In Defense of the Government Contractor Defense

R. Todd Johnson
IN DEFENSE OF THE GOVERNMENT CONTRACTOR DEFENSE

The concept of shielding contractors from liability for third party injuries sustained as a result of defective government specifications is rooted in public works cases decided in the middle 1900's.\(^1\) Only during the last five years, however, has the idea of shielding military contractors from strict liability for defects caused by government design specifications come of age.\(^2\) As with any maturation process, the growing pains have been considerable. The relatively quick ascendancy of this defense stimulated discussion by courts and commentators over its validity, its elements,\(^3\) its applicability to

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1. See Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18 (1940). In Yearsley, the Court determined that a contractor building dikes to improve river navigation under a government contract was not liable for the erosion of private property where the contractor's performance conformed with government specifications. Id. at 20-21. Like Yearsley, other cases that applied the defense before the 1970's involved public works projects. See Meyers v. United States, 323 F.2d 580 (9th Cir. 1963) (holding the contractor immune from liability for damages resulting from the construction of highways in accordance with government specifications); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965) (holding the contractor immune from liability for damages resulting from dredging harbors in accordance with government specifications).


3. In particular, the defense as originally formulated in Agent Orange included the following elements which the court required the contractor to prove: (1) that the government established the specifications; (2) that the product manufactured by the contractor met the government’s specifications in all material respects; and (3) that the government knew as much or more than the contractor about the hazards to people that accompanied use of the product. 534 F. Supp. at 1055.

Since 1982, however, the courts have disagreed on the meaning and application of some elements of this formulation. Compare Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14, 16-17 (9th Cir. 1961) (requiring the contractor to prove some element of compulsion in order to successfully raise the defense) with Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980) (stating that mere conformance with government specifications in time of war would support the defense against both negligence and strict liability claims). For example, the duty to warn arose in Agent Orange, 534 F. Supp. at 1055, and thus, was not required in the earlier cases. See Casabianca. 104 Misc. 2d at 350, 428 N.Y.S.2d at 402; Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976), aff’d. 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), certif. denied. 75 N.J. 616, 384 A.2d 846 (1978). The greatest disagreement, however, surrounds the issue of whether the first

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various situations, and the law to be applied in various jurisdictions. The government contractor defense is now widely accepted in those jurisdictions that have considered it. Under its current parameters, this affirmative element of this defense allows any degree of contractor discretion in preparing design specifications. See infra text accompanying notes 84-143.

4. The courts have also disagreed as to whether the defense is applicable to nonmilitary products produced for the government. See Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985) (applying the defense to front-end loaders); Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982) (applying the defense to tractors); Casabianca, 104 Misc. 2d at 400 (applying the defense to pizza machines); Sanner, 144 N.J. Super. at 1, 364 A.2d at 43 (applying the defense to jeeps). But cf. Johnston v. United States, 568 F. Supp. 351, 357 (D. Kan. 1983) (refusing to apply the defense to radium dials designed for aircraft); Jenkins v. Whittaker Corp., 551 F. Supp. 110, 114 (D. Haw. 1982) (refusing to apply the defense to an atomic simulator that was “not a device used as a weapon”). The question becomes one of whether the same policy considerations apply to consumer products as apply when the court is reviewing the design and production of military equipment. Johnston, 568 F. Supp. at 357-58.

5. Most of the cases involving this issue applied federal common law because the issue involved the government's sovereignty. See, e.g., Bynum v. FMC Corp., 770 F.2d 556, 567-74 (5th Cir. 1985); Agent Orange, 597 F. Supp. 740, 847 (E.D.N.Y. 1984); In re Related Asbestos Cases, 543 F. Supp. 1142, 1151 (N.D. Cal. 1982); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 195 Cal. Rptr. 764, 768 (1983). But see Brown, 696 F.2d at 247-49 (applying Pennsylvania law because the court found that the issues involved in uniquely federal concerns were not present); see also Tillett, 756 F.2d at 599-600; Hunt v. Blasius, 53 Ill. App. 3d 14, 370 N.E.2d at 617, 622 (1977), aff'd on other grounds, 74 Ill. 2d 203, 384 N.E.2d 368 (1978); Sanner, 144 N.J. Super. at 1, 364 A.2d at 43; Casabianca, 104 Misc. 2d at 348, 428 N.Y.S.2d at 400 (adopting the defense under state law).


7. See, e.g., Tozer, 792 F.2d at 403; Shaw, 778 F.2d at 736; Bynum, 770 F.2d at 556; In re
tive defense allows a military contractor, who exercised little or no discretion over design specifications, to escape liability for injuries to servicemen resulting from design defects in military equipment. The degree to which a contractor exercises discretion in design specifications represents the central focus of dispute as the various circuits analyze the policy rationales justifying the different formulations of the defense. Ultimately, divergent views of appropriate public policy have resulted in the development of conflicting standards for the defense in different circuits.

Air Crash Disaster at Mannheim Germany, 769 F.2d 115, 121 (3d Cir. 1985), cert. denied, 106 S. Ct. 851 (1986); Tillett, 756 F.2d at 591; Koutsoubos, 755 F.2d at 354-55; McKay, 704 F.2d at 451; Hendrix, 634 F. Supp. at 1551; In re Related Asbestos Cases, 543 F. Supp. at 1142; In re “Agent Orange” Product Liability Litigation, 534 F. Supp. at 1046, 1055 (E.D.N.Y. 1982), modified, 597 F. Supp. at 740, 849 (E.D.N.Y. 1984); McLaughlin, 148 Cal. App. 3d at 203, 195 Cal. Rptr. at 768; Sanner, 144 N.J. Super. at 8-9, 364 A.2d at 47; Casabianca, 104 Misc. 2d at 350, 428 N.Y.S.2d at 402; but cf. Challoner v. Day & Zimmermann, Inc., 512 F.2d 77 (5th Cir.), vacated and remanded for misapplication of conflict of laws rules, 423 U.S. 3 (1975); Foster v. Day & Zimmermann, Inc., 502 F.2d 867 (8th Cir. 1974) (where the courts refused to extend the defense to shield a manufacturer from liability for a manufacturing defect); Merritt, Chapman, 295 F.2d 14 (9th Cir. 1961) (where the court refused to apply such a defense where the government contract left complete discretion concerning construction and maintenance with the contractor); Johnston, 568 F. Supp. 351 (D. Kan. 1983) (where court rejected the defense because radium dials which allegedly caused cancer were not mandated by the government contract); Nobriga v. Rayestos-Manhattan, Inc., 67 Haw. 157, 683 P.2d 389, 392 (1984) (rejecting the defense in an asbestos case on grounds that the “product manufactured [was] inherently dangerous because of a quality in the materials specified for use”).

See Tozer, 792 F.2d at 405; McKay, 704 F.2d at 444, cited in Bynum, 770 F.2d at 564-65; Tillett, 756 F.2d at 596; Koutsoubos, 755 F.2d at 354. See also In re “Agent Orange” Product Liability Litigation, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982). But cf. Shaw, 778 F.2d at 744-46.

Specifically, those circuits that view contractor participation in the design process as an important goal, have tended to adopt a formulation of the defense that includes an allowance for some amount of contractor discretion in producing design specifications. See, e.g., Koutsoubos, 755 F.2d at 355; McKay, 704 F.2d at 450. See also infra note 13. In Bynum, 770 F.2d at 556, the court stated: “Courts and commentators disagree over the extent to which the government must participate in generating the design specifications of military equipment before the government contractor defense would be applicable.” Id. at 574 n.23 (citations omitted). See In re Air Crash Disaster at Mannheim Germany, 769 F.2d at 121; McKay, 704 F.2d at 450-51; Price v. Tempo, Inc., 603 F. Supp. 1359, 1363 (E.D. Penn. 1985); Note, Government Contract Defense, supra note 6, at 221-22; Note, Manufacturer Discretion, supra note 6, at 200.

10. The Court of Appeals for the Eleventh Circuit summarized the two basic formulations and one hybrid version of the government contractor defense. Shaw, 778 F.2d at 744. The two basic forms cited in Shaw were those adopted by the courts in In re “Agent Orange” Product Liability Litigation, 534 F. Supp. 1046 (E.D.N.Y. 1982), modified, 597 F. Supp. 740 (E.D.N.Y. 1984) and McKay, 704 F.2d 444 (9th Cir. 1983). The Shaw court noted the critical difference between these two tests as the allowance in McKay for “mere government approval of a contractor’s design” to shield the contractor from liability. Agent Orange does not make such an allowance. 778 F.2d at 744. See supra note 3. The Shaw opinion also noted that a “hybrid” of these two standards was developed in Koutsoubos. In the Koutsoubos case, the United States Court of Appeals for the Third Circuit formally adopted the Agent Orange stan-
Courts justified early formulations of the defense as an extension of sovereign immunity based on public policy concerns. For example, the United States District Court for the Eastern District of New York in In re “Agent Orange” Product Liability Litigation, considered it unfair to hold contractors liable for the government’s defective design specifications, particularly where military contractors were compelled to provide equipment according to government specifications. During the development of the defense, courts began to abandon the idea of compulsion as a necessary element of the defense. Ultimately, in McKay v. Rockwell International Corp., the United States Court of Appeals for the Ninth Circuit determined that contractors could escape liability where the government established or simply approved design specifications. Since 1983, two other circuits have
adopted the McKay standard and its underlying rationale.  

