *Id.* at 1342-46.

166. *Id.* at 1344.

167. *Id.* at 1345.

168. *Id.* at 1346.

169. *Id.* at 1355. The court's complaints about *Feres* were virtually identical to those made by the Supreme Court in *Boyle*: "[I]t seems to us that 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." *Boyle v. United Tech. Corp.*, 487 U.S. 500, 510 (1988).

outside the policy aims supported by *Feres*.¹⁷⁰ Additionally, the doctrine was held to be too narrow in that it only provided immunity from suits by soldiers, not by civilians.¹⁷¹ This paradoxical set of weaknesses of the *Feres* doctrine as applied to the *McMahon* facts would produce absurd results—such as having the claims on behalf of the soldiers completely barred regardless of merit—yet would allow for claims against Presidential Airways by any nonmilitary personnel on board the crashed flight.¹⁷² Because of these faults in the *Feres* argument, the court rejected its application.¹⁷³

The court did recognize the fact that the third *Feres* factor, a fear of interference and evaluation of sensitive military decisions, was applicable to the *McMahon* facts.¹⁷⁴ Despite finding the other two factors inapplicable¹⁷⁵ and ultimately rejecting Presidential Airways's derivative *Feres* claims,¹⁷⁶ the court found that the value of the all-important third factor could merit some level of immunity for Presidential Airways.¹⁷⁷ The court went on to suggest that this standard for immunity would be somewhere between “incident to service” and the political-question doctrine.¹⁷⁸ It would need to be less than “incident to service” for the same reason that the “incident to service” standard of *Feres* made that doctrine too broad, namely that it would protect contractors from liability in virtually all of their actions, regardless of negligence.¹⁷⁹ The questions then

170. *McMahon*, 502 F.3d at 1355; see *Boyle*, 487 U.S. at 510.

171. *McMahon*, 502 F.3d at 1355; see *Boyle*, 487 U.S. at 510.

172. *McMahon*, 502 F.3d at 1355. The court presented an example of such an absurd result:

Assume also three people injured by the contractor's performance of the sensitive military function: a soldier, a civilian employee of the private contractor, and a journalist. If we extended *Feres* derivatively to the private contractor, the soldier could not sue the contractor. The employee of the private contractor could sue because, by hypothesis, the suit would not be barred by the political question doctrine. And so could the journalist, for the same reason.

Id. at 1354.

173. *Id.* at 1355.

174. *Id.* at 1348-52. The *McMahon* court raised the issues of an institutional lack of competence in the judiciary to evaluate military decisions and also made a strong argument that separation of powers precludes the courts from intruding on military decisions left to the two political branches. *Id.* at 1349-50.

175. *Id.* at 1346-47.

176. *Id.* at 1356.

177. *Id.* at 1351 (“We thus acknowledge that private contractor agents may be entitled to some form of immunity that protects their making or executing sensitive military judgments, and that overlaps and possibly extends beyond the protection provided by the political question doctrine.”).

178. *Id.*

179. *Id.*

posed by the court were whether the political-question doctrine was too narrow and whether there were instances in which Presidential Airways could merit immunity while at the same time not requiring the court to directly consider a political question.¹⁸⁰ Ultimately, the court did not answer these questions and instead left them merely as suggestions.¹⁸¹

V. THE *BOYLE* TEST SHOULD BE APPLIED TO SERVICE CONTRACTORS

Civilian companies who contract to provide services to the United States military should receive immunity from civil liability in cases where they have acted in compliance with specific directions of the United States military. This immunity is necessary for two reasons. First, it is necessary to protect the discretion of the United States in its military contracts, discretion that would be threatened by contract liability for actions performed by a contractor under the direction of the United States. Second, a service-contractor immunity is necessary to maintain the internal discipline of the United States military, which could be threatened if regular tort analysis was applied to the orders and directions given to military contractors.

This Note will analyze the *Feres* doctrine and will argue that *Feres* is structurally inappropriate for application in these scenarios. Then this Note will consider the political-question doctrine and will argue that it does not provide broad and consistent enough coverage to meet all of the potential scenarios. Finally, the Note will argue that a modified version of the *Boyle* test represents the most balanced, fair, and consistent way to provide the necessary immunity for military service contractors. This test would grant immunity to contractors in any case where (1) the United States military

180. *Id.* For a description and analysis of the political-question doctrine by the Supreme Court, see *Baker v. Carr*, 369 U.S. 186, 210 (1962). The Court placed a large amount of emphasis on the separation of powers, stating that “[t]he nonjusticiability of a political question is primarily a function of the separation of powers.” *Id.* The political-question doctrine, in general, prevents courts from hearing claims that present issues committed to another branch of the government. See Morgan McCue Sport, *An Inconvenient Suit: California v. General Motors Corporation and a Look at Whether Global Warming Constitutes an Actionable Public Nuisance or a Nonjusticiable Political Question*, 38 CUMB. L. REV. 583, 619-21 (2008). The basis of the American political-question doctrine lies, like many jurisprudential concepts, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). There, the Court stated that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” *Id.*

181. *McMahon*, 502 F.3d at 1355-56.

had given a contractor a reasonably specific outline of their contractual duties, (2) the contractor had performed its duties satisfactorily, and (3) the contractor had apprised the United States of any risks or dangers it knew of concerning its contractual duties. Through this test, immunity would be fairly invoked in cases where contractors caused injuries or damages merely through following the orders given to them by the United States military.

