SUPREME COURT
OF THE UNITED STATES

In the Matter of:	)	
	)	
DELBERT BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF DAVID A. BOYLE, DECEASED,	)	
	)	No. 86-492
Petitioners	)	
v.	)	
	)	
UNITED TECHNOLOGIES CORPORATION	)	

PAGES: 1 through 48

PLACE: Washington, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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OF THE HEIRS AND ESTATE OF :
DAVID A BOYLE, DECEASED, :
Petitioner :
v. : No. 86-492
UNITED TECHNOLOGIES CORPORATION :

Washington, D.C.
Wednesday, April 27, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

LOUIS S. FRANECKE, ESQ., San Francisco, California;
on behalf of Petitioner.

PHILIP A. LACOVARA, ESQ., Washington, D.C.;
on behalf of Respondent.

DONALD B AYER, ESQ., Department of Justice,
Washington, D.C.;
on behalf of United States, as amicus curiae,
supporting respondent.

C O N T E N T S

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 86-492, Delbert Boyle v. United Technologies Corporation.

Mr. Franecke, you may proceed whenever you're ready.

ORAL ARGUMENT OF LOUIS S. FRANECKE, ESQ.

ON BEHALF OF PETITIONER

MR. FRANECKE: Mr. Chief Justice, and may it please the Court.

This is a reargument of this case. On April 27, 1983, a 26 year old marine pilot was killed in the crash of a Sikorsky helicopter within the three mile limit off the Virginia coast. His family sued Sikorsky for wrongful death.

At trial, both parties stipulated that Virginia law applied. The jury was not charged with a Virginia Logan type defense, and respondents did not request one. The jury was charged, however, with a Government contractor defense approved by the respondents. This is despite the fact that the Government contractor defense as given by the trial court was not a part of Virginia law and had not been adopted by the Fourth Circuit at the time.

The jury found against the respondents. This is despite this jury charge of the Government contractor defense, thus respondents had not met their burden of proof at the trial level. Respondents appealed to the Fourth Circuit and did not

challenge the Government contractor defense as given by the trial court. They also then for the first time raised the Virginia Logan defense.

The Fourth Circuit, sua sponte, reversed the jury verdict based on, one, the Government contractor defense it had just announced that day in the Tozer case that they did not then remand the case down to the trial level to determine the facts based on the just announced Government contractor defense, which we contend is a violation of a Seventh Amendment right to a jury trial on the facts.

And secondly, based upon a Virginia Logan defense which was not raised at trial and again did not remand on this jury question back to the trial court level. Petitioner therefore asks in the alternative, three things.

The first thing, that the jury verdict be reinstated because petitioner met their burden of proof, both under the Government contractor defense and under a Logan type defense.

Two, in the alternative, that the jury verdict be reinstated and that Congress be asked to consider a Government contractor defense pursuant to an advisory opinion by this Court, which this Court has recently done in the Westfall case and which it has done in the past.

Three, again in the alternative, that the case be remanded to trial in accordance with the opinions of this Court.

We ask these in the alternative.

First of all, we contend that the petitioner's rights to a jury verdict on both the Government contract defense and on the Logan type defense was violated under the Seventh Amendment. The reason being that if you consider that the Government contractor defense shouldn't even be in the trial court level, every circuit that has adopted it has said it is a jury verdict. The Fourth Circuit --

QUESTION: You mean a jury question?

MR. FRANECKE: A jury question, that is correct.

The Fourth Circuit, on the other hand, changed the Government contractor defense from the trial court statement and jury charge and gave its own version of it and then decided the facts. We contend that this is a violation of the Constitutional right.

Yes, Justice?

QUESTION: It wouldn't be if the facts clearly could produce only one result.

MR. FRANECKE: In fact, the issue was very hotly contested, as the Fourth Circuit said. Which of course we contend is exactly the point. The jury is in the best position to hear the evidence, review the witnesses and make the determination as to what facts in fact apply based on the law as charged.

QUESTION: You'd acknowledge though that if the facts

could produce only one verdict from a reasonable jury, then it could be decided on the issue?

MR. FRANECKE: Absolutely, of course.

QUESTION: But you say that's not the case, here?

MR. FRANECKE: I say absolutely that is not the case. Precisely.

Similarly, this begs the question of the Government contractor defense in the first place. Now, this Court of course has heard a full hour of argument from both parties with regard to the Government contractor defense and has asked for reargument.

Petitioner contends, however, that Congress is in the best position to consider the empirical evidence that is necessary to determine whether even any form of a Government contractor defense, if any, should be articulated by this Court or articulated by Congress.

QUESTION: Well, could the State of Virginia enact a statute indicating specifications for helicopters and say that violation of that statute was negligence and apply it in this case?