In December 1985, the United States Court of Appeals for the Eleventh Circuit adopted a radically different standard than either McKay or Agent Orange. By challenging the underlying rationale, as well as the standard applied in McKay, the court in Shaw v. Grumman turned the government contractor defense "onto its head." In Shaw, the court rested its formulation of the defense on separation of powers concerns and the idea that the judiciary should not second-guess military decisions. The court's decision raises fundamental questions concerning the background and policy justifications underlying the defense, because its formulation presumes that a contractor cannot successfully assert the defense if it participates in the preparation of design specifications.

The formulation adopted by the Eleventh Circuit, however, has not gone unchallenged. The United States Court of Appeals for the Fourth Circuit attacked the standard applied in Shaw and adopted the McKay formulation of the government contractor defense. Significantly, the court's opinion in Tozer v. LTV Corp. justified the McKay formulation of the defense with the separation of powers rationale used in Shaw. Similarly, in Hendrix v. Bell Helicopter Textron, Inc., the Northern District of the United States District Court for the Western District of Texas adopted the McKay formulation and rationale.

16. Although the Seventh Circuit adopted the standard and rationale of McKay, it failed to critically review either. See Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985). The Fifth Circuit was slightly more circumspect in its adoption of the McKay standard. The court refused to address the issue of whether the defense could be successfully asserted where the government approved specifications which the contractor had developed. Bynum, 770 F.2d at 565 575 n.25. Yet, the Bynum court adopted the McKay formulation and rationale. Id. at 566-67.


18. Id. The court rejected the "pass-through" rationale based on Feres-Stencel immunity and the idea that the government contractor defense was necessary to encourage cooperation and innovation among military contractors. Id. at 742.

19. Id. at 746. See infra notes 124-26 & accompanying text.

20. Id. at 742-43.

21. The Shaw decision states that, "[a]s a general rule, the military contractor will be liable... to servicemen injured by defects (i.e., unreasonable dangerousness) in the products, or portions or phases of products, that it designs—that is, for which it provides [detailed design] specifications." Id. at 745-46.


23. 792 F.2d 403 (4th Cir. 1986).

24. Id. at 405-07.

25. 634 F. Supp. 1551 (N.D. Tex. 1986). The Hendrix opinion represents only the second
strict Court of Texas justified the McKay formulation of the defense on separation of powers considerations.

This Comment will review the circuits' conflict surrounding the government contractor defense. It will examine the policy considerations that courts have analyzed in determining which considerations compel one standard of the government contractor defense over another. The policy considerations under analysis include fairness, preservation of governmental immunity, separation of powers—including questions regarding the need for military autonomy and discipline—and the degree to which the application of the defense encourages both design innovation and participation of contractors in the design of military equipment. This Comment concludes that separation of powers concerns and the benefits of encouraging contractor participation in the design of military equipment dictate a defense that protects contractors from liability where the government affirmatively approves contractor design specifications.

I. DEVELOPMENT OF THE DEFENSE

A. Feres-Stencil Immunity

The development of the Feres-Stencil doctrine, is credited as the stimulus for the modern government contractor defense. The doctrine is rooted in the Federal Tort Claims Act (FTCA), enacted by Congress in 1946 to waive governmental immunity in the area of tort actions brought by individuals injured by the government's actions. The FTCA provides governmental concession to liability for its own negligence unless the situation falls within one of the enumerated statutory exceptions.

26. The Feres-Stencil doctrine is actually the rule of law derived from the cases of Feres v. United States, 340 U.S. 135 (1950) and Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977).


28. The FTCA represents a consent by Congress to allow the government to be held liable "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." 28 U.S.C. § 1346(b) (1982). Certain statutory and judicial exceptions to the FTCA limit this amelioration of sovereign immunity. The statutory exceptions to this waiver of liability have been classified in three basic categories including: (1) torts arising from the per-
In *Feres v. United States*, the Supreme Court addressed the issue of whether the FTCA extended to members of the Armed Services. The Court determined that the "government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The Court's decision resulted from two bases. First, the Court determined that the relationship between the government and the members of the Armed Forces was "distinctively federal in character" and that it would make little sense to have the government's liability depend on where the soldier was stationed at the time of the injury. Second, the Court determined that injured servicemen received adequate compensation under the statutorily established "no fault" compensation scheme of the Veterans Benefit Act that provided for generous pensions without regard to negligence attributable to the government. Thus, the Court precluded military servicemen injured incident to duty from obtaining recovery from the government except where expressly
provided by statute.\textsuperscript{34}

As a result of \textit{Feres}, military servicemen were effectively barred from bringing tort claims against the government. Injured servicemen ultimately began suing military contractors to recover for injuries resulting from government design defects.\textsuperscript{35} But the contractor often possessed little or no discretion in the design specifications that caused the injury.\textsuperscript{36} Thus, contractors found themselves paying for the government's design defects, particularly in strict liability jurisdictions where the absence of the military contractor's negligence was irrelevant.\textsuperscript{37}

The case of \textit{Stencel Aero Engineering Corp. v. United States}\textsuperscript{38} best illustrates the dilemma confronting military contractors prior to the establishment of the government contractor defense.\textsuperscript{39} In \textit{Stencel}, the contractor questioned the government's design specifications but was ordered to proceed despite perceived defects.\textsuperscript{40} The contractor later sought indemnification for claims paid to servicemen injured by those defects.\textsuperscript{41} Relying on the \textit{Feres} rationale, the Supreme Court held the contractor's indemnity claims

\begin{itemize}
\item \textsuperscript{34} 340 U.S. at 146.
\item \textsuperscript{35} See Note, \textit{Government Contract Defense}, supra note 6, at 182-83; Note, \textit{Liability of a Manufacturer}, supra note 6, at 1025.
\item \textsuperscript{36} See, \textit{Liability of a Manufacturer}, supra note 6, at 1026 n.2.
\item \textsuperscript{37} In fact, strict liability suits do not require that a defect be caused by a contractor's act or omission. Instead, the product need only be defective when it leaves the defendant's control. \textit{Restatement (Second) of Torts} § 402A (1965).
\item Although this Comment considers the government contractor defense as it applies to strict liability suits, the reader should note the various arguments advanced by courts and commentators regarding the application of the defense to suits based on negligence, strict liability, and breach of warranty claims. See Note, \textit{Government Contract Defense}, supra note 6, at 214-18; \textit{see also} McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451-53 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984).
\item \textsuperscript{38} 431 U.S. 666 (1977). In \textit{Stencel}, a National Guard officer sustained permanent injuries when the emergency ejection system in his fighter aircraft malfunctioned during flight. Stencel manufactured the system pursuant to government specifications. In fact, during testing of the ejection system Stencel recognized a design defect and warned the government. The Air Force refused to allow design changes recommended by the manufacturer, and instead insisted on production in accordance with original design specifications. Following the accident, an independent panel determined that the injuries sustained by the serviceman resulted directly from the design defect noted by Stencel and pointed out to the government. Stencel settled the claims with the serviceman and sought indemnification from the United States Government. Tobak, \textit{A Case of Mistaken Liability: The Government Contractor's Liability for Injuries Incurred by Members of the Armed Forces}. 13 \textit{Pub. Cont. L.J.} 74, 75-76 (1982).
\item The idea of a military contractor's "predicament" or "dilemma" was first raised in Tobak, \textit{supra} note 38, at 75.
\item \textsuperscript{40} Id. at 75 (citing, \textit{Hearing on H.R. 1504 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary}, 97th Cong., 1st Sess., at 9-10 (Mar. 19, 1981)).
\item \textsuperscript{41} \textit{Stencel}, 431 U.S. at 668.
\end{itemize}
impermissible. The Court reasoned that recovery through indemnification would circumvent the statutorily created limit for compensation to injured servicemen under the Veteran Benefits Act. In addition, the Court expressed reluctance in permitting litigation on matters that would require second-guessing military orders and pose a threat to military discipline. Thus, as a matter of public policy, the Court rejected the idea of government indemnification for contractors held liable for the government's design defects.

The Feres-Stencel doctrine created an insurmountable dilemma for military contractors by excusing the government both from suit by servicemen and from indemnification actions brought by the contractor. As a result, contractors resorted to the traditional defenses employed in defending suits filed by injured servicemen.

B. The Traditional Defenses

Traditional defenses to the liability dilemma created for military contractors by the Feres-Stencel doctrine proved either ineffective or difficult to establish. The contract specification defense shielded a contractor from

42. Id. at 673. The Court reasoned that suppliers of military equipment maintained a relationship with the government that was distinctly federal in character and similar to that between the government and its Armed Forces. Id. at 671-72. As in Feres, the Court determined it made no sense to permit the situs to affect liability of a government contractor for service connected injuries to servicemen. The Court also reasoned that recovery through indemnification would circumvent the statutorily created limit for compensation to injured servicemen under the Veteran Benefits Act. Id. at 672-73. Further, the Court expressed particular concern over this possibility and its effect in undermining sovereign immunity since contractors would pass the costs of either liability or liability insurance onto the government, thereby undermining the FTCA and Feres decision. Id. Finally, the Court decided that such a suit, if permitted to proceed, would require the civilian courts to second-guess military orders. Thus, as a matter of public policy, the Court rejected the idea of government indemnification for contractors held liable for the government's design defects. Id. at 673-74.