A. *Military Service Contractors Should Receive Some Level of Immunity*

Military service contractors should receive some level of immunity because the same concerns that substantiate immunity in military products-procurement situations exist in the service-contractor sector as well. The same concern exists for allowing the government to get its work done and have discretion in determining its contracts. There also exists the concern that military discipline is threatened by litigation over military contracts.

1. The Threat to Military Discipline

While the concern for military discipline was not even an element of the *Feres* decision, it has undoubtedly become the most substantial of the *Feres* factors.¹⁸² The potential exists in suits brought against military service contractors to significantly impact military discipline.¹⁸³ These suits would be brought against contractors whose actions were dictated at least in part by the terms of their government contract.¹⁸⁴ Because of this contractual obliga-

182. See Seidelson, *supra* note 20, at 226-30 (discussing the evolving changes to the discipline rationale, beginning with its absence in *Feres*, and continuing until it became the controlling rationale in *Shearer*); see also Astley, *supra* note 20, at 217-19 (discussing the Court's use in *Johnson* of the other nondiscipline *Feres* factors, despite having been rendered noncontrolling in earlier decisions).

183. See Seidelson, *supra* note 20, at 229-30 (explaining how the entire rationale of *Feres* becomes "[j]udicial second-guessing of military acts and decisions [that] would have an adverse effect on military discipline"). It is important for this discussion of the military-discipline factor to see that it is no longer truly about the conflict between officers and their subordinates but has evolved into something else—a question of the impacts of judicial interference into the military's decision-making process. See *United States v. Johnson*, 481 U.S. 681, 681-91 (1987).

184. See *Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986). In *Tozer*, the court noted within the context of products-procurement contracts that the contractors and the military work "so closely" together that to criticize the contractor inherently criticizes the military. *Id.* This situation repeats itself in service contracts where the government and the contractors work together to build a set of parameters for the performance of the service, much as the military works with its products contractors to come up with a design for a product. If a court were to criticize a plan executed by a

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tion, a claim against the contractor could very likely require the court to make qualitative assessments of protocols and procedures determined by the United States military and its officers. It does not matter that the claim is not brought against the military and that there is no allegation of negligence against the military, since “a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.”¹⁸⁵ Thus, a suit brought against a military contractor could likely result in the court analyzing and criticizing the decisions of the United States military.

Courts have neither the competence nor the constitutional power to judge decisions made by the military. Courts are not competent to analyze the decisions of the military because they lack the expertise necessary to formulate a standard of care to determine whether the decisions of the military adequately balance interests in safety and effectiveness.¹⁸⁶ A court simply could not establish a competent standard of care for how well the military balances all of its considerations when it makes a decision.¹⁸⁷ As well, for the court to consider these military decisions would violate the separation of powers doctrine, since oversight of military decisions is exclusively left to the legislative and the executive branches by the Constitution.¹⁸⁸ This logic applies with equal strength to the mili-

military contractor, it would implicate the military just as much as the contractor. *Id.*; see also *McMahon*, 502 F.3d at 1336 (military retained control over what flights would be flown, where to, and with who onboard); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1331 (11th Cir. 2003) (military controlled the frequency and thoroughness of maintenance inspections on helicopters).

185. *Johnson*, 481 U.S. at 691. The *Johnson* Court pointed out that judicial analysis of civilian activities can be just as potent an attack on military discipline as a direct analysis of the military judgment itself. *Id.* at 691 n.11; see also *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977) (holding that the impact on military decision making will not depend on the target of the suit—the military contractor or the military itself—as it would “in either case, involve second-guessing military orders”).

186. *McMahon*, 502 F.3d at 1350. The Eleventh Circuit in *McMahon* quoted from *Gilligan v. Morgan*, which stated, “[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

187. *McMahon*, 502 F.3d at 1350 (“Where sensitive military judgments are involved, courts lack the capacity to determine the proper tradeoff between military effectiveness and the risk of harm to the soldiers.”).

188. U.S. CONST. art. I, § 8; *id.* art. II, § 2; see *United States v. Stanley*, 483 U.S. 669, 682 (1987) (noting “the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches”); *McMahon*, 502 F.3d at 1350-51.

tary's use of contractors. It would violate separation of powers for the court to interfere with military plans executed by military contractors, since the decisions still belong to the military regardless of who brings them to completion.¹⁸⁹ The Supreme Court has held that these concerns for military decision making justify a doctrine of immunity in various circumstances.¹⁹⁰

Military service contractors are entitled to some level of immunity in situations where judicial attempts to determine contractor liability would require the court to stick its nose into the military decision-making process. For example, the court would be called on to entertain questions over what would be a safe flight plan for a military contractor transporting soldiers, what are appropriate safety protocols for bodyguards protecting important persons visiting Iraq, or what are reasonable schedules of contracted maintenance for military aircraft. Even if a court could fairly assess a negligence claim in such specialized contexts, the very process of doing so would interfere in military decision making and violate the separation of powers.¹⁹¹

189. *McMahon*, 502 F.3d at 1350-51. The court stated,

It would similarly violate separation of powers for the courts to interfere with sensitive military judgments made or executed by private contractor agents of the military. The military has the constitutionally exclusive authority to make those kinds of judgments, and judicial oversight of the private contractor agents the military uses to execute those judgments would likewise violate separation of powers principles.