MR. FRANECKE: I would doubt very seriously if they would ever do that.

QUESTION: I didn't ask you whether they would. I said, could they?

MR. FRANECKE: Of course. I believe that they could.

However, I think it would then be reviewable.

QUESTION: A state statute can control the specifications for a Government helicopter?

MR. FRANECKE: I think there is an argument to be made that yes, it could, because under the Federal Tort Claims Act, Governmental activity is subject to state sovereignty, if you will, or state law. So that if a product is in fact being used in a state, then the state may enact statutes or legislation which may cover that particular product, especially if it's a military product.

In fact, the Dorsey case in Florida already does make the Government contractor defense or a form of it the law of Florida.

QUESTION: So your position is the State of Virginia and every other state can pass statutes specifying safety designs for military vehicles?

MR. FRANECKE: If they so choose, I think they could. I think they could. Now, of course the question is, would they, when Congress itself has not.

QUESTION: This is a preemption question, isn't it?

MR. FRANECKE: Exactly, of course. And then there would be the question of whether or not the supremacy clause would or would not apply for a particular state's enunciation or non-enunciation of a Government contractor defense.

QUESTION: Well, and that question turns upon whether

or not there would be inconvenience and disruption to the Government design?

MR. FRANECKE: Up to a point, yes. I consider that to be precisely the issue we are dealing with here. And that again begs the question, is Congress then in the best position to make such a determination.

QUESTION: Hasn't Congress made a determination in the Tort Claims Act that if a state should pass such a statute, it's pretty clear, is it not, that that statute could not be applied to hold the Government liable for determination by the Department of the Defense that a relatively unsafe helicopter, given all the other factors that have to be considered in a battle environment, is what it wants.

You couldn't sue the Government under the Federal Torts Claims Act, right? It would be a discretionary decision.

MR. FRANECKE: I'm not so sure that that is correct. You had asked in the previous argument in October about the discretionary function, and of course, this is a detail of this particular defense that we really haven't even gotten, at least in the facts of the Boyle case. But taking your hypothetical, I would say that if Congress has said that under the Federal Tort Claims Act, that acts of the Governmental employees, save for the discretionary act, are subject to state law, then state law would in fact apply, unless of course this Court or some other court determined it was a discretionary act.

QUESTION: Well, let's assume, I mean just take that as a given. I understand you quarrel as to whether it would be, but if it were, don't you think it would be a peculiar result if the consequence was you therefore could not sue the United States Government, says Congress, but you can sue the person from whom the Government bought the helicopter.

MR. FRANECKE: I think that would be a peculiar result because I think Congress has already spoken that it feels that the state law in fact should be applied if an accident takes place in its own borders and even if it's military, save of course for any action arising out of combative activities of the Armed Forces during time of war which is the only exception under the Federal Tort Claims Act.

QUESTION: Well, I'm not sure I understand your answer. You acknowledged that if it was within the discretionary function exemption of the Tort Claims Act, there could neither be a suit about it against the United States nor a suit against the seller to the United States on the Tort theory?

MR. FRANECKE: If that were the articulation of the law, yes. However, the question is in fact there a discretionary act on the part of a Government employee which we contend the Government contractor defense is not a discretionary act and should not fall within that exception.

And of course I'm prepared to go into that in more

detail. In fact, as a point, I think I should raise that now because we contend that Congress has a scheme of procurement of military products. This scheme has evolved over in essence 200 years. Congress is the one who has been setting forth what its relationship is, and the Executive Branch for that matter, what its relationship is with the contractors who provide for profit military or non-military equipment, all of the thousands and millions of things that are bought by the Government.

That scheme would be totally undermined by what the respondents request as a Federal common law that says, we now want a blanket tort defense to protect Government contractors. And I might point out, we're not talking about just United States contractors. The Federal Government buys from foreign Governments, also. This hasn't been raised before, but that's the point.

Are we now going to start protecting foreign contractors as well? This is the question of an overriding federal interest --

QUESTION: Well, let's get back just to the state law for a moment. What happens if the Government says you shall have a steering mechanism that meets exactly these qualifications, and the state mandates something differently. Helicopter crashes, suit in state court.

MR. FRANECKE: All right. Two things. First of all, certainly under the supremacy clause, it would sound as if

Congress' ruling would preempt. But secondly, we already have laws on the books called the contract specification defense, which is a matter of compulsion, if you will, to a contractor to specifically and exactly comply with a particular specification, unless they're so obviously defective --

QUESTION: But on the basic point that the Federal statute or Congressional directive would control, that's really the case here if the Executive acts pursuant to statutory authority and prescribes a particular mechanism, is it not?