43. Id. at 672-73.
44. Id. at 673.
45. Id.
46. The "contract specification defense" is based on principles of negligence and provides that a contractor may escape liability for damages resulting from specifications provided by another (regardless of whether that person is the government, a corporation or an individual) unless those specifications contained patent defects which would put a contractor of reasonable prudence on notice concerning the dangerous nature of the work. RESTATEMENT (SECOND) OF TORTS § 404 comment a (1965). The defense is based on the idea that a contractor fails to possess the necessary expertness required to evaluate specifications, thereby excusing the contractor from the same high standard of care. Johnston v. United States, 568 F. Supp. 351, 354 (D. Kan. 1983); see Note, Liability of a Manufacturer, supra note 6, at 1034-35. This formulation led one court to refer to the "defense" as a standard of proof rather than a defense at all. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 739 (11th Cir. 1985), petition for cert. filed, 54 U.S.L.W. 3632 (U.S. Mar. 25, 1986) (No. 85-1529).
liability resulting from specifications provided by another unless the contractor failed to warn of a patent defect. Successful application of the contract specification defense depends, however, on the concepts of fault and negligence. Thus, for suits brought in strict liability against military contractors, the assertion of the contract specification defense failed.

The separately distinct government agency defense had its origin in the case of Yearsley v. W.A. Ross Construction Co. In Yearsley, the Supreme Court refused to impose liability upon a contractor who built dikes in the Missouri River that accidentally eroded part of the petitioners' land. The Court found that the contractor acted at the government's direction, and therefore, regarded the contractor as "an agent or officer of the government," acting on the government's behalf. In this regard, two considerations were of paramount importance to the Court: (1) whether the contractor's authority was validly conferred; and, (2) whether the contractor exceeded the scope of its authority. The Court determined that where the public works contractor exercised its duties within the scope of validly conferred authority, it was permitted the cloak of the government's immunity. While this holding appears to be far reaching, the finding that the contractor actually acted as an agent or officer of the government does not extend to an independent military contractor. Thus, military contractors cannot successfully assert the Yearsley government agency defense.

47. Not only does the contract specification defense fail to protect a contractor from liability where the contractor possesses some special knowledge, but in some circumstances, the contractor may be held to a higher standard of care. Bynum v. FMC Corp., 770 F.2d 556, 563 (5th Cir. 1985). See Person v. Cauldwell-Wingate Co., 187 F.2d 832 (2d Cir.), cert. denied, 341 U.S. 936 (1951); Johnston, 568 F. Supp. at 354.


49. Although some courts have extended the contractor specifications defense based on public policy to situations involving strict liability claims, most courts will only apply the defense to situations involving negligence. Bynum, 770 F.2d at 563; Johnston, 568 F. Supp. at 354 (quoting Challoner v. Day & Zimmerman Inc., 512 F.2d 77, 83 (5th Cir.), vacated and remanded on other grounds, 423 U.S. 3 (1975); Lenherr v. NRM Corp., 504 F. Supp. 165 (D. Kan. 1980)). But cf. Hunt v. Blasius, 55 Ill. App. 3d 14, 20, 370 N.E.2d 617, 620-22 (1977) (applying defense in strict liability case to encourage bidding and to keep government expenses down); McCabe Powers Body Co. v. Sharp, 594 S.W.2d 592, 594-95 (Ky. 1980) (determining it was illogical to hold nondesigner liable for design defect).


52. Id. at 20-21.

53. Id. at 21.

54. Id. See also Myers v. United States, 323 F.2d 580 (9th Cir. 1963); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965).

The limited availability of the government agency defense and the bar against asserting the contract specifications defense to shield military contractors from strict liability leaves military contractors subject to third party liability under the *Feres- stencil* doctrine. Because strict liability requires no proof of fault, the contractor could be held liable even where the government had designed the defect that caused the injury.\textsuperscript{56}

This exposure of military contractors to strict liability under circumstances where the government shares partial or total responsibility for defects potentially affects the independence of military decisions, the preservation of sovereign immunity, and the continuing relationship between military contractors and the government. As a result of these potential effects, state and federal courts began to recognize a limited form of relief based upon public policy concerns known as the government contractor defense.

\textbf{C. Development of the Modern Defense}

The government contractor defense is widely considered to have originated from the government agency defense applied in *Yearsley*.\textsuperscript{57} While that case and its progeny dealt primarily with public works contracts, courts began to apply the *Yearsley* rationale of permitting the "cloak of governmental immunity" in cases involving products manufactured pursuant to government specifications.\textsuperscript{58} These product liability cases replaced the policy

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\textsuperscript{56} See supra note 37 and accompanying text.


\textsuperscript{58} Instead of an "extension" of sovereign immunity to contractors, see supra note 11 and accompanying text, the courts sometimes "cloak in governmental immunity those contractors, like agents and officers, whose suit represents an uncontested claim against the government, although brought against the individual." J. Steadman, supra note 11, at 323.
considerations offered to justify the privilege derived from an agency or office relationship in Yearsley with a different set of public policy considerations.59

The first suggestion of a defense for military contractors sued for design defects arose in a footnote in Littlehale v. E.I. du Pont de Nemours & Co.60 In Littlehale, a military employee and serviceman sustained injuries resulting from the explosion of a defective blasting cap.61 Although the court decided the case on other grounds, it acknowledged that a government contractor defense might have merit.62 Specifically, the court noted that where the government maintained immunity from suit and the party contracting with the government followed government specifications, the manufacturer should not be held liable under regular liability standards.63 Thus, the court suggested the possibility of a defense for manufacturers of military equipment where they complied with government specifications.64

The Superior Court of New Jersey was the first court to extend a defense to manufacturers of military equipment.65 In Sanner v. Ford Motor Company,66 a passenger sued Ford for injuries resulting from an accident in a military jeep lacking seatbelts and a roll bar.67 The appellate court upheld the summary judgment entered by the trial court in favor of Ford, on the

59. In a suit against an employee or officer, the primary consideration includes the impact on administration and the threat of freedom of action. J. Steadman, supra note 11, at 323. See Symposium on Civil Liability of Government Officials, 42 LAW & CONTEMP. PROBS. 1 (1978).

60. 268 F. Supp. 791 (S.D.N.Y. 1966), aff’d, 380 F.2d 274 (2d Cir. 1967). See Foster v. Day & Zimmermann, Inc. 502 F.2d 867 (8th Cir. 1974) (where a military serviceman sued the manufacturer of a hand grenade for injuries sustained when the grenade exploded in his hand). In Foster, the court acknowledged that the defense provided for public works contractors, but refused to permit Day & Zimmermann to employ a similar privilege since the court found that the defect resulted from the contractor’s faulty manufacturing. In a footnote the court stated that “[t]he government’s specifications did not call for the defendants to assemble a defectively made grenade.” Thus, by implication the court recognized that a manufacturer of military equipment might be entitled to a defense where the defect was associated solely with faulty design specifications and not the manufacturing process. Id. at 874 n.5.


62. Id. at 803 (where the court stated that a defense based on a contractor’s compliance with government specifications “may have merit”). The plaintiffs based their suit on “failure to warn” grounds, but the court found that those injured failed to represent the class of individuals whom the manufacturer had a duty to warn. Id. at 800-03.

63. Id. at 803 n.17.

64. Id. (basing the defense on Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18 (1940) and the other public works cases).


66. Id. at 1, 364 A.2d at 43.

67. Id. at 3, 364 A.2d at 43-44.
basis that the absence of safety equipment resulted from the government's insistence not to add seatbelts and a roll bar. The trial court determined that because the defect resulted solely from government design specifications, the contractor, who exercised no discretion, was immune from liability. The court relied on the public works cases as a parallel for its decision to provide the contractor with a defense based on policy considerations. The court's decision to provide the contractor with a defense resulted from the court's belief that if contractors were held liable, they would simply pass the cost of liability on to the government in the form of increased contract prices, thereby undermining the government's immunity for discretionary functions. Although this case's application of the defense was important, its impact remained muted due to the court's failure to provide the necessary elements for successfully asserting the government contractor defense.