Id.; see Harry A. Austin, *Boyle v. United Technologies Corporation: A Questionable Expansion of the Government Contract Defense*, 23 GA. L. REV. 227, 235 (1988) ("Several courts have relied upon the [separation of powers] doctrine as a sufficient justification for the adoption of the government contract defense.").

190. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-13 (1988) (using the concern for military decision making as a supporting rationale for its creation of an immunity standard for military-products contractors); *Stanley*, 483 U.S. at 682-83 (holding that merely entertaining the questions—even if they could obtain the right answers—would disrupt military decision making, precluding a case-by-case analysis of military-discipline interference); *Johnson*, 481 U.S. at 691-92 (using the military-discipline question as part of the *Feres*-factor analysis); *United States v. Shearer*, 473 U.S. 52, 57-59 (1985) (holding that the discipline and decision-making factor was the sole factor left justifying and substantiating the *Feres* doctrine); *Stencel Aero*, 431 U.S. at 673 (holding that the discipline-and-decision-making factor applied just as strongly in cases against contractors as in cases against the military); *United States v. Brown*, 348 U.S. 110, 143-44 (1954) (introducing the concerns for military discipline into the *Feres*-doctrine discussion); *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986) (holding that the concern for military decision making and separation of powers substantiated an immunity for a military contractor).

191. See, e.g., *Stanley*, 483 U.S. at 683 ("[T]he mere process of arriving at correct conclusions would disrupt the military regime.").

2. The Discretionary-Function Exemption to the FTCA and the *Boyle* Analysis

The impropriety of judicial intrusion into military decision making is further demonstrated by the Supreme Court's treatment of the discretionary-function exemption to the FTCA.¹⁹² In *Boyle*, the Court used the discretionary-function exemption of the FTCA as the main rationale for the military-contractor immunity it established.¹⁹³ This same rationale is used in the service-contractor context, where the chance for interference with discretionary military decisions is equally present.¹⁹⁴ To justify its use of the discretionary-function exemption as the basis of an immunity standard, the Court stated that the "[selection of designs] 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."¹⁹⁵ All of these considerations can and do apply for service contracts. The military, in deciding the parameters within which its service contractors will work, must balance safety, effec-

192. *Boyle*, 487 U.S. at 511 ("And we are further of the view that permitting 'second-guessing' of these judgments . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption." (citations omitted)).

193. *Id.* at 510-12; see Watts, *supra* note 135, at 649-50, 655-58 (describing the Court's concern that the costs of liability would ultimately be transferred to the United States and would thus infringe on its powers to make discretionary decisions affecting social, economic, or political policy).

194. *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. 2003). 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. . . . We would be exceedingly hard-pressed to conclude that the unique federal interest recognized in *Boyle* . . . [is] 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 liable for departing from design specifications.*

Id. (emphasis added) (citations omitted).

195. *Boyle*, 487 U.S. at 511. The Court went on to discuss how the liability of the contractor would be paid in the contract fees of the United States and thus represented a nonsensical position, whereby the United States would be shielded from financial liability when it made its own products but not when it ordered the products from a military contractor. *Id.* at 512. This same idea applies to service contracts, whereby the cost of litigation would be passed on to the United States government. This reality carries just as much sense as the situation the Court identified in *Boyle*. See *id.*

tiveness, cost, and many other factors within a context that is unique to the military and quite different from that of state tort law.

For the purpose of this Note's analysis, it is best to take the *Boyle* analysis step-by-step and analogize it to military service contracts. The *Boyle* analysis requires that, to preempt state law concerns, the competing concern must be a "unique[] federal interest[]."¹⁹⁶ In *Boyle*, the court found that the government's obligations and responsibilities in forming and satisfying contracts to be a uniquely federal interest.¹⁹⁷ This unique federal interest also exists in performance or service contracts. Based on the extensive history of federal case law recognized in *Boyle* and *Hudgens*, the terms and management of service contracts by the United States military is a uniquely federal interest.¹⁹⁸

The second unique federal interest found in *Boyle* is a desire for "getting the Government's work done."¹⁹⁹ While this typically comes in the form of limiting the liability of federal officials conducting their duties, at its heart it is an interest in allowing the United States to conduct all of its various functions free from the encumbrances of excessive liability.²⁰⁰ The *Boyle* Court did not find a meaningful distinction between an independent contractor performing his obligations for the military and a federal official per-

196. *Id.* at 504; see Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 496 n.243 (2007) (describing Supreme Court case law on "[u]nique federal interests").

197. *Boyle*, 487 U.S. at 504-05; see Wendy B. Davis, *De Facto Merger, Federal Common Law, and Erie: Constitutional Issues in Successor Liability*, 2008 COLUM. BUS. L. REV. 529, 591 (2008) ("The Court [in *Boyle*] found a uniquely federal interest in limiting the liability of military contractors.").