MR. FRANECKE: Absolutely. Absolutely, and I agree with you, Justice Kennedy.

QUESTION: Is there a basis for that preemption argument in this case?

MR. FRANECKE: There's a basis for the argument but there is not an actual basis coming from Congress and from the Executive Branch.

QUESTION: Well, you're not saying that the Government was not authorized to purchase and design the helicopter, are you?

MR. FRANECKE: No, not at all. What I am saying is after the fact of their purchase, the courts, specifically the Eastern District of New York in the "Agent Orange" case specifically then made up the Government contractor defense. And it started being picked up by the various circuits and it has now reached this Court.

QUESTION: I'm trying to explore the difference between a specific Congressional authorization for a design and what occurred here.

MR. FRANECKE: What occurred here if you are asking the factual underlying basis of this particular case is that in this particular case there were basically two items of defect, one of which had to do with an escape system which was supposed to be used by the pilot or co-pilot, I should say, who unfortunately was not able to use it, and we contended it was defective, because the helicopter sank in the water and a window which was supposed to be opened could not open because it only opened out and water pressure held it in. We contended that that was a defect.

The second defect was that we contended that a servo, which is a mechanism like the power steering on your car, went awry and forced the helicopter into an uncontrolled maneuver and it crashed.

QUESTION: And my question is were those specified and designed by the Government in cooperation with the contractor?

MR. FRANECKE: Here is the insidious aspect of the Government contractor defense. The servo was told by Sikorsky to the Government that it could be controlled under the worst case malfunction. In fact, they didn't know this servo could be controlled under the worst case malfunction which it could

not. They only learned it after the fact when they did testing.

The Government approved it, approved the statement that this could be handled in a worst case malfunction. It was then built and actually there was no knowledge one way or another whether it could be controlled under the worst case malfunction until after the accident in this case.

QUESTION: But that's factual.

MR. FRANECKE: That's correct.

QUESTION: I simply want to establish whether or not in your view, in a case where the Government purchases a helicopter under a general statutory authorization, and designs that helicopter, the state can impose inconsistent regulations?

MR. FRANECKE: In contrary to the specification itself?

QUESTION: Yes.

MR. FRANECKE: I don't think it could because again if the Government is the one who is doing it unless there was a suit under the Federal Tort Claims Act, that then it would be a balance policy question which we contend Congress has to balance as to whether or not Congress would subject its specifications to state law or whether or not a supremacy clause would overcome it.

I think that is the policy question we're dealing with here. There isn't an answer because of the nature of the

several different ways Congress has formulated various schemes to buy products. It isn't one simple contract that is mimeographed 52,000 times a day, which is basically how many products they buy, and that says the same thing. They have different ways of buying different kinds of products.

And yet this Government contractor defense is supposed to be applied throughout. That's why Congress has got to look at the empirical evidence and decide whether or not it wants to afford such a defense, in our view. Because it isn't a simple answer. It isn't just a simple specification. There are many many different ways in which Congress either asks for certain things to be built, or they buy them off the shelf, or they buy them in combination with many different things.

It's not that simple and that's why I'm saying that this Court unfortunately in our view is not equipped to question military necessities, military needs, Congressional necessities and Executive Branch implementations of those necessities when dealing with this type of specifications and products.

QUESTION: Well, in Stencel Aero certainly that's a judicially created doctrine of indemnity there.

MR. FRANECKE: Yes, it is. Under the Feres-Stencel doctrine, there is a judicial created indemnity. We contend that of course this may even be considered an extension of the Feres-Stencel doctrine which we contend frankly we don't

believe is appropriate.

QUESTION: But it seems to me the parties in Stencel could have made the same argument you're making here. If there's to be a right of indemnity here by the contractor, it ought to be created by Congress. Obviously, this Court did not accept that submission if it were made in the Stencel case.

MR. FRANECKE: I think however this goes much further, because what you're dealing with here is not just a single suit by a Government employee against the Government. You're dealing with a say a Government employee or soldier past the Government, the Government isn't involved, down into a contractor who's a private citizen.

And under Feres-Stencel of course you're dealing only, as I said, between the Government and the thing, and you were talking in that case of course that it was incident to military service, and that the Veterans' Benefit Act which has no exclusion, this Court felt was an exclusion to any kind of a suit against the Government.

Here, you're asked to go far beyond that down into the private sector where manufacturers hold themselves out to be experts in their field, design and manufacture products for profit, sell them to the Government, and then are saying, oh, no, we're not responsible because the Government said, oh, we're buying it.

QUESTION: I thought the contractor in Stencel was in

the private sector.