The actual formulation of the government contractor defense arose from suits filed by Vietnam veterans and their families for injuries sustained by servicemen as a result of exposure to the chemical defoliant "Agent Orange" and the subsequent decisions in In re "Agent Orange" Products Liability Litigation. The court specifically recognized the existence of a government contractor defense.
contractor defense based on public policy considerations\textsuperscript{74} including the need to protect governmental immunity from subversion.\textsuperscript{75} Additionally, the court found that the lack of discretion by the contractor in developing design specifications, coupled with the government's compulsory production of the defoliant in accordance with specifications, made the imposition of liability on the contractor particularly unfair.\textsuperscript{76}

The court set out the elements that a military contractor must prove in order to successfully assert the defense. Chemical companies supplying "Agent Orange" to the government could escape liability if they proved: (1) the government established the design specifications; (2) the product manufactured by the defendant met government specifications in all material respects; and (3) the government knew as much as, or more than, the defendant about the hazards to people that accompanied use of the product.\textsuperscript{77}

The court's next opinion refined the defense in three significant ways. First, the court added the requirement that a contractor, possessing superior knowledge of defects, warn the government of those defects.\textsuperscript{78} Second, the court drew a broad distinction between performance and reasonably detailed design specifications.\textsuperscript{79} The court held that successful proof of the govern-
ment contractor defense required a showing that the government expressly set design specifications. Finally, although the court required that the
government establish specifications, it recognized the need for allowing the
defense where a contractor exercised some discretion with respect to the
product's design. The court specifically rejected plaintiffs' argument that a
proper formulation of the government contractor defense required the de-
fendants to prove that they lacked direct or indirect responsibility for pre-
paring design specifications. Thus, the court created a limited defense,
with a suggestion that it might be applied where the contractor supplied
 specifications that the government subsequently approved.

II. RECENT CONTROVERSIES

A. McKay and Progeny

In 1983, the United States Court of Appeals for the Ninth Circuit fol-
lowed a suggestion made in Agent Orange II and extended the government contractor defense by permitting a supplier of military equipment to avoid liability where the government merely approved, rather than established, de-
sign specifications. In McKay v. Rockwell International Corp., the wid-
owns of two Navy pilots sought damages for the deaths of their husbands
caused by the failure of an ejection system on a Navy aircraft. The court
acknowledged the existence of a government contractor defense based on the
Yearsley, Sanner and Agent Orange decisions, but rejected the plaintiff's

There are DESIGN specifications which set forth precise measurements, tolerances,
materials, in process and finished product tests, quality control, inspection require-
ments, and other specific information. Under this type specification, the Government
is responsible for design and related omissions, errors, and deficiencies in the specifi-
cations and drawings.

Id. (emphasis in original).
80. Agent Orange II, 534 F. Supp. at 1056.
81. Id.
82. Id.
83. The court's formulation of the defense included the following limitations. First, the
defense applies only where there are reasonably precise design specifications. See supra note 79
and accompanying text. In addition, the defense places a duty upon contractors to warn the
government of known hazards. Agent Orange II, 534 F. Supp. at 1055. The defense has never
been applied to situations involving defective manufacturing. See, e.g., Foster v. Day & Zim-
merman, Inc., 502 F.2d 867 (8th Cir. 1974). Finally, the application of the defense is generally
limited to defective military equipment instead of ordinary consumer products. See McKay v.
Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984); see
also Note, supra note 13, at 1082.
85. Id.
86. Id. at 446.
87. Id. at 448.
contentions that the defense should be limited to situations where specifications left the manufacturer no discretion in the product’s design.\(^{88}\) Although the Ninth Circuit adopted the *Agent Orange* standard, it permitted government approval of design specifications offered by the contractor to satisfy the first element of the defense.\(^{89}\) The court determined that public policy considerations supported both the defense in general and the extension of the defense to situations where the contractor participated in preparing design specifications subsequently approved by the government.\(^{90}\) Thus, proof by the contractor that the government established, or approved, reasonably precise specifications resulted in immunity from liability for defective military equipment, provided the contractor satisfied the other elements of the *Agent Orange* test.\(^{91}\)

The *McKay* court also set forth the underlying justifications for the defense. Prior decisions rationalized the government contractor defense in terms of fairness and attempts to preserve the government’s immunity by avoiding “pass-through” costs associated with contractor liability.\(^{92}\) *McKay* adopted this rationale as a primary basis for the defense\(^{93}\) but articulated three additional justifications for military contractor immunity from third party tort actions where the government established or approved design specifications. First, the court noted the dangers associated with judicial inquiry into design defects that resulted from government established or approved specifications.\(^{94}\) Under the aegis of separation of powers concerns, the *McKay* court recognized the limits to the judiciary’s omniscience and the problems associated with second-guessing military decisions.\(^{95}\) Second, the court noted that the development of military equipment often required pushing technology toward its limits, thereby creating risks that surpassed those normally associated with consumer products.\(^{96}\) Finally, the court recognized the benefits of such a defense in providing incentives for

\(^{88}\) *Id.* at 450.
\(^{89}\) *Id.*
\(^{90}\) *Id.* at 449-51.
\(^{91}\) *Id.* The other elements of the defense involve material compliance with the specifications and the satisfaction of the duty to warn. *See Agent Orange II*, 534 F. Supp. at 1055.
\(^{93}\) The importance of this rationale to the *McKay* formulation of the government contractor defense is represented by the court’s inclusion of another element to the defense, i.e., that the United States be immune from liability under the *Feres-Stencel* doctrine. *McKay*, 704 F.2d at 451.
\(^{94}\) *Id.* at 449.
\(^{95}\) *Id.*
\(^{96}\) *Id.* at 449-50.
suppliers of military equipment to cooperate and work closely with military officials. 97

The dissent in McKay took issue with the majority's reliance on the Feres-Stencel doctrine and noted that neither the Feres nor the Stencel decisions addressed the issue of contractor liability for injuries resulting from design defects. 98 Further, the dissent distinguished Feres and Stencel, and their primary focus on government liability, from the McKay facts. The dissent criticized the use of the Stencel opinion to protect contractors, relying on a footnote in that opinion where the court stated that contractors had notice of the risks involved in military equipment contracting when they negotiated such contracts. 99

The McKay dissent also asserted that the majority ignored the realities of the marketplace in its reliance on the “pass-through” rationale for supporting the defense. 100 The dissenting opinion contended that because contractors take the risk of liability into consideration when they bid on contracts, the final contract price represents potential liability costs. 101 The dissent reasoned that those contractors which develop better safety records, ultimately provide the most competitive price in contract bids, and therefore, the absence of a government contractor defense fosters safety and lower costs. 102 Determining that the defense as construed by the majority allowed contractors to escape liability too easily, the dissent argued that the defense ought to require government compulsion before permitting a contractor to avoid liability. 103

Other courts have adopted the McKay majority standard and policy justifications. 104 But subsequent decisions following McKay have added little in

97. Id. at 450.
98. Id. at 456 (Alarcon, J., dissenting).
99. Id. at 457 (Alarcon, J., dissenting). Judge Alarcon suggests that contractual indemnification remains a viable alternative for military contractors. Id. at 457-58. This argument ignores the historical reality that the government rarely indemnifies, even when given express authority by Congress. See Tobak, supra note 38, at 104-06.
100. The dissent contended that “pass-through” costs would be minimal because the competitive bidding system would keep costs low. In particular, the dissent asserted that contractors who maintained satisfactory safety records could offer lower bids, thereby keeping down “pass-through” costs and eliminating unsafe bidders who were required to raise the cost of their bid. McKay, 704 F.2d at 457-58 (Alarcon, J., dissenting).
101. Id. (quoting Stencel v. Aero Eng'g Corp. v. United States, 431 U.S. 666, 674 n.8) (Alarcon, J., dissenting).
102. Id. at 457 (Alarcon, J., dissenting).
103. Id. at 458 (Alarcon, J., dissenting).
Commentators suggest that the McKay decision permits contractors to escape liability for their own design defects that the government merely approves by a rubber stamp. In 1985, however, the Third Circuit refined the approval standard adopted in McKay by addressing the issue of whether an establishment or approval standard more appropriately embodied the policy concerns underlying the defense.

In Koutsoubos v. Boeing Vertol, the United States Court of Appeals for the Third Circuit rejected a strict “establishment” standard. The court also rejected the idea of “approval” as nothing more than a government rubber stamp. Instead, the Koutsoubos court reasoned that a standard that defeated the defense for any contractor involvement in design, would destroy the incentive for contractors to work closely with the military. The Third Circuit also recognized that the lack of any government involvement in the preparation of specifications would undermine the rationales that justified application of the defense. The court determined that the proper formulation of the defense required a recognition of the “continuous back-and-forth” that took place between the military contractors and the government in preparing design specifications. Thus, the Koutsoubos court determined that encouraging cooperation between the government and contrac-

105. In fact, the Fifth Circuit specifically refrained from addressing the issue of how much government participation was required for a contractor to assert the defense. Bynum, 770 F.2d at 574 n.23.


107. Koutsoubos v. Boeing Vertol, 755 F.2d 352, 355 (3d Cir.), cert. denied, 106 S. Ct. 72 (1985). In Koutsoubos, three servicemen were killed when their helicopter crashed into the water while on a training flight. The Third Circuit relied on the district court finding that “a continuous back and forth” had occurred between the government and the contractor concerning design specifications. Id. Additionally, the court specifically found that “the [government] always, expectedly and properly, ha[d] the responsibility for and exercis[ed] responsibility for making final decisions as to specifications.” Id. The court concluded that this degree of government participation warranted the contractor’s invocation of the government contractor defense.


