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De-Coupling the Military/Industrial Complex - The Liability of Weapons Makers for Injuries to Servicemen

Barry Kellman
Cleveland-Marshall College of Law

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DE-COUPLING THE MILITARY/INDUSTRIAL COMPLEX— THE LIABILITY OF WEAPONS MAKERS FOR INJURIES TO SERVICEMEN

BARRY KELLMAN*

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* Professor of Law, Cleveland State University College of Law. B.A., University of Chicago; J.D., Yale University. The author would like to acknowledge the contribution of Karen Khan of the Cleveland-Marshall College of Law in the difficult task of researching and organizing the information and ideas contained herein.

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I. INTRODUCTION

This Article is about the military contractor defense—the legal doctrine which insulates weapons makers from liability to servicemen for injuries caused by defectively designed weapons. The military contractor defense is currently before the Supreme Court.[1] In resolving this issue which has occupied so much attention in the lower courts,[2] the

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[1] Boyle v. United Technologies Corp., 792 F.2d 413 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987).

[2] *In re* "Agent Orange" Prod. Liab. Litig., MDL NO. 381, (2d Cir. Apr. 21, 1987); Boyle v. United Technologies Corp., 792 F.2d 413 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987); Dowd v. Textron, Inc., 792 F.2d 409 (4th Cir. 1986); Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); *In re* Air Crash Disaster at Mannheim, Germany on Sept. 11, 1982, 769 F.2d 115 (3d Cir.), *cert. denied*, 465 U.S. 1067 (1985); Koutsoubos v. Boeing Vertol, 755 F.2d 352 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985); Brown v. Caterpillar Tractor Co., 741 F.2d 656 (3d Cir. 1984) (*Brown II*); *In re* Diamond Shamrock Chem. Co., 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982) (*Brown I*); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1982), *cert. denied*, 464 U.S. 1043 (1984); Vasing v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981); Challoner v. Day & Zimmerman, Inc., 512 F.2d 77 (5th Cir.), *vacated on other grounds*, 423 U.S. 3 (1975); Foster v. Day & Zimmerman, Inc., 592 F.2d 867 (8th Cir. 1974); Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969); Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961); Ramey v. Martin-Baker Aircraft Co., 656 F. Supp. 984 (D. Md. 1987); Church v. Martin-Baker Aircraft Co., 643 F. Supp. 499 (E.D. Mo. 1986); Trevino v. General Dynamics Corp., 626 F. Supp. 1330 (E.D. Tex. 1986); *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296 (E.D.N.Y. 1985); Price v. Tempo, Inc., 603 F. Supp. 1359 (E.D. Pa. 1985); *In re* General Dynamics Asbestos Cases, 602 F. Supp. 497 (D. Conn. 1984); *In re* All Maine Asbestos Litigation, 575 F. Supp. 1375 (D. Me. 1983); Johnston v. United States, 568 F. Supp. 351 (D. Kan. 1983); Plas v. Raymark Indus., Inc., No. C-78-946 (N.D. Ohio May 3, 1983);

Supreme Court will add its unique perspective to the national debate on issues of accountability for military policy. This Article suggests that the military contractor defense raises critical issues of law which need to be carefully addressed.

How should the United States make weapons, by whom, and under what authority? The United States entrusts a private weapons industry to equip its supreme military force, necessitated by the realities of modern geopolitics. What is the legal relationship between the military and its suppliers? What is the proper role for the legal system? For a constitutional democracy to sustain the status of world superpower presents difficult problems regarding the propriety of judicial scrutiny of issues potentially impacting on weapons procurement. These questions are as old as the Republic although the technological leap since 1945 has altered the nature of the debate.

The military contractor defense has generated a considerable quantity of academic discussion.[3] This Article does not intend to review that

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Raybestos-Manhattan, Inc. v. United States, No. 79-0382 (D. Haw. Oct. 20, 1983); *In re* "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied*, 104 S. Ct. 1417 (1984); *In re* Related Asbestos Cases, 543 F. Supp. 1142 (N.D. Cal. 1982); Jenkins v. Whittaker Corp., 551 F. Supp. 10 (D. Haw. 1982); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965); Nobriga v. Johns-Manville Sales Corp., No. 55624 (Haw. Cir. Ct. May 24, 1982); Valeri v. Johns-Manville Sales Corp., No. 82-2686, (D. N.J. Dec. 11, 1985); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

[3] *See generally* P. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986); Ausness, *Surrogate Immunity: The Government Contract Defense and Products Liability*, 47 OHIO ST. L. J. 985 (1986); Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U.L.J. 383 (1985); Chapman, *Government Contractor Defense Revisited*, TRIAL LAW. GUIDE 30 (1986); Geldon, *New Developments in Government Contract Litigation*, 32 PRAC. LAW 67 (1986); Polinsky, *Product Liability and the United States Government Contractor*, 14 PUB. CONT. L.J. 313 (1984); Scantlebury, *The Government Contract Defense: Alive and Well in the Fourth Circuit*, 22 TORT & INS. L.J. 268 (1987); Sherman, *Agent Orange and Problem of the Indeterminate Plaintiff*, 52 BROOKLYN L. REV. 369 (1986); Tobak, *A Case of Mistaken Liability: The Government Contractor's Liability for Injuries Incurred by Members of the Armed Forces*, 13 PUB. CONT. L. J. 74 (1982); Turner and Sutin, *The Government Contractor Defense: When are Manufacturers of Military Equipment Shielded From Liability For Design Defects?*, 52 J. AIR L. & COM. 397 (1986); Twerski, *With Liberty and Justice For All: An Essay on Agent Orange and Choice of Law*, 52 BROOKLYN L. REV. 341 (1986); Zollers, *Rethinking the Government Contract Defense*, 24 AM. BUS. L. J. 405 (1986); Note, *The Government Contract Defense: Is Sovereign Immunity A Necessary Prerequisite?*, 52 BROOKLYN L. REV. 495 (1986); Note, *In Defense of the Government Contractor Defense*, 36 CATH. U.L. REV. 219 (1986); Note, *The Essence of the Agent Orange Litigation: The Governmental Contractor Defense*, 12 HOFSTRA L. REV. 983 (1984); Note, *The Government Contractor Defense and Manufacturers of Military Equipment*, 21 HOUS. L. REV. 855 (1984); Note, *Government Contractor Defense to Strict Products Liaiblity*, 49 J. AIR. L. & COM. 671 (1984); Note, *The Government Contract Defense: Should Manufacturer Discretion Preclude Its Availability?*, 37 ME. L. REV. 187 (1985); Note, *Tort Remedies For Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L. REV. 601 (1980); Note, *The Government Contractor Defense: Preserving the Government's Discretion-*

discussion; instead, it uses the controversy over the military contractor defense to focus on an abstract, but critically important issue of law: Will weapons manufacturers be recognized as framers of national security policy such that they are entitled to legal status and immunities equivalent to those of the military itself? If the answer to that question is "yes," then in this year of the Constitution's bicentennial, we have indeed sold our birthright to the military/industrial complex.

The courts which have propounded the military contractor defense have cited the need for a close and unscrutinized relationship between the military and weapons makers. This holding, in addition to depriving accident victims of compensation which they would otherwise receive under state tort law, fundamentally misconstrues the weapons procurement process. Exposure of this misconstruction is the purpose of this Article.

It has been asserted that "the judiciary should not be thrust into the position of second-guessing military decisions. . . . [I]nterference by civilian courts with military authority raises both questions about judicial competency in this area and separation of powers" [4]—it is "unseemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government."[5] The heart of the military contractor defense is the proposition that the judiciary cannot and should not decide whether the manufacturer or the military was responsible for the defect because "there can be no question that the design of military equipment is, at bottom, a military decision."[6] Curiously, these propositions are advanced without serious inquiry as to their veracity. Yet, federal appellate courts have cited these assertions to strike down jury verdicts awarded under state product liability law. It is important to emphasize that the military contractor defense is a judicially-developed policy which operates to deny remedies which would otherwise be available by law. Regardless of the

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ary Design Decisions—McKay v. Rockwell International Corp., 57 TEMP. L.Q. 697 (1984); Note, *Schoenborn v. Boeing Co.: The Government Contractor Defense Becomes a 'Windfall' for Military Contractors*, 40 U. MIAMI L. REV. 287 (1985); Note, *Under a Cloak of Olive Drab: Extending the Military Contractor Defense in Tozer v. LTV Corp.*, 48 U. PITT. L. REV. 933 (1987); Note, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L. J. 1077 (1987); Comment, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity After McKay v. Rockwell International Corp.*, 37 BAYLOR L. REV. 181 (1985); Comment, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. REV. 1025 (1982); Comment, *The Government Contract Defense: An Overview*, 27 HOW. L.J. 275 (1984); Comment, *An Interpretation of the Feres Doctrine After West v. United States and In re 'Agent Orange' Product Liability Litigation*, 70 IOWA L. REV. 757 (1985); Comment, *Strict Product Liability Suits for Design Defects in Military Products: All the King's Men; All the King's Privileges?*, 10 U. DAYTON L. REV. 117 (1984).

[4] Bynum v. FMC Corp., 770 F.2d 556, 574-75 (5th Cir. 1985).

[5] Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986).

[6] *Bynum*, 770 F.2d at 569.

merits of the military contractor defense as policy, there is a serious question raised as to the limits of authority of the federal appellate courts to interfere with the operation of state tort law.

Essentially, the military contractor defense shields weapons makers from state product liability law because of fears that operation of that law will cause the judiciary to trespass into the military sphere. Difficult issues revolve around the relationship between the judiciary and the military. Platitudes are easy—homilies of the dire consequences of one institution trespassing onto the other's sphere do not help answer these issues. The doctrine of separation of powers does not hermetically insulate one branch of government from another. "Separation of powers analysis must focus pragmatically on whether the challenged provision actually or potentially interferes with the ability of the affected branch to accomplish its constitutionally assigned functions."[7] It is necessary, therefore, to investigate the extent to which matters of military strategy and procurement may be legally addressable.

This Article suggests that the military contractor defense constitutes a rejection of the judicial role in regulating procurement. This rejection is an unwarranted step in favor of an overgrown military establishment. Court decisions have suggested that the design of a weapon is presumably a policy decision unreviewable in the courts. In fact, a scrutiny of procurement policy shows that the military of the United States has clearly chosen a private market weapons industry with its accumbent advantages and disadvantages in order that that market system, regulated by commercial law, would produce more and better weapons at lower cost. This policy provides that determinations be made assigning responsibility for the design of a weapons system, and these determinations are judicially reviewable. There is little in the process of determining responsibility which in any way implicates the formation or execution of military policy. To the extent that the military contractor defense rests on the proposition that the design of a weapons system is the result of a blurred meshing of manufacturing capabilities with national security needs, the defense denies the efforts of the Department of Defense and the Congress to develop a procurement system embodying strict standards of accountability. The judiciary has a vital role in enforcing that accountability which should not be abdicated.

The theme of this Article is that military policy is something which is factually, theoretically, and legally separate from weapons manufacture. The line of demarcation which separates the military as the protector of national security from the weapons maker as the manufacturer of goods must be judicially understood and underscored; since weapons makers may not decide American military policy, they should not be entitled to

[7] Ameron, Inc. v. U.S. Army Corps of Eng'rs, 787 F.2d 875, 881 (3d Cir. 1986).

the legal deference afforded the military itself. In a democracy, there should be resistance to the possibility that weapons makers are intimately involved in establishing this nation's military policy.[8] There exists some historical apprehension that, if empowered, private weapons makers might initiate and propel military acquisitions in order to advance their pecuniary interests.[9] If it were true, it would be a grievous fault. True or false, it is a possibility which must not receive judicial imprimatur. On the contrary, weapons makers must be held legally accountable to the same degree as any private market participant. Judicial deference is appropriate only for controversies demonstrably falling into the sphere of policy-making.

While the necessity of a private weapons industry has long been undeniable,[10] that necessity is not a justification for denying the responsibility of these manufacturers to be held accountable for the weaponry they produce. Congress and the Executive have demonstrated a commitment to a regulated system of procurement which segregates strategic and policy responsibilities from undue influence by the private economic interests that supply weapons for profit. The weapons industry is not part of the military; its members have no unique responsibility to fashion policy or to make strategic decisions. As the last forty years have witnessed the growth of the most powerful military establishment assembled by humankind, there has been the corresponding onus to use that power in the pursuit of policy democratically decided. Military strength has been sought, but not militarism. A private source of weapons production has developed, but privatization of weapons policy is eschewed.

This Article puts forward the counter-proposition that primary responsibility for the design of most weapons systems, in fact, lies with the contractor. Consider the recent testimony of Brig. Gen. Weiss before the Senate Armed Services Committee:

> Ultimate responsibility for product quality and the assurance that a given company's product conforms to contractual specifications and the statements of work, rest with the prime contrac-

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[8] President Washington warned: "Overgrown military establishments are, under any form of government, inauspicious to liberty, and are to be regarded as particularly hostile to republican liberty." E. MEAD, WASHINGTON, JEFFERSON AND FRANKLIN ON WAR 10 (1913). These sentiments were, of course, echoed by President Eisenhower in his famous Farewell Address to the American People, Jan. 17, 1961, *reprinted in* 44 DEP'T OF STATE BULL. 179-82 (1961): "[I]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist."

[9] *See* S. REP. No. 944, 74th Cong., 2d Sess., pt. 3 (1936).

[10] *See To Increase the Efficiency of the Military Establishment of the United States: Hearings Before the House Comm. on Military Affairs*, 64th Cong., 1st Sess. 498 (1916).