MR. FRANECKE: He was but the case only turned on the question of whether there was a suit against the Government, as I understand it. The suit against Stencel was something else. And that has seemed to have happened in all of the cases in the past, especially when looking at, for instance, Westfall, which you just decided in February of this year. Talking about a tort and the question of Governmental immunity where again you looked at the balance between human life and what price is paid for that if you decide you want to offer an immunity for a Government employee's discretionary act and within his duties. And you in that case kicked it over to Congress.

And as you stated in that particular case, Congress is in the best position to analyze the empirical data to determine whether or not this should apply or not.

QUESTION: I thought you conceded that in some cases preemption would afford this defense to the contractor.

MR. FRANECKE: Absolutely, if this defense is put in place.

QUESTION: No, I thought you conceded that under existing law, the preemption type of defense should be available to a private contractor in an appropriate case?

MR. FRANECKE: Perhaps I was not answering exactly that --

QUESTION: I mean, you have to concede that because

that's simply hornbook preemption law, isn't it?

MR. FRANECKE: That's right. The point is it's a policy choice, which is what I was answering. We contend that it is a policy choice that should not be made by this Court, and it is possible --

QUESTION: Well, are there any other areas in which we say preemption is a policy choice and we're not going to apply standard supremacy principles?

MR. FRANECKE: No, no. That's not what I mean. What I am saying, Justice Kennedy, is that certainly once the law is on the books by Congress then it is for this Court to determine both preemption and supremacy and to interpret of course Congress' intent under the law.

What I am saying is that Congress doesn't want this law and it only is coming up through the judiciary which is not the right place for it to be coming from. So your hypothetical of saying, well, would supremacy in fact apply. Yes, of course, it would apply if it's on the books. But it's not on the books. And I contend that it shouldn't be.

QUESTION: Well, then we're back to where we started from because it seems to me there is authority to design a helicopter and to specify its characteristics.

MR. FRANECKE: I absolutely agree and I think there's no question that there is the authority to specify how a helicopter should be built. The question then is, if the

helicopter is defective, is the contractor in fact responsible for the defect even though there's a specification which in some cases might be very specific and in other cases may be very vague. And I am contending that Congress is the one that has to determine that point because of so many variables.

For instance, the cost. The helicopter that crashed in this case cost several millions of dollars. That helicopter was a loss to the Federal Government and I am sure they were not happy about it as such. That cost override is a Congressional determination as to whether or not it should put the responsibility on the contractor or whether or not it should absorb it and say, well, okay, you weren't responsible.

Even in the contract in this particular case, there was a specific clause called the "design responsibility clause" where the Government specifically said that it was not, the Government was not responsible for the actual suitability of the design of this particular helicopter, even though it set forth specifications which were really requirements. And then Sikorsky provided detailed specifications which said, this is what the helicopter will do when we build it, which were then approved by the Government.

As I said, it is a very very thorny issue that would in essence be a broad stroke national tort defense which would then be filtering down and frankly probably provide tremendous amounts of further litigation back and forth and back and forth

on all of the various enumerations of it.

We contend that this is an area that Congress should in fact address rather than this Court at this time.

Your Honor, I would reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Franecke.

Mr. Lacovara, we'll hear from you now.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.

ON BEHALF OF THE RESPONDENT

MR. LACOVARA: Mr. Chief Justice, and may it please the Court.

Before getting to the substance of the Federal military contractor defense, which I believe is the principal issue before the Court, I do want to take just a moment to explain why there are really no other issues, procedural or substantive, besides that.

Counsel has referred to Seventh Amendment jury trial issues and absence of request for instructions.

QUESTION: Mr. Lacovara, let me interrupt. Did we limit the grant of certiorari in this case?

MR. LACOVARA: The grant was not limited.

QUESTION: Okay.

MR. LACOVARA: That's correct.

So I do want to indicate apart from the limitation on the question that the Petitioner raised about the military contractor defense which did not take issue with the existence

of the defense or its federal source, Petitioner's Seventh Amendment claims as reiterated today ought not to distract the Court.

First of all, as the Court of Appeals indicated in its opinion, there were only two bases arguably available for the jury verdict against Sikorsky. One was an alleged negligence in repairing the servo which is the control mechanism like power steering. The other was the alleged defective design of the escape system.

It was that first issue, negligence in reworking or overhauling that the Fourth Circuit said was simply not proved sufficiently in accordance with Virginia law. There was no claim submitted to the jury or pressed before the Court of Appeals concerning the design of the servo.

Petitioner argues here that the Logan case which is the case on which the Fourth Circuit relied in finding that Virginia law on liability for negligence in repair had not been satisfied, had not been argued at the trial court. That is simply false. The case was specifically referred to on page 394 of the trial transcript where counsel for Sikorsky moved for a directed verdict expressly on the ground that Petitioner had not borne his burden of proof under the Logan case as established by the Virginia courts.