109. Id. at 355.

110. Id.

111. Id.

112. Id. Specifically, the court found each of these alternatives to represent the extreme that was rejected in Agent Orange II where the District Court for the Eastern District of New York refused to frame the defense with an approval element, yet rejected the contention by the plaintiffs that the defense validly applied only to those situations in which the government compelled compliance with government specifications and the contractor exercised no discretion. Agent Orange II, 534 F. Supp. at 1056.

tors justified the approval standard applied in *McKay*, as long as "approval" meant more than the government's mere rubber stamp.\(^{114}\)

**B. Shaw v. Grumman**

In *Shaw v. Grumman Aerospace Corp.*, the United States Court of Appeals for the Eleventh Circuit specifically rejected the approval standard and the *Agent Orange* and *McKay* formulations of the government contractor defense.\(^{115}\) In *Shaw*, the personal representative of a serviceman killed in an airplane crash brought a wrongful death action against Grumman, which had manufactured the defective stabilizer system in the airplane.\(^{116}\) At trial, Grumman asserted the government contractor defense, but the district court found that Grumman had failed to prove the requisite elements of the defense.\(^{117}\) Specifically, the court found that: (1) Grumman, rather than the government, established the defective design specifications; (2) Grumman failed to prove that it met government specifications in all material respects; and (3) Grumman failed to prove that it had warned the Navy of any errors in specifications or about the dangers of the aircraft use and that the Navy had relied on Grumman's design expertise and experience.\(^{118}\)

In affirming the district court's findings, the Eleventh Circuit rejected the *McKay* formulation of the government contractor defense.\(^{119}\) The *Shaw*

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114. The Koutsoubos court specifically relied on the district court's finding that a "continuous back-and-forth" existed between the military and the contractor "with the Navy always, expectedly and properly, having the responsibility for and exercising responsibility for making final decisions as to specifications." *Id.* (citing *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 453 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984)). In *McKay*, the Ninth Circuit adopted the approval standard and remanded for trial the question of whether the government approved the specifications "by examining and agreeing to a detailed description of the workings of the system." *McKay*, 704 F.2d at 453.


116. *Id.* at 738.

117. *Id.* See *Shaw v. Grumman Aerospace Corp.*, 593 F. Supp. 1066 (S.D. Fla. 1984). The district court specifically found that there was an imbalance of knowledge between the supplier and the military at the time Grumman's detailed specifications were approved. The court also found that Grumman was aware of the existence of an actual design defect and led the Navy to believe that the installation of the self-retaining bolts would correct the problem. The district court determined that the Navy was justified in relying on Grumman's design expertise and experience when Grumman represented that the new bolt would correct the problems caused by the defect. *Id.* at 1074.

Based on these findings of the district court, the Eleventh Circuit could have disallowed Grumman's use of the government contractor defense based on either the *Agent Orange* or *McKay* formulations. Instead, the court chose to provide a new formulation of the defense. *Shaw*, 778 F.2d at 745-46.


court analyzed the four policies advanced by the McKay court and found that only the separation of powers argument supported the defense. The Shaw court agreed with the McKay dissent and rejected the "pass-through" rationale as a relevant consideration. In addition, the Eleventh Circuit recognized that the separation of powers consideration accounted for the concerns of risky technology and encouraged cooperation articulated in McKay.

On this basis, the Eleventh Circuit fashioned a new standard of proof for contractors asserting the government contractor defense. The Shaw test holds a military contractor liable for all defects resulting from detailed design specifications in which it participated. Under Shaw, the contractor can escape liability if it can prove either that its participation in the design specifications was minimal or that it timely warned the government of all known risks and alternatives and that the government decided to accept the risks and proceed with the design.

C. Post-Shaw Decisions

The two post-Shaw cases that raise the government contractor defense adopted the McKay formulation of the defense. Instead of relying on sovereign immunity concerns, however, these decisions used separation of powers considerations as the primary justification for the defense.

In Tozer v. LTV Corp., the United States Court of Appeals for the Fourth

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120. Id. at 741.
121. Id. at 741-44.
122. Id. at 741-42.
123. Id. at 743.
124. The court never referred to the defense as the government contractor defense, but instead, adopted the "military contractor defense" as a more descriptive and more precise term. Id. at 739 n.3. See supra note 6.
125. Id. at 745-46.
126. Id. at 746. The court's new formulation of the defense begins with an assumption that any military product that fails is automatically contrary to government specifications if the contractor exercised any discretion in design. Id. at 745. Applying this test to the facts, the court determined that Grumman failed to prove the elements of the government contractor defense. Id. at 746-47. Specifically, the court found that, contrary to minimal participation in design specifications, Grumman had exclusively designed and produced the detailed specifications for the aircraft. Id. at 747. In addition, the court relied on the trial court's finding that Grumman failed to warn the Navy of the inherent dangers in failing to provide a backup stabilizer control system. Id.
Government Contract Defense

Circuit confronted an action brought by the widow of a Navy pilot to recover damages for the death of her husband resulting from the crash of his aircraft.\textsuperscript{128} Investigations determined that the accident was caused by design modifications made by the contractor and approved by the Navy to affect a change the Navy had requested.\textsuperscript{129} The Fourth Circuit reversed a jury award for the plaintiff on the basis of the McKay formulation of the government contractor defense.\textsuperscript{130}

The court’s decision rested on the “historic purposes” of the defense, including fairness, the need to encourage contractor cooperation and participation in the development of military equipment, and a desire to avoid the “pass-through” costs associated with contractor liability.\textsuperscript{131} The central rationale for the court’s decision, however, rested on separation of powers considerations.\textsuperscript{132} The court divided its separation of powers discussion into two areas: (1) judicial interference with military decisions; and, (2) the problem of undercutting military discipline by judicial second-guessing of mili-

\begin{enumerate}
\item \textit{Tozer}, 792 F.2d at 404.
\item \textit{Id.} at 404-05. The \textit{Tozer} case arose from a military aircraft crash that occurred while the pilot was executing a low-altitude, high speed, fly-by of an aircraft carrier. The plaintiffs alleged that Tozer’s crash and subsequent death was due to the loss of a hinged panel that permits access to equipment underneath the aircraft. LTV’s subsidiary, Vought Corporation, had originally designed a panel that had to be removed in order to perform maintenance or repair work in the compartment below. At the Navy’s request, Vought modified the panel to provide hinged pieces, with the nonhinged sides fastened with quick fasteners for easy release by the turn of a screwdriver. The Navy investigation found that the accident occurred when this panel, known as the “Buick Hood,” opened during flight. \textit{Id.}

\item The fact that the defect in \textit{Tozer} resulted from the Navy’s design might suggest that the Fourth Circuit’s language regarding an approval standard for the government contractor defense represented dicta. The court’s opinion is justified, however, by the fact that the rationale was designed to apply to the factual situations of two other cases decided that same day by the Fourth Circuit. \textit{See supra} note 127. The facts of the \textit{Boyle} case justified the court’s rationale and better typify the dilemma under consideration. \textit{Boyle}, 792 F.2d 413 (4th Cir. 1986). \textit{See supra} note 39.

\item In \textit{Boyle}, the father of a deceased Marine helicopter pilot brought suit against the Sikorsky Division of United Technologies, Inc. Boyle alleged defective design by Sikorsky of the copilot’s escape hatch. \textit{Id.} at 413-14. The court specifically found that the back-and-forth discussions between Sikorsky and the Navy, coupled with the Navy’s inspection and approval of the design of a mock-up of the cockpit built by Sikorsky, constituted “approv[al of] reasonably detailed specifications for the escape hatch.” \textit{Id.} at 414-15.

\item Unlike \textit{Tozer}, the facts of the \textit{Boyle} case represent the essence of the conflict under analysis—whether the approval of a contractor’s design should suffice for the first element of the government contractor defense. For the remainder of this Comment, however, the \textit{Tozer} opinion and facts will be used because that rationale represents the Fourth Circuit’s stance on the appropriateness of an approval standard for the government contractor defense.

\item The jury returned a verdict for the plaintiffs, awarding $350,000 to the serviceman’s wife and $50,000 to each of his two daughters. \textit{Id.}

\item \textit{Id.} at 405.

\item \textit{Id.} at 405-07.
\end{enumerate}
In *Hendrix v. Bell Helicopter Textron, Inc.*, the District Court of the Northern District of Texas mirrored the considerations in *Tozer*. In *Hendrix*, the beneficiaries of two servicemen killed in a helicopter crash brought suit against the manufacturer for design defects that caused the accident. The court held the contractor immune from liability based on the McKay formulation of the government contractor defense. This decision reflected the precedent within the Fifth Circuit, but, the justification offered by the court for its formulation of the defense followed *Tozer*.

