Double Indemnity for Operators of Nuclear Facilities? In re Hanford Nuclear Reservation Litigation, the Price-Anderson Act, and the Government Contractor Defense

Chris Addicott
DOUBLE INDEMNITY FOR OPERATORS OF NUCLEAR FACILITIES? IN RE HANFORD NUCLEAR RESERVATION LITIGATION, THE PRICE-ANDERSON ACT, AND THE GOVERNMENT CONTRACTOR DEFENSE

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Abstract: Thousands of people who lived downwind of the Hanford Nuclear Reservation have brought suit against the contractors who operated the facility, claiming that radiation releases caused property damage, illness, and death. For the defendants, there is little at stake. Because they fall under the Price-Anderson Act, the U.S. Government will indemnify them for their legal expenses and any judgments against them. Nevertheless, the defendants have invoked the "government contractor defense," claiming that they should be immune from suit because anything they may have done wrong was done at the direction of the government. This Comment argues that the government contractor defense, which is a creation of federal common law, should not be available to Price-Anderson contractors. Operators of nuclear facilities are already protected by the indemnity provisions of Price-Anderson. Price-Anderson carefully balances the need to ensure that victims of nuclear accidents receive swift and adequate compensation with the goal of facilitating the participation of the private sector in the nuclear industry. To preserve this balance and avoid denying recovery to plaintiffs with legitimate claims, Price-Anderson must preempt the government contractor defense.

I drive through Hanford now and I get very angry just seeing that this beautiful place where I grew up has poisoned me, as well as my friends and their families.... I feel an incredible amount of outrage about what Hanford has done to that area, to my friends and family. And it goes beyond just my having cancer... I have to live with what else is going to happen to me and to those people.¹

In the once pristine deserts and hills of Eastern Washington flanking the Columbia river lies one of the most toxic sites on earth. The radioactive remnants of the facilities that produced the plutonium that ended World War II stew in massive underground tanks, some of which are slowly leaking, some of which threaten to explode.² These tanks—with their deadly mixture of radionuclides and other toxic chemicals³—


3. Hanford plaintiffs allege that a number of these substances, including chromium, tritium, iodine-129, cyanide, uranium, nitrates, carbon tetrachloride, and technetium-99, have leaked into
are an apt metaphor for the multitude of overlapping and sometimes conflicting legal doctrines that ultimately will determine when and how this mess is cleaned up, and whether and to whom blame and financial responsibility will be assigned for the thousands of injuries and deaths the activities at Hanford may have caused over the last fifty years.

The case of *In re Hanford Nuclear Reservation Litigation* ("Hanford") was first filed on August 6, 1990. Although some preliminary matters have been decided, a trial date has not yet been set. The Hanford plaintiffs lived near, worked at, or had an interest in real property or commercial enterprises near the Hanford Nuclear Reservation. The defendants—DuPont, GE, UNC Nuclear Industries, ARCO, and Rockwell International—are major corporations who contracted in succession with the Department of Energy (DOE) to operate the Hanford facility, which produced plutonium for the government. The plaintiffs allege that the defendants negligently, recklessly, and intentionally released a variety of radionuclides and other toxic substances into the environment surrounding Hanford. As a result, the plaintiffs claim, they suffered property damage, illness, and death.

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7. Consolidated Complaint, supra note 3, at 4-5.

8. Id. at 13-14. Westinghouse Hanford Co. was named as a defendant in the Consolidated Complaint, id. at 14, but has since been dropped from the suit because apparently it was not responsible for any off-site releases of radiation. Interview with Tom Foulds, Co-Lead Counsel for the Plaintiffs, in Seattle, Wash. (Oct. 25, 1996).

9. Consolidated Complaint, supra note 3, at 14-42. Plaintiffs allege that there were radiation releases through the water, the air, and from leaking storage tanks during plutonium production. Although the plutonium production process was obviously complex, there were essentially two steps. First, uranium underwent nuclear fission and was converted into plutonium and other radionuclides. Second, the plutonium was chemically separated from the resulting material. During fission, radiation allegedly was released into the Columbia River. Water from the Columbia was piped in to cool the fuel rods, impurities in the water became radioactive, on occasion fuel rods ruptured, and these radioactive substances were released when the water was returned directly to the river. Airborne emissions allegedly occurred during the chemical extraction process, when the radioactive byproducts were released directly into the atmosphere through exhaust stacks. Finally, various radioactive and other toxic substances allegedly have leaked into the groundwater from the underground tanks used to store the high-level radioactive waste at Hanford. Id. at 21-42.

10. Id. at 6. Plaintiffs' claimed injuries include "personal injury, emotional distress, diminution in the value of real property, lost income, and/or a significant increased risk of harm." Id. at 5.
The plaintiffs' complaint sets forth a broad range of legal theories of recovery. Under the Price-Anderson Act (Price-Anderson) the plaintiffs have claimed eight causes of action in state tort law: negligence and negligence per se; absolute or strict liability; intentional trespass and private nuisance; public nuisance; misrepresentation and concealment; outrageous conduct and intentional infliction of emotional distress; negligent infliction of emotional distress; and civil conspiracy. Because of the inherent difficulties of proving causation in large toxic tort cases, particularly for radiological injuries, it will be difficult for the plaintiffs to prevail on any of these theories. If the plaintiffs do prevail, any judgments will be paid not by the defendants, but by the U.S. Government.

All of the Hanford defendants have indemnity agreements with the U.S. Government that fall under Price-Anderson. In the event that a state tort action is successfully maintained against a Price-Anderson contractor, these indemnity agreements cap the amount of damages that may be awarded and indemnify the contractors for any judgments they pay and any legal expenses they incur. Despite this financial protection, the case is being defended vigorously. Each defendant has plead in excess of twenty affirmative defenses and claimed immunity.

Personal injuries include thyroid cancer, stomach cancer, intestinal cancer, breast cancer, leukemia, hypothyroidism, miscarriages, and birth defects. Id. at 4–12.


12. Consolidated Complaint, supra note 3, at 60–76.

13. Under this theory, plaintiffs allege that the defendants conspired to conceal the dangerous nature of the activities conducted at Hanford. Id. at 70.


17. See infra notes 48–49 and accompanying text.

18. See infra Part I.C.

19. See infra Part I.C.

20. These include arguments that the plaintiffs assumed the risk; that the claims are not valid or ripe; that the claims are barred or reduced by statutes of limitations, statutes of repose, laches, and contributory negligence; that there were intervening causes; that the state claims are preempted by federal laws; and that the alleged injuries were caused by someone else. See Answers of E.I. Du Pont De Nemours & Co. at 30–35; UNC Nuclear Indus., Inc. at 2–31; Rockwell Int'l Corp. at 23–
from suit on a variety of doctrinal grounds.\textsuperscript{21} Under one of these immunity defenses, a creation of federal common law that has become known as the "government contractor defense,"\textsuperscript{22} the defendants claim, in essence, "[t]he Government made [them] do it."\textsuperscript{23}

This Comment argues that the government contractor defense should not be available to Price-Anderson contractors. Part I lays out the basic provisions of Price-Anderson and describes the indemnity agreements that exist between the government and the Hanford contractors. Part II describes the evolution, purposes, and elements of the government contractor defense. Part III suggests that the underlying rationale of the defense is inapplicable to Price-Anderson contractors. Finally, Part IV argues that Price-Anderson preempts the government contractor defense.