> tor. The government's role is to assure that the contractor's quality system is working and is reliable through periodic system checks, audits and selected physical inspection of products on a preplanned and random basis.
>
> The cornerstone of our quality program is the military specification, MIL-Q-9858A, Quality Program Requirements. . . . The specification emphasizes the importance of contractor actions to establish a timely method of preventing, detecting and correcting discrepancies at the earliest possible time.
>
> . . .
>
> [T]he contractor is responsible for the quality of his product. His responsibility starts with product design, carries through producibility reviews and culminates in the manufacturing process. The government's responsibility is to make sure that the contractor's system is functioning through system checks, and random and selected mandatory inspections and tests of product.[11]

Throughout this Article runs the underlying idea that the private enterprise system of weapons procurement in the United States has afforded large opportunities for personal and economic success in order to provide incentives for efficient and innovative production.[12] In 1985, the Department of Defense placed contracts worth approximately $164 billion, seventy percent of which went to the top one hundred contractors.[13] The beneficiaries now claiming the military contractor defense seek to have it both ways: the pecuniary benefits of the free market with the legal privileges of being part of the military establishment. This claim confuses military contractors with the duly authorized decision-makers in the Department of Defense and the White House. If commercial interests are immune from accountability under law because of the judiciary's misconception that weapons makers can and should guide military policy, then democratic control over the most critical matters of national governance is jeopardized.

This Article contains two Parts. Part One presents the military contrac-

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[11] *Task Force on Selected Defense Procurement Matters: Hearings Before the Senate Armed Services Committee* 98th Cong., 2d Sess., 11-12 (1984) (statement of Brig. Gen. Bernard L. Weiss, Director Contracting and Manufacturing Policy, Headquarters, United States Air Force).

[12] The Department of Defense is the largest single purchaser of goods and services in the nation. Each year it enters into 15 million contracts, about 52,000 per day. The Department of Defense annually conducts business with some 60,000 prime contractors and hundreds of thousands of other suppliers and subcontractors. Korb, *The Defense Budget*, in AMERICAN DEFENSE ANNUAL 1986-1987, at 41 (1986).

[13] PRESIDENT'S BLUE RIBBON COMM. ON DEFENSE MANAGEMENT, CONDUCT AND ACCOUNTABILITY 1 (Comm. Print 1986).

tor defense in its current doctrinal form and concludes that the military contractor defense can rest only upon a judicial refusal in the name of separation of powers to scrutinize the responsibility for a weapon's design. Part Two examines the United States' procurement system and concludes that determinations of responsibility and accountability subject to judicial review are critical to the nation's reliance on the private market for weapons.

II. PART ONE: UNDERSTANDING THE MILITARY CONTRACTOR DEFENSE

A. *Establishing the Prima Facie Case*

1. The Accident

The following allegations are increasingly the subject of federal litigation: a serviceman died or was injured when the equipment s/he was using malfunctioned (typically the pilot of an aircraft died in a crash). None of these suits concern combat injuries—in every case the accident occurred in training or testing. In many cases, neither the victim nor the equipment is ever found.

A subsequent military investigation determines that an equipment defect, rather than user or maintenance error, was the cause of the accident. Survivors, if any, and witnesses are interviewed, logbooks and records are examined, and simulated tests of various possible breakdowns are performed. Most important in some cases may be a process of elimination whereby possibly reasonable causes may be tested and rejected, leaving only one potential cause. Based on all of the information gathered in the investigation, an Official Report of Investigation is prepared. In most of the cases discussed herein, the Report pointed to equipment failure as the cause of the accident.

The injured serviceman or a representative of his estate then files suit against the corporation which designed and manufactured the weapon in question. Unfortunately, such suits have become more frequent in recent years. Typically, the plaintiff tries to show that the manufacturer should have designed the weapon in a manner which would have avoided the accident or that it should have warned of the risk. Claims of negligence—that the manufacturer failed to exercise due care in designing the weapon so that it was reasonably safe for the purposes for which it was intended—are often made. In every case, a claim of strict liability is made, alleging that the product was in a defective condition unreasonably dangerous to the user at the time of sale.[14] In fact, claims of negligence and strict liability in servicemen suits alleging defectively designed weapons are

[14] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

very similar: in regard to each claim, the plaintiff must prove that design of the weapon was unreasonably dangerous at the time it left the control of the defendant/manufacturer and that that design defect caused the injury.[15] Somewhat distinct but related is a claim that the manufacturer knew of risks associated with its product and failed to warn the military of those risks. In such event, the burden of showing an unreasonably dangerous design is lessened if it is factually demonstrable that whatever danger was threatened by the design was kept secret from the military.

Proving a defect need not be done by direct or conclusive evidence. The accident itself is evidence of a defect, especially if other rational explanations are eliminated. Thus, where hand grenades prematurely explode, the liability of the manufacturer has gone to the jury even without direct evidence of a defect.[16] There is an obvious yet important point which is asserted in these decisions: weapons are inherently lethal. Like good whiskey,[17] weapons are not unreasonably dangerous simply because they are destructively employed. Mere danger or potential for harm does not translate into unreasonable danger unless the danger is unanticipated by the user. A hand grenade is not unreasonably dangerous because it explodes; it is unreasonably dangerous when it explodes prematurely.

A contention has often been raised in strict liability litigation involving weapons that the design is state of the art at the cutting edge of technology. Strict liability law has long recognized that the standard of *unreasonably dangerous* must consider the risks inherent in forging new capabilities. The obvious need for constant innovation in the production of weapons means that the existence of a risk of accident does not render the product in violation of that standard. However, just because a piece of equipment is a weapon does not necessarily mean that it is on the cutting edge of technology, nor does it mean that the particular device that was defective was itself innovative. This is a question of fact, considerably significant to the resolution of the dispute because the legal standard—unreasonably dangerous in the context for which it was made and to be used—must consider the military's acceptance of the risks of innovation only when, in fact, it was innovative technology that caused the accident. Only in one of the many recent disputes (*Agent Orange*) has a serious factual issue been raised that the defect which caused the accident was itself on the cutting edge of technology. Merely because the defect was in a weapon has not suggested in most cases any reason for relaxing strict liability law.

The most important question facing the finder of fact is proximate cause. The plaintiff has the burden of proving that the defect caused his

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[15] L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 3.03[4] [f] [iv] (1960).

[16] Challoner v. Day & Zimmerman, Inc., 512 F.2d 77 (5th Cir.), *vacated on other grounds*, 423 U.S. 3 (1975); Foster v. Day & Zimmerman, Inc., 592 F.2d 867 (8th Cir. 1974).

[17] *See* RESTATEMENT (SECOND) OF TORTS § 402(a) comment i (1965).

injury. The law permits a causal link to a design defect to be found when injury follows either from a technical flaw in the design or from the failure of the design to provide for safety or redundancy in the event of an accident. The manufacturer is not an insurer against all accidents, but it must produce weaponry designed to state of the art specifications in light of its expertise and the weapon's intended use. Even where the military is accused of having made faulty repairs on the weapon, thus interjecting an unforeseeable and intervening negligent act, liability may be imposed on the manufacturer where such military negligence is slight.[18] By the same logic, the manufacturer is not excused from liability by arguing that it had merely assembled parts from its suppliers—the assembler of components defectively produced by other manufacturers is subject to liability as though it was the manufacturer of the component.[19] Certainly, the failure of a manufacturer carefully to inspect the final product may be the proximate cause of the accident if a reasonable inspection would have disclosed the defect.[20]

2. Legal Responsibility for the Design Defect

Assuming that the cause in fact of a serviceman's injury was a design defect, the question remains as to who is responsible for that defect. Often this responsibility is addressed contractually—the procurement contract provides that responsibility for design rests with the manufacturer. Such contractual provisions only address the mutual obligations of the manufacturer and the military without determining the tort liability of the manufacturer to the injured serviceman. In tort actions, the injured plaintiff still must prove that the defendant/manufacturer breached its legal responsibility. This burden may be complicated by the unique nature of military procurement.

Initially, the manufacturer may argue that the military stood between it and the serviceman and thereby intervened in the chain of causation such that the manufacturer was not responsible for the accident. The manufacturer may argue that while the design was its own, it had to submit the final design decision to the military for approval and review. Furthermore, once submitted, the design may have been incorrectly or negligently used or maintained and this improper use by the military intervened as a cause of the accident. Thus, a recurring question has involved the liability of a manufacturer for a design defect where the government has inspected the weapon at the government's own facilities.

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[18] Vasina v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981).

[19] Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1969).

[20] Guarnieri v. Kewanee Ross Corp., 263 F.2d 413 (2d Cir.) *modified* 270 F.2d 575 (2d Cir. 1959); Sieracki v. Seas Shipping Co., 57 F. Supp. 724 (E.D. Pa. 1944), *aff'd in part, rev'd in part*, 149 F.2d 98 (3rd Cir. 1945), *aff'd*, 328 U.S. 85 (1946).

The courts have repeatedly held that government negligence in inspecting a weapon will not relieve the manufacturer of liability for a design defect since the inspection is generally intended only to assure performance of the work and not to create a duty of care on the military's part.[21]

Certainly, where the manufacturer introduces a flaw in the equipment and where the cause of the accident can be factually traced to that flaw which rendered the design unreasonably dangerous, then a prima facie case against the manufacturer can generally be made. The difficult problem appearing in many of the recent disputes concerns design defects of omission—claims that while the accident was not in fact caused by a design defect, the design was defective for failing to provide a means of protecting against such contingencies or in building in redundancy such that if one aspect of the equipment fails it is not catastrophic. This is the crux of two cases which frame both sides of the current litigation: *Tozer v. LTV Corp.*[22] and *Shaw v. Grumman Aerospace Corp.*[23]

Failure to design defensively against foreseeable accidents may be grounds for imposing strict liability. Even under strict liability, however, not all accidents are foreseeable. At the opposite end of the spectrum, some accidents are so foreseeable (indeed, they have happened before) that it may be presumed that the buyer has assumed the risk. The point here is that even where an aspect of the design is *unreasonably dangerous* and where that aspect (defect) *causes* injury, a prima facie case under strict liability may be made only against the party who had a legal duty to act in such a way as to prevent the accident. The finder of fact must determine, therefore, whether the military or the private manufacturer bears responsibility for the absence of redundancy in the design of a weapon that was thereby rendered unreasonably dangerous. In the context of weapons procurement, where the equipment inevitably passes through the unique hands of the military, the failure to include redundant safety devices may not be a manufacturer's responsibility.

The military may have rejected an offer to build redundancy into the design. Perhaps redundant safety equipment would have been expensive, or perhaps it would have reduced some aspect of the weapon's performance. In some cases, a manufacturer's warnings of possible accident have been rejected by military officials. While it may be unreasonable to consider that the military might choose broken technology, it is conceivable that the military might choose to eliminate redundancy for fiscal or performance reasons. The point here is that while a defect of commission

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[21] Harris v. Pettibone Corp., 488 F. Supp. 1129 (E.D. Tenn. 1980). *See also* Boeing Airplane Co., 291 F.2d 310.

[22] 792 F.2d 403 (4th Cir. 1986) (failure to fasten panel with redundant camlocks was negligent).

[23] 778 F.2d 736 (11th Cir. 1985) (failure to provide redundancy in longitudinal flight control system was negligent).

can usually be traced to an overt decision by either the military or the manufacturer responsible for the design, a defect of omission may be more difficult to ascribe. The following considerations may be relevant to the inquiry: (1) the relative technical knowledge and expertise of the military and the manufacturer; (2) whether the selection of the manufacturer came before or after the selection of the design; (3) whether redundant safety design was customary for the technology in view of its intended use; and (4) if similar accidents previously occurred, whether the military chose to maintain the design or to fix it itself or to require that the manufacturer fix the design.

Arguably, these questions interject the fact finder into the realm of decision-making of weapons design in a manner without analogy in strict liability litigation over commercial goods. While these matters may be no more technologically complex than other controversies routinely litigated, a challenge has been directed against the propriety of legal inquiry into military procurement. The basis of this challenge is that to permit the plaintiff to establish a prima facie case of liability for a design defect in a weapon would thrust the judiciary into the position of overseeing procurement decisions. Since this position is arguably inappropriate, defendant/manufacturers should not be held liable and such litigation should not be heard.

Properly understood, this challenge does not refute the prima facie case: the accident was in fact caused by a design defect which was in fact the result of an act of the defendant. Rather, this challenge asserts that even if the prima facie case is factually demonstrable, there are supervening reasons why such litigation should be barred. This challenge thus operates as an affirmative defense—where defendant can demonstrate that the necessary conditions exist, the defendant is immune from liability regardless of the merits of the plaintiff's tort claim. Hereinafter, this challenge is referred to as the military contractor defense.

B. Establishing the Military Contractor Defense

The military contractor defense exempts a weapons maker from liability for servicemen's injuries caused by its product. If the product was provided to the military and if the defect was in the design specified by the military, the manufacturer asserts the defense to avoid liability. If the cause of injury was a manufacturing defect by the weapons maker, then of course there is no reason to immunize a manufacturer from its traditional liability for defective products. For the defense to stand, the source of harm must be some military-mandated design over which the manufacturer has little or no control.

The military is immune from liability; its determinations of appropriate weapons design are not actionable, even under the limited waiver of

sovereign immunity established by the Federal Tort Claims Act.[24] Accordingly, it may be unfair to hold liable the weapons maker that has provided the good according to the military's specifications. Tort law traditionally places liability on the wrongdoer who caused the harm in order to create incentives to prevent future harm; the manufacturer who properly performs according to military specifications, however, is not in a position to correct the tortious defect.

Besides the unfairness of holding the manufacturer liable for a design defect for which it is not responsible, such imposition of liabililty may ignore the fact that the manufacturer is an agent of the military, acting pursuant to its command. Since the military can compel a manufacturer to produce a weapon for a price,[25] to enquire as to the manufacturer's liability for defective designs would place the judiciary in a position to second-guess military decisions. The procurement of high-performance weapons at the cutting edge of technology that are intended for highly sophisticated military missions demands a close working relationship between industry and government in the design, testing, and manufacture of the desired weapon. Product liability litigation involving judicial evaluation of the competence with which a military decision was made might threaten a substantial intrusion upon military prerogatives as well as a potential burden to the weapons procurement process. The courts have hesitated to set themselves the task of determining how much attention must be given to safety risks by the military—or from whom the military must receive opinions—before a command decision to acquire a product in a given form is respected.

This section portrays the military contractor defense as the product of three propositions: (1) the military is immune from product liability litigation by servicemen; (2) a weapons maker can share that immunity under certain circumstances; (3) the determination of when such circumstances exists may implicate concerns that the judiciary will interfere with the formation of military policy.