And that's why, in going to the Court of Appeals, the Petitioner expressly said that the issue before the Court was

simply whether the military design of the helicopter had been adequately approved by the Department of Defense.

QUESTION: But the instructions on this point, and the instructions included, as I understand it, a version of the contractor defense, were approved by both parties, or at least there was no objection by either party. So under Rule 51, why aren't you barred from arguing any differently here?

MR. LACOVARA: We are not arguing differently. We indicated that we were satisfied with the instruction given at the trial level. And as Justice Scalia indicated in his colloquy with counsel a few minutes ago, the issue before the Court of Appeals was not whether the law on the military contractor defense ought to be different from the charge given to the jury, but whether or not the facts as a matter of law made out that defense.

QUESTION: But the Court of Appeals went far beyond that and why not, how could it do so properly when the instructions had been agreed on by both of the parties?

MR. LACOVARA: I do need to interject at this point, Justice Kennedy, that plaintiffs did object to the instruction. Sikorsky announced that it was satisfied with the instruction as given by the Fourth Circuit.

QUESTION: Well, then that's even worse.

MR. LACOVARA: Well, it would be worse if we were asking for a different rule of law in the Fourth Circuit, or if

the Fourth Circuit announced a different or more restrictive rule of law, but that isn't true. The District Court's instructions, as you will see, required that Sikorsky prove three things: that the Government had approved reasonably precise specifications; that the helicopter had been built in accordance with those specifications; and that Sikorsky did not have superior knowledge to the Government's knowledge about any defect.

That is exactly the instruction that was approved or the rule of law that was adopted by the Fourth Circuit.

QUESTION: Then this is just a sufficiency of the evidence case?

MR. LACOVARA: That's all it is from the Petitioner's standpoint, that's correct. We regard that issue as not properly being before the Court whether Sikorsky proved that the military contractor defense had been satisfied under a correct definition of the law.

QUESTION: It seems to me that's all either party's entitled to argue about.

MR. LACOVARA: And that's all we are arguing about.

QUESTION: Sufficiency of the evidence?

MR. LACOVARA: No. The Fourth Circuit ruled, and I assume that this Court is not interested in reexamining that issue, that the evidence as a matter of law made out each of those three elements.

QUESTION: I understand that. But how is anything else properly before us?

MR. LACOVARA: The Petitioner is arguing, I gather, on the basis of his latest brief despite what seemed to have been conceded as generally common ground at the opening part of the argument, that there ought not even to be a military contractor defense, at least it is not permissible for the Federal courts to adopt such a defense. That we assume is an issue that --

QUESTION: Well, we're reviewing the Fourth Circuit. Petitioner wins, the Fourth Circuit said the instructions should be different, but you didn't ask for a different instruction.

MR. LACOVARA: The Fourth Circuit, sir, did not say that the instructions should be different. The Fourth Circuit did not reverse and remand for a new trial. It reversed and remanded with instructions to dismiss the case, as has been done because there was no stay, on the ground that the evidence showed as a matter of law that Sikorsky had demonstrated all of the elements necessary under the military contractor defense as the district court improperly allowed the case to go to the jury but as the record showed, the Fourth Circuit effectively ruled that the motion for directed verdict and the motion for judgment notwithstanding the verdict, should have been granted as a matter of law.

There is no dispute about the rule of law applied by the District Court or by the Fourth Circuit from Sikorsky's standpoint. The only issue was whether the jury should have had the case at all. And the Fourth Circuit ruled by directing judgment that this was not a jury trial issue because the record was absolutely clear that the military had approved the reasonably precise specifications for the design for the escape system of the helicopter, that the Government was completely satisfied that it had been manufactured to satisfy those standards and specifications.

QUESTION: Well, I thought the way the case was argued before that the issue before us was the existence of a military contractor defense.

MR. LACOVARA: That is the issue that is framed.

QUESTION: And you say it isn't here?

MR. LACOVARA: The Petitioner's first question presented is what ought to be the uniform definition of the military contractor defense applied throughout the circuits. And Petitioner conceded at oral argument in the first argument at pages 11 to 12 that this is a matter of Federal law.

And what we are here we believe addressing is what ought to be the contours of the military contractor defense.

QUESTION: If he says the contours are zero, that's still talking about contours.

MR. LACOVARA: Well, that would be, I would suggest,

Mr. Chief Justice, an imaginative argument. It is the case at the trial level, and I would refer the Court to record references 45 and 46, that the Petitioner, Plaintiff, did submit Government contractor defense jury instructions to the trial court. There was no contention at the trial level that there is zero content to the defense. In fact, Petitioner, as you'll see in the original record, submitted four different alternatives.