I. THE PRICE-ANDERSON ACT

In the 1950s the U.S. Government decided to encourage private industry to participate in the nuclear power industry. Recognizing that the private sector was leery of the potentially enormous liabilities that went hand-in-hand with the destructive power of nuclear energy, Congress responded with the Price-Anderson Act.\textsuperscript{24} Price-Anderson

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\item \textsuperscript{28} General Elec. Co. at 1, 24–29; Atlantic Richfield Hanford Co. at 58–64 [hereinafter Defendants’ Answers], Hanford (E.D. Wash. 1992) (Master File No. CY-91-3015-AAM).
\item Interestingly, in at least one toxic tort case similar to Hanford, the court held that the defendant’s assertion that the plaintiff’s agent had assumed the risk by choosing to live near a chemical plant was "so outrageous as to subject the defendant to punitive damages." Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 323 (W.D. Tenn. 1986), modified, 855 F.2d 1188, 1216 (6th Cir. 1988) (holding that such punitive damages could only be assessed if defense had been asserted in bad faith). Although punitive damages may not be assessed against Price-Anderson contractors if they are to be indemnified by the government, 42 U.S.C. § 2210(s) (1994), the court nevertheless is likely to frown on the assertion of outrageous, unfounded defenses.
\item \textsuperscript{21} Defendants’ Answers, supra note 20. Specifically, the defendants argue: (1) that the claims against them are really claims against the United States and are thus barred by sovereign immunity; (2) that the claims fall within the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1994); (3) that the defendants’ actions were undertaken pursuant to governmental privilege and public necessity; and (4) that the defendants were government contractors and they acted only at the direction and under the supervision and control of the government. \textit{Id.} This Comment focuses only on the last of these arguments.
\item \textsuperscript{22} Some courts refer to the defense as the "military contractor defense." This Comment adopts the term "government contractor defense" to avoid confusion.
\item \textsuperscript{23} \textit{In re} Hawaii Fed. Asbestos Cases, 960 F.2d 806, 813 (9th Cir. 1992) (citing \textit{In re} New York Asbestos Litig., 897 F.2d 626, 632 (2d Cir. 1990)).
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offers private companies a deal: if they participate, the government will indemnify them for any judgments against them. The Hanford defendants are all insured by such indemnity agreements.

A. Purposes of Price-Anderson

Congress passed the Price-Anderson Act in 1957 as a comprehensive amendment to the Atomic Energy Act of 1954. Price-Anderson had two fundamental purposes: "to protect the public and to encourage the development of the atomic energy industry." After holding a number of hearings in 1956, Congress's Joint Committee on Atomic Energy concluded that the open-ended liability associated with operating nuclear facilities was deterring the participation of private parties in the industry. Although the possibility of a nuclear accident was considered remote, the estimated costs of an accident ranged from a few hundred thousand to over one billion dollars. Many companies were unwilling to take on this highly uncertain liability. It was also impossible to adequately insure against this risk. Because of lack of actuarial experience in the area and the small number of potential industry participants among whom risk could be spread, the largest liability policy that could be obtained at the time was for twenty-five million dollars.

B. General Provisions of Price-Anderson

To accomplish Price-Anderson’s purpose of ensuring that victims are adequately compensated in the event of a nuclear accident, the statute


28. Id. at 1804.

29. Id. ("Since radioactive materials are many times more toxic and poisonous than other substances, the companies . . . are hesitant about assuming the liabilities which could ensue in the remote event of a reactor meltdown with the resulting release of fission products and radioactive materials into the air.").


31. Id.
simply relies on state tort law.\textsuperscript{32} At no point in the consideration of Price-Anderson did Congress seriously contemplate creating a federal cause of action to allow recovery.\textsuperscript{33} The U.S. Supreme Court has stated that in passing Price-Anderson, "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted."\textsuperscript{34}

Price-Anderson encourages private participation in the nuclear industry by limiting the total amount of money that plaintiffs may recover for each nuclear incident,\textsuperscript{35} providing insurance mechanisms for contractors,\textsuperscript{36} and indemnifying contractors for liability in some instances.\textsuperscript{37} Price-Anderson draws a distinction, however, between contractors who operate commercial power plants for the Nuclear Regulatory Commission ("NRC contractors") and those involved with weapons production for the DOE ("DOE contractors").\textsuperscript{38} Both types of contractors enjoy the same limit on liability, but only DOE contractors are indemnified by the government.\textsuperscript{39}

Price-Anderson’s liability cap for all contractors is set equal to the total level of financial protection required of NRC contractors.\textsuperscript{40} Each NRC contractor must carry $200 million of primary liability insurance.\textsuperscript{41} In addition, in the event of a nuclear incident for which liability is incurred, each NRC contractor must pay "retrospective" premiums of up to $75.5 million.\textsuperscript{42} With 109 NRC contractors currently operating

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    \item \textsuperscript{33} Berkovitz, \textit{supra} note 16; see also Silkwood, 464 U.S. at 255–56.
    \item \textsuperscript{34} \textit{Silkwood}, 464 U.S. at 255.
    \item \textsuperscript{35} 42 U.S.C. § 2210(e) (1994).
    \item \textsuperscript{36} \textit{See infra} notes 41–45 and accompanying text.
    \item \textsuperscript{37} \textit{See infra} notes 47–50 and accompanying text.
    \item \textsuperscript{38} Compare 42 U.S.C. § 2210(b)–(e) (1994) (governing NRC licensees) with 42 U.S.C. § 2210(d) (1994) (governing DOE contractors). NRC contractors are engaged in commercial activities such as fabricating nuclear fuel and operating nuclear power plants, whereas DOE contractors generally are involved in the development, testing, or production of nuclear weapons. Berkovitz, \textit{supra} note 16, at 1.
    \item \textsuperscript{39} There remains in the law a vestigial requirement that the government indemnify NRC contractors for the difference between $560 million and the amount of available liability insurance. \textit{See} 42 U.S.C. § 2210(e). However, because NRC contractors are insured well in excess of $560 million, this provision no longer has any effect, and the government will not have to indemnify NRC contractors in the event of a nuclear accident. Berkovitz, \textit{supra} note 16, at 15.
    \item \textsuperscript{40} 42 U.S.C § 2210(e).
    \item \textsuperscript{41} 42 U.S.C. § 2210(b)(1); 10 C.F.R. § 140.11(a)(4) (1996).
    \item \textsuperscript{42} 10 C.F.R. § 140.11(a)(4). No more than $10 million of this amount may be assessed each year. § 140.11(a)(4).
\end{itemize}

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nuclear power plants, this secondary insurance mechanism may provide up to $8.2 billion of protection. Combined with the primary insurance, the total liability for each nuclear incident is capped at approximately $8.4 billion, although this limit will of course fluctuate over time as a function of the number of NRC contractors and the amount of primary insurance required.

The liability cap for NRC contractors also applies to DOE contractors. However, DOE contractors, which include the Hanford defendants, do not have to pay "retrospective" premiums if they incur liability. Instead, the government indemnifies DOE contractors for any uninsured liability up to the amount of the liability cap. The government also may indemnify the contractors for any legal expenses they incur. Finally, because the government ultimately must pay the bulk of any claims against DOE contractors, it has the authority to direct the defense of the case and must review and approve any settlements.

C. The Indemnity Agreements of the Hanford Defendants

All of the Hanford defendants have indemnity agreements with the government that fall under Price-Anderson. The indemnity agreement

44. See 42 U.S.C. § 2210(b)(1).
45. § 2210(b)(1); 10 C.F.R. § 140.11(a)(4).
47. § 2210(d). At its discretion, however, DOE may require its contractors to carry basic insurance. § 2210(d)(2).
48. § 2210(d).
49. § 2210(d)(2).
50. § 2210(d)(2).