1. The Military is Immune from Liability for Deciding to Use a Weapon, Despite its Risk to Servicemen.

Indisputably, the military may not be sued by servicemen for service-related injuries. Still debatable is whether this immunity applies whenever the victim is a serviceman on duty or whether it applies only if matters of military discipline will be challenged in court. In *Feres v. United States*,[26] the widow of a lieutenant killed by fire in his Army

[24] 28 U.S.C. §§ 1346(b), 2674-2680 (1982).
[25] Defense Production Act, 50 U.S.C. §§ 2061-2169 (1982).
[26] 340 U.S. 135 (1940).

quarters in New York was denied the right to pursue her claim. Justice Jackson ruled that since military activities have no analogy in state tort law, the government should not be liable to servicemen in suits that involve such activities. Furthermore, the distinctly federal relationship between the government and military personnel should not be subject to differing state laws according to the place of injury. Finally, the Veterans Benefits Act[27] was enacted as a uniform compensation scheme and should be viewed as the exclusive remedy for injured soldiers. It is ironic that the principle for which *Feres* is currently cited was not asserted in the Court's opinion. That principle is that suits by servicemen would threaten military discipline and empower the courts to interfere with the management of the military. Four years after *Feres*, the Court in *United States v. Brown*,[28] engrafted this onto the *Feres* rationale.

Under what circumstances does this immunity arise? In *Brooks v. United States*,[29] the Court permitted a Federal Tort Claims Act (FTCA) suit by servicemen on leave hit by a government truck negligently driven by a government employee. More recently, in *Chappell v. Wallace*,[30] the Court denied recovery of damages and injunctive relief to five Navy enlisted men who sued their superiors alleging racial discrimination. The Court held that the special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel support denial of relief. The Court has subsequently clarified that the only controlling rationale for the *Feres* doctrine is the need to preserve military discipline.[31] In *United States v. Shearer*,[32] the mother of a serviceman murdered by a fellow soldier (allegedly negligently discharged from military prison) was barred from suit: the claim went directly to the management of the military calling into question basic choices about the discipline, supervision, and control of a serviceman. This language does not suggest that the mere status of the victim as a serviceman bars any and all tort recovery, and the lower courts have not so held.[33]

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[27] 38 U.S.C. §§ 101-5228 (1976).

[28] 348 U.S. 110 (1954).

[29] 337 U.S. 49 (1949).

[30] 462 U.S. 296 (1983).

[31] Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983).

[32] 473 U.S. 52 (1985).

[33] The Ninth Circuit in Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983) permitted the suit of a sergeant injured in an automobile leaving an allegedly negligently-permitted Air Force party. The sergeant was at the party working in his off-duty time as a bartender; no threat to military discipline was implicated by the suit. A number of courts have refused to apply *Feres* to suits brought by veterans alleging that the military failed to warn of dangers caused by having been exposed to a dangerous substance. Broudy v. United States, 661 F.2d 125 (9th Cir. 1981); Schwartz v. United States, 381 F.2d 627 (3d Cir. 1967); Targett v. United States, 551 F. Supp. 1231 (N.D. Cal. 1982); Everett v. United States,

Two recent Supreme Court decisions have reaffirmed the *Feres* bar to suits by servicemen against the government. In *United States v. Johnson*,[34] the Court by a 5-4 majority held that a Coast Guard pilot's widow could not charge Federal Aviation Administration (FAA) controllers with negligence because the *Feres* doctrine "has been applied consistently to bar all suits on behalf of service members against the government based upon service-related industries."[35] The Court found that the three broad rationales underlying *Feres* applied despite the fact that the FAA is a civilian agency: (1) the federal relationship between the government and servicemen; (2) the existence of generous statutory disability and death benefits; and (3) the potential that servicemen's suits against the government could disrupt military discipline.

The applicability of *Feres* was less central to the Supreme Court's decision in *United States v. Stanley*.[36] The Court unanimously ruled that plaintiff's FTCA claim for damages resulting from the alleged administration to him of LSD had been improperly considered by the Court of Appeals since it was not related to the certified order over which the court had jurisdiction. On the very separate question of whether plaintiff could proceed with a claim that a violation of constitutional rights can give rise to a damages action against the offending federal officials even in the absence of a statute authorizing such relief barring special factors counselling hesitation, the Court split 5-4 in favor of dismissing such a claim.

In a very real sense, these decisions interpreting *Feres* are not implicated by the litigation against weapons makers. While it is difficult to dispute that under any interpretation of *Feres* a suit by a serviceman against the military for injuries sustained from a defective weapon must be barred, nothing in *Feres* suggests that a serviceman may not be a plaintiff in a civil lawsuit—the focus is rather on the immunity of the government as a defendant. *Feres* signifies the judicial hesitance in matters of military management and the need for military discipline to be insulated from scrutiny in civil litigation. Whether that barrier also protects weapons makers depends on whether a product liability suit similarly jeopardizes these concerns such that the immunity which has been afforded to the government should be extended to cover private corporations.

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492 F. Supp. 318 (S.D. Ohio 1980). *But see* Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982); Gaspart v. United States, 544 F. Supp. 55 (E.D. La. 1982); Sheehan v. United States, 542 F. Supp. 18 (S.D. Miss. 1982), *aff'd*, 713 F.2d 1097 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984); Sweet v. United States, 528 F. Supp. 1068 (D.S.D. 1981) *aff'd*, 687 F.2d 246 (8th Cir. 1982); Kelly v. United States, 512 F. Supp. 356 (E.D. Pa. 1981).

[34] 107 S.Ct. 2063 (1987).

[35] *Id.* at 2067.

[36] 107 S.Ct. 3054 (1987).

2. A Weapons-Maker is Immune if it Follows the Military's Reasonably Precise Specifications, Unless the Contractor Knew More than the Military About Dangers Inherent in the Weapon's Design.

a. The Contract Specification Defense

Early cases involving public works projects generously immunized contractors who fully complied with government specifications if those specifications were not so obviously defective and dangerous that a competent contractor would not have followed them and if the injury was attributable to a flaw in the specifications. When the government contracts with the private sector to assist it in performing a governmental function, the contractor is merely an instrumentality to carry out that function; the government has deputized the contractor. Thus, in *Yearsley v. W.A. Ross Construction Co.*,[37] the Court held that a Corps of Engineers contractor was immune from liability for diverting the course of the Missouri River so long as the diversion was within the scope of its authority. "[I]t is clear that if 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."[38] Subsequent decisions involving allegations of negligence in the performance of a service for the government have reinforced this defense.[39]

Subsequent decisions involving contracts to supply goods have not been so easily resolved. With the rise of strict liability for products, the fact that the contractor was not negligent may be irrelevant since it is only necessary that the product be defective when it leaves the defendants' control and that the defect be the cause of the injury. In *Challoner v. Day & Zimmerman*,[40] an injured serviceman and the heir/estate of another serviceman sued the manufacturer of a howitzer round which prematurely exploded during combat with the North Vietnamese. Judgment in plaintiffs' favor was upheld despite defendants' contention that the trial judge erred in instructing the jury that it could find the defendants liable if it found that the howitzer shell was defectively designed. Even though the design of the shell was within the exclusive control of the government, the contract specification defense did not bar an action in strict liability since a primary goal of strict liability is to allocate the costs of

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[37] 309 U.S. 18 (1940).

[38] *Id.* at 19.

[39] Meyers v. United States, 323 F.2d 580 (9th Cir. 1963) (work on a federal highway in conformity with the terms of the contract was not subject to liability); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1964) (authority to dredge a channel conferred immunity on the contractor who had complied with the contract requirements).

[40] 512 F.2d 77 (5th Cir. 1975), *vacated and remanded for misapplication of conflict of laws rules*, 423 U.S. 3 (1975).

injuries caused by defective products to manufacturers instead of to the persons injured by the products, including members of the armed forces.

Furthermore, when the controversy involves the supply of goods, a substantial question is raised regarding the manufacturer's duty of care in light of the exception to the defense for specifications which are obviously defective and dangerous. Although the purpose of the defense is to hold the obedient contractor to a lower standard of care than the contractor who has itself drafted the specifications, this defense is not without limits. In *Person v. Cauldwell-Wingate Co.*,[41] Judge Learned Hand held that the trial court correctly instructed the jury that one contractor was liable for defects in the specifications which would have been obvious to an electrical engineer since the contractor employed an electrical engineer, but another contractor was held to a lower standard since he had no engineer in his employ. Thus, the inquiry is whether the design defect should have been obvious to the contractor in light of the contractor's expertise.

The most serious problem in the application of the contract specification defense arises when the manufacturer is granted some discretion as to the details of the product's design or when the contractor has participated in the design of the product. In these cases, the supplier of goods to the government is more like an arms-length bargainer than a deputy carrying out the sovereign's will. Whether the contractor is transacting business with the government as its customer or with its private sector customers, no defense exists if the contractor has discretion in the manner of accomplishing the work. Clearly, when the contract establishes only performance specifications stating the desired outcome and characteristics for the item without specifying the process by which that outcome will be obtained, it is inappropriate for the contract specification defense to bar recovery.[42] More problematic is when the contracting process entails a cooperative effort between the government and a manufacturer before the government ultimately decides on a particular design. From an informal suggestion through compromises during development and testing, the manufacturer can be intimately involved with the government in designing the product. Whether the contract specification defense should be applied in such circumstances was addressed in *O'Keefe v. Boeing Co.*,[43] involving a wrongful death action against the manufacturer of an Air Force B-52 which crashed, allegedly as a result of a defectively designed welded bulkhead. The court recognized that the ultimate responsibility for the design of the B-52 rested with the government—

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[41] 187 F.2d 832 (2d Cir. 1951), *cert. denied*, 341 U.S. 936 (1951).

[42] Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14 (9th Cir. 1961).

[43] 335 F. Supp. 1104 (S.D.N.Y. 1971).

> [T]his fact, in itself, neither exonerates the defendant, nor has it in any way altered the defendant's duty as a manufacturer in this case where there has been no showing that the defendant was totally oblivious of and/or aloof from the genesis of the design specifications in the first place or that the specifications represented either something less than the uppermost level of the art or a compromise of safety.[44]

These decisions which have limited the contract specification defense recognize that a manufacturer may not be negligent in performing according to specifications even if those specifications later cause injuries. It may be reasonable, therefore, to suggest that where the alleged flaw in the design was the result of a conscious choice by the government after balancing all relevant considerations, then the contractor is not at fault. However, where the contractor is negligent in not having perceived an obvious defect, then the defense is effectively forfeited. The defense does not apply whatsoever where, in fact, the contractor is not merely the government's agent but is instead an active participant in the critical design.

b. The Emergence of The Military Contractor Defense

Precisely because of the limited applicability of the contract specification defense, defendants in product liability actions involving weapons have sought a type of immunity from liability for design defects in cases where the military would itself be immune under *Feres*. This military contractor defense, unlike the contract specification defense, permits the contractor to share the military's sovereign immunity. Properly understood, the military contractor defense is far broader than the contract specification defense since it applies to anyone engaged in the design of weaponry regardless of responsibility for defects so long as the manufacturer notified the military of all known risks and correctly manufactured the item. Whereas the contract specification defense was based on the unfairness of holding the obedient contractor liable for defects beyond its control, the military contractor defense is based on a public policy rationale of insulating the weapons procurement process from judicial scrutiny for product liability. For these reasons, the military contractor defense stands separately from the contract specification defense, raises policy considerations not raised by the specification defense, and could fall without jeopardizing the specification defense.

The extension of sovereign immunity to military contractors is a recent invention. Twenty years ago, the judiciary recognized no defense for a manufacturer claiming to be the alter ego of the military. In *Whitaker v.*

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[44] *Id.* at 1124.

Harvell-Kilgore Corp.,[45] the maker of a hand grenade that prematurely exploded injuring plaintiff during combat training was held liable despite the fact that it was operating a government-owned plant, using materials supplied by the government, and that the contract provided for indemnification by the government for losses. Furthermore, the grenade fuses were inspected by the government on the government's X-ray machine operated by government employees. These facts did not, however, justify granting sovereign immunity to the defendant simply because it occupied "a near-symbiotic relationship with the military."[46]

This position began to erode during the mid-1970s under stress from the convergence of two lines of case law. First, the Supreme Court definitively insulated the military from liability for defective weapons by applying *Feres* to a suit brought by a manufacturer. In *Stencel Aero Engineering Corp. v. United States*,[47] the Court considered whether the United States was liable under the FTCA to indemnify a third party for damages paid by it to a member of the Armed Forces. Stencel had supplied North American Rockwell, the prime contractor, with egress life-support systems consisting of ejection seat kits, parachutes, and parachute packs for the F-100 and F-102 aircraft. During testing of the product, failures were discovered by Stencel, indicating that the design of the parachute pack container was faulty. Despite Stencel's urgings that the Air Force change the design of the system, the Air Force refused to allow Stencel to implement its recommended changes. Stencel produced the units which later caused the death of Captain Werner when his parachute malfunctioned after he ejected from his F-102. Werner sued Stencel; Stencel settled for $187,000.[48] The Court ruled that permitting tort recovery against the government would encourage second-guessing of military orders and would require testimony of members of the services as to each other's decisions and actions. By dismissing Stencel's claim for indemnification, the Court essentially rendered Stencel solely liable for having fulfilled its contract according to government-prescribed specifications.[49]

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[45] 418 F.2d 1010 (5th Cir. 1969).

[46] *Accord* Foster v. Day & Zimmerman, Inc., 502 F.2d 867 (8th Cir. 1974) ("The doctrine of sovereign immunity may not be extended to cover the fault of a private corporation.").

[47] 431 U.S. 666 (1977).

[48] Stencel's settlement is somewhat problematic for the development of legal doctrine. Perhaps if Stencel had litigated the case, it would have been exonerated by the contract specification defense. Stencel's suit for indemnification, therefore, appears to be something of an end run around *Feres* with the contractor as the passive intermediary allowing a serviceman to recover for injuries caused by the military's deliberate selection of a dangerous design.