All of the cases cited by Plaintiff's counsel at the trial court level to support its different versions of what the Government contractor defense should be were Federal cases. The existence of a military contractor defense did not surface in this case until the case was ordered set for reargument, I think it's fair to say. Nor was there any question that it is appropriate, as counsel I think aptly recognized at the first argument, that this is a matter that satisfies all of the standards for determining an issue of defense as a matter of Federal common law in accordance with the issues and tests that this Court has evolved over the fifty years since Erie Railroad against Tompkins.

And so I think it's appropriate to turn then to the issue that we think is being --

QUESTION: Didn't the Petitioner argue this before at the first argument?

MR. LACOVARA: The issue the first time --

QUESTION: The existence or vel non of the military contract defense?

MR. LACOVARA: I think not. As we understood the position, it was that the Shaw test adopted by the Eleventh Circuit is the proper test. And indeed, the reason for the petition seemed to be that there was a conflict in the Circuit. That's what question one in the petition identified, what ought to be the uniform standard. Petitioners said most of the circuits have identified with the Ninth Circuit's so-called McKay test which is the one applied here, and the Eleventh Circuit has adopted the Shaw test which is fundamentally different.

And we and the United States agree that the Shaw test is inconsistent with the purposes for the defense. That's what the original argument was about.

QUESTION: I thought the last part of the Petitioner's brief filed in this case really in effect raised this, the question of the existence of the defense.

MR. LACOVARA: There is a last section, Justice White, that suggests --

QUESTION: That military equipment manufacturers be shielded, etcetera.

MR. LACOVARA: If that is the issue that the Court wants to address, that's been fully briefed by all the parties, and of course, we are prepared --

QUESTION: Why was it briefed if it wasn't here?

MR. LACOVARA: Well, as we had indicated, the issue of the existence of the military contractor defense had never been raised in the lower Court. And the issue therefore is whether that can be properly raised for the first time in this case as contrasted with what was debated below, what are the contours of the defense.

Now, I recognize, and despite our first footnote in the Supplemental Brief on Reargument, that this Court is not going to take the military contractor defense as a given if the Court believes there is no Federal authority to recognize it. Which is the reason that our Supplemental Brief on Reargument goes in great detail in explaining not only what the elements of the defense are, but why it is a matter of supervening national federal law.

QUESTION: What is the source of the law? Is it something more than preemption?

MR. LACOVARA: It is essentially preemption, yes. That's the best analysis that we think to decide why this defense exists as a matter of immunity, why it governs not only the bulk of these cases which come up in Federal Court because they involve matters where the claim itself arises under Federal law, death on the high seas.

QUESTION: Can we adopt it just to make preemption work? It's just a mechanism to insure that the policy of

preemption is followed?

MR. LACOVARA: Well, putting it that way, Justice Kennedy, makes it seem a bit more casual than I think it is. As the presence of the United States rather graphically illustrates, there are fundamental Governmental functions at stake here in the way the Executive Branch and the Congress discharge their constitutional functions to equip and direct the Armed Forces.

They have gone about that pursuant to statutory allocations of responsibilities in a way that involves a partnership between the Defense Department and defense contractors in providing the weapons of defense that the Executive Branch and Congress believe are necessary. It's not simply an idle suggestion that we want symmetry in the law to say that that decision not only controls a Federal court in considering a liability claim or challenging a design decision, but also binds state courts.

QUESTION: Well, is it just the military that we're concerned with? What about the Forest Service if it has a particular kind of saw that it designs? Is the manufacturer liable for a defect in the saw if the Forest Service wants it exactly that way?

MR. LACOVARA: There is a very substantial argument which I think the Court needn't address today that if the Federal Government in carrying out any of its functions decides

that it wants a particular kind of equipment made in a certain way to certain standards, that decision is binding. Indeed, that would not be a revolutionary concept because the Yearsley case --

QUESTION: Well, how is this case somehow different?

MR. LACOVARA: This case is stronger because of what we suggest to the Court are rather core areas of national supremacy. This Court has said in some circumstances that even though Federal law may be the source of a decision, it may be appropriate to adopt state rules of decision, that is, to allow local policies to govern. Mire v. DeKalb County is an example of that, where there is no reason why there needs to be uniformity because the functions of Government are not really at work or at risk.

This is not that case.

QUESTION: May I ask you a question about what you mean by preemption. You mean there is some Federal law that commands the particular elements, the one, two, three, four elements that are set forth in the Court of Appeals' opinion of the military contractor defense?