198. See *Hudgens*, 328 F.3d at 1334; see also Ben Davidson, Note, *Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors*, 37 PUB. CONT. L.J. 803, 827 (2008) ("[T]he *Boyle* Court's use of the FTCA discretionary function exception to cabin the uniquely federal interest of procuring military equipment could just as easily apply when the Government buys nonmilitary products or services.").

199. *Boyle*, 487 U.S. at 505; see David E. Seidelson, *Federal Common Law: Whose Baby Are You?*, 5 WIDENER J. PUB. L. 365, 368-69 (1996).

200. *Boyle*, 487 U.S. at 505-06. The Court admitted that this interest had been specifically stated as one concerning the liability of federal officials. *Id.*; see, e.g., *Howard v. Lyons*, 360 U.S. 593, 597 (1959) (holding that an interest in overseeing the actions of federal officials is uniquely federal in nature); see also Koen Lenaerts & Kathleen Gutman, "Federal Common Law" in the European Union: A Comparative Perspective from the United States, 54 AM. J. COMP. L. 1, 98-100 (2006) (explaining the Court's rationale in linking the *Boyle* facts to contractual obligations and limiting the scope of federal official liability, issues which the private contractor scenario did not directly represent but which it indirectly touched).

forming his duties as they relate to getting the job done.²⁰¹ Whether it is for a military procurement contract or a military services contract, both involve private contractors carrying out a contractual obligation to the United States military in the furtherance of military goals.²⁰² Under the *Boyle* analysis, there are unique federal interests implicated by the application of state tort law to claims arising out of injuries caused by military service contractors.

To justify preemption of state tort law, it is not enough that there are substantial federal interests involved. There must also be significant conflict between those interests and the application of state law.²⁰³ It is at this stage of the analysis that the discretionary-function exemption comes into play.²⁰⁴ The discretionary-function exemption, as part of a federal statute, is a textual expression of federal policy.²⁰⁵ The policy embodied in that exemption comes into conflict with state law when claims arise that call on courts to assess, and potentially interfere with, discretionary decisions made by the United States government.²⁰⁶ As demonstrated in *Boyle*, in the products-procurement context, the statutory goal of protecting government officials who make discretionary decisions conflicts with the application of state law, which must therefore be preempted.

201. *Boyle*, 487 U.S. at 505 (“The present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government’s work done.”).

202. *Id.* at 506. The Court stated that “[t]he federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for distinction.” *Id.* The Court stated this in reference to *Yearsley v. W.A. Construction Co.* and the established history of federal law preempting state law for civilian government service or performance contracts. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940). The interpretation here should thus be the same for military service contracts, which clearly must represent a unique federal interest. *See Hudgens*, 328 F.3d at 1334.

203. *Boyle*, 487 U.S. at 507 (“That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law.”); *see* Roger Doyle, Comment, *Contract Torture: Will Boyle Allow Private Military Contractors to Profit from the Abuse of Prisoners?*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 467, 479 (2007) (“However, simply finding a unique federal interest does not inevitably result in the displacement of state law. Displacement will only occur where a significant conflict exists between an identifiable unique federal interest and the operation of state law.” (citation omitted)).

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

205. 28 U.S.C. § 2680(a) (2006).

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

Establishing a judicial basis for preemption of state-law tort suits against military contractors may appear to be an abstract undertaking. Behind this undertaking, however, is a very real concern—the lost opportunity for citizens of the United States to be compensated for injuries they suffer in interactions with a military contractor. The immunity doctrine proposed by this Note would require not only an individualized loss of compensation but also the complete disregard of a bedrock principle of the American legal tradition—that people are entitled to be compensated for injuries they suffer—for an entire category of claims.²⁰⁷ There is, however, an established line of Supreme Court precedent that supports denying plaintiffs their day in court, especially within the context of protecting military interests.

Perhaps the most notable example of the Court's willingness to deny relief in such circumstances is *United States v. Stanley*.²⁰⁸ Recall that Master Sergeant James B. Stanley, a member of the United States Army, was secretly administered LSD as part of an official army plan to test the effects of the drug.²⁰⁹ Because of this testing, Stanley suffered an extensive list of problems that ultimately ruined his post-service life.²¹⁰ If any claim deserves redress and compensation, it would be a claim such as Stanley's.²¹¹ Instead, the Court

207. See Ronen Perry, *The Economic Bias in Tort Law*, 2008 U. ILL. L. REV. 1573, 1610 (2008) ("One may argue that any attempt to challenge the principle of full compensation for harm caused by wrongful conduct defies the basic structure of tort law.").

208. 483 U.S. 669 (1987).

209. *Id.* at 671.

210. *Id.* Stanley suffered from hallucinations, memory loss, and personality changes that impaired his work performance and ultimately resulted in the end of his marriage. *Id.*

211. In fact, the opinion by Justice O'Connor suggests that it must be compensated, raising comparisons to the medical testing by Nazi officials during the Second World War. See *id.* at 709-10 (O'Connor, J., concurring and dissenting). After restating the standard that there must be consent by the test subjects, Justice O'Connor stated, "If this principle is violated the very least that society can do is to see the victims are compensated, as best they can be, by the perpetrators." *Id.* at 710. Justice Brennan also delivered a sharply worded opinion: "[T]he Court disregards the commands of our Constitution, and bows instead to the purported requirements of a different master, *military discipline*, declining to provide Stanley with a remedy because it finds 'special factors counseling hesitation.'" *Id.* at 686 (Brennan, J., concurring and dissenting) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)). Justice Brennan went on to state that "[t]he subject of experimentation who has not volunteered is treated as an object, a sample. James Stanley will receive no compensation for this indignity." *Id.* at 707. The words of Justices Brennan and O'Connor accurately frame the severity of the offense against Stanley.