[49] 431 U.S. at 674, n. 8. The Court, in a footnote, denied any unfairness because Stencel "no doubt had sufficient notice so as to take this risk [i.e., being held liable without indemnification by the government] into account in negotiating its contract for the emer-

The second line of cases concerned the proof requirements for the contract specification defense in the unique factual instances involving military procurement. This line begins with *Sanner v. Ford Motor Co.*,[50] where a serviceman injured when thrown from an Army jeep could not recover for the manufacturer's failure to equip the vehicle with seat belts and a roll bar. Ford had designed seat belts to be installed in the jeep, but the Army rejected installation because they were incompatible with the intended use of the vehicle. As in regard to *Stencel*, this dispute may have justified the contract specification defense. The trial court, however, couched its decision in sovereign immunity: "To impose liability on a governmental contractor who strictly complies with the plans and specifications provided to it by the Army in a situation such as this would seriously impair the government's ability to formulate policy and make judgments pursuant to its war powers."[51] The Appellate Division retreated from this language stressing that Ford had no discretion with respect to the safety devices in light of the conscious, intentional determination by the military not to include seat belts. Nevertheless, *Sanner* has been cited for the proposition that sovereign immunity applies to contractors even in cases lacking an express decision by the government against a design change which would have remedied the defect. Thus, in *Casabianca v. Casabianca*,[52] recovery was denied to the civilian victim of an allegedly defective dough mixer built during WWII in accordance with Army specifications for use in field kitchens. Without exhaustive inquiry as to who was responsible for the defect, the New York Supreme Court ruled that a supplier to the military during wartime has a right to rely on specifications; if not, manufacturers may withhold needed equipment from the Armed Forces because they consider the designs to be imprudent or dangerous.

The product of these two lines of cases was that the courts repeatedly held weapons procurement decisions to be beyond judicial scrutiny. These cases may well have been correctly decided on their facts since in each instance the contractor was obedient to the explicit compulsion of military specifications. However, the doctrine enunciated in *Stencel* suggested that a manufacturer may get trapped in an indefensible dilemma while the doctrine enunciated in *Sanner* and *Casabianca* suggested that broader application of the military's immunity could protect the procurement process by insulating the compliant manufac-

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gency eject system at issue here." This suggests that the Court consciously declined to preclude the manufacturer's liability because these manufacturers can set their bid prices to reflect this risk.

[50] 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd* 154 N. J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

[51] *Id.* at 9, 364 A.2d at 47.

[52] 104 Misc.2d 348, 428 N.Y.S.2d 400 (N.Y. Sup. Ct. 1980).

turer so trapped. In this regard, the failure properly to assert the contract specification defense in cases where it arguably may have applied has directly spawned claims of sovereign immunity for military contractors.

c. *Disputes re The Compulsion Requirement*

Operationally, the difference between the contract specification defense and the military contractor defense is whether defendant bears the burden of proving governmental compulsion. Where such compulsion is factually demonstrable there is no independent need to extend sovereign immunity; the military contractor defense is separately significant only where proof of compulsion is absent or ambiguous. Recent cases have thus focused on the question of whether a defense based on sovereign immunity will stand if the military *chose* rather than *ordered* the design subsequently alleged to be defective.

That the current controversy over the military contractor defense stems from the *Agent Orange* litigation bears witness to Justice Holmes admonition that hard cases make bad law. "Agent Orange" refers to herbicides used by the United States as defoliants in the Vietnam War to improve visibility of the enemy and to destroy the enemy's food supply. The manufacture of one of the herbicides generated an extremely toxic byproduct known as dioxin which allegedly was inhaled by servicemen as seventeen million gallons of Agent Orange were sprayed over Vietnam from 1962 to 1971. These servicemen have since complained of birth defects, cancer, immune system dysfunction and other physical disorders as well as symptoms of mental distress such as dizziness and depression. Suit against the manufacturers of Agent Orange led defendants to assert that the government had invented Agent Orange and had compelled its production despite knowledge of its dangers. Further, defendants claimed that they had manufactured Agent Orange in strict compliance with government specifications as they were required to do under the Defense Production Act.[53] According to the plaintiffs, however, the manufacturers owned their plants as well as the raw materials and the final product and were primarily responsible for inspection of the product. Furthermore, every manufacturer was active in the solicitation of military contracts and, according to the Department of Justice, the government never sought or anticipated any contract for Agent Orange until the manufacturers convinced the government of its desirability.[54] Early settlement of the litigation failed to resolve this factual disparity.

Prior to settlement, the court rejected the plaintiffs' argument that the government contract defense required that defendant manufacturers prove that they had no responsibility for formulation of the specifications.

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[53] 50 U.S.C. §§ 2061-2169 (1976).

[54] Nat'l L.J., Sept. 17, 1984, at 1, col. 1.

Instead, the court stated that the defense could be invoked if defendants proved: (1) the government established the specifications for the product; (2) the product complied with the government specifications in all material respects; and (3) the government knew as much as or more than the defendants did about the hazards that accompanied use of the product.[55] Critically important was the substitution of "specifications established by the government" for the compulsion requirement demanded by earlier courts:

> The purpose of a government contract defense in the context of this case is to permit the government to wage war in whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and should be exempt from review by civilian courts. . . . A supplier to the government under specifications established by the government is exempt from liability whether the theory of the claim be negligence or strict products liability.[56]

What is meant by the phrase "specifications established by the government?" How is this requirement substantively different from the compulsion requirement of *Sanner*? Numerous decisions coming on the heels of *Agent Orange* have struggled with these questions and provide a spectrum of opinion. At one pole is *Jenkins v. Whittaker Corp.*,[57] where the court refused to permit defendants to argue to the jury that the unexpected explosion of an atomic simulator did not establish strict liability for the death of a soldier despite defendants' argument that they had followed government specifications. According to the court, *Agent Orange* applied only to weapons manufactured during war; during peacetime, some involvement by the manufacturer in the design of the product was sufficient to deny summary judgment sought on the basis of sovereign immunity. Similarly, in *Johnston v. United States*,[58] the court found the defense inapplicable to the production of an item which was simply an adaptation of an item already sold in private commerce and where the manufacturer has had substantial input into the product's design. Several cases involving claims for asbestos-related injuries have also rejected

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[55] *In re* "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied*, 465 U.S. 1067 (1984).

[56] *Id.* at 1054.

[57] 551 F. Supp. 110 (D. Haw. 1982).

[58] 568 F. Supp. 351 (D. Kan. 1983).

the defense. The court in *In re Related Asbestos Cases*,[59] denied summary judgment sought by defendants sued for having provided asbestos to the Navy. Because government strictures placed on defendants varied during the performance of their contracts, emphasized the court, the degree of compulsion required for the defense was not shown.

A somewhat looser standard was developed by the Third Circuit in a series of decisions in *Brown v. Caterpillar Tractor Co.*[60] Plaintiff member of the Army Reserve was injured when a falling tree crushed the tractor-bulldozer he was operating. Plaintiff did not dispute that defendant made the item pursuant to the military's specifications but claimed that it was defectively designed for lack of a protective device over the passenger seat and for lack of warning of danger to occupants in tree removal operations. In *Brown I*,[61] the court reversed defendants' summary judgment and instructed that while it might be persuaded that a contractor must prove some degree of compulsion in order to successfully raise the defense, under Pennsylvania law the contractor need only establish that it executed the government's specifications carefully. After a jury verdict in favor of the manufacturer, the court in *Brown II*,[62] ruled that the issue in a design defect case is whether the design of the product is or is not that called for by the specifications."[63]

d. McKay

While the defenses approved in *Agent Orange* and *Brown* are ambiguous regarding the compulsion requirement, there is little in these opinions to suggest the leap taken by the Ninth Circuit in *McKay v. Rockwell International Corp.*[64] The court adopted a standard for applying the military contractor defense which is considerably more lenient by permitting a manufacturer to invoke the defense in situations where it selects a defective design and the military merely *approves* it. Widows of two Navy pilots convinced the district court that the cause of their husbands' deaths was the unreasonably dangerous and defective ejection components on their RA-5C jet aircraft. Rockwell was held liable under section 402A of the Second Restatement of Torts for damages in excess of $700,000. The Ninth Circuit, however, expressed concern that such liability would: (1) subvert the *Feres/Stencel* rule, since military suppliers

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[59] 543 F. Supp. 1142 (N.D.Cal. 1982). *See also*, Raybestos-Manhattan, Inc. v. United States, No. 79-0382 (D. Haw. Oct. 20, 1983 (LEXIS, Genfed library, Dist file)); Plas v. Raymark Indus., Inc., No. C-78-946 (N.D. Ohio May 3, 1983 (LEXIS, Genfed library, Dist file)); Nobriga v. Johns-Manville Sales Corp., No. 55624 (Haw. Cir. Ct. May 24, 1982); Hammond v. North Am. Asbestos Corp., 97 Ill. 2d 195, 454 N.E.2d 210 (1983).

[60] 741 F.2d 656 (3d Cir. 1984); 696 F.2d 246 (3d Cir. 1982).

[61] 696 F.2d 246 (3d Cir. 1982).

[62] 741 F.2d 656 (3d Cir. 1984).

[63] *Id.* at 662.

[64] 704 F.2d 444 (9th Cir. 1982), *cert. denied*, 464 U.S. 1043 (1984).

would pass the cost of accidents off to the military through cost overrun or insurance provisions in contracts or through higher prices on later sales; (2) thrust the judiciary into the making of military decisions implicating concerns for military discipline as well as national security; (3) interfere with the military's efforts to push defense technology toward its limits; and (4) encourage fixing the locus of responsibility for design defects with more precision than is possible since manufacturers work closely with military authorities. Consequently, military contractors should be immune from liability except when only minimal or very general requirements are set for the contractor by the United States.

This immunity from liability may be established where: (1) the United States is immune from liability under *Feres* and *Stencel*; (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment; (3) the equipment conformed to those specifications; and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.[65]

The court rejected the need for prices of a weapon to reflect the cost of accidents caused by its use since "[m]eeting adequately the need of national defense, not accident costs, is the ultimate standard by which purchases of military equipment must be measured."[66] Furthermore, since the military has the ability to recognize safety problems and negotiate with suppliers, imposition of liability would "no doubt increase defense costs but would do little not already being done to increase the safety features in military equipment."[67] Third, the Veteran's Benefits Act generously compensates the serviceman or his family, unlike the case of an ordinary consumer injured by a defective product. Finally,

> [M]embers of the armed forces are not ordinary consumers with respect to military equipment. Their "reasonable expectations of safety" are much lower than those of ordinary consumers. They recognize when they join the armed forces that they may be exposed to grave risks of danger, such as having to bail out of a disabled aircraft. This is part of the job. The Nation sometimes demands their very lives. This is an immutable feature of their calling. To regard them as ordinary consumers would demean and dishonor the high station in public esteem to which, because of their exposure to danger, they are justly enriched.[68]

It is difficult to measure the value of public esteem to Lieutenant

[65] *Id.* at 451.
[66] *Id.* at 452.
[67] *Id.*
[68] *Id.* at 453.

McKay's widow. If Rockwell could prove by the preponderance of evidence that "the United States established, or approved, reasonably precise specifications for the ejection system"[69] then the law will not demean Lieutenant McKay's calling by awarding damages. Only if the United States neither set specifications for the system (other than general outlines of what type of system it required) nor approved Rockwell's final reasonably detailed specifications may Rockwell be liable.

Dissenting, Judge Alarcon focused on the fact that "the only specifications which Rockwell adhered to were initially produced by its own design staff."[70] Subsequent military ratification "should not alter Rockwell's primary responsibility for their content and adequacy."[71] Agreeing that servicemen are entitled to high honor and esteem, Judge Alarcon took issue with the majority's description of its source:

> Military personnel are honored and esteemed because they are willing to fight for their country and risk their lives doing so. They are not so respected because they are sometimes forced by their calling to use unsatisfactory or unsafe equipment. It is the Military's, Rockwell's and this court's duty to insure that our servicemen are provided with reliable and safe equipment. Just as the Military can make any parachute packer take one that he has just folded and make him jump with it, the court should require that Rockwell stand behind the products for which it voluntarily contracts and provides at a profit. To extend the contractor defense in the way the majority suggests will only result in more unsafe and unreliable equipment. To do so would unnecessarily increase the danger which our military personnel face so patriotically.[72]

e. *McKay's Progeny: Emerging Concerns for Separation of Powers*

Subsequent courts have not all agreed with Judge Alarcon that it is the law's duty to insure that our servicemen are provided with reliable and safe equipment. The Third Circuit has twice held that, under Pennsylvania law, where the military made all final decisions as to specifications, the defense would apply because of concerns for separation of powers.[73] This principle was held to bar judicial second-guessing of military judgments so long as there was true government participation (more than mere rubber-stamping) in the design. The Seventh Circuit similarly held

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[69] *Id.* at 451.

[70] *Id.* at 459.

[71] *Id.*

[72] *Id.* at 461.

[73] Koutsoubos v. Boeing Vertol, 755 F.2d 352 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985); *In re* Air Crash Disaster at Mannheim, Germany on Sept. 11, 1982, 769 F.2d 115 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 851 (1986).

that Wisconsin law barred liability and that the *McKay* test best reflects the policies underlying the defense.[74]

The Fifth Circuit displayed considerable sympathy for manufacturers who have been increasingly threatened "with liability that could not be passed on to the party ultimately responsible for the plaintiffs' injuries—the government."[75] Litigation over such liability would compel the courts to second-guess professional military judgment—a task for which courts have little competence and which raises significant separation of powers concerns. Consequently, to ask the defendant to prove that the military demanded production of its own design would not reflect the policies of the defense.