All agreements of indemnification under which the Department of Energy (or its predecessor agencies) may be required to indemnify any person, shall be deemed to be amended, on August 20, 1988, to reflect the amount of indemnity for public liability and any applicable financial protection required of the contractor under this subsection on August 20, 1988.
between DuPont and the United States was entered into prior to the enactment of Price-Anderson, but nevertheless provides comprehensive protection for the company in the event that it is sued for actions undertaken under the contract. The indemnity agreements of the remaining defendants, which were drafted under Price-Anderson, are more comprehensive than the DuPont agreement in that for catastrophic nuclear accidents, indemnification is provided even if the accident was willfully or maliciously caused by the contractor. The contracts are less comprehensive in that the contractors are required to carry liability insurance for accidents, and for extraordinary nuclear incidents the contractor must waive certain defenses, including government immunity.

II. THE GOVERNMENT CONTRACTOR DEFENSE

The government contractor defense immunizes government contractors from lawsuits in state tort law when a contractor can establish that "[t]he Government made [them] do it." It is an affirmative defense and the contractor bears the burden of proving each of its elements by a preponderance of the evidence. Prior to 1988, the circuits were split as to both the doctrinal basis of the defense and its


52. See DuPont Contract, supra note 51. The contract provides:

The Contractor shall not be liable for, and the Government shall indemnify and hold the Contractor harmless against, any delay, failure, loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind and for any cause whatsoever [except] . . . bad faith or willful [sic] misconduct.

Id. at 49.


55. In re Hawaii Fed. Asbestos Cases, 960 F.2d 806, 813 (9th Cir. 1992) (citing In re New York Asbestos Litig., 897 F.2d 626, 632 (2d Cir. 1990)).

56. Oliver v. Oshkosh Truck Corp., 96 F.3d 992 (7th Cir. 1996); Carley v. Wheeled Coach, 991 F.2d 1117, 1125 (3d Cir. 1993).
formulation. These disputes were resolved, however, with the U.S. Supreme Court’s decision in Boyle v. United States Technologies Corp. Since Boyle, courts generally have agreed on how the elements of the government contractor defense should be applied, but the circuits have split on the issues of when the defense may be invoked and what types of contractors may invoke it.

A. Historical Development

The first U.S. Supreme Court case to immunize a government contractor from suit was Yearsley v. W.A. Ross Construction Co. The Yearsley Court held that a contractor conducting a public works project for the government could not be sued because it was an agent of the government, and thus cloaked in the United States’ sovereign immunity. The “agency” rationale was seriously undermined, however, with the passage of the Federal Tort Claims Act (FTCA), which specifically excludes independent contractors from the definition of federal agency. Since the passage of the FTCA but prior to the U.S. Supreme Court’s landmark decision in Boyle, the government contractor defense survived, but primarily in the context of military contracts.

Courts developed two different theories for defining the scope of “military contractor immunity.” First, in McKay v. Rockwell International Corp., the Ninth Circuit held that the government contractor defense would apply in cases in which suit is brought by

57. See infra Part II.A.
58. 487 U.S. 500 (1988); see infra Part II.B.
59. 309 U.S. 18 (1940).
60. Id. at 20–21. In Yearsley, the defendant had contracted with the government to build a series of dikes along the Missouri River. The plaintiff owned property along the river and sued on the grounds that the defendant’s actions had caused 95 acres of his property to be eroded away. Id. at 19–20.
61. 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1291, 1346(b), 1346(c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671–2680 (1994)). The FTCA waives the United States’ sovereign immunity for harm caused by the negligent or wrongful conduct of government officials, 28 U.S.C. § 1346(b), but exempts from this waiver “any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a); see also Grover Glenn Hankins, The Federal Tort Claims Act: A Smooth Stone for the Sling, 31 Gonz. L. Rev. 27, 41–47 (1996).
64. 704 F.2d 444 (9th Cir. 1982).
members of the military against a contractor, and in which the United States would have been immune from suit under the *Feres-Stencel* doctrine.\textsuperscript{65} The Fourth Circuit adopted the same approach in *Tozer v. LTV Corp.*,\textsuperscript{66} reasoning that if contractors were not immunized from suit under these circumstances, they would pass the costs of liability on to the government, which would defeat the purpose of immunizing the government in the first place. The second approach was enunciated in *Shaw v. Grumman Aerospace Corp.*,\textsuperscript{67} where the Eleventh Circuit recognized a "military contractor defense" founded on the principle that "the constitutional separation of powers compels the judiciary to defer to a military decision."\textsuperscript{68} The *Boyle* Court has since rejected both of these approaches.\textsuperscript{69}

The pre-*Boyle* decisions also disagreed on how to define the elements of the government contractor defense. The Eleventh Circuit held that a contractor could take advantage of the defense only by showing that it had minimal input into the design of the defective equipment, and that it warned the government about any known risks.\textsuperscript{70} The Fourth and Ninth Circuits, however, held that the defense would apply when the government approved reasonably precise specifications, the contractor conformed to the specifications, and the contractor warned the government about any known dangers.\textsuperscript{71} The *Boyle* Court adopted these elements, but changed the doctrinal basis of the defense.\textsuperscript{72}

\textsuperscript{65} *Id.* at 451. The *Feres-Stencel* doctrine refers to two U.S. Supreme Court cases that together immunize the government from suits brought by members of the military. In *Feres v. United States*, 340 U.S. 135 (1950), the Court held that members of the military cannot bring suit against the government for injuries arising incident to service. *Id.* at 146. In *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), the Court extended this rule to hold that contractors who had been sued by members of the military for injuries arising incident to service could not seek indemnity from the government. *Id.* at 673–74.


\textsuperscript{67} 778 F.2d 736 (11th Cir. 1985).

\textsuperscript{68} *Id.* at 743

\textsuperscript{69} *Boyle*, 487 U.S. at 510. The *Boyle* court never discussed the separation of powers rationale, but explicitly rejected *Feres-Stencel* as a doctrinal basis for the government contractor defense. *Id.* The Court found that the doctrine was too narrow because it only immunized contractors when they were sued by members of the military, and too broad because it would apply even when the government had exercised no discretion in selecting the design feature that was at issue. *Id.*

\textsuperscript{70} *Shaw*, 778 F.2d at 746.

\textsuperscript{71} *Tozer*, 792 F.2d at 408; *McKay*, 704 F.2d at 451.