The decision of the Court went against Stanley based on "*military discipline*," as Justice Brennan noted. *Id.* at 686. Perhaps even more frustrating to Justice Brennan

rejected Stanley's arguments and denied him a remedy.²¹² The Supreme Court showed itself willing to reject the compensation for a heinous, blatant, and intentional tort in order to protect the government interests under examination in this Note.

Stanley was not the first time the Court had shown such an inclination to protect government interests over the right of individuals to obtain redress in court.²¹³ *Boyle* also demonstrated the Court's willingness to see individuals go uncompensated where it deems such an outcome necessary to protect the United States's control over the terms of military contracts and judgment regarding the appropriate trade-offs between safety, efficiency, and various other concerns.²¹⁴ Cases like *Boyle* and *Stanley* show that the Court is willing to put aside the basic principles of redress for injury that form the core of American tort law in cases where that law substantially conflicts with a uniquely federal interest.²¹⁵ It is established that the interest in getting the government's work done and protecting the ability of the military to enter into and perform contracts is sufficient to displace state tort concerns in products-procurement situations.²¹⁶ Thus, no logical reason exists to deny a similar outcome in situations involving military service contracts.

B. *How Much Immunity Is Necessary?*

Military contractors should be entitled to a standard of immunity, modified from the *Boyle* standard, in cases where the contractor followed specified terms set by the United States military and

was that it could not even be shown concretely how military discipline was implicated in the case; it was a "talismanic invocation" of the military-discipline concern. *Id.* at 708. While Justice Brennan's words are biting and persuasive, the real force of the *Stanley* decision comes in the recognition of just how far the Court is willing to go to protect the interests of the military.

212. *Id.* at 686 (majority opinion).

213. See *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 22 (1940) (holding that a civilian claim could not be brought against a government contractor acting within the bounds of its constitutional assignment by the United States government).

214. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988). In creating its limited immunity standard, the Court accepted that certain injuries would not be compensated. On remand, judgment for the defendants was ordered because United Technologies satisfied the elements of the government-contractor defense. *Boyle v. United Techs. Corp.*, No. 85-2264, 1988 WL 96122, at *1 (4th Cir. Aug. 3, 1988) (per curiam). Thus, the decision in *Boyle* explicitly paved the way for a wrongful death claim to go uncompensated.

215. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

216. See *Boyle*, 487 U.S. at 512.

fulfilled them satisfactorily. The alternatives are not sufficient. The *Feres* doctrine is inappropriate because it is too broad (shielding from liability for any injury suffered incident to service, thus even in cases of simple incompetent execution on the part of the contractor) and too narrow (shielding only from claims by soldiers and not from civilians, thus leaving the contractor potentially liable for mistakes originating in government plans given to the contractor).²¹⁷ The political-question doctrine, because of its inconsistent application, is also not a sufficient standard. *Boyle* presents the most balanced and fair approach because it can be applied evenly to select out those cases that threaten the military interests the Court wishes to protect, regardless of who is bringing the claim or what type of claim it is.

1. The *Feres* Doctrine Is an Inappropriate Standard

Despite the relevance of military-discipline concerns to cases involving military service contractors, the analytic structure of the *Feres* doctrine itself is not well-suited for the type of immunity doctrine such cases demand. There are two main reasons for this conclusion. First, the *Feres* doctrine's incident-to-service test is far too broad.²¹⁸ Any type of modified incident-to-service test would immunize service contractors from virtually all liability.²¹⁹ Such a so-

217. See *supra* notes 169-173 and accompanying text.

218. See *Boyle*, 487 U.S. at 510 (“[I]t seems to us that the *Feres* doctrine . . . logically produces results that are . . . too broad . . .”); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1351 (11th Cir. 2007) (“We think it quite clear that the incident-to-service test sweeps far too broadly to protect this concern. Some suits barred by the incident-to-service test simply do not involve sensitive military judgments that courts lack the competence or authority to deal with.”).

219. See R. Craig Anderson & John. M. Pellett, *Personal Civil Liability for Federal Employees and Their Representation by the Department of Justice in the Aftermath of the Westfall Legislation—An Introduction for the Base Judge Advocate*, 33 A.F. L. REV. 19, 28 (1990) (“The scope of injuries incident to service and thus barred by the *Feres* doctrine is broad enough to encompass virtually any injury for which a plaintiff might seek to sue a federal official individually.” (alteration to original)); see also Robert J. Gross, *Special Considerations in Military Flying Club Litigation*, 59 J. AIR L. & COM. 561, 577-78 (1994) (“[I]ncident to service’ is not a narrow term restricted to military training, field maneuvers, or combat situations; rather it is a broad concept encompassing all types of recreational activities, even though the military member is not acting pursuant to orders or subject to direct military command or discipline.”).