MR. LACOVARA: Those elements --

QUESTION: One, that the United States is immune from liability; two, it approved a reasonably precise specification; three, the equipment conformed to the specification; and, four, the supplier warned the United States about any danger that it

knew about that the United States didn't know about?

MR. LACOVARA: Those are the tests for determining when a military decision --

QUESTION: They're the tests in the defense as the Fourth Circuit applies it. But I'm asking you about preemption. What preempted what? In other words, is there a Federal rule that commands no state to adopt any rule differently than one that includes those four elements?

MR. LACOVARA: Yes.

Let me answer that question with a hypothetical that I think is quite similar to the question Justice Kennedy raised. Let's assume for a minute that the State of Virginia through its legislature had said, no company anywhere in the country may manufacture and provide to the Department of Defense a weapons system that the Defense Department orders unless the Courts of Virginia are satisfied it's appropriately designed and those courts may issue orders to prohibit or restrain the delivery of such an inappropriately designed product.

That is not, I suggest, a statute that this Court would have much difficulty striking down.

QUESTION: It's probably a statute that the Virginia legislature won't enact, either.

MR. LACOVARA: The Virginia legislature won't enact it, I suspect, because they probably know what the supremacy

clause requires.

QUESTION: If the United States wants to build it, even if it is dangerous, the United States has the power to do so.

MR. LACOVARA: And we are saying that is exactly what is at issue in this kind of case. The courts of the states, just as the Courts of the United States, --

QUESTION: Are you saying even if the United States made a determination that the design was dangerous and said, you have to take all the risk but just because we want it manufactured that Virginia couldn't impose any liability for its use?

MR. LACOVARA: Yes. I absolutely concur in that.

QUESTION: So there's an absolute defense no matter how negligent, no matter how willful or what, if I understand you correctly, as long as the United States wants that particular piece of equipment.

MR. LACOVARA: That is exactly right.

QUESTION: Even if the manufacturer knows, and even if the United States did not know it would be dangerous.

MR. LACOVARA: Oh, no. that's the last element of the test, Justice Stevens. The essence of this defense is that there is a determination being made by the Government that it wants certain equipment designed in a certain way. That's why the test requires that the Government have approved reasonably

precise specifications. We and the United States agree, however, as have all the courts, that if the contractor knows about a hazard and the Government doesn't, then one cannot attribute the decision to the Government.

QUESTION: Well, what if the manufacturer just negligently fails to be aware of it?

MR. LACOVARA: That's the debate between the Eleventh Circuit and the Shaw test, and every other Circuit.

QUESTION: Well, why is one preempted any less than the other if the United States wants the item?

MR. LACOVARA: The determination that distinguishes whether there is to be preemption is whether or not it is fair to treat it as the military department's decision. If the military did not know, because a defect was concealed from it, that a particular design had a latent hazard, which is not this case of course, that would not then be fairly attributed to design decision of the military department.

QUESTION: Let me ask you one other question.

Your opponent says that the origin of the defense grew out of the Feres-Stencel case in 1977. Do you agree that that's the source of the defense?

MR. LACOVARA: No. We cite Feres and Stencel and those related cases as showing in part this Court's function in interpreting the scope of liability in the military context. But our principal submission is that this is a separation of

powers and justiciability issue. That is, the Constitution commits to the legislature, Federal legislature and the President, the responsibility for equipping and directing the Armed Forces.

And it is not, as this Court held in Gilligan against Morgan fifteen years ago, it is not a proper judicial function to supervise the training and weaponry.

QUESTION: It is a proper judicial function to craft the contours of the military contractor defense.

MR. LACOVARA: Yes, that's where we get to the Federal common law issue.

QUESTION: Well, would that be true, Mr. Lacovara, even if there were no discretionary function exemption in the Federal Tort Claims Act?

MR. LACOVARA: I think, yes. If the Government is making a decision, if the Department of Defense makes a decision that it wants a helicopter designed in a certain way, it ought not to make a difference to the contractor, or to the courts, I would submit, whether or not the Government has a discretionary function exception under the Tort Claims Act.

There is another issue which probably would lead to the same result, and that is, is it the proper function of the courts to reexamine that military decision which the Court I think in Gilligan against Morgan said it is not.

QUESTION: I think your position would be the same if

Congress had never waived its sovereign immunity in the Federal Tort Claims Act. The Government just was, period, just didn't get into the picture, you'd still make the same preemption argument.

MR. LACOVARA: That's correct. I think Gilligan against Morgan leads you to that same conclusion.