\textsuperscript{72} See infra Part II.B.
B. Boyle: The Modern Formulation of the Government Contractor Defense

David Boyle drowned in 1983 when he was unable to escape his helicopter after it crashed into the ocean off the coast of Virginia. He had been a helicopter copilot for the U.S. Marines.\(^7\) Boyle’s father brought suit against the manufacturer of the helicopter, Sikorsky, alleging among other things that Sikorsky had defectively designed the helicopter’s escape hatch to open outwards, instead of inwards.\(^7\) As a result, due to water pressure, Boyle was unable to escape.\(^7\) The jury found for Boyle and awarded $725,000.\(^7\) The court of appeals reversed, finding that Sikorsky could not be held liable because of the “military contractor defense.”\(^7\) The U.S. Supreme Court agreed that the defense could be raised on these facts. Nevertheless, the Court remanded the case to determine whether the court of appeals had decided as a factual matter that the defense applied, which would be error, or whether it had decided as a matter of law that no reasonable jury could have found for Boyle, which would be allowed.\(^7\)

I. Preliminary Requirements

The government contractor defense established under Boyle is grounded in the federal common law.\(^7\) The Court noted that there are certain areas of “uniquely federal interests”\(^7\) where “state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called ‘federal common law.’”\(^7\) Boyle bordered on two areas that the Court had

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74. Id.
75. Id.
76. Id. at 503.
77. Id.
78. Id. at 514.
79. Regardless of the various intellectual foundations and formulations of the elements of the government contractor immunity defense, it has always been a rule of federal common law. Compare Yearsley v. W.A. Ross Constr. Co. 309 U.S. 18, 22 (1940) with McKay v. Rockwell Int’l Corp., 704 F.2d 444 (9th Cir. 1983).
previously found to be of uniquely federal interest—the contractual rights and obligations of the United States and the civil liability of federal officials acting within the scope of their duty.\textsuperscript{82} The Court thus held that "the procurement of equipment by the United States" is an area of uniquely federal interest,\textsuperscript{83} and that this interest exists as much in performance contracts as in procurement contracts.\textsuperscript{84}

For the government contractor defense to apply, however, Boyle also requires that the federal interest be "implicated" by the contract.\textsuperscript{85} In other words, the contract must threaten to impede the ability of government contracting officials to do their jobs. This was the case in Boyle, the Court reasoned, because if government contractors were subjected to liability, then either they would decline to enter into such contracts in the future, or they would charge more for their services. Either way, the discretion of government officials to purchase items with specified design features would be limited.\textsuperscript{86}

Finally, the Court held that the government contractor defense only is available when "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' [87] . . . or the application of state law would 'frustrate specific objectives.'\textsuperscript{88} The Court provided no bright-line rule for when such a significant conflict will exist, but held that the discretionary function exception to the Federal Tort Claims Act\textsuperscript{89} should guide the analysis.\textsuperscript{93} A contractual provision can only significantly conflict with state tort law when it embodies the discretionary decision of a government official. If a federal procurement officer for the military orders "stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature."\textsuperscript{91} Whenever it is impossible to comply with both

\textsuperscript{82} \textit{Id.} at 504–05.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{Id.} at 507. Note that this is the same reasoning employed by the Fourth Circuit in Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986). \textit{See supra} note 66 and accompanying text.

\textsuperscript{87} \textit{Boyle}, 487 U.S. at 507 (citing Wallis v. Pan Am. Petroleum Corp. 384 U.S. 63, 68 (1966)).

\textsuperscript{88} \textit{Id.} at 507 (citing United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)).

\textsuperscript{89} 28 U.S.C. § 2680(a) (1994); \textit{see supra} note 61.

\textsuperscript{90} \textit{Boyle}, 487 U.S. at 511 (stating that FTCA "suggests the outlines of . . . 'significant conflict' between federal interests and state law in the context of Government procurement").

\textsuperscript{91} \textit{Id.} at 509.
federal and state interests, however, a “significant conflict” exists. In Boyle, there was a “significant conflict” because the contract required that the escape door open outwards, whereas the duty of care under state tort law required that the door open inwards.

2. The Three-Part Test

Once the basic requirements are established, Boyle prescribes a three-part test to determine when the federal contract provisions will displace state tort law:

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

The purpose of the three-part test is to protect the discretionary decisions of the federal government. The first two prongs of the test ensure that the contract was carried out pursuant to a discretionary decision of a government official. If the government did not review and approve precise specifications, the contract would not embody an exercise of discretion; if the contract did not conform to those specifications, in effect there would be no government approval at all. The third requirement is designed to accomplish the same objective, but indirectly. The Boyle Court reasoned that if government contractors were not required to disclose knowledge of dangers, they would have a perverse incentive to withhold information so as not to jeopardize the contract. This, in turn, would lead to government officials being forced to make discretionary decisions without vital information.

92. Id.
93. Id.
94. Id. at 512.
95. Id. at 512–13.
96. Id. at 512.
97. Id.
98. Id.
99. Id. at 512–513.
C. Applying the Government Contractor Defense After Boyle

In the wake of Boyle, there has been considerable litigation over each of the elements of the three-part test, but courts have reached a rough consensus regarding when these elements are satisfied. The circuits have split, however, on whether the defense applies narrowly to contracts for military equipment or broadly to any government contract, and concomitantly, on whether the existence of a "significant conflict" should be considered a separate threshold requirement or should be presumed to be met whenever the three-part test is satisfied.

1. Interpreting the Three-Part Test

To establish that the government approved reasonably precise specifications, the first prong of the three-part test, a contractor must show that the government conducted a meaningful, substantive review of the specifications at issue; the test is not satisfied when the contract was approved with a mere rubber stamp. Applying this standard, government approval is found when the government and the contractor engaged in a "continuous back and forth" review process regarding the design feature in question. The precision requirement is intended to ensure that the government approved the precise specification that gave rise to the lawsuit.

100. See Tate v. Boeing Helicopters, 55 F. 3d 1150, 1154 (6th Cir. 1995) (referring to purpose of this prong of test, stating that "[t]he government exercises no discretion when it simply approves a design with a rubber stamp, that is, approves a design without scrutiny"); Levis v. Babcock Indus., Inc., 985 F.2d 83, 87 (2d Cir. 1993); Maguire v. Hughes Aircraft Corp., 912 F.2d 67, 72 (3d Cir. 1990); Ramey v. Martin-Baker Aircraft Co., 874 F.2d 946, 950 (4th Cir. 1989); Trevino v. General Dynamics Corp., 865 F.2d 1474, 1480 (5th Cir. 1989).

101. See Tate, 55 F. 3d at 1155–56 (noting that design features of helicopter had been developed by government and Boeing together over 10-year period); Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1320 (11th Cir. 1989) (stating that Air Force had solicited proposals from manufacturers, extensively reviewed winning proposal, and assisted in design of electrical system); see also Carley v. Wheeled Coach, 991 F.2d 1117, 1125 (3d Cir. 1993); Stout v. Borg-Warner Corp., 933 F.2d 331, 335–36 (5th Cir. 1991); Kleeman v. McDonnell Douglas Corp., 890 F.2d 698, 702–03 (4th Cir. 1989); Ramey, 874 F.2d at 950; Smith v. Xerox Corp., 866 F.2d 135, 138 (5th Cir. 1989); Trevino, 865 F.2d at 1480–81; Dowd v. Textron, Inc., 792 F.2d 409, 412 (4th Cir. 1986); McKay v. Rockwell Intl Corp., 704 F.2d 444, 450 (9th Cir. 1983); Sundstrom v. McDonnell Douglas Corp., 816 F. Supp. 577, 582–83 (N.D. Cal. 1992); In re Aircraft Crash Litig. Frederick, Md., 752 F. Supp. 1326, 1337 (S.D. Ohio 1990); Galik v. Lockheed Shipbuilding Co., 727 F. Supp. 1433, 1435 (S.D. Ala. 1989).

102. Bailey v. McDonnell Douglas Corp., 989 F.2d 794 (5th Cir. 1993). The precision of specifications requirement is most clear in cases where the plaintiff has brought claims based on both negligence and failure-to-warn. Courts have required the defendant to show that the government approved not only the specification that caused the injury but the specification
There has been relatively little litigation over the second prong of the Boyle test, the requirement that the equipment conform to the contract specifications. Generally plaintiffs simply have not alleged nonconformity. When such allegations are made, however, conformity to specifications may be found explicitly or inferred from inspection and acceptance of the product by the government. Even if the product does not conform to the original specifications, conformity will be found when the government has been actively involved in approving changes. Finally, a product may conform to specifications even if it does not perform as intended, so long as it was produced according to specifications.