If an incident-to-service standard were used as the main test for immunity for service contractors, it would immunize contractors from liability for their own blatant negligence. Imagine, for example, that a contracted helicopter mechanic forgot to complete a portion of a scheduled check mandated by the government by the terms of the maintenance contract. A pilot of the United States Navy then flies the vehicle. It crashes, and he is injured. Based on a modified incident-to-service test, the injured

lution is not fair, nor is it justified by concerns for military discipline or the discretionary-function exception to the FTCA.

Additionally, the *Feres* doctrine's incident-to-service test is too narrow because it would only protect contractors from suits by soldiers.²²⁰ While many of the suits brought against military contractors would be brought by soldiers, the fact that civilian contractors now make up more than half of the manpower on the ground in Iraq shows the potential that exists for military contractors to be sued by one of the tens of thousands of other contractors on the ground with them or any other civilian.²²¹ A test that covers only a subset of the population that could potentially bring suit, and covers that subset to an excessive degree, does not represent a reasonable standard.²²² So, while the concern for military discipline that

pilot would have no claim against the contractor. This would not be a fair or justifiable result since there is little or no recognizable benefit to military discipline or any preservation of discretionary functions if a contractor is immunized from liability for its own negligence. The only interest served in such a case would be that of the contractor. Such an interest does not justify displacing the basic right of compensation for those injured by contractor's negligence. See *McMahon*, 502 F.3d at 1351 ("For example, where a private contractor agent is running a mess hall on a peacetime base, and a soldier gets food poisoning attributable to the contractor's negligence, the suit would be barred under the 'incident to service' test.").

220. See *Boyle*, 487 U.S. at 510-11. "[R]eliance on *Feres* produces (or logically should produce) results that are in another respect too narrow." *Id.* at 510. The Court found the *Feres* doctrine inapplicable for the contractor scenario because it would not protect the government interests in cases where civilians were injured because of an interaction with a government contractor. *Id.* The Court provides the following example:

Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines. Yet we think that the character of the jet engines the Government orders for its fighter planes cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the Armed Services.

Id. at 510-11; see also *McMahon*, 502 F.3d at 1355 (holding that an application of *Feres* to a service contractor "would be too narrow because it would only protect against suits implicating sensitive military judgments that are brought by soldiers, and not against those brought by civilians, or even employees of the private contractor itself").

221. See *supra* note 25.

222. See *McMahon*, 502 F.3d at 1354. The court presented a scenario where three individuals are injured in conjunction with some act by a military contractor. *Id.* One is a soldier, one a civilian employee of the contractor, and the other is a journalist. *Id.* In such a case, both the journalist and the contractor's employee could sue while the soldier could not. *Id.* The court determined that "[t]here is simply no principled reason why this result should obtain." *Id.* In a similar example presented by the court, it pointed out that suits brought by the employees would not be barred, "[y]et they would present the very same threat of subjecting sensitive military judgments to second-guess-

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has come to dominate *Feres* claims is certainly present, the incident-to-service test at the core of the *Feres* doctrine simply cannot be the standard for immunity for military service contractors.

2. The Political-Question Doctrine Is Not Sufficient

Nor is the existing political-question doctrine sufficient to protect the interests implicated by military service contractor liability. The doctrine lacks the type of consistent, clear, and specific application necessary to guarantee protection of military interests.²²³ The situation does not call for a prudentially applied immunity left to the case-by-case whims of any particular judge but rather a predictable and consistent standard where the question of immunity would be resolved beforehand by referencing specific criteria set forth in the test.

While the rationale of the political-question doctrine coincides in some places with this Note's proposed test,²²⁴ there are likely to be many instances where the doctrine would be inapplicable yet where a *Boyle*-type test would still provide a fair and necessary immunity to a military contractor. An example would be where a military policy led to an injury and the military subsequently—but before litigation—changed its policy.²²⁵ In such a case, there would be no worries of confusing and differing positions espoused by the different branches of government. Removed from the incident and

ing by a court." *Id.* Thus, the results are neither fair nor effective. The military's ability to do its work without interference is not protected, and soldiers are specifically singled out to not be allowed to recover for their injuries in situations where civilians can. *Id.*

223. See Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125, 152-54 (1993) (discussing the inconsistent application of the political-question doctrine, stating that "[t]he result is a political-question 'doctrine' that is mixed up and inconsistent with its own purposes"); Melissa Blair, Comment, *Terrorism, America's Porous Borders, and the Role of the Invasion Clause Post-9/11/2001*, 87 MARO. L. REV. 167, 200-02 (2003) (discussing the "jurisprudential chaos" of the Court's application of the political-question doctrine to claims raising questions of foreign relations). This "jurisprudential chaos" would not be helpful in the quagmire of Iraq war litigation. A clear, specific rule is needed, not merely a reliance on a nebulous and inconsistently applied standard.

224. See Davidson, *supra* note 198, at 805-06, 822-27. Davidson argues that the *Boyle* test and the political-question doctrine are different versions of the same concept. *Id.* *Boyle* represents a more specific application of the political-question doctrine; however, the political-question doctrine has been used as an imprecise application of *Boyle* in situations where the text of the *Boyle* test does not directly relate, such as military service contractors. *Id.*

225. This was the case in *Hudgens v. Bell Helicopters/Textron*, where the military changed its maintenance policy after the incident. See *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1330-31 (11th Cir. 2003).