> [A] requirement of compulsion of this sort would discourage military contractors from bidding on government projects or, alternatively, give the contractors incentive to pressure the military to purchase safer equipment. Either result would be contrary to sound public policy, which requires that contractors be encouraged to enter into contracts with the government for the production of military hardware and to adhere fully to specifications furnished by the government. While it is reasonable to expect a military contractor to apprise the government of any risks relating to the equipment of which it has knowledge, the contractor, like the judiciary, should not be thrust into the position of second-guessing military decisions.[76]

Bynum's focus on separation of powers helps address the issue of what must the defendant manufacturer prove in order to apply the *McKay* defense. The expansion of the contractor defense in *McKay* (to cases involving government approval of reasonably precise specifications) left unanswered the type and amount of evidence required. *Bynum* clarified that this threshold is quite low since "interference by civilian courts with military authority raises questions about both judicial competency in this area and separation of powers." The judiciary can not and should not decide whether the manufacturer or the military was responsible for the defect because "there can be no question that the design of military equipment is, at bottom, a military decision."[77]

This position was adopted and expanded by the Fourth Circuit's recent trilogy: *Tozer v. LTV Corp.*,[78] *Dowd v. Textron, Inc.*,[79] and *Boyle v. United*

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[74] Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985).
[75] Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985).
[76] *Id.* at 574-75.
[77] *Id.* at 569.
[78] 792 F.2d 403 (4th Cir. 1986).
[79] 792 F.2d 409 (4th Cir. 1986).

Technologies Corp.[80] Asserting that it was "unseemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government,"[81] the court ruled that "it is nearly impossible to contend that the contractor defectively designed a piece of equipment without actively criticizing a military decision."[82] Consequently, "the contractor's participation in design—or even its origination of specifications— does not constitute a waiver of the government contractor defense."[83] Only if the government did not approve the design is inquiry and perhaps liability appropriate.

It should be noted that two courts have not accepted the line of authority from *McKay* to *Boyle*. In *Trevino v. General Dynamics Corp.*,[84] the court denied that public policy required any judicial restraint because the design decision at issue was a non-military decision requiring no military expertise nor did it involve a conscious decision on the part of the military to accept a known hazard because of military considerations. The evidence did not show that the military consciously decided on the specific design for military reasons; it showed that design determinations were left to the discretion and expertise of General Dynamics:

> General Dynamics was hired for the expertise and the experience it possessed. The government neither possessed the qualifications nor the ability to engage in any substantial review of General Dynamics' specifications. Moreover, the design decisions, material to the defects alleged, required no military expertise, therefore, there is no justification for insulating General Dynamics from liability where the government merely approves of the decision. . . . The government's approval in this case is no different from the approval of any product or design prepared for the government. If that type of approval is sufficient to satisfy the [defense], then there would never be a recovery under any circumstances against defense contractors.[85]

According to *Trevino*, judicial inquiry—at least so far as to determine whether real military interests were at stake—is appropriate. Furthermore, if defendant cannot prove that the design defect was the result of a definite military selection, then the defense may not apply. In this sense, the nature of the decision-making process may be factually relevant as may be whether the reason for the defect was related to traditional military concerns for strength and mobility, etc. The Eleventh Circuit, in

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[80] 792 F.2d 413 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987).
[81] 792 F.2d at 405.
[82] *Id.* at 406.
[83] *Id.* at 407.
[84] 626 F. Supp. 1330 (E.D. Tex. 1986).
[85] *Id.* at 1337.

Shaw v. Grumman Aerospace Corp.,[86] also recognized a judicial role in determining whether, in fact, the military had decided that the risk of injury to servicemen from a design defect in the equipment it ordered is a risk that it (the military) is willing to take. As a consequence, the manufacturer must prove the negative proposition that the design in question does not merely represent its own judgment by showing either that it did not participate in the design of the defective product or that it warned the military of the risks of the design. The purpose of this requirement is for the judiciary to determine whether or not a military judgment to proceed with the dangerous design was actually made. If not, then no separation of powers concerns are raised and the contractor is subject to the customary strictures of product liability law.

3. Would the Formation of Military Policy be Jeopardized by Judicial Inquiry into the Responsibility for the Design of a Military-Approved Weapon?

Commentators on the military contractor defense have discussed numerous purported bases for the defense. It is the thesis of Part One of this Article that, in truth, there exists only one base for immunizing weapons makers from liability—that the defense is necessary to protect the military establishment from judicial scrutiny. Part Two of this Article will attempt to demonstrate the reasons why this base should not be legally recognized as support for civil tort immunity. The remaining comments here in Part One are for purposes of dismissing the various make-weight arguments and to hone the critical legal issue which the judiciary must soon decide.

a. The Unfairness Justification

At the outset, it may be argued that holding a manufacturer strictly liable for supplying defective weapons is unfair. The manufacturer is thus portrayed as the passive means by which the military accomplishes its ends. This is simply inaccurate for most military procurement. Most sophsticated procurement matters are intentionally the result of designs developed by contractors, not by government employees. Indeed, recognition that the government does not have the expertise to develop many high technology weapons systems underlies our reliance on the private sector for the tools of national defense.[87] To assume that in all or even

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[86] 778 F.2d 736, 742 (11th Cir. 1985).

[87] *See Government Contractors' Product Liability and Indemnification Acts, 1984: Hearings on H.R. 4083 and H.R. 4199 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary*, 98th Cong., 2nd Sess. 50 (1984)

most cases the manufacturer has no choice regarding the design of a weapon misconstrues the procurement process. More to the point, where the manufacturer finds itself caught in the untenable position of facing liability for merely producing what the government has ordered it to produce, the contract specification defense can and should be applied. This puts a relatively straight-forward burden on the defendant to establish that it entered into the contract after specifications were developed without its involvement. In the few cases where imposition of liability would be unfair, therefore, there is no need to employ the military contractor defense.

b. The Cost-Savings Justification

No more compelling is the *McKay* court's justification that imposing liability on military contractors will cause them to reflect these higher costs in future contract prices. This is an ironically troubling argument because it seems to contravene so blatantly principles of separation of powers. The first objection is that there is little factual support for the assertion that manufacturers will pass on these higher costs to the government. Such an assertion suggests that now it is the military which is wholly passive in accepting the prices offered to it by its contractors. Such passivity is hardly more likely than the alleged passivity of the manufacturers discussed above. Congress and the Pentagon have arduously sought to promote competition for procurement contracts, as will be discussed *infra*. Critics may contend that military procurement is not as competitive as it should be; but that is no reason to take judicial notice of the alleged fact that contractors face no competitive pressures whatsoever and therefore can pass higher costs to the Pentagon automatically. More likely is that if product liability applies in the competitive market for weaponry, manufacturers who defectively design products and consequently pay damages will suffer a loss of market position vis-a-vis their more careful competitors.

The second objection to the cost justification for *McKay* is that it completely ignores the fact that avoidable accidents involving servicemen and weaponry have high costs for the military. That is, it may very well be economically efficient for the military if the courts held manufacturers liable in tort for defectively designed products. The military invests significant resources not only in equipment but in the servicemen who use that equipment; the loss of these resources is a waste which cannot serve the interests of national security. Therefore, it may be hoped that future contract prices reflect the responsibility borne by manufac-

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(testimony of Richard K. Willard, Acting Assistant Attorney General, Civil Division, Dept. of Justice).

turers; imposition of liability can serve to spread risks over many products sold to a large consuming public. The law has long supported the social value in cost spreading as a pillar of modern product liability law.

The third objection to this justification is simply that the Ninth Circuit invented it. There is nothing in *Feres* or *Stencel* or any other Supreme Court decision which suggests that the basis for barring a serviceman's claim is fear of higher prices. As has been discussed at length herein, a consistent line of authority from *Feres* to *Stencel* to *Shearer* recognizes that the military's immunity from suit derives from concerns for military discipline and separation of powers. These concerns are the focus of the remainder of this Article; it demeans the arguments on either side to claim that the issue really is that the government wants to save some money.

A fourth objection is that if the rationale for the military contractor defense is protection of the public treasury, why are civilians—injured as a result of a defectively designed product purchased and used by the government—permitted to sue. No court has ever held that servicemen should have fewer rights than their civilian counterparts because the need to protect the public treasury is an onus uniquely theirs to bear. Furthermore, this purported justification wholly ignores the fact that in most contracts for military procurement, the manufacturer must purchase liability insurance. The military can, of course, choose to cover the cost of premiums in the contract price, just as the civilian branches of government can cover the premiums for insurance obtained by civilian contractors. Indeed, the *McKay* concern for higher military contract prices is wholly illusory, since the government's account is not likely to change regardless of the defense. Instead, it will have paid for liability insurance to cover a non-existent liability—and the only beneficiaries of the defense will be the insurers.

Most importantly, even if these objections are all discarded, one must ask whether the judiciary has the authority to create a legal immunity in order to reduce the costs of military procurement. The constitutional power to raise and equip armies is, of course, given to Congress. Congress has chosen to entrust the task of producing weaponry to private enterprises who sell their expert efforts to the military for a profit. In all respects, these transactions are subject to the law of the land except where Congress specifically provides otherwise. Congress could, of course, immunize weapons makers from product liability if it so chose; it has not. What cause is there for the judiciary to immunize what Congress has left alone?

c. The Military Discipline Justification

There is a real judicial concern that the legal system not be used to invade the prerogatives of military discipline. Underlying *Feres* are: (1) the need to bar soldiers from using the civilian courts to challenge a

military order from a superior; and (2) the need to protect members of the military from being compelled to testify against each other. As explained above, there is no logical nexus between these understandable concerns for military discipline and the military contractor defense.

The Department of Justice has recently argued that denial of the military contractor defense will permit a plaintiff/serviceman to demonstrate that a military purchasing judgment was unknowing—that his superiors "lacked the competence to make the judgment they made and that, therefore, more disclosure on the part of the contractor was required than was given."[88] It is difficult to perceive the logic in this argument. The military contractor defense is, of course, an affirmative defense pled in a private civil suit between a serviceman and a weapons maker. In the absence of the defense, the plaintiff/serviceman must show that the cause of injury was a design defect. There is no necessary suggestion that the military purchaser of that equipment was in any way incompetent. Only if the defense is allowed will potentially conflicting military testimony be necessary as defendants attempt to show that it was the military which specifically requested the product despite knowledge of the defect. If the military contractor defense was legally rejected, responsibility for the defect would legally fall on the manufacturer without need to scrutinize the military's role in the procurement process.

d. The Need to Protect the Defense Establishment from Judicial Scrutiny

As stated, this is the only justification for the military contractor defense which deserves serious attention. The role of the judiciary does not include making or even influencing the military policy of the United States. The decision in time of war to develop a weapon or to use a weapon in pursuit of a military purpose can not be a reviewable matter for a court of law. Even in peace, the United States confronts a threatening world which looks to it as a force of stability; therefore, there exists a continuing need for preparedness unimpeded by the judiciary. When establishing military policy, those in authority must make hard decisions to push technology and strategy to outer limits perhaps knowing the statistical probability that servicemen will die obeying those decisions. Furthermore, those decision-makers must rely on an efficient and sophisticated private sector to provide the equipment without which policy is a mere paper tiger. On occasion, the decisions that are made in pursuit of our national security will not accord safety the primary value that it is given in making decisions regarding what goods should be produced for civilian use. A command decision to acquire a product in a given form could

[88] Brief for the United States as Amicus Curiae at 20, Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985).

ignore safety criteria altogether (although one might hope not) without incurring legal consequences. No one reasonably familiar with our constitutional separation of powers could argue to the contrary.

The issue spotlighted by the military contractor defense, however, is not strictly whether the judiciary should second-guess military decisions; more accurately, it is when should the judiciary recognize that a military decision has in fact been made which compels judicial deference. There are only two possible answers to this issue: either judicial deference is appropriate whenever the controversy involves a weapon acquired by the military, or judicial deference is appropriate only when defendant can prove that the defect which caused the injury is the direct result of a military decision to accept the risk. To adopt the former position essentially treats weapons makers as identical to the military itself. To adopt the latter position requires that in each case a court decide that the military actually made a decision to use a product that it knew to be defective and dangerous to servicemen. To adopt the former position confers a virtual immunity from liability to any weapons maker which can only be forfeited by failing to warn of known hazards. The single virtue of this position is that it easily and uniformly negates any judicial obligation to impose accountability for the consequences of procuring weapons for our defense. To adopt the latter position does require that the courts at least make an initial determination whether military policy is, in fact, implicated in a given controversy. Only if the defendant can establish that the military commanded the decision to employ the allegedly defective design would judicial deference be warranted. The former position confers near-sovereign immunity on private companies; the latter position confers nothing that is not already provided by the contract specification defense. The starkness of the choice is absolutely clear. The Supreme Court can choose one position or it can choose the other, but it cannot choose both nor can it compromise nor can it base its choice on considerations other than separation of powers. Part Two of this Article respectfully advocates the rejection of the military contractor defense and suggests that the latter position which permits product liability litigation except where the contract specification defense would apply is the only choice consonant with our democracy's pursuit of national security under law.

III. Part Two: The Procurement System's Concept of Accountability and the Role of the Judiciary

Part Two contains three sections. Section A examines the process of weapons contracting and suggests that this process provides readily accessible standards by which to ascertain responsibility for weapons design. Section B highlights the methods to assign the responsibility for a weapons system's design through the production process. Section C discusses the role of litigation in enforcing accountability.

A. *Contracting For Weapons*[89]

Weapons makers formally enter the weapons acquisition system through the contracting process. This section describes two aspects of that process: (1) the distinction between formally advertised and negotiated solicitations for contracts; and (2) the distinction between design and performance specifications in weapons procurement contracts.

This section will assert two critical points regarding the military contractor defense. First, while procurement policy contemplates a close working relationship between the military and members of the weapons industry, that relationship does not contravene the fact that each party has severable interests and obligations. Under this nation's procurement system, the military has the authority to determine military needs and to exercise its judgment, within legal limits, to satisfy those munitions needs; private entrepreneurs have the opportunity to respond to the military's demand in a manner which, subject to legal limits, maximizes each entrepreneur's self-interest. Furthermore, the weapons acquisition process is, in all material respects, supposed to reflect the operation of typical market forces. That process clearly manifests a policy in favor of arms-length relationships subject to the strictures of commercial law.