Under the third prong of the Boyle test, a contractor must warn the government only of dangers known to it but not to the government. If the contractor was unaware of the risk (even a risk of which it should have been aware), if the government actually knew of the risk, if the risk was common knowledge, or if government knowledge of the risk may be inferred from the circumstances of the case, the contractor has no duty to warn. As with the first and second prongs of the Boyle test, pervasive involvement by the government gives rise to an inference that it was aware of the risks.


3. See, e.g., Tate, 55 F.3d at 1156.


5. Tate, 55 F.3d at 1156 (inferring conformity where army inspected and approved helicopter); Carley, 991 F.2d at 1126 (same, where government inspected and accepted ambulances); Lewis, 985 F.2d at 89 (same, notwithstanding evidence of design defect).

6. Kleemann, 890 F.2d at 702 (finding continuous exchange between government and contractor to be “persuasive evidence” of conformity).

7. In re Air Disaster at Ramstein Air Base, Germany, 81 F.3d 570, 575 (5th Cir. 1996) (finding that failure to conform to precatory contractual requirement that airplane be “failsafe” did not constitute nonconformance when defendant conformed to detailed, quantitative specifications of contract); see also Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1321 (11th Cir. 1989).


9. Smith v. Xerox Corp., 866 F.2d 135, 139 (5th Cir. 1989) (presuming government to be aware of danger if similar accidents occurred in past); Harduvel, 878 F.2d at 1321–22 (holding that contractor was required only to warn of actually known dangers); Sundstrom v. McDonnell Douglas Corp., 816 F. Supp. 587, 593 (N.D. Cal. 1993) (finding no duty to warn about dangers of which contractor should have known but did not).

2. *A Split Among the Circuits over When the Defense May Be Invoked*

Although courts have come close to reaching consensus on how to apply the elements of the three-part *Boyle* test, the circuits are split on the issues of whether the defense may be invoked only by military contractors and whether the significant conflict requirement is a threshold test.\(^{11}\) These splits reveal a fundamental difference in how the courts have understood and construed the meaning and scope of *Boyle*.

a. *Applying the Defense to Nonmilitary Contracts*

The leading case to apply the government contractor defense in a nonmilitary setting is *Carley v. Wheeled Coach*.\(^ {12}\) In *Carley*, an ambulance manufacturer under contract with the General Services Administration of the United States invoked the defense after being sued for negligent design. The Third Circuit allowed the defense, reasoning that, although *Boyle* had involved a contract for military equipment, the underlying rationale of *Boyle* applies in a nonmilitary setting.\(^ {13}\) *Boyle* sought to protect the discretionary functions of government officials, and the decisions relating to nonmilitary procurements are no more or less protected under the FTCA than military procurement decisions.\(^ {14}\) Therefore, the defense should be available to any government contractor.\(^ {15}\) Other courts have reached the same conclusion, allowing the defense even to manufacturers of mail-sorting machines.\(^ {16}\)

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that government was aware of danger when it had designed specifications, helped design full-scale models, and conducted numerous inspections).

111. See Kelly A. Moore, Note, *The Third Circuit Expands the Government Contractor Defense to Include Nonmilitary Contractors*, 72 Wash. U. L.Q. 1435 (1994) (reviewing arguments for and against allowing defense for nonmilitary contractors, and concluding that it should not be available because doing so would deny numerous plaintiffs any recovery).

112. 991 F.2d 1117 (3d Cir. 1993). In *Carley*, the plaintiff was an emergency medical technician. She was injured when the ambulance she was in flipped over while trying to avoid an accident. She brought suit against the manufacturer of the ambulance, alleging that it had been negligently designed because the center of gravity was too high. The district court granted summary judgment for the defendant based on the government contractor defense. The court of appeals held that the government contractor defense is available to nonmilitary contractors under federal common law, but reversed and remanded, finding that the third prong of *Boyle* had not been met as a matter of law. *Id.* at 1127–28.

113. *Id.* at 1124.

114. *Id.*

115. *Id.* at 1125.

Hanford and the Government Contractor Defense

Taking a very different approach, the Ninth Circuit, in *Nielsen v. George Diamond Vogel Paint Co.* and *In re Hawaii Federal Asbestos Cases,* held that the defense may not be invoked when the product being manufactured is of a nonmilitary nature, even if the contract is with a branch of the military. In *Nielsen,* the court found that there is a unique federal interest involved anytime a government official exercises discretion under the FTCA. The court held, however, that there is only a "significant conflict" between that interest and state tort law in the context of military procurement contracts. Stressing the historical evolution of the defense, the court reasoned that even after *Boyle,* "the policy behind the defense remains rooted in considerations peculiar to the military." The Second Circuit also has adopted this interpretation of *Boyle.* For courts taking this approach, of course, the government contractor defense would not be available to NRC contractors operating commercial power plants.

b. Applying the "Significant Conflict" Requirement

The courts have adopted two different approaches to analyzing whether a given case gives rise to a "significant conflict" under *Boyle.* This difference, while subtle, has critical implications in the Hanford case. Under the minority approach, the three-part *Boyle* test is considered the means by which a court should determine the existence of a significant conflict; if the elements are established, then a significant conflict is deemed to exist.

The second approach, followed by the majority of courts, is to treat the significant conflict analysis as a threshold test. This is the approach

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117. 892 F.2d 1450 (9th Cir. 1990).
118. *In re Hawaii Fed. Asbestos Cases,* 960 F.2d 806, 812 (9th Cir. 1992) (holding that manufacturer of asbestos insulation under contract with Navy could not invoke defense).
119. *In re Hawaii Fed. Asbestos Cases,* 960 F.2d at 812 (holding that manufacturer of asbestos insulation under contract with Navy could not invoke defense); *Nielsen,* 892 F.2d at 1451 (same, for paint manufacturer under contract with Army).
120. *Nielsen,* 892 F.2d at 1454.
121. *Id.* at 1455.
122. *See supra* Part II.A.
123. *Nielsen,* 892 F.2d at 1454–55; *see also Andrew,* 936 F. Supp. at 828–30 (discussing reasoning of *Nielsen*).
taken by the courts holding that the defense cannot be applied outside of contracts for military equipment.\textsuperscript{126} Thus in \textit{Nielsen}, the Ninth Circuit did not even apply the three-part \textit{Boyle} test; it determined that because there was no significant conflict, the case was outside the scope of \textit{Boyle}.\textsuperscript{127} It is also the approach taken by cases that have held that the federal interest at stake was embodied not in the contract, but in a federal law or regulation.\textsuperscript{128} In \textit{Crawford v. National Lead Co.},\textsuperscript{129} for example, the court determined that there was no significant conflict between the federal anti-pollution laws and the state standard of care; therefore, it was not necessary to reach the three-part \textit{Boyle} test.\textsuperscript{130}

III. THE UNDERLYING RATIONALE OF THE GOVERNMENT CONTRACTOR DEFENSE DOES NOT APPLY TO PRICE-ANDERSON CONTRACTORS

There have only been two reported cases in which Price-Anderson contractors have invoked the government contractor defense: \textit{Crawford v. National Lead Co.}\textsuperscript{131} and \textit{Lamb v. Martin Marietta Energy Systems, Inc.}\textsuperscript{132} These cases, along with \textit{Hanford}, suggest that the government contractor defense is inappropriate for Price-Anderson contractors. First, no unique federal interest is threatened. The discretionary decision of a government official to enter into a contract for the operation of a nuclear facility constitutes a unique federal interest; however, this interest is not threatened by the application of state tort law because the contractors are already adequately protected from liability by the indemnity agreements and insurance mechanisms of Price-Anderson. Second, even assuming that a unique federal interest were implicated, it is extremely unlikely that a "significant conflict" will exist between that federal interest and the dictates of state tort law. Both federal environmental laws and state tort laws prohibit the radiation releases upon which lawsuits against Price-Anderson contractors are likely to be based.