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after the military had already changed its policy, a court would be less likely to apply the political-question doctrine. What would remain, however, would be the need to protect the discretionary decisions of the United States and its military. Allowing litigation to move forward in such cases would expose the contractors to liability where they fulfilled their duties as requested by the military.

As the Court noted in *Boyle*, the cost of litigation for the contractor would be passed on to the United States in its contracts and would influence the ability of the government to contract in the future.²²⁶ By eliminating this fear of litigation, the costs of the United States's military contracts would be reduced, and more contractors may be willing to enter into business with the United States knowing that they would be immunized from some of the unfortunate things that happen in military theaters. Allowing the litigation to go forward, on the other hand, would inevitably mean the costs of litigation would be passed on to the United States. Additionally, fear of liability for government decisions could potentially discourage contractors from doing business with the United States military and thus infringe on the United States's ability to contract. Because of these issues, the political-question doctrine is not a complete or reliable standard. It is too nebulous to fairly and predictably grant immunity to military contractors.

3. A Modification of *Boyle* Presents the Best Standard

The test used in *Boyle* provides the most effective and fair standard to use for military contractors. It shields contractors from liability in cases where the principle cause of the injury is not any individualized negligence but instead springs from some larger decision made by the United States military. A modification of this three-part test represents the best route to an immunity standard for service contractors.²²⁷

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

227. *See Hudgens*, 328 F.3d at 1333. In *Hudgens*, the Eleventh Circuit applied a modified version of the *Boyle* standard to a claim brought against a service contractor who had been responsible for maintenance on a helicopter that crashed. *Id.* at 1334-38. The court took the *Boyle* test prong by prong and modified the language to specifically suit *Hudgens's* contract with the United States military. *Id.* The court did not consider or criticize the United States military's decision to maintain its own standards for the maintenance of its vehicles. *Id.* The court left the military's decisions regarding how to appropriately balance safety and efficiency to be reviewed by those with the competency and authority to do so. *Id.* As well, *DynCorp*, the maintenance contractor, was not held liable for its maintenance performance which met the standards and requirements the United States military set on it. *Id.* at 1345. While *Hudgens* represents an

The first prong of the test is that the contractor had a reasonably specific outline of its contractual duties. This flows from the first prong of *Boyle*'s test, which requires that "the United States approve[] reasonably precise specifications."²²⁸ This factor guarantees that the military has actually been involved in the decision-making process by giving the contractor a reasonably precise set of requirements and parameters for its contractual duties.²²⁹ Within each individual type of service, the nature of these specifications would be different. For contracted airlines, it could be military control over flight plans, passenger lists, and other things that lead to very specific parameters within which to conduct each flight.²³⁰ For a maintenance contractor, it could be the protocols the military had established for the frequency and thoroughness of inspection and repair.²³¹ For a private security contractor, it could be protocols covering the use of force or a host of other details. While the requirement might not be satisfied in exactly the same way for any two contractors, this standard is flexible enough to only provide immunity for contractors whose duties were discretionally decided by the United States military.

The key in any type of service contract would be that the guidelines provided by the government "constitute[d] a comprehensive regime that [the contractor] was not expected to supplement through any procedures other than those specifically set forth."²³² Each attempt to establish this immunity would thus require contractors to show that the course of their actions was determined by a "comprehensive regime."²³³ Contractors who were not given spe-

individual example of the application of the *Boyle* immunity test to service contractors, it is also a case tailored to a set of facts. The modifications made to the *Boyle* test serve to test maintenance contractors and DynCorp specifically. What is necessary is a universal test, inspired by *Boyle*, for service contractors. This requires broader language that is applicable to a host of types of contractors. This type of test would preserve the same interests as *Boyle* and offer the same type of limited and fair protection to contractors, just for a different type of contract.

228. *Boyle*, 487 U.S. at 512.

229. *Id.* (stating that the factor "assure[s] that the suit is within the area where the policy of the 'discretionary function' would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself").

230. See *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1336 (11th Cir. 2007) (detailing the statement of work for an airline contractor).

231. See *Hudgens*, 328 F.3d at 1335. In *Hudgens*, the Army's maintenance guidelines controlled DynCorp's actions and the court ruled that those guidelines constituted something equivalent to *Boyle*'s reasonably specific design requirement. *Id.*

232. *Id.*

233. *Id.*

cific parameters for their actions and who were given broader discretion in determining how their duties would be carried out would not be protected in this immunity standard. Without the existence of specified protocols mandated by the military, there are no pertinent discretionary decisions made by the government which the court must protect.²³⁴ An example of this came in the application of *Boyle* in *Chapman*, where the court did not find evidence of any precise specifications and thus found the *Boyle* test inapplicable.²³⁵

The second prong of the test requires that the contractor completed its duties according to the standard required by the specific governmental regime or protocol. This prong comes from the *Boyle* test's requirement that the final product met government specifications.²³⁶ This requirement is necessary to definitively connect the injury at issue to a discretionary decision made by the military and would preclude immunity in situations in which the contractor either did not complete its duties or did so negligently.²³⁷ Contractors who negligently perform their obligations should not be protected from liability simply because they have a contract with the government. Furthermore, because the military's discretionary decision would be too far removed from claims involving contractor negligence, such claims would not be covered by the policy ratio-