Second, the courts regularly and routinely consider exactly analogous issues to those which would be raised in a serviceman's tort suit alleged in *McKay et al* to be improper for judicial review. This section suggests that to distinguish those contracts where the contractor is simply following advertised design specifications from those contracts where the contractor designed a weapon in response to performance specifications does not necessarily implicate issues of national security or military policy. For a court of law to distinguish between advertised contracts and negotiated contracts is not complicated nor is the task of distinguishing design from performance specifications. The relevant category for most product liability litigation—negotiated contracts containing performance specifications—includes virtually all of the recent cases discussed in Part One. As to these cases, a determination of whether the contractor was in fact responsible for the faulty design is steps away from an inquiry into military policy. This is not to deny that there may be occasional cases whose pursuit could involve inquiries into military policy, but those problems may be coped with selectively. The point here is that it wholly misconstrues the procurement process to assert that establishing whether a contractor is responsible for a weapons design defect would improperly interfere with the formation of military policy. On the

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[89] The bases of this section derive generally from three sources: J. FOX, ARMING AMERICA—HOW THE U.S. BUYS WEAPONS (1974); D. PACE, NEGOTIATION AND MANAGEMENT OF DEFENSE CONTRACTS (1970); M. PECK AND D. SCHERER, THE WEAPONS ACQUISITION PROCESS (1962). Specific citations are noted as appropriate.

contrary, the judiciary should continue to uphold a well-entrenched and well-justified line of demarcation distinguishing the formation of military policy from the contractor's task of designing a weapon.

1. Advertised or Negotiated Solicitations

The Armed Services Procurement Act of 1947 provides for two methods of letting contracts: formal advertising and negotiation. While formal advertising—calling for sealed bids from contractors—is the traditional method of government contracting and is statutorily preferred,[90] it accounts for only about a third of total procurement, most of which is concentrated in supplies and small weaponry. Formal advertising has as its main goal the promotion of the benefits of full and free competition: lower prices, better quality, and increased output. A contractor may simply enter a dollar amount in the SOA or IFB, seal it, and deliver it to the procurement office where it will be publicized along with all other bids to ensure the integrity of the advertising process.[91] Contracts subject to formal advertising must be awarded to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the United States.[92]

For formal advertising to work, there must be sufficiently precise specifications to allow bids to be evaluated on a common basis. If the technical requirements of the desired item or service are not adequately defined, bidders cannot outline their proposals in sufficient detail. Major defense research and development programs do not lend themselves to formal advertising because they cannot be described with sufficiently detailed specifications at the time a contractor is to be selected.[93]

A contractor's bid must be in strict compliance with the advertised solicitation, including the vast body of specifications incorporated by reference.[94] For the performance of military contracts, there is a vast library of specifications and standards. As defense procurement has emerged from the era of mass production, the regulations that govern the business operations of the Defense Department and industry have grown more sophisticated and complex.[95] A quick and sure way to have a bid

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[90] 10 U.S.C. § 2304(a) (1982) provides: "Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances."

[91] 41 U.S.C. § 253(b) (1982). For a detailed factual discussion of the submission of bids, see Washington Mechanical Contractors, Inc. v. United States Dep't of the Navy, 612 F. Supp. 1243 (N.D. Cal. 1984).

[92] 10 U.S.C. § 2305(c) (1982).

[93] J. Fox, *supra* note 89, at 251.

[94] Fairfield Scientific Corp. v. United States, 611 F.2d 854 (Ct. Cl. 1979).

[95] In 1947, the Armed Services Procurement Regulation (ASPR) was a slim volume of

rejected is to make it nonresponsive, i.e., to take exception to the specifications or in some way not comply with the terms of the solicitation. The main reason why procurement agents are quick to reject nonresponsive bids is public policy: to maintain the integrity of a formal advertising procurement process.[96] If one contractor were able to take exception to specifications or to hedge his bid, it would be unfair for the government to give him the award, even though the contractor offered a better product and lower price. Other bidders would not have had the opportunity to bid on the same terms and conditions. Other bidders, under the modified conditions or specifications, may have been able to offer a comparably low or lower price to the government. Therefore, the government has adopted a firm policy that a bidder who takes exception or qualifies his bid must be rejected, even if he is the low bidder.[97]

Formal advertising for weapons contracts is judicially reviewable; even in the face of an urgent military need, the procurement agency's failure to comply with the regulations cannot be considered to be in accord with law.[98] While the courts are deferential to agency action demonstrating a rational basis, such basis "must be one based upon the exercise of reason and judgment, which takes into consideration the circumstances and achieves a result which whether appearing to be right or wrong, is arrived at by a process of reasoning."[99] The test is not what the court would have done had it been in the military agency's position but whether it can say that the action taken by the procurement officer was not rational.[100] Most courts consider such matters appropriate for judicial review but require a strong factual showing of agency violation and resolve doubts in favor of the agency.[101]

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125 pages; a quarter century later, it consisted of several large volumes, totalling approximately 3,000 pages. J. Fox, *supra* note 89, at 14.

[96] Doing business with the government has become an important part of American economic life; arbitrary deprivation of government contracts on non-discretionary grounds is a serious wrong against which Congress may well have wished to protect when it stiffened the bidding statutes. Indeed, Congress amended the Armed Services Procurement Act in 1955 to require that all bids and invitations to bid contain specifications which would give prospective bidders sufficient information to permit them to bid responsibly. Congress enacted this amendment, Act of Aug. 9, 1955, ch. 628, § 15(c), 69 Stat. 547, 551-52 (codified at 10 U.S.C. § 2305 (b)), to correct the 'deplorable' situation whereby procurement agencies had not given their notices to bid in sufficient detail, thus needlessly injuring prospective bidders. *See* H.R. Rep. No. 1350, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Admin. News 2713, 2722. B.K. Instrument, Inc. v. United States, 715 F.2d 713, 719 (2d Cir. 1983).

[97] D. Pace, *supra* note 89, at 61.

[98] Robert E. Derecktor of R. I., Inc. v. Goldschmidt, 506 F. Supp. 1059 (D.R.I. 1980).

[99] *Id.* at 1065.

[100] Sea-Land Serv. Inc. v. Brown, 600 F.2d 429 (3d Cir. 1979).

[101] Washington Mechanical Contractors, Inc. v. United States Dep't of the Navy, 612 F. Supp. 1243 (N.D. Cal. 1984).

Negotiation is the method for selecting a contractor without formal advertising and competition. Negotiation replaces formal advertising as a procurement method when one or more of seventeen conditions applies. The decision to advertise or negotiate is up to the military's broad authority to decide when it is impracticable to competitively advertise.[102] The determination by military officials that a weapons system should be procured through single source negotiation is reviewable only as to the validity and the legality of the action taken; the law demands no more than one reasonable ground for the conclusion that advertising would be impracticable.[103] Procurement through negotiation represents sixty to eighty percent of total current military contracting, comprising almost exclusively the production of major weapons systems. Procurement by negotiation allows the Department of Defense to select the contractor who seems best prepared to meet all the requirements of the program, and to meet them on the terms most satisfactory to the government. Under procedures for negotiation, the IFB is replaced by the Request For Proposal (RFP). In the RFP, interested contractors must submit proposals outlining technical and management approaches for a specific program as well as cost estimates for the work. All offerors of proposals must be notified of deficiencies and given a reasonable opportunity to correct their proposals.[104]

If negotiated procurement is chosen, proposals must be solicited from the maximum number of qualified sources.[105] The choice of a contractor is a judicially reviewable decision, but the courts "respect the wide discretion accorded to contracting officers in their evaluation of bids and in their application of procurement regulations."[106] The extent of discretion exercisable by a contracting officer in processing bids is greater if the solicitation of those bids is under a procurement by negotiation rather than by formal advertising; furthermore, the absolute requirement of responsiveness is not applicable to negotiated procurement.[107] However, such discretion is inappropriate where it is demonstrated that the military's position is contrary to established practice.[108] Thus, if the totality of the circumstances involved demonstrates that the decision of the contracting officer violates established policy —such as to maximize competitiveness in procurement—judicial review is appropriate.[109]

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[102] Self-Powered Lighting, Ltd. v. United States, 492 F. Supp. 1267 (S.D.N.Y. 1980).

[103] Cessna Aircraft Co. v. Brown, 452 F. Supp. 1245 (D.D.C. 1978).

[104] DAR 3-805.3.

[105] *See* 10 U.S.C. § 2304(g) (1982).

[106] Saco Defense Sys. Div. v. Weinberger, 806 F.2d 308, 313 (1st Cir. 1986), (quoting Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260, 1272 (5th Cir. 1978)).

[107] DeMat Air, Inc. v. United States, 2 Ct. Cl. 197 (1983) (citing DAR 3-805.5). *See also* NOA Airscrew Howden v. United States Dep't of the Navy, 622 F. Supp. 984 (D. Mich. 1985).

[108] Baird Corp. v. Marsh, 579 F. Supp. 1158 (D.D.C. 1983).

[109] *Id.*

Pursuant to the Contract Disputes Act of 1978,[110] all contract claims by a contractor against the government must be submitted to the contracting officer for decision.[111] A contractor may appeal the contracting officer's decision to an agency board of contract appeals within ninety days from the date of receipt of a contracting officer's decision. The decision of an agency board of contract appeals is final except for appeal to the the Federal Circuit Court of Appeals.[112] In lieu of appealing the decision of the contracting officer to the appropriate agency board, a contractor may bring an action directly on the claim in the United States Court of Claims. Thus, where a contractor claims that the military has failed to comply with the procurement laws in awarding negotiated contracts, those claims may be addressed to the United States Claims Court or the Armed Services Board of Contract Appeals.[113] Alternatively, if the disappointed bidder can demonstrate that the challenged agency action has caused him injury in fact and that such injury was to an interest 'arguably within the zone of interest to be protected or regulated by the statute,' then the bidder may have standing under section 10 of the Administrative Procedure Act[114] and the Armed Services Procurement Act,[115] if the claim is not based on any express or implied contract.[116]

2. Design or Performance Specifications

The distinction between advertised and negotiated contracts is especially significant to the military contractor defense: contracts involving an explicit government-mandated design specification leaving only actual construction to the contractor tend to be formally advertised. Design specifications have been characterized as including "precise measurements, tolerances, materials, in-process and finished product tests, quality control and inspection requirements, and other information."[117] The government may be liable for any errors, omissions, and deficiencies in design specifications, predicated upon an implied warranty of suitability.[118] Thus, design specifications may impute a warranty that if the specifications are complied with they will produce an

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[110] Act of Nov. 1, 1978, 92 Stat. 2383 (codified at 41 U.S.C. §§ 601-613 (1982)).

[111] *Id.* at § 605(a).

[112] *Id.* at § 607. *See* Teller Envtl. Sys., Inc. v. United States, 802 F.2d 1385 (Fed. Cir. 1986).

[113] Rex Sys., Inc. v. Holiday, 814 F.2d 994 (4th Cir. 1987) (citing 28 U.S.C. § 149 (a)(3) and 41 U.S.C. § 607(d)).

[114] 5 U.S.C. § 702 (1982).

[115] 28 U.S.C. § 1331 (1982).

[116] *See* B.K. Instrument, Inc. v. United States, 715 F.2d 713 (2d Cir. 1983); Choctaw Mfg. Co. v. United States, 761 F.2d 609 (11th Cir. 1985).

[117] Appeal of Aerodex, Inc., 1962 B.C.A. (CCH) § 3492 (Sept. 11, 1962).

[118] Appeal of Blount Bros. Constr. Co., 1962 B.C.A. (CCH) § 3300 (Jan. 31, 1962).

acceptable result.[119] However, not even a design contract entitles a contractor to rely solely on the drawings and specifications provided nor does the labelling of a contract as containing design specifications remove a contractor's obligations for the extent of work to be accomplished.[120] Where the contractor should have known that the prepared specifications could not produce the desired result, he cannot successfully claim that the government is liable for additional compensation.[121]

By contrast, negotiated contracts tend to entail performance specifications merely indicating what characteristics the government requires in the item. "Where an item is purchased by a performance specification, the contractor accepts general responsibility for design, engineering, and achievement of stated performance requirements."[122] Negotiated contracts containing only performance specifications leave design of the weapon system to the expertise and discretion of the manufacturer. "[I]n a performance contract, the contractor must assume responsibility for the means and methods selected to achieve the end result."[123] Where the contractor's product fails to meet performance specifications, the government faces no contractual liability even if it did not disclose the novelty of the item or if the contractor's difficulties were unanticipated.[124] The point here is that a deliberate policy choice has been made by the nation's senior military officials to award contracts for major weapons programs entailing significant design tasks through negotiation because the government wants to evaluate contractors' technical capabilities, technical approaches, and management ability, as well as costs. It is significant that these contracts for major weapons systems entail only general performance specifications. Consider the recent testimony of Deputy Secretary of Defense, William H. Taft IV:

> The quality and productivity of a weapons system is enhanced when we focus our efforts on its critical requirements. In the past, our requests for proposals contained thousands of detailed military specifications. These specifications prescribed how contractors were to accomplish specific tasks, allowing little flexibility for contractors to assess and recommend those requirements which were cost effective and truly needed. Under our new "streamlining" initiative, we are telling contractors what is required rather than how to accomplish it.[125]

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[119] Dewey Elecs. Corp. v. United States, 803 F.2d 650, 658 (Fed. Cir. 1986); LaCrosse Garment Mfg. Co. v. United States, 432 F.2d 1377 (Ct. Cl. 1970).

[120] Zinger Const. Co., Inc. v. United States, 807 F.2d 979 (Fed. Cir. 1986).

[121] L. W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969).

[122] Appeal of Aerodex, Inc., 1962 B.C.A. (CCH) § 3492 (Sept. 11, 1962).

[123] Penguin Indus., Inc. v. United States, 530 F.2d 934, 937 (Ct. Cl. 1976).

[124] Jet Constr. Co. v. United States, 531 F.2d 538 (Ct. Cl. 1976).

[125] *Defense Acquisition Process, Policies, and Structure: Hearings before the Subcomm. on*

This point is critical to the military contractor defense. The procurement system has institutionalized the fundamental difference between the acquisition of relatively fungible commodities as to which it can specify design requirements from the acquisition of sophisticated weapons systems as to which it *intentionally assigns design responsibility to the manufacturer*. It would seem eminently reasonable for the judiciary to maintain faith by ruling that a contractor charged with defectively designing a product may claim the contract specification defense when it proves that it complied with the military's design specifications set forward in an advertised contract competitively bid. Accordingly, where the procurement system has assigned design responsibility to the manufacturer by use of a negotiated contract containing only performance specifications, it might be reasonable for the judiciary to rule that the contractor independently assumed responsibility for the design of the weapon and that the burden of proof as to fault for a defect lies exclusively with the contractor.