\textsuperscript{126} See supra notes 119–124 and accompanying text.
\textsuperscript{127} \textit{Nielsen}, 892 F.2d at 1450.
\textsuperscript{129} \textit{Crawford}, 784 F. Supp. 439.
\textsuperscript{130} \textit{Id.} at 447.
\textsuperscript{131} 784 F. Supp. 439 (S.D. Ohio 1989)
\textsuperscript{132} 835 F. Supp. 959 (W.D. Ky. 1993).
A. Background: Government Contractor Defense Cases Under Price-Anderson

In Crawford v. National Lead Co., the defendants were contractors who operated a federally-owned uranium metals production plant near Fernald, Ohio for thirty-four years. The plaintiffs lived near the plant and alleged that the defendant's failure to prevent emissions of uranium and other harmful materials had caused emotional distress and diminished property values. The defendants raised the government contractor defense.

The Crawford court held that Boyle's significant conflict requirement had not been established by the defendants. The defendants conceded that the operation of the uranium plant caused emissions of uranium and other harmful materials into the surrounding environment. The defendants also did not dispute the plaintiffs' contention that the government contractor defense would not apply if the emissions had violated applicable federal environmental laws. The court reasoned that if federal law prohibited the same emissions that were the basis of the state law claims, there could be no significant conflict. "Significant conflict" is defined by reference to the discretionary function exception to the FTCA, and because there is no discretion to violate federal law under the FTCA, the government contractor defense cannot apply when such violations occurred. The court denied cross-motions for summary judgment, holding that there was a genuine issue of material fact as to whether federal environmental laws had been violated. DOE eventually settled the case for seventy-three million dollars.

133. Crawford, 784 F. Supp. at 441.
134. Id.
135. Id. at 441–42.
136. Id. at 442.
138. Id. Note that the court conducted the significant conflict analysis as a threshold test. See supra Part II.C.2.b and infra note 161 and accompanying text.
139. Crawford, 784 F. Supp. at 446.
140. Id. at 447–48.
141. Ankney, supra note 63, at 416–17 n.116. Because the United States must indemnify the Price-Anderson contractor for any settlement it enters into, the settlement can only be made with the approval of the United States. See supra note 50 and accompanying text.
The facts and holding in *Lamb v. Martin Marietta Energy Systems, Inc.* are remarkably similar to *Crawford*. In *Lamb*, the plaintiffs owned property about two miles away from the Paducah Gaseous Diffusion Plant, which produced nuclear materials for DOE under Price-Anderson. The *Lamb* plaintiffs claimed personal injury and property damage as the result of the defendants' emission of radionuclides into the groundwater. The defendants moved for summary judgment based in part on the government contractor defense.

Applying the criteria of *Boyle*, the court found that operating a nuclear production facility clearly involves a unique federal interest because the plants are owned and under the exclusive regulation of the United States. However, the court held that there was no significant conflict with state tort law because "it is not enough to show that a government official had approved of the plant’s activities; the defendants must show that the government official’s approval involved the permissible exercise of policy judgment." There was no such showing here, but the court granted summary judgment to the defendants on other grounds.

**B. No Unique Federal Interest Is Implicated**

Although the *Lamb* and *Crawford* courts found a unique federal interest, they failed to recognize that *Boyle* also requires that the unique federal interest be *implicated*. In *Boyle*, this requirement was met because of the possibility that the imposition of state tort law would affect the ability of government officials to procure helicopters with particular design features at the then-current price. On the surface, this rationale would seem to apply equally to contracts to operate nuclear facilities. If nuclear contractors are subjected to state tort law liability, either they will be forced to pay damages in the event of a nuclear accident, or they will purchase liability insurance to cover this contingency; either way, these costs will be internalized and passed on to the consumer—that is, the government. At the margin, perhaps, exposure to this liability could cause some contractors to exit the

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143. *Id.*
144. *Id.* at 965.
145. *Id.* at 967.
146. *Id.* at 971–72.
147. See *supra* notes 85–86 and accompanying text.
148. See *supra* note 86 and accompanying text.
market. Thus the ability of government officials to enter into contracts for operation of nuclear facilities at current prices would be affected.\textsuperscript{149}

The superficial resemblance between this scenario and Boyle becomes illusory, however, in light of Price-Anderson. DOE contractors like the Hanford defendants will never bear any of the costs of litigation nor have to pay any damages if they lose a lawsuit; Price-Anderson indemnifies them fully.\textsuperscript{150} The availability of the government contractor defense is thus economically meaningless to DOE contractors; either way, they pay nothing. It follows that allowing state tort lawsuits against these contractors will have minimal effect on the contract price, the willingness of private industry to participate, or concomitantly, the ability of government officials to carry out their discretionary functions. Because no unique federal interest is at stake, the government contractor defense should not be available to DOE contractors.

It is possible that DOE contractors who were successfully sued for the negligent operation of nuclear facilities would be forced to pay higher insurance premiums, and conceivably these costs would be passed on to the government. Nevertheless, because DOE contractors must insure against only about two percent of the potential liability for a nuclear accident,\textsuperscript{151} marginal fluctuations in insurance rates should not affect their willingness to participate in the industry and should have little effect on the contract price. Moreover, as a matter of public policy, requiring DOE contractors to carry some liability insurance and to be responsible for increases in premiums encourages careful conduct. Allowing the government contractor defense not only would remove this incentive to operate with care, but it would leave the law in the nonsensical position of requiring DOE contractors to carry liability insurance while at the same time immunizing them from liability.\textsuperscript{152}

For NRC contractors, the analysis is slightly more complex, but the conclusion is most likely the same. Although Price-Anderson caps the

\textsuperscript{149} This Comment argues that the unique federal interest required to trigger the Boyle defense is the threat to discretionary government functions under the FTCA. See supra notes 79–86 and accompanying text. Arguably, if Boyle were to be read more broadly, Price-Anderson's indemnity payments could constitute a unique federal interest triggering the application of Boyle. However, because these payments are specifically authorized by Congress, Price-Anderson must preempt any federal common law defense that would directly eliminate them. See infra Part IV. Therefore, this argument is not addressed in this subpart.

\textsuperscript{150} See supra notes 46–54 and accompanying text.

\textsuperscript{151} DOE contractors are required to carry only up to $200 million of liability insurance for a potential liability of $8.4 billion. See supra Part I.B.

\textsuperscript{152} Such contradictions seem to suggest that Congress's statutory prescription should preempt the government contractor defense for Price-Anderson contractors. See infra Part IV.
total liability for NRC contractors at $8.4 billion, they and their insurers ultimately must pay any damages resulting from a nuclear accident. These contractors would thus benefit from the availability of the government contractor defense. With the defense, they would pay nothing so long as the contractor operating the facility where the accident occurred met the elements of the Boyle test; without the defense, however, each NRC contractor could be forced to pay up to $75.5 million any time a serious nuclear accident occurred at an NRC facility. If these contractors did not have to account for this contingency, they would not build the expected costs into the terms of the contracts, and government officials could procure their services at a reduced rate. But this was not the test of Boyle. Boyle was concerned only with the possibilities that contractors would increase their prices or exit the market. To the extent that NRC contractors are forced to internalize liability costs, they have already done so, and these costs are already reflected in their contracts with the government. Therefore, depriving these contractors of the government contractor defense will have little, if any, effect on their willingness to participate and will not increase the price of their services. In turn, the unique federal interest of contracting for the operation of nuclear facilities is not threatened in the absence of the government contractor defense.