234. It is possible that in some of these cases, considering a claim against a contractor that was left to its own devices by the military in the nebulous and oftentimes uncharted territory of postwar occupation—all while being compensated by piles of taxpayer dollars—would embarrass the military and perhaps interfere with it accomplishing its goals. These situations would not fit within a *Boyle*-like standard of immunity for military service contractors and are not argued for in this Note. The political-question doctrine and the state-secrets privilege exist outside of any immunity standard for service contractors and can be invoked when warranted in such cases to protect their own concerned interests. See *Gilligan v. Morgan*, 413 U.S. 1, 10-12 (1973) (noting political-question doctrine); *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (noting state-secrets privilege). The immunity standard argued for in this Note explicitly considers only those whose duties were specified to a reasonable degree by the United States and who followed through satisfactorily on those requirements, even if they later proved insufficient or damaging. A defining rule—such as the one presented in this Note—which clearly separates those contractors entitled to immunity from those not entitled to immunity could perhaps go a long way towards clearing up the legal minefield and tasking contractors with mindfulness of their own negligence.

235. *Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267, 271 (9th Cir. 1990). Without the precise specifications of the government, there is really no discretionary function being protected. If immunity were afforded in such a situation, the negligence of the contractor would be shielded, not the decisions of the United States. This would not produce fair or logical results.

236. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).

237. *Id.* at 512-13. The Court also attributed the second element of the test to limiting the test to claims that would raise the discretionary-decision issue. *Id.*

nales underlying the discretionary-function exemption.²³⁸ In attempting to establish the immunity, the contractor would have to show that its performance complied with its government instructions.²³⁹

The third prong of the test requires that the contractor disclose to the United States any knowledge of risks or dangers that it knew of within the government's plans. This flows directly from the final part of the *Boyle* test, which requires that "the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not the United States."²⁴⁰ The third factor, as in *Boyle*, is necessary to prevent contractors from protecting themselves merely by not disclosing their own awareness of risks.²⁴¹

A great strength of this test is that it is not limited to a certain type of claim and it is not limited by who brings the suit. Regardless of whether the claim is brought under common law, under the FTCA, or the Constitution, the analysis of the *Boyle* test remains the same. Just as well, this test is not limited to only suits brought by soldiers—as a *Feres*-based test would be—nor is it limited to claims brought by civilians. The *Boyle* test can be applied to any type of claim by any type of plaintiff brought against a military contractor.

238. *Id.* The Court stated that the purpose of the factor is to select down to the claims that will involve discretionary decisions made by the military. *Id.* Again, there are potential situations within this context where ancillary or tangential information brought about by the claim could threaten state and military interests. *Id.* However, here, as well, those situations are not pertinent, and the political-question doctrine and the state-secrets privilege exist to solve those problems.

239. In *Hudgens*, this was achieved through evidence admitted to show that the mechanics would not have seen the defect in the helicopter while performing their scheduled maintenance and thus that they performed their duties satisfactorily. *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1344-45 (11th Cir. 2003).

240. *Boyle*, 487 U.S. at 512.

241. *Id.* at 512-13. The Court stated this position:

The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.

Id. This rationale is clear and logical and the requirement is itself necessary to accomplish the true goal of the immunity standard: to protect the ability of the military to make informed discretionary decisions without the risk of interference from litigation. *Id.*

The test proposed by this Note provides a limiting standard that fairly immunizes contractors only from claims in which an injury arose because of a discretionary decision by the United States military in how specifically to use a contractor in conducting its mission. By precluding litigation of these claims, the military's decision-making process is protected, and courts refrain from stepping in to consider questions they are not competent to address. This immunity standard joins other means—including the political-question doctrine and the state-secrets privilege—to shield sensitive military decisions from judicial interference.

CONCLUSION

While the *Boyle* standard exists for products-procurement contracts, the legal world remains in the dark on the liability situation of the tens of thousands of private-service contractors on the ground in places like Iraq and Afghanistan. What is needed is a predictable test and standard for immunity that will protect state interests and fairly shield contractors from liability when they have satisfactorily completed their contractual duties. This test implicitly recognizes that the military must be left to its own discretion and must be able to decide for itself where the appropriate balance lies among safety, effectiveness, cost, and efficiency. This is a different standard than the standard for state tort law and is not one judges are competent to adjudicate. In the case of this conflict between a textually powered reservation of sovereign immunity²⁴² and the tradition of mandating a remedy for a wrong, the remedy must be set aside for the protection of federal interests.

An extension of *Boyle* into the services sphere satisfies all of these necessities. As seen in *Hudgens*,²⁴³ this use of a modified government-products, contractor-immunity standard protects the military decision-making process and empowers the United States to contract for military services while fairly and justly immunizing a contractor from suit under the appropriate circumstances. This system correctly precludes recovery when the injury at the heart of the suit was caused by decisions of the United States. For more than two decades such a system has existed for products-procurement contractors, while service contractors and the courts resolving the claims against them have been left in uncharted waters. The changing United States military requires the solidification of law in this

242. 28 U.S.C. § 2680(a) (2006).

243. *Hudgens*, 328 F.3d at 1333-38.

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area. The best and clearest solution is this Note's proposed modification of the *Boyle* test.

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