B. Production of Major Weapons Systems

In many of the cases raising the military contractor defense, the defect in a design which caused the accident was incorporated into the weapon after the contract was signed—changes were made as production proceeded. Obviously, by this stage of the procurement process, the contractor is engaged in attempting to satisfy the government's specifications. Oftentimes, that effort will result in compromises and changes of some specifications. Because the relationship between the contractor and the military during the production stage can be cooperative, the *McKay* court believed that the judiciary can not and should not encourage "fixing the locus of responsibility for military equipment design with more precision than is possible."[126] The purpose of this section is to assert the contrary position that precisely fixing the locus of responsibility for military equipment design is not only possible but is routinely accomplished by the judiciary.

The military relies on private contractors to take advantage of the superior efficiency and expertise of the private sector especially after source selection, and therefore provides methods by which changes may be introduced as necessary. Critically, the promotion of entrepreneurial initiative is balanced by the effort to determine accountability for weapons design. This section examines the issue of accountability for design changes during the production phase by discussing: (1) the reasons for design changes as identified in subsequent litigation; and (2) propos-

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Procurement and Military, Nuclear Systems of the House Comm. on Armed Services, 99th Cong., 1st Sess. 1579-80 (1985) (statement of Deputy Secretary of Defense William H. Taft).

[126] McKay v. Rockwell Int'l Corp., 704 F.2d 444, 450 (9th Cir. 1983).

als to allocate responsibility in advance by congressionally mandated warranties or indemnification.

That major weapons systems incorporate design specifications established during the production phase does not blur the allocation of responsibility. On the contrary, the responsibility for the decision to incorporate design changes is often fixed with precision, and those determinations are unquestionably a matter for judicial review. Once again, *McKay* suggests a confused and entangled meshing of military and contractor interests which the judiciary cannot unravel without intruding on the military's policy prerogatives. However, by the time that the contract has been signed for the production of a major weapon system, the policy questions implicating the judgment of the military have typically reached a point of finality; the question is how best to accomplish the assigned tasks. The answers to that question do not invariably come from contractors or from the military, but they inevitably come through a traceable record which may be judicially reviewed without significant implication for national security policy.

1. The Dynamics of Weapons Production

The underlying idea of designing a weapon system is to meet an enemy threat that will prevail five to seven or more years from now. There is an implicit uncertainty as to how that will be accomplished which is reflected in the fact that a major weapons program can experience contract changes at a rate of 2,000 per year.[127] Unforeseen pitfalls and opportunities arise during the production phase which cause the need for a design change. Each of these changes is reflected in a "Supplemental Agreement" which is negotiated much like the original contract was.[128] This is a formal document embodying strict concern for accountability.

The sources for design changes during production vary. No doubt many changes represent the unilateral action by a government authority compelling the contractor to perform according to a new or altered requirement. Such changes may have been initially suggested by the government in response to new developments of military policy or technology. Many contracts for major weapons systems contain a changes clause which vests in the contracting officer discretion to make changes within the scope of the contract. An order change determined to be outside the scope of the contract is an abuse of the contract right and is a cardinal change for which the government may be held liable.[129]

Most often it is the contractor who suggests the design change. One reason may be that the production of the weapon as originally contracted

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[127] J. Fox, *supra* note 89, at 359.

[128] *Id.*

[129] General Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978).

may be proving more difficult or expensive than planned. The main goal of a weapons development program is to resolve engineering problems, a process that by its very nature generates change. It is during the course of a development program that contractors begin to do the work they outlined in response to the government's RFP. As a contractor transforms its paper designs into actual hardware, the contractor may contend that certain approaches will not work. When this happens, the contractor must submit an Engineering Change Proposal (ECP) describing an alternative approach. When a dispute arises, the contractor is required to proceed diligently in accordance with the Contracting Officer's decision, but may later claim compensation if it can prove losses resulting from a defect in the government's design specifications.[130] This claim is typical of any commercial claim of impossibility and, accordingly, is an issue of law reviewable by the courts.[131]

Structural deficiencies in the procurement system can also result in design changes in ways arguably adverse to the nation's interest.[132] Perhaps system capabilities that were considered desirable at the time the initial program was planned and contracted were omitted from the original contract because the related costs might have prevented the program from receiving requisite military approval. In such event, the features deleted at the time of initial approval may be re-introduced during the production phase when the likelihood of approval is greater. Alternatively, it has been often claimed in recent years that some changes are added which are not cost justifiable. The extent of such "goldplating"—as contrasted to "worthwhile improvement"—depends to a great extent on who is making the cost/benefit evaluation. Yet the possibility of goldplating underlines the fact that fallible program managers, not necessarily supreme military commanders, originate and justify ideas for changes. At minimum, any contract change is likely to increase profits for the contractor because no matter how competitive was the initial procurement, a contractor is inevitably in a sole source position when nego-

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[130] S.W. Elecs. & Mfg. Corp. v. United States, 655 F.2d 1078 (Ct. Cl. 1981).

[131] Koppers Co. v. United States, 405 F.2d 554 (Ct. Cl. 1968).

[132] For its part, the military authority will often want the product even if it cannot meet all the original specifications. Within reasonable limits, the military would rather accept a weapon that almost meets original specifications than no new weapon at all. DOD program managers may lack both the capability and desire to make many of the decisions regarding the design of weaponry. Military personnel in program offices are rapidly rotated from one type of assignment to another which tends to deprive them of the understanding of a project equal to the sophistication of the private contractors. Furthermore, there is little incentive provided to Pentagon managers to take real control over the production process. Many young officers believe that procurement assignments will not advance their careers. Procurement positions may lack status because there are no uniform standards by which to evaluate the effectiveness of program managers. *See* R. STUBBING, THE DEFENSE GAME ch. 10 (1986).

tiating contract changes.[133] The longer the time period between a contractor's proposed change and the military's final approval, the greater the likelihood that the contractor will have already spent significant sums on the new work. When the product is finally delivered, it may be difficult for military officials to prove that changes already incurred should have been pursued differently. It is often easier and more efficient to take the change offered by the contractor (usually with substantial documentation and support) in reliance on that contractor's expertise.

The point here is not to criticize the current procurement process but to acknowledge the obvious: that changes in the design of a weapon can result from numerous causes, many of which are, in fact, the responsibility of the contractor. To presume as a matter of law that the design of a weapon is inevitably the product of a policy decision made by military authorities begs reality unnecessarily. On a case by case basis, that responsibility could lie with either the government or the contractor. A refined system for adjudicating disputes and allocating responsibility has been established therefore which relies on the judiciary to enforce accountability under the law. To suggest that the determination of who is legally responsible for a design defect in a weapon is too complex for the courts unnecessarily and incorrectly belittles the ability of the many panels which cope with these same issues in a variety of analogous legal contexts. The courts can and do hold weapons makers accountable for their products. The suggestion that weapons procurement is not accountable because of the identity of interests of both the military and private contractors is simply contradicted by the vast body of procurement law and litigation.

Consider the role of the judiciary in allocating the responsibility for design changes in *Ordnance Research v. United States*.[134] Plaintiff claimed recovery for increased costs resulting from what it termed the government's defective specifications under a Navy contract for production of igniters used in fire bombs. Six explosions occurred during production resulting in delay and increased costs as well as loss of life. The question was whether the government or the plaintiff contractor was responsible for the accident. Plaintiff established that the advertised contract contained elaborate design specifications and claimed that upon deviating from the specification calling for "wet blending" the explosions ceased. The military claimed that its specifications were not defective and that plaintiff violated its obligation to follow the specifications by changing to "dry blending" without formally notifying responsible officials. Thereupon followed a lengthy inquiry by the Armed Services Board of Contract Appeals which held in favor of the military. This holding was reversed by the trial judge who found that the Board's decision that the

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[133] *See* D. PACE, *supra* note 89, at 181-93.

[134] 609 F.2d 462 (Ct. Cl. 1979).

two blending processes were equally safe was arbitrary and capricious. The Court of Claims affirmed the trial judge's determination that the precautions prescribed in the Navy's specifications were inadequate to prevent some explosions and were, therefore, the legal cause of the explosions. Accordingly, the military was held liable for the losses.

The importance of *Ordnance Research* is not its outcome but rather that the Armed Services Board of Contract Appeals, the trial judge, and the Court of Claims each engaged in a detailed inquiry as to which party was responsible for which specifications leading to which accidents. In this case, the courts assumed their obligation to adjudicate a dispute with proper respect for the military as a fellow institution of the national government. Simply enough, a court of law ruled after substantial factual inquiry that in this case the military was responsible for the design specification which caused the accident, and liability for injuries and losses necessarily followed. This case did not raise any concerns about the necessity to protect the military establishment from judicial scrutiny. It must be stressed that such disputes, which inquire into the respective rights and obligations of the military and its contractors, necessarily come before the courts, and the courts seem to be competent at resolving them.

While no court has seriously asserted that it would have the authority to judge decisions made in pursuit of national security, neither has any court been deterred from resolving commercial disputes by that hypothetical concern. As stated earlier, the question here is not strictly whether the judiciary may second-guess military decisions, but rather when the judiciary should recognize that a military decision which compels judicial deference has in fact been made. Contrary to the decisions of *McKay* and its progeny, the courts routinely make such determinations apparently without significant complexity or jeopardy to national security. Judicial respect for the province of military policy-making is and should be considerable; but no immunity is so wide that it should be applied unquestioningly.

2. Design Warranties and Indemnification

The issue of accountability for weapons design has been recently and explicitly addressed by Congress, and many of the questions raised by the military contractor defense have been debated and resolved legislatively. In 1984, Congress passed section 794 of the Department of Defense Appropriations Act, FY 1984, which provides that contractors for a weapon system must guarantee in writing that the system and its components were (1) designed and manufactured to conform to the government's performance standards and (2) free from all defects.[135] In the event of a

[135] *See Warranties: Consideration of Section 794 of the Department of Defense Appropri-*

failure of that weapons system, the contractor must bear the cost of prompt repair or replacement or reimburse the United States for such costs. The statute provides that the Secretary of Defense may waive the requirement of a written guarantee where such waiver is necessary in the interest of the national defense or where it would not be cost-effective if he properly notifies Congress.[136]

"The principal purposes of a warranty in a government contract are to delineate the rights and obligations of the contractor and the government for defective items and services and to foster quality performance."[137] The purpose of section 794 is to insure that the defense department purchases weapons systems which work in the way they are intended at the time they are needed.[138] Underlying the congressional requirement was the belief that such warranties are appropriate where a contractor had substantial design responsibility. The possibility that a contractor had limited responsibility in the design of a weapon such that the imposition of a warranty requirement would be inequitable was considered, and congressional conferees agreed that in such event the Department of Defense could narrow the scope of the warranty.[139]

Many of the policy issues raised regarding warranties are identical to issues raised by the military contractor defense as was demonstrated by testimony of contractors at hearings subsequent to passage of section 794. Representatives of contractors argued that adherence to section 794 would increase the cost of national defense, would deter contractors from offering innovative approaches to defense needs, and would represent an unprecedented expansion of post-acceptance contingent liabilities facing all tiers of contractors.[140] Still others testified as to the unfairness of holding a contractor responsible for a weapons system design that was developed or at least approved by the government and was within the

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ations Act for Fiscal Year 1984: Joint Hearing before the Subcomm. on Procurement and Military Nuclear Systems and the Subcomm. on Investigations of the House Comm. on Armed Services, 98th Cong., 2d Sess. iv (1985) [hereinafter *House Warranties Hearings*].

[136] *Id.* at 1. (statement of Rep. Stratton, Chairman, Procurement and Military Nuclear Systems Subcomm.).

[137] Armed Services Procurement Regulation 1-324. *See generally, Warranties on Weapons Systems: Hearings Before the Senate Comm. on Armed Services*, 98th Cong., 2d Sess. 32 (1984) [hereinafter *Senate Warranties Hearings*].

[138] *Id.* at 32-33. (statement of Dr. Richard D. DeLauer, Under Secretary of Defense for Research and Engineering). Under Secretary DeLauer also noted that the use of warranties is not new to the Department of Defense: "Their use goes back at least two decades; warranties were used on an independent basis by individual services for many years prior to 1964."

[139] Statement of Managers in H.R. 5167 Conference Report, Congressional Record H 10304, Sept. 26, 1984.

[140] *Senate Warranties Hearings* 84-87 (statement of James R. Lincicome, Executive Vice President Motorola Inc., on Behalf of the Electronic Industries Association).

government's complete control with respect to technical details.[141] Additional concerns were raised concerning the potential hazards for the defense industrial base in the event that warranties were required, and that the results of such requirements would be protracted and damaging litigation which would further impede the weapons production process as well as raise its costs. The prevailing congressional response to these arguments was succinctly stated by Congressman Levine:

> Warranties do cost money; . . . but the Pentagon's current build-now-test-later policy is costing taxpayers billions of dollars and is bankrupting our defense budget. Isn't it better to make sure that an expensive weapon works correctly from the beginning rather than cost the taxpayers enormous sums of money for repairs and spare parts to make the weapon work the way it was supposed to in the first place?[142]

Warranties for the design of major equipment are common in the commercial marketplace despite the opposition of those manufacturers to which warranties may apply. Not surprisingly, their introduction into military contracting was not warmly received by weapons makers. Some observers believe that weapons makers have successfully evaded the spirit if not the letter of the law.[143] The point here is not to weigh the merits of warranties but simply to acknowledge that the warranty requirement is law.[144] Congress, with the constitutional authority to raise and equip armies, obviously did not consider these purported consequences for procurement to be sufficiently serious such that responsibility for design defects should not be assigned, by law, to weapons contractors. Warranties are a recognized means to hold producers of goods accountable to the users of those goods for losses resulting from defective design or workmanship. To require them of military contractors, despite the objections of those contractors, signifies a profound congressional commitment to subject military procurement to the laws of the commercial marketplace. Ironically, having lost in Congress, the objections to accountability have been accorded a more sympathetic judicial reception. It must be asked by what authority the judiciary may enact policies regarding weapons procurement which Congress has chosen to reject.