This conclusion for NRC contractors could become less clear, however, if the underlying cost structure of the industry were to change. If, for example, scientific advances indicate that a nuclear accident is more likely or would result in greater damages than originally believed, the expected costs of retrospective premiums under Price-Anderson might rise closer to the $75.5 million limit. Premiums for primary liability insurance also might rise. If so, contractors might be less willing to participate, and the discretionary functions of government officials might be threatened. Ultimately, however, Boyle does not seem to require that the government contractor defense be available to account for such contingencies. The remote, speculative threat to discretionary government functions hypothesized here seems to be distinguishable from the direct causal relationship described in Boyle. Regardless, this argument is inapplicable to DOE contractors like the Hanford defendants.

153. See supra notes 40–45 and accompanying text.
154. See supra notes 40–45 and accompanying text.
155. See supra note 86 and accompanying text.
In a broader context, this analysis regarding the implication of a unique federal interest highlights a potential pitfall for courts in applying the government contractor defense. Courts have tended to gloss over this threshold requirement in Boyle, presuming that a unique federal interest is implicated whenever a government official contracts for goods or services. As the Price-Anderson example illustrates, however, extraneous laws may work to rebut this presumption. Thus to ensure the proper application of Boyle, courts must treat the federal interest requirement as a genuine threshold issue, even though a unique federal interest may in fact be implicated in the vast majority of government contracts.

C. There Is No Significant Conflict

The Lamb and Crawford courts were correct in holding that the government contractor defense under Boyle was intended to protect only permissible discretionary functions of government officials, and that a government action that violates federal laws or regulations does not meet this test. Boyle defined the parameters of the government contractor defense by reference to the discretionary function exception to the FTCA. Moreover, in the same year that Boyle was decided, the Court held in Berkovitz v. United States that the discretionary function exception does not apply to government actions that violated applicable federal laws or regulations. Therefore, the government contractor defense can only protect contractual obligations that do not violate federal rules. Although this limitation on the government contractor defense is unavoidable under the law, the results are arguably unfair. The innocent contractor could argue it should not be forced to pay for the illegal actions of government officials.

This contention, however, fails in a number of respects. Most obviously, if there are indemnity agreements, the contractor does not pay; the government does. Even absent an indemnity agreement, because the FTCA waives sovereign immunity when the discretionary function exception does not apply, the truly innocent contractor could implead the government official who approved the illegal action as a third-party...


157. Berkovitz v. United States, 486 U.S. 531, 546–48 (1988) (holding that government officials who had licensed polio vaccine without conducting tests required by law were not shielded by discretionary function exception).

defendant.\textsuperscript{159} Also, it seems likely that a contractor who engaged in illegal conduct under a contract would have or should have known that what it was doing was wrong; if so, it should share in the liability. At a minimum, contractors should not have an incentive to look the other way when government officials break the law. Finally, plaintiffs do not have the privilege of knowing the dynamics of the interaction between the government and the contractor that led to the illegal action; therefore, they should not bear the burden of guessing who is to blame when they decide whom to sue.

Notwithstanding the merits of these normative arguments, Boyle and Berkovitz read together establish that the government contractor defense does not apply when contracting officials for the government act outside the bounds of their discretionary authority. In effect, there is an implicit hierarchy of authority for determining the federal interest to be examined when courts conduct significant conflict analysis under Boyle. If a federal statute or regulation exists that governs the permissibility of the act in question, that rule constitutes the federal interest; only when there is no such rule will the actions of the government contracting officer be used to determine whether there is a significant conflict with state tort law. Implicitly, this was how the Lamb and Crawford courts analyzed the issue. Because federal law and state law were in accord, there was no need to look to the terms and conditions of the contracts. If the contracts allowed for the release of radiation into the environment, then the government officials had exceeded their discretion; conversely, if the contracts prohibited the very releases upon which the state tort law claims were founded, then there was no significant conflict. Either way, the defense fails. The Hanford defendants are likely to encounter this conundrum.\textsuperscript{160}

\textsuperscript{159} Fed. R. Civ. P. 14(a).

\textsuperscript{160} Releases at Hanford that occurred after 1972 may violate the Clean Water Act, which prohibits the discharge of pollutants into navigable waters without a permit. 33 U.S.C. § 1311(a) (1994). All releases may be violations of the Refuse Act of 1899, which prohibits the discharge of refuse into navigable waters. 33 U.S.C. § 407 (1994). As early as 1945, Hanford officials knew that radioactive elements were being released directly into the Columbia River. A formerly classified statement to Hanford workers, apparently intended to allay fear of radiation exposure, states:

There may be some concern that radioactive water released from the Plant to the Columbia River will so contaminate the river that its water will be dangerous to man, fish or fowl. It is true that the water which passes through the units to a act as a coo ant does become radioactive. But it is also true that the greatest part of this radioactivity is lost before the waste water is ever put back into the river.

This analysis suggests a resolution to the split among the circuits as to whether the significant conflict requirement of Boyle should be treated as a separate, threshold test, or rather should be deemed to exist whenever the elements of Boyle's three-part test are met. If the government contractor defense is to be limited to cases where the government has exercised permissible discretionary functions, the significant conflict analysis must be done as a threshold test. The three-part Boyle test takes no account of whether the government had the authority to approve the specifications in the contract. Thus, if the significant conflict is not treated as a threshold requirement, a contractor could escape from liability even when the government-approved action is an egregious violation of constitutional principles. If, for example, the contracting official in Crawford had ordered the contractor to release plutonium into the drinking water supply, the contractor would be completely immune from suit if it could establish the elements of the three-part Boyle test. This result would protect the impermissible exercise of government discretion and thus violate the holding of Boyle.

IV. PRICE-ANDERSON PREEMPTS THE GOVERNMENT CONTRACTOR DEFENSE

Although no court has considered the issue on the record, Price-Anderson should preempt the government contractor defense. In a broad range of legal areas, the U.S. Supreme Court has held that federal common law doctrines may exist only when Congress has not acted in a given area or when the dictates of common law are parallel and complementary to the statutory scheme prescribed by Congress. Because neither condition is present here, Price-Anderson must preempt the government contractor defense.

A. Background: Statutory Preemption of Federal Common Law

The preliminary determination of whether an act of Congress preempts federal common law turns on the question of whether the statutory scheme is sufficient to address the problem that the common law rule is designed to address. In Milwaukee v. Illinois, the U.S. Supreme Court held that Congress's passage of the Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act")

161. See supra notes 133–141.
preempted the federal common law of nuisance. The Court noted that a federal statute need not proclaim itself as providing the exclusive rights or remedies, or prohibiting the application of federal common law. Rather, preemption occurs whenever Congress has "[spoken] directly to a question." Because the Clean Water Act is a comprehensive regulatory program supervised by an expert administrative agency established by Congress, the judicially-created law of interstate nuisance was preempted.

Similarly, in *Brown v. General Services Administration*, the Court held that the Civil Rights Act of 1964, as amended, was "the exclusive judicial remedy for claims of discrimination in federal employment," and thus would preempt earlier federal common law remedies. In reaching this conclusion, the Court noted that Congress had established a very detailed, specific procedure for how claims of discrimination were to be made. All administrative remedies had to be exhausted before a claim could be made in court, and the claim had to be made within thirty days. Noting that Congress had established "a careful blend of administrative and judicial enforcement powers," the Court stated that "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."