QUESTION: Now, wait. I really don't understand that. It seems to me you can make the argument that there should be preemption if Congress wanted it, but how are we to perceive that's what Congress wanted if in the Tort Claims Act, Congress had said the Government itself should be liable for an ill designed helicopter? Why would we have any reason to think that Congress wanted to preempt liability of a private contractor for an ill designed helicopter?

MR. LACOVARA: If Congress said it wanted the courts to get into this question, you'd have a different issue. Presumably, Congress could waive -- could waive -- the political question doctrine invoked in Gilligan against Morgan.

You then though, Justice Scalia, have the other issue which is the Yearsley defense. The contractor doing the Government's bidding under established law in this Court and everywhere else is not directly liable even if the principal is liable for a negligent or improper decision. So it wouldn't answer the question in this case if Congress had said that, which it assuredly has not.

QUESTION: Just let me make -- your preemption argument, I want to be sure I understand it -- does not depend at all on the Federal Tort Claims Act, as I understand it. Your preemption is based on the power of the Government to buy the military hardware that it needs.

MR. LACOVARA: That's correct.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lacovara. We'll hear now from you, Mr. Ayer.

ORAL ARGUMENT OF DONALD B. AYER, ESQ.
AS AMICUS CURIAE, SUPPORTING RESPONDENT

MR. AYER: Thank you, Mr. Chief Justice, and may it please the Court.

It's generally agreed I think along the lines of the questions being asked by Justice Kennedy earlier that a contractor who is working from Government supplied specifications and simply producing what the Government asks for will not be liable for tort action under state law.

The issue here, --

QUESTION: But you would agree, wouldn't you, that the contractor could be liable for other responsibilities under state law, such as paying taxes on his earnings.

MR. AYER: Certainly.

QUESTION: But the one thing the state can't do is forbid the manufacture of what the Government wants?

MR. AYER: Well, forbid or interfere.

QUESTION: Well, what about tax? Isn't that interfering?

MR. AYER: Well, I think it becomes a question of the nature of the interference and how substantial it is.

QUESTION: If employees get hurt in the course of manufacturing the item, they have to pay workmen's compensation. Why is that different than the responsibility for the use of the product?

MR. AYER: Well, I think it's a matter of degree. And I think our position is that these questions of immunity or freedom from liability are questions that must be resolved as a matter of Federal common law. And that they are best resolved at least initially, and here I think we're at the initial stages of defining and or recognizing this defense, we should deal with the case that we have, and then work off later, if it's relevant to other case that are more difficult. And there are more difficult cases than this one.

QUESTION: But your common law argument as I understand it is quite different from your colleague's preemption argument?

MR. AYER: Well, if I may, I'd like to proceed and explain why the Government is here in this case.

We think that the issue is the next logical step beyond what I think most people take as a given, that is, that when you are dealing with Government supplied specifications,

there's no liability.

The question here is whether that freedom from liability is lost where a contractor is first working together with the Government to produce the specifications and then once they are arrived at and approved by the Government, goes forward and builds the product.

QUESTION: But it seems to me that Federal common law and preemption, as Justice Stevens suggests, are quite different. Where do we get the authority to make up the law in this area and not in any other area, if it's federal common law?

MR. AYER: Well, I don't agree, I guess, that they are quite different. The question is whether Federal courts have a basis to move in and define what the appropriate law should be. And I think the preemption, if preemption is the right word, and I don't disagree with its use, the preemption comes from the lawful act of the Executive Branch pursuant to legislative enactments in defining a particular product that the Government wants.

It then has by those specifications preempted a contrary state law claim in essence that you can't build this product without being liable under state tort law. That I think is the kind of preemption.

What is behind --

QUESTION: That's really not too different from

Clearfield Trust, is it? The Government issues a whole bunch of checks. Because of that, it needs a general rule that will apply across the board and not the vagaries of the fifty states.

MR. AYER: I think that's exactly right, Your Honor.

QUESTION: Would you characterize Clearfield Trust as preemption?

MR. AYER: Well, I wouldn't initially and I think you can argue about whether it's preemption or not. I would prefer to talk about it in terms of an area of Federal common law. I think that's the way it's most usually thought of.

QUESTION: You're saying Federal law controls and the state law does not.

MR. AYER: That's correct.

QUESTION: And if the state tries to do it, they cannot do it and you might put the preemption label on it. It's just that Federal law controls.

MR. AYER: That's right. That's exactly correct.

QUESTION: What about a procurement of items that aren't according to a specification, an ordinary item?

MR. AYER: An ordinary item that is not according to a specification is not something that we think should be covered by the defense. Our concern is with preserving the ability of the United States and especially in the military context, which is this case, to procure by an appropriate

process, the equipment it needs. The cooperative interaction of the Government and the contractor is critical in the area of military high technology equipment.

You simply cannot