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[141] *Id.* at 140-43. (statement of Machinery & Allied Products Institute).

[142] *House Warranties Hearings* at 5.

[143] *See Department of Defense Appropriations for Fiscal Year 1984: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 98th Cong., 1st Sess. 415-420 (1983) (statement of Senator Andrews).

[144] The Department of Defense Appropriations Act of 1984, 10 U.S.C. § 2304 (1983), which provided for weapon system guarantees, was repealed and replaced by 10 U.S.C. § 2403 (Supp. 1987).

Closely related to the issue of warranties has been the issue of indemnification. Stressing that liability for product defects raises the costs of weapons and interferes with the development of high technology equipment, military contractors have long sought government indemnification for tort liability arising from defective products. Under current law, the United States is liable for indemnification in tort to the same extent that it is liable directly in tort under the Federal Tort Claims Act—i.e. when one of its employees was at fault. Indemnification is appropriate only in limited and carefully considered situations.[145] However, the enormous growth in the size of product liability awards has elicited proposed legislation that the government essentially insure contractors from having to pay such awards. These proposals have not been successful due in great part to the Administration's position that government indemnification would invite greater government control over the design and manufacturing practices of contractors:

> In the commercial world, risks of third party liability are covered by insurance or are assumed by the manufacturer. In defense contracting, we believe this should also be the case except for exceptional circumstances involving unusually hazardous or nuclear risks which DoD does indemnify. We are concerned that blanket indemnification may reduce the contractors' incentive to assume responsibility for the performance of their products by shifting part or all of the liability onto the government. We prefer to contract in an environment similar to the commercial marketplace where companies must take all the steps that would be required by a prudent businessman in order to ensure the safety of the company's product.[146]

The imposition of warranties and the denial of indemnification are compelling evidence that Congress has chosen not to protect military contractors from product liability for defective design and manufacturing typical of civilian production. The preference for contracting in an environment similar to the commercial marketplace, where accountability under law stands unquestioned, is powerful evidence that the arguments advanced in favor of the military contractor defense are contrary to established procurement policy. The implications for resolution of the military contractor defense are clear because of the shared concern with who will be held accountable for injuries caused by design defects.

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[145] *See, e.g.*, 10 U.S.C. § 2354 (dealing with indemnification provisions of a contract of a military department for research and development); Price-Anderson Act, 42 U.S.C. § 2210; 50 U.S.C. §§ 1431-1435.

[146] *Indemnification of Government Contractors: Hearings before the Senate Comm.on the Judiciary*, 99th Cong., 1st Sess. 30 (1986) (statement of Mary Ann Gilleece, Deputy Under Secretary of Defense for Acquisition Management).

Weapons contractors, by opposing efforts to require warranties and by advocating government indemnification, have sought to avoid legal responsibility for design defects on the grounds that the onus of responsibility would be too expensive and would interfere with the nation's attainment of the strongest defense. As to each of these issues, Congress has repeatedly and forcefully rejected the contractors' position in favor of increased accountability. Ironically, it has been the courts, in the name of judicial deference and separation of powers, which have been far more receptive to policy arguments regarding the costs of accountability and the needs of national security than has Congress. In this sense, the judicially-developed military contractor defense is a striking departure from procurement policy as developed by the institutions (Congress and the military) which are constitutionally vested with the authority to determine matters of national security.

C. Litigation re Weapons Production

At least since the formation of the modern military establishment in 1947, there has been no litigation which has seriously challenged the process by which military needs are identified and translated into weapons requirements. No court has seriously considered that high military officers in the Pentagon should be subject to civil tort liability for their decisions, nor are the policies emanating from the Pentagon matter for judicial review absent specific congressional authorization. However, it should be noted that there exists no absolute immunity for non-military executive officers carrying out tasks essential to national security.[147] Even military officials performing military decisionmaking are entitled only to a qualified immunity for the consequences of the lawful decision to take military action.[148]

1. Litigation Involving Competition Among Weapons Makers[149]

Congress has long sought to hold private commercial conduct subject to judicial enforcement of private commercial law and has encouraged weapons acquisition through competition.[150] The Competition In Con-

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[147] Mitchell v. Forsyth, 472 U.S. 511, 521 (1985).

[148] Scheuer v. Rhodes, 416 U.S. 232 (1974).

[149] An inexhaustive list of recent decisions includes: Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3d Cir. 1982); Grumman Corp. v. LTV Corp., 665 F.2d 10 (2d Cir. 1981); Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896 (E.D. Mich. 1981); General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3 (D.D.C. 1979); Babcock & Wilcox Co. v. United Technologies Corp., 435 F. Supp. 1249 (N.D. Ohio 1977).

[150] The Federal Property and Administrative Services Act, 41 U.S.C. § 401(2) (1980), established "the policy of Congress to promote economy, efficiency and effectiveness in the procurement of property and services." The Armed Services Procurement Act of 1947, 10

tracting Act requires that a procurement agency maximize the use of full and open competition in procuring goods and services. The Act created bid protest systems within the GAO and the GSA Board of Contract Appeals to resolve charges of illegal conduct on the part of procuring agencies. Vendors who believe they have been injured by abusive contracting practices may challenge the government and other vendors through these proceedings.[151] The bid protest procedures are intended to inform Congress of the operation of existing procurement laws, and to use the pressure of publicity to enforce compliance with those laws. Most important, these procedures enable disappointed bidders to compel the executive to explain some of its procurement decisions. Barring exigent circumstances, once a bid protest has been filed, a contract cannot be executed until the protest has been resolved by the issuance of the Comptroller General's recommendation.[152]

These bid protest procedures were constitutionally challenged in *Ameron, Inc. v. United States Army Corps of Engineers*.[153] Plaintiff, a disappointed bidder, filed a bid protest, but the Army proceeded with execution of the contract because it believed the stay provisions unconstitutional. Since the Comptroller General is a member of the legislative branch,[154] the Army claimed that the Act empowered him to interfere excessively in the execution of procurement laws. In rejecting that argument, the Third Circuit reflected an appreciation of the distribution of governmental authority among the branches of government as regards procurement:

> Rather than concentrating power in the legislative branch, CICA diffuses and divides power, giving final control over procurement decisions to the executive but permitting meaningful oversight by an agent of Congress. Like other political mechanisms built on the basis of the doctrine of separation of powers, CICA encourages the branches to work together without enabling either branch to bind or compel the other. That is the way a government of divided and separated powers is supposed to work.[155]

U.S.C. §§ 2301-2316 (1982) similarly emphasizes efficient acquisition by the Department of Defense. *See generally* HOUSE COMM. ON GOVERNMENT OPERATIONS, H. R. REP. No. 97-71 accompanying H.R. 3519 (subsequently passed as the DEPARTMENT OF DEFENSE AUTHORIZATION ACT OF 1982, Pub. L. 97-86, 95 Stat. 1099 (1982)).

[151] *See Efforts by Federal Agencies to Circumvent the Competition in Contracting Act: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 2d Sess. (1986).

[152] 31 U.S.C. § 3553 (c), (d) (supp. 1984).

[153] 809 F.2d 979 (3d Cir. 1986).

[154] Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[155] 809 F.2d 979, 998.

The policies embodied in CICA and the decision in *Ameron* reflect a consistent willingness to separate the military as buyer from the weapons maker as seller and to treat their contracts as commercial transactions rather than as political decisions. All of this strongly suggests that this nation has chosen a competitive market process for procuring weapons with no special legal immunities other than those explicitly granted by Congress.

Many disputes among military contractors involve claims that one contractor culpably excluded another contractor from a weapons procurement market. These disputes necessarily implicate the military's decision to engage one contractor rather than the other—an issue analogously sensitive to the military as the decision to approve a defective weapons design. While the courts have been urged to immunize conduct undertaken in the pursuit of weapons procurement contracts on grounds similar to those supporting the military contractor defense, such arguments have never been successful.

In *Northrop Corp. v. McDonnell Douglas Corp.*,[156] plaintiff claimed that defendant was liable for breach of contract and attempt to monopolize, but the district court dismissed plaintiff's claims because they "called into question the government's unfettered right to designate the who, what, when and where of weapons system production; injunctive relief would 'necessarily limit the United States Government in its F-18 procurement activities' and relief would impinge on the government's conduct of foreign relations."[157] Reversing, the Ninth Circuit definitively addressed the propriety of an immunity for weapons makers from civil tort liability:

> Northrop does not challenge the wisdom or legality of any governmental act or decision. Instead, it seeks to restrain and recover damages from McDonnell for the latter's allegedly improper tactics in marketing F-18's. The challenged activity by McDonnell was neither authorized nor directed by any branch of Government. The mere fact that the challenged conduct occurred in a regulated industry does not alone alter its private commercial character. The issues presented for trial are not political questions—they are legal issues, involving private commercial activity which the judiciary is uniquely equipped to resolve.[158]

2. The Military Secrets Privilege

In the scant tort litigation involving challenges to military decisions generally, the courts have focused on the narrow issue of an evidentiary

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[156] 705 F.2d 1030 (9th Cir. 1983).
[157] *Id.* at 1042.
[158] *Id.* at 1047.

privilege rather than a broad immunity derived from separation of powers doctrine and accordingly have, when necessary, granted to the military a privilege regarding the release of sensitive information. The Supreme Court in *U.S. v. Reynolds*,[159] established that secrets of state—matters the revelation of which reasonably could be seen as a threat to the nation—are absolutely privileged from disclosure in the courts. The important aspects of the military secrets privilege for purposes of this discussion are its rigorous limitations. The Court in *Reynolds* denied disclosure of an Air Force report of an accident to widows of servicemen because of the reasonable possibility that military secrets were involved. While the Court recognized the need to safeguard national security from improper disclosure, the Court upheld the authority of the judiciary to determine, on a case by case basis, whether a claim of privilege should be accepted. The significant limitations of this privilege were clearly described:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[160]

This privilege to protect the military from judicial scrutiny which might threaten national security has been applied in product liability litigation against weapons manufacturers. In *Machin v. Zuckert*,[161] the D.C. Circuit Court upheld the Secretary of the Air Force's claim of privilege against disclosure of reports concerning an aircraft accident only to the extent that the Secretary could show that disclosure would "impair the national security by weakening a branch of the military," including "any portions of the report which reflect Air Force deliberations or recommendations as to policies that should be pursued."[162]

The point here is that concern that the judiciary will overstep proper boundaries by scrutinizing a military judgment is well-meaning but generally inapplicable to the problem of the military contractor defense. The design of a weapon follows analytically and chronologically far after

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[159] 345 U.S. 1 (1953).

[160] *Id.* at 7-8. *See also* Halkin v. Helms, 690 F. 2d 977 (D.C. Cir. 1982). *See generally*, Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive*, 91 Yale L. J. 570 (1982).

[161] 316 F.2d 336 (D.C.Cir. 1963).

[162] *Id.* at 339.

the fashioning of weapons policy—judicial inquiries into the responsibility for a defective design need not force the courts to trespass into the military sphere. The claim by the courts in *McKay* that contractors and the military work intimately in making decisions providing for common survival and defense suggests an impropriety which may or may not exist but in any event should not, in a nation governed by law, be promoted.

On the hypothetical assumption that a serviceman's product liability suit against a weapons manufacturer challenges the military's identification of a weapons requirement, the courts can invoke the military secrets privilege to protect legitimate national security interests. The military secrets privilege is a more sharply refined legal doctrine than a blanket refusal to hear cases which might implicate a procurement decision. The requirements of the privilege—a formal claim made by the department head after personal consideration—suggest the type of judicial effort to balance potentially conflicting interests on a selective basis which obviates the need for *McKay's* broader immunity and which recognizes that judicial protection should be afforded only to the government, not private parties.

IV. Conclusion

In 1945, the United States gained the ability to expunge any threat, indeed any nation. The difficulties of reconciling this power with our constitutional commitment to rule by law were complicated when our chief adversary matched our ability. In the face of that threat, some have argued that this nation's adherence to the rule of law may weaken the execution of military policy and jeopardize this nation's security: that since our adversary is not restricted by our law, we should become more like our adversary to save ourselves. The response offered here is that there is no fundamental contradiction between the need for security in a dangerous world and the rule of law.

A thorough review of the weapons acquisition system developed by Congress demonstrates a repeated effort to enhance accountability and to promote typical market conditions. This vast system may not be as successful as it should be. Arguably, the expenditure of hundreds of billions of dollars in relative secrecy creates opportunities for weapons manufacturers which are difficult to control. Perhaps more reforms are needed. No serious commentator, however, has suggested that the military/industrial complex should be more invidious—that as a matter of declared national policy we should encourage military contractors to decide, in secret and without review, what are the tolerable risks of weapons.

The military contractor defense is a recent judicial invention motivated by serious concerns for the impacts of product liability judgments on the national defense establishment. With respect, however, those concerns are perhaps best left to Congress. The judiciary should treat all private

parties equally; if immunities are to be granted to military contractors, Congress should be the grantor. The judiciary's role is nevertheless extremely significant for it is the judiciary which must repeatedly define the line of demarcation separating the determination of military policy by proper authorities from the production of weapons by private industry. The ability of the courts to assess responsibility for defective weapons on a case by case basis is an important and powerful tool toward an efficient weapons procurement system. The Supreme Court should reverse *McKay* and require the lower courts to perform this legal function to the best of their ability.

The military contractor defense should be declared a nullity. As a matter of product liability law, if any contractor can show that it precisely followed the explicit specifications of the government and that it was those specifications which caused the injury, then the contract specification defense might appropriately be invoked. However, any defense based on the uniqueness of *weapons contractors* embues these entrepreneurs with a privileged status to which they are not entitled. Only if the cause of the accident was the military's responsibility in dictating the specific design found to have caused the loss should product liability to any injured party (including servicemen) be negated; the burden of proof must, of course, be on the defendant to establish that the cause of the accident was, in fact, the military's responsibility.