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133. *Id.* The court specifically found that questions of military safety were uniquely subject to civilian control through the legislative and executive branches of government, not the judiciary. *Id.* at 405 (citing Gilligan v. Morgan, 413 U.S. 1, 10 (1973)). Thus, the court noted that in the context of the constitutional doctrine of separation of powers, judicial caution and deference to the decision of the other branch of government was necessary. *Id.* (citing Baker v. Carr, 369 U.S. 186, 217 (1962)). Outside of the Constitution, the court recognized the limitations on judicial expertise. *Id.*

In addition to these concerns, the *Tozer* court recognized that the military's ability to balance the risks associated with any particular piece of equipment in relation to the mission represented a unique skill not found in civilian evaluations. *Id.* at 406. The court specifically rejected the notion raised in *Shaw*, that in second-guessing such decisions in a civilian court, "'the danger of interfering with [military] discipline . . .' is too remote to be accorded significant weight when the decision only indirectly involves military orders or practices concerning active duty soldiers." *Id.* (quoting Shaw v. Grumman Aerospace Corp., 776 F.2d 736, 743 (11th Cir. 1985), petition for cert. filed, 54 U.S.L.W. 3632 (U.S. Mar. 25, 1986) (No. 85-1529)). Again, the court recognized that such inquiries were better left to the legislative and executive branches of government. *Id.*


135. *Id.* at 1552. In *Hendrix*, the helicopter crash resulted from the severing of a bolt that was defectively manufactured by an unknown company. *Id.* During normal overhaul procedures, Bell determined the bolts to be defective and suggested that the Army replace them with bolts produced by Bell. The Army refused. *Id.* at 1553-54. Based on these facts, the court specifically found that Bell had done everything in its power to encourage the replacement of the defective bolts. *Id.* at 1554.

136. *Id.* at 1555-58.

137. The *Hendrix* court cited *Bynum* as authority for applying the McKay formulation of the defense. *Id.* at 1555 (citing *Bynum* v. FMC Corp., 770 F.2d 556 (5th Cir. 1985)). Unlike *Bynum*, however, the *Hendrix* court did not hedge on the issue of whether the defense applied to situations of government approval instead of establishment, but rather stated that the second element of the McKay formulation was satisfied by the fact that precise specifications were "established or approved by the government." *Id.* at 1556.

138. The *Hendrix* court gave primary attention to the separation of powers argument, and specifically quoted the same passage from *Gilligan* as *Tozer*. *Id.* at 1555 (citing *Gilligan* v. Morgan, 413 U.S. 1, 10 (1973)). See supra note 133. By contrast, the *Hendrix* court simply mentioned that the other policy reasons for [the] defense [as] includ[ing] (1) that imposing liability on military contractors for defective designs supplied by the government would circumvent the government's immunity under the Feres-Stencel doctrine because military suppliers would pass the costs of such liability off on the United States; (2) that military contractors [were] unable to alter the design specifications of their military
The *Hendrix* court justified the defense by relying on the separation of powers doctrine. Specifically, the court determined that the judiciary lacked the ability to second-guess military judgments, particularly in the area of the design of military equipment. While the court recognized that other rationales for the defense included fairness, fear of "pass-through" costs, and the need to encourage contractor participation in the design process, the *Hendrix* court stated that it relied primarily on separation of powers considerations in support of the defense.

In sum, these circuits agree on the availability of some form of the government contractor defense. The six circuits that found a defense to exist, however, differ on what policy considerations should justify its existence and affect its formulation. The *Shaw* decision disrupted unanimous adoption of the *McKay* formulation of the defense by offering a new formulation. The *Shaw* court determined that the policy considerations cited by *McKay* failed to support the liberal "approval standard" adopted by the Ninth Circuit. Instead, the court in *Shaw* developed a new formulation of the defense based solely on separation of powers concerns. Subsequent decisions, however, have adopted the *McKay* formulation of the defense and justified its adoption using separation of powers concerns similar to those used in *Shaw*. Thus, the question of whether policy considerations justify one formulation of the defense over another remains unsettled.

### III. RATIONALES AND PUBLIC POLICY

Collectively, the courts have advanced four basic policy justifications in support of the government contractor defense. Concerns of fairness and the

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139. *Id.* at 1555-56.
140. *Id.* at 1555.
141. *Id.*
143. The Ninth Circuit’s justifications in *McKay*, 704 F.2d at 449-50, were followed by the Third, Fifth, and the Seventh Circuits. *See, e.g.*, *Bynum*, 770 F.2d at 565-66; *Tillett*, 756 F.2d at 597; *Koutsoubos*, 755 F.2d at 354-55. Chronologically, the Eleventh Circuit then disrupted this uniformity by justifying a different formulation of the defense on separation of powers concerns. *Shaw*, 778 F.2d at 741-43. As a result, the Fourth Circuit followed *Shaw*’s reasoning concerning the importance of separation of powers considerations, but used it to justify the *McKay* formulation of the defense. *Tozer*, 792 F.2d at 405-07.
preservation of sovereign immunity predominated early decisions but were greatly discredited in the Eleventh Circuit's Shaw decision. Instead, the Shaw decision advanced separation of powers concerns as the only legitimate justification for a government contractor defense. The court's decision in Shaw, however, ignores the goal of fostering contractor innovation and participation in the design process. Cases decided subsequent to Shaw agree that separation of powers considerations are of paramount concern, but not to the exclusion of these latter justifications for the government contractor defense. Thus, the Fourth Circuit's opinion in Tozer and the District Court opinion in Hendrix adopted the McKay formulation of the defense using the Shaw rationale but preserved concerns for contractor innovation and participation in the design process.

A. Fairness

Early decisions invoking the government contractor defense found that if the government compelled the manufacture of a particular product to be in strict compliance with government specifications, the contractor could avoid liability. In Agent Orange, for example, the court maintained that it would be unfair under normal tort principles to find an "innocent" contractor liable for the government's design defects. Decisions after Agent Orange used the Veteran Benefits Act's compensation of servicemen as additional support for the idea that making a contractor pay results in unfairness.

Although the facts in the Agent Orange case dealt with a unique type of compulsion under the Defense Production Act of 1950, the court did not limit its application of the defense to circumstances of statutory compulsion. In Agent Orange II, the court rejected arguments by plaintiffs that the defendant should be required to prove its lack of responsibility in formu-

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144. Tozer, 792 F.2d at 403, 405-06; Hendrix, 634 F. Supp. at 1551, 1555-56.
146. Agent Orange I, 506 F. Supp. at 793. The court recognized that tort liability principles sought to place liability with the wrongdoer, deter wrongful acts, and discourage wrongdoers from committing future wrongs. The court noted that this goal would be frustrated if contractors were held liable for the government's defective specifications. Id. at 793-94 (citing W. Prosser, Law of Torts § 4, at 23 (4th ed. 1971)).
147. Bynum, 770 F.2d at 566 (citing Feres v. United States, 340 U.S. 135, 145 (1950)).
149. See Agent Orange II, 534 F. Supp. at 1056. See supra note 13 and accompanying text.
lating design specifications.\textsuperscript{150} The court implicitly acknowledged the need for a contractor's participation in developing design specifications.\textsuperscript{151} The court determined that consideration of the contractor's participation in preparing design specifications might prove relevant in establishing the relative degrees of knowledge between the contractor and the military, but that such consideration had no place as a strict requirement of proof in the elements of the defense.\textsuperscript{152}

The \textit{McKay} decision rejected the compulsion requirement altogether when the court determined that a contractor met the first element of the \textit{Agent Orange} test by demonstrating that the government approved the specifications provided by the contractor.\textsuperscript{153} The court did not, however, reject the fairness rationale. Rather, the \textit{McKay} court still considered it unfair to impose liability upon the contractor alone, where the government remained at least partially at fault.\textsuperscript{154} The fairness rationale fails to withstand the criticism, however, that the \textit{McKay} formulation no longer serves the need of protecting the "innocent contractor" from liability.\textsuperscript{155} Unlike \textit{Agent Orange}, where the government was solely responsible for design defects, with the approval standard a design defect at least partially represents the contractor's act or omission. This act or omission might be prevented in the future if the contractor were made to suffer the consequences of liability.\textsuperscript{156} In addition, arguments concerning fairness to the contractor fail to account for the question of fairness to servicemen injured, maimed or killed as a result of the

\begin{footnotes}
\textsuperscript{150} \textit{Agent Orange II}, 534 F. Supp. at 1056.
\textsuperscript{151} \textit{Id.} By rejecting the plaintiff's argument that defendants were required to prove no direct or indirect responsibility in formulating design specifications to assert the defense, the court implicitly recognized the need for contractor participation in preparing design specifications. \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{154} \textit{Id.} at 450-51 (criticizing the narrow application of the defense in Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Corp., 295 F.2d 14 (9th Cir. 1961)). See Lifschitz & Mizoguchi, \textit{supra} note 48, at 10.
\textsuperscript{155} \textit{See} Johnston v. United States, 568 F. Supp. 351, 358 (D. Kan. 1983); Note, \textit{Liability of a Manufacturer, supra} note 6, at 1072-73; see \textit{also} Note, \textit{Manufacturer Discretion, supra} note 6, at 202-03.
\textsuperscript{156} It should be recognized, however, that to the extent the government still shares responsibility for faulty specifications where the contractor exercises some discretion, the prophylactic effect of liability upon a contractor will not completely eradicate future defective designs. \textit{Contra}, Note, \textit{Manufacturer Discretion, supra} note 6, at 203 (the author bases his conclusion on the improper assumption that the mere existence of manufacturer discretion in establishing design specifications necessarily means that the government exercised no discretion). See \textit{Note, supra} note 13, at 1082.
\end{footnotes}
contractor's design. Thus, the fairness rationale is difficult to defend under the McKay formulation of the government contractor defense. Unless other reasons compel its adoption, the McKay formulation should be rejected.