This does not mean, however, that any time a federal statute exists to address a problem or area there is no room for federal common law. In *Carlson v. Green*, the U.S. Supreme Court held that the availability of a statutory remedy under the FTCA did not deny the plaintiff the right to assert a federal common law claim for Fourth Amendment violations under color of authority. The Court stated that "crystal clear" that the FTCA and the federal common law should provide "parallel, complementary causes of action." The Court also

163. *Id.* at 317–19.
164. *Id.* at 315 (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)).
165. *Id.* at 317 ("Congress has not left the formulation of appropriate federal standards to the courts ... but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.").
167. *Id.* at 835.
168. *Id.* at 831–33.
169. *Id.* at 833.
170. 446 U.S. 14 (1980).
noted that the federal common law claim is a more effective remedy than the FTCA in a number of instances, implying that it addresses problems that have not been addressed by Congress.\(^{173}\) The Court thus held that the appropriate test for determining whether a federal statute preempts federal common law is "whether Congress has created what it views as an equally effective remedial scheme."\(^{174}\)

Considered together, these cases establish a two-part test: (1) Preemption will occur whenever Congress has acted on the same issue or area addressed by the federal common law unless (2) Congress intended for the statutory and common law schemes to be parallel and complementary.

B. *Price-Anderson Preempts the Government Contractor Defense*

The application of the government contractor defense to Price-Anderson contractors would directly undermine Congressional intent. Price-Anderson carefully balances the competing goals of encouraging private contractors to enter the nuclear industry and providing adequate compensation to victims in the event of a nuclear accident.\(^{175}\) Allowing the contractor immunity defense here, especially if the defense were construed broadly, would completely frustrate the second of these two goals. Price-Anderson thus should preclude the application of the government contractor defense because Price-Anderson has left no room for the common law to exist, and because the two doctrines are not parallel and complementary.

1. **The Government Contractor Defense Covers the Same Ground as Price-Anderson**

Price-Anderson and the government contractor defense were created for the same purpose: to ensure that the government would be able to contract with private industry for goods or services that the government deemed important. Moreover, the two schemes seek to achieve this goal by employing the same methodology of immunizing government contractors from lawsuits. In essence, the two regimes differ only as to the scope of application, the method of immunization, and the level of legislative detail. Price-Anderson is relatively narrow in scope, focusing

\(^{173}\) Id. at 22–23.

\(^{174}\) Id. at 22 n.10.

\(^{175}\) See supra Part I.A.
only on the nuclear industry; it immunizes contractors with indemnity agreements; and it was established through a complex, detailed statutory scheme. Conversely, the government contractor defense is broad in scope, applying at least to all government contracts for military goods or services and perhaps to all government contracts, depending on the circuit; it immunizes contractors by providing an affirmative defense; and it was created by a short and arguably ambiguous judicial decision. Ultimately, however, the two regimes are addressed to the same concern; therefore, the government contractor defense should be preempted unless it is parallel and complementary to the system established under Price-Anderson.

2. Price-Anderson and the Government Contractor Defense Are Not Parallel and Complementary

A comparison of the Boyle defense and the Price-Anderson indemnity scheme reveals that, unlike in Carlson, the common law and statutory provisions are not parallel and complementary. Indeed, the government contractor defense would directly undermine Price-Anderson’s purpose of providing adequate compensation to victims of nuclear accidents. At the time Price-Anderson was enacted, little was understood about the potential dangers of atomic energy. Congress worried that even if everything was done correctly, an accident might occur and people might be harmed. Therefore, it set up a compensation and indemnification scheme that was, essentially, a no-fault system. If plaintiffs could establish a tort under state law, they could recover from the contractor. And if the contractor had to pay damages, then regardless of fault, it would be indemnified. Moreover, Congress did not create a specific cause of action to provide relief to plaintiffs. Instead it relied on state tort law to effect its objective of providing adequate compensation to victims of nuclear accidents. Allowing the government contractor defense could effectively eviscerate the ability of state tort law to compensate victims of nuclear incidents. As long as the contractor could establish the elements of the Boyle test, the victims would get nothing.

176. See supra Part I.A.
177. See supra notes 32–34 and accompanying text.
178. See supra Part I.B.
179. See supra notes 32–34 and accompanying text.
Allowing Price-Anderson contractors to invoke the government contractor defense thus would create an artificial and arbitrary split among Price-Anderson plaintiffs. Plaintiffs could recover for their injuries if the elements of the *Boyle* test were not met, and they could not recover for the injuries if the *Boyle* test was met. In passing and amending Price-Anderson, Congress intended to make no such arbitrary distinction. Price-Anderson must be seen as precluding the availability of the government contractor defense to Price-Anderson contractors.

V. CONCLUSION

Price-Anderson contractors should be precluded from invoking the government contractor defense. The underlying reasons for the existence of the government contractor defense lose their logical force in this arena. The U.S. Supreme Court created the defense because it was concerned that if contractors were exposed to liability even when fully complying with the terms of a government contract, either they would be frightened into exiting the market, or they would internalize the liability costs and increase their prices. But the economics of the nuclear industry do not work like this. Price-Anderson contractors are either fully immunized from liability under indemnity agreements with the government, or they are already protected with private insurance and by Price-Anderson’s risk-spreading mechanisms. Regardless, not allowing them to invoke the government contractor defense will have minimal effect on the price of nuclear contracts or the willingness of industry to participate. Furthermore, the defense is unlikely to work because of the difficulty of meeting the “significant conflict” requirement. There can be no significant conflict when state tort law claims are based on releases of radiation that are also prohibited by federal law.

More fundamentally, federal common law cannot fill a gap that does not exist. The Price-Anderson Act is a complex and comprehensive piece of legislation that is carefully constructed to balance competing policy interests. It seeks to develop and promote nuclear power by encouraging private industry to participate; at the same time, recognizing the inherent risk of the enterprise, it seeks to ensure that any victims of nuclear accidents will be adequately compensated. The government contractor defense would upset this balance. It would duplicate the protections Price-Anderson already provides to nuclear contractors, providing a superfluous affirmative defense on top of Price-Anderson’s already generous indemnity agreements. Moreover, allowing the defense would subvert Congress’s goal of ensuring the compensation
of victims. As long as contractors followed orders and played by the rules, victims would get nothing. These duplicative and subversive results contravene congressional intent and require that Price-Anderson preempt the government contractor defense.

The Hanford case is of interest in part because it raises these issues, but more importantly because it clearly illuminates the injustice of allowing a government contractor defense in this area. The Hanford plaintiffs' allegations paint a bleak picture of the last fifty years. The plaintiffs claim that the government and its contractors negligently and intentionally released large amounts of radiation onto a rural population; that despite knowledge of the danger, no one was warned; and that as a result, thousands of people are seriously ill or dead. Even assuming all of these allegations to be true, the government contractor defense could prevent the victims from receiving any compensation. This, of course, makes no difference to the contractors, who, with or without the defense, will pay nothing because of their indemnity agreements with the government. Instead, it simply means that the U.S. Government will not have to make indemnity payments. Although protecting the public fisc and reducing the national deficit are laudable public policy objectives, they pale in juxtaposition with the inequity of denying nuclear victims any legal recourse. The Hanford contractors eventually may prevail on one of the scores of defenses they have asserted, but they should not have access to the government contractor defense.