B. Feres-Stencil Immunity

The oldest rationale for the government contractor defense reflects an effort to preserve the governmental immunity. Relying on Stencil, courts justified the defense on the basis that contractors would pass on the costs of liability or liability insurance through cost overruns, higher contract prices or a greater cost in later equipment, thereby undermining governmental immunity. This "pass-through" rationale has been attacked on several bases.

The dissent in McKay criticized the economic soundness of the "pass-through" rationale. The opinion rejected the use of Feres and Stencil as a basis for protecting a government contractor from liability, since both the Feres and Stencil decisions concerned government liability and not contractor liability. The dissent also noted that the Stencil opinion included an implied recognition that contractor liability was permissible. Finally, the McKay dissent found the "pass-through" rationale economically unsound since it ignored the reality of the competitive bidding process where contractors with good safety records offered the lowest cost.

The Shaw opinion expounded on the idea that the "pass-through" rationale belied sound economic principles. First, the court argued that competition deters contractors with defective designs from passing costs along, since the competitive bidding process weeds them out. Second, the court reasoned that the absence of the defense would deter defective design be-

162. Id. at 456-57 (Alarcon, J., dissenting).
163. Id. at 457-58 (Alarcon, J., dissenting).
164. Id. This last argument falters, however, when equipment is purchased through sole source contracting.
166. Id. (citing McKay, 704 F.2d at 457 (Alarcon, J., dissenting)). But cf. supra note 164.
cause accidents cost more than liability insurance. Shaw also relied on a footnote in the Supreme Court's opinion of United States v. Shearer that suggested that "pass-through" arguments are no longer controlling under the Feres-Stencel doctrine. These recent attacks on the extension of Feres-Stencel immunity are underscored by the rhetorical question of whether a justification exists for passing the cost of manufacturing defects along to the tax payers, while the cost of design defects falls upon "a few unfortunate, innocent, randomly selected victims."169

The McKay dissent and the court in Shaw reject the use of the "pass-through" rationale as a legitimate justification of the government contractor defense. But the arguments that competition deters defective design assumes an element of negligence, thereby ignoring the fact that many of the suits brought against military contractors are based upon strict liability.170 Regardless, the justification for the government contractor defense appears to have lost its validity in light of recent decisions that discredit the "pass-through" rationale as a justification for the government contractor defense.171

C. Separation of Powers

The circuits that have addressed the government contractor defense agree that a primary concern underlying the defense is a desire to permit the military to make decisions concerning the risk of a design, free from judicial interference.172 Courts rely on the constitutional doctrine of separation of powers in opinions giving deference to military decisions.173 In addition, some courts attempt to support the separation of powers rationale with additional arguments such as (1) the suggestion that limits exist to the judiciary's

167. Id. at 742.
168. Id. (citing United States v. Shearer, 105 S. Ct. 3039, 3043 n.4 (1985)). In Shearer, the Supreme Court concluded a discussion on separation of powers concerns in the context of the Feres-Stencel doctrine by noting that other factors mentioned in Stencel were present in the Shearer facts, even though those considerations were no longer controlling. Id. at 3043.
169. Johnston v. United States, 568 F. Supp. 351, 357 (D. Kan. 1983). The court questioned: "[o]n what principled ground, then, could it be justified that the cost of manufacturing defects will be passed along, through higher contract prices to the government, to all of us who are taxpayers, while the design defect tax will fall only on a few unfortunate, innocent, randomly selected victims?" Id.
170. See generally Note, supra note 13, at 1061.
171. Shaw, 778 F.2d at 741-42.
173. See supra note 172.
omnicompetence and (2) the fear that judicial inquiry will undercut military discipline.\textsuperscript{174}

1. Military Decisions

The idea that the government contractor defense derives support from the constitutional doctrine of separation of powers was first expressed in the \textit{Agent Orange} case.\textsuperscript{175} In an often quoted footnote, that court determined it was inappropriate for the judiciary to review military decisions regarding cost, time for production, or risks to participants and third parties.\textsuperscript{176}

Subsequent decisions unanimously agreed that military decisions should be free from civilian court review.\textsuperscript{177} In \textit{Tozer}, the Fourth Circuit concluded that the important decisions of defense could not rationally be left to the least accountable branch of government.\textsuperscript{178} In addition to the requirements of the Constitution, the courts have cited the judiciary’s lack of omnicompetence in the area of military matters as an additional reason for prohibiting judicial second-guessing of military decisions.\textsuperscript{179}

This consensus of opinion has resulted in various attempts to establish a standard for the government contractor defense that does not require a second-guessing of military decisions.\textsuperscript{180} In proposing various formulations of the defense, courts make every effort to avoid judging the quality of a design decision and instead seek a standard of proof that permits the defense when it is demonstrated that the military made the decision.\textsuperscript{181} Some commentators suggest that where a manufacturer exercises discretion concerning design specifications, by implication, the military made no decision on the ultimate design.\textsuperscript{182} Such a suggestion belies the “back-and-forth” reality of government contracts recognized in the \textit{Koutsoubos} case.\textsuperscript{183} Instead, the en-

\textsuperscript{174} McKay, 704 F.2d at 449, cited in Koutsoubos, 755 F.2d at 354; Tozer, 792 F.2d at 405-07; Bynum, 770 F.2d at 562; Tillett, 756 F.2d at 597). \textit{But cf. Shaw}, 778 F.2d at 742-43.

\textsuperscript{175} \textit{Agent Orange II}, 534 F. Supp. at 1054 n.1.

\textsuperscript{176} The court stated: “[c]onsiderations 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.” \textit{Id.}

\textsuperscript{177} \textit{Tozer}, 792 F.2d at 405-06; \textit{Shaw}, 778 F.2d at 742-43; \textit{Bynum}, 770 F.2d at 562-63; \textit{Tillett}, 756 F.2d at 597; \textit{Koutsoubos}, 755 F.2d at 354; \textit{McKay}, 704 F.2d at 449.

\textsuperscript{178} \textit{Tozer}, 792 F.2d at 405.

\textsuperscript{179} \textit{McKay}, 704 F.2d at 449, cited in Koutsoubos, 755 F.2d at 354; \textit{Bynum}, 770 F.2d at 565.

\textsuperscript{180} \textit{See generally Shaw}, 778 F.2d 736 (11th Cir. 1985); \textit{McKay}, 704 F.2d 444 (9th Cir. 1983); \textit{Agent Orange II}, 534 F. Supp. 1046 (E.D.N.Y. 1982).

\textsuperscript{181} See, e.g., \textit{Shaw}, 778 F.2d at 743-44.

\textsuperscript{182} See Miller, supra note 157, at 65-66.

\textsuperscript{183} \textit{Koutsoubos}, 755 F.2d at 355.
vironment of government contracts often requires design specification decisions by both the contractor and the government. Unlike private contracts, where the parties negotiate as equals, in government contracts, the government always retains the power of final decision for design specifications. Thus, regardless of the amount of contractor participation in the design process, ultimate responsibility should not rest with the contractor if the government approved design changes.

This analysis of the discretion standard bodes well for the McKay formulation of the government contractor defense. The first element of the McKay standard requires a contractor to prove that the government either provided the specifications or approved specifications provided by the contractor through a process involving more than a mere rubber stamp. This standard of proof remains in sharp contrast to the Shaw formulation of the defense where the court required a showing that the government participated in the defective design. The Shaw requirement compels an evaluation of a military decision and thus, fails to achieve the goal of the separation of powers concerns raised by the defense.

2. Military Discipline

Circuits disagree on the issue of whether the military discipline strand of the separation of powers rationale should affect a government contractor defense. As stated in its earliest formulation, the issue involves “the degree of fault . . . on the part of the Government’s agents” and its effect on the

184. Id.
185. Id.
186. The Ninth Circuit maintained that it lacked the information and facts to determine whether the government had made a conscious decision regarding approval of the contractor’s design specifications. Thus, the McKay court remanded the case for trial on the question of whether the government approved Rockwell’s reasonably detailed design specifications “by examining and agreeing to a detailed description of the workings of the system.” McKay, 704 F.2d at 453.
187. Where a contractor participates in design decisions, under the Shaw formulation, the contractor must prove that the government’s decision was paramount or that the government’s decision was made in light of all reasonably known risks. Shaw, 778 F.2d at 746.
188. Tozer, 792 F.2d at 406-07.
189. In McKay, the court quoted Stencel. The McKay and Stencel courts both noted that trials concerning design defects would necessarily “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.” Stencel v. Aero Eng’g Corp. v. United States, 431 U.S. 666, 673 (1977); McKay, 704 F.2d at 449. In contrast, the Shaw court quoted Cole v. United States, stating that “the danger of interfering with discipline in military contractor cases ‘is too remote to be accorded significant weight when the decision only indirectly involves military orders or practices concerning active duty soldiers.’” Shaw, 778 F.2d at 743; Cole, 755 F.2d 873, 879 (11th Cir. 1985).
safety of servicemen.\textsuperscript{190} The \textit{McKay} court recognized that trials concerning design defects in military equipment might often involve a second-guessing of military orders and may include the testimony of servicemen concerning the decisions and actions of their superiors.\textsuperscript{191}

The Eleventh Circuit strongly disagreed with the \textit{McKay} court.\textsuperscript{192} The \textit{Shaw} court noted that the \textit{Stencel} rationale relied on two concerns: (1) the idea that a civilian court might have to review the order of a superior officer; and (2) the fear that a soldier might have to testify against his superior.\textsuperscript{193} The \textit{Shaw} court concluded that neither of these concerns existed in a government contractor suit, and therefore, the risk of interfering with military discipline represented a possibility too remote for consideration in the context of the government contractor defense.\textsuperscript{194}

The \textit{Shaw} decision ignores the weight of judicial precedent. The Supreme Court first noted the potential for interfering with military discipline in the context of a military contractor suit in its decision in \textit{Stencel}.\textsuperscript{195} The Court determined that cases concerning servicemen injuries necessarily affected military discipline. This view has since been adopted by virtually every court that has considered the rationale for the government contractor defense.\textsuperscript{196}

The \textit{Shaw} decision also ignores the realistic effect of inquiries concerning defective design. First, where a contractor and the military work together in a government contract, it is impossible to contend that defective contractor design existed without criticizing a military decision.\textsuperscript{197} Second, the \textit{Shaw} opinion ignores the implications of its own formulation of the government contractor defense in this regard. Under the \textit{Shaw} test, the contractor's success in proving the defense requires a plaintiff to prove that the military did not make reasoned and informed decisions.\textsuperscript{198} Thus, to prove the affirmative

\begin{itemize}
\item \textsuperscript{190} \textit{Stencel}, 431 U.S. at 673.
\item \textsuperscript{191} \textit{McKay}, 704 F.2d at 449.
\item \textsuperscript{192} \textit{Shaw}, 778 F.2d at 743.
\item \textsuperscript{193} \textit{Id.} at 742 (construing United States v. Brown, 348 U.S. 110 (1954)).
\item \textsuperscript{194} \textit{Shaw}, 778 F.2d at 742-43.
\item \textsuperscript{195} \textit{Stencel}, 431 U.S. at 673.
\item \textsuperscript{196} Tozer v. LTV Corp., 792 F.2d 403, 406 (4th Cir. 1986); Bynum v. FMC Corp., 770 F.2d 556, 562 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); \textit{McKay}, 704 F.2d at 449. \textit{But cf. Shaw}, 778 F.2d at 742-743. Even Justice Marshall, the sole dissenter in \textit{Stencel}, appears to have altered his opinion since that decision. Originally, Justice Marshall asserted that the problem of undercutting military discipline did not arise in the context of government contractor suits. \textit{Stencel}, 431 U.S. at 676 (Marshall, J., dissenting). In \textit{Shearer}, however, the Court based part of its decision on the idea that the \textit{Feres-Stencel} doctrine protected against undercutting military discipline. United States v. \textit{Shearer}, 105 S. Ct. 3039, 3044 (1985). Justice Marshall concurred in that portion of the opinion. \textit{Id}.
\item \textsuperscript{197} \textit{Tozer}, 792 F.2d at 406.
\item \textsuperscript{198} See supra note 187.
\end{itemize}
defense, the contractor must present evidence and require the court to re-
view the decisions of military officials presumably through testimony by ser-
vicemen against their superior officers. Contrary to the court's assertion that
interference with military discipline remains too remote in government con-
tractor defense cases, decisions applying the Shaw standard carry necessary
implications for military discipline where the contractor asserts the defense.199

The McKay standard avoids such interference with military discipline by
requiring an easier standard for contractors to prove. Under the McKay
formulation, a contractor need only prove government establishment of
specifications or government approval of contractor specifications. Such a
judicial inquiry eliminates the evaluation of a military decision that might
arise under an application of the Shaw standard.200

D. Innovation and Cooperation

One of the least developed rationales for the government contractor de-
fense rests on the idea that absence of the defense would discourage military
contractors from bidding on essential military projects.201 As the product of
research and development that pushes technology towards its limit, military
equipment is distinctively different than the ordinary consumer products
normally involved in product liability suits.202 The production of military
equipment represents a much greater risk of liability, and sometimes limitless exposure.203

The Shaw court confused the cooperation rationale with the idea of mili-
tary risk-taking, thereby glossing over any real consideration of military

199. The more realistic analysis was summarized in the Tozer decision, where the court stated:

The fact that the challenge here does not involve Tozer's immediate commanding
officer or relate to matters of personal discipline is irrelevant. Military contractors
ordinarily work so closely with the military . . . that it is nearly impossible to contend
that the contractor defectively designed a piece of equipment without actively criti-
cizing a military decision. Civilian scrutiny of such decisions is generally exerted
through executive and legislative oversight on behalf of the public at large, not, as
here, through the judiciary at the behest of an individual serviceman.

Tozer, 792 F.2d at 406. See H.R. 4765, 99th Cong., 2d Sess., 132 CONG. REC. H2482 (daily
ed. May 7, 1986); S. 2441, 99th Cong., 2d Sess., 132 CONG. REC. S5851, S5811 (daily ed. May
13, 1986); see also Brief for the United States as Amicus Curiae at 10-15, Grumman Aerospace

200. See supra note 187.

201. Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985); McKay v. Rockwell Int'l


203. Note, Liability of a Manufacturer, supra note 6, at 1067-68.
The court asserted that concerns of military risk-taking are included in considerations of separation of power and concluded that the “risky technology” argument merely restated the military decision rationale.

Instead of focusing on military decisions that take a risk in a particular design or piece of equipment, most courts support the government contractor defense relying on (1) a distinction between military products and consumer products; (2) the inherent risks involved in the former; and (3) military and consumer products relation to strict liability standards. Because the development of military equipment often requires the design and production of new and technically complex products through contractor participation, it does not seem fair to hold the contractor solely liable for accidents that result from a “no-fault” pushing of technology to the limit.

The Tozer court developed the cooperation line of thought by specifically recognizing that in order for military technology to continue its advancement, the government must continue to rely on the uninhibited assistance of the military contractors.

The McKay court recognized that the government contractor defense encouraged cooperation by providing “incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment.” In Koutsoubos, the court expanded the cooperation rationale by noting that “[t]he contractor and the military pool their expertise, matching the latest advances in military technology with the specific dictates of the mission.” These statements recognize the reality of government contracts as a “back-and-forth” relationship between the military and the contractor.

The Koutsoubos court specifically recognized that the cooperation rationale supported the approval standard of the government contractor defense. Except for the brief statement in Shaw, no other court has

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204. The Shaw court confused manufacturer risk-taking with governmental risk-taking and stated that such a consideration was covered by the separation of powers considerations. Shaw, 778 F.2d at 743.
205. Id.
206. See generally Tobak, supra note 38.
207. Tozer, 792 F.2d at 407.
208. Id.
209. McKay, 704 F.2d at 450.
211. Tozer, 792 F.2d at 407.
212. Koutsoubos, 755 F.2d at 355.
213. Shaw, 778 F.2d at 743.
criticized the justification of encouraging innovation and participation. Thus, the goal advanced by the McKay formulation still remains legitimate.

IV. CONCLUSION

The six circuits that have addressed the government contractor defense recognize its existence. The Fourth, Fifth, Seventh and Ninth Circuits adopt the McKay formulation of the government contractor defense that allows military contractors to escape liability for defective design specifications prepared by the contractor but approved by the government. The Third Circuit interpreted this latter standard as requiring an actual decision by the military, rather than a mere rubber stamp approval.

In contrast, the Eleventh Circuit formulated a different rule and a separate line of reasoning. The Shaw decision effectively rebutted portions of the "pass-through" rationale and arguments that justified the defense on issues of fairness. In addition, the opinion offered a new formulation of the defense that presumes liability for the contractor for any discretion in design specifications. For a contractor to effectively avoid liability, the court required proof that the government's participation was greater and resulted in the defective design. Yet, these requirements of proof tend to undercut the very separation of powers issues that the Shaw court used to justify its formulation. In addition, the Shaw formulation of the defense appears to have serious implications for military discipline, notwithstanding the court's statement to the contrary.

On balance, the McKay formulation of the defense protects both the military discipline and military decision strands of the separation of powers rationale. In addition to protecting the legitimate interests of the government and the contractor in the area of separation of powers, the McKay formulation of the government contractor defense fosters innovation in military design and improved cooperation between military contractors and the military. Since the Shaw formulation of the defense fails to achieve these latter goals, public policy considerations appear to dictate the adoption of the holding in McKay.

R. Todd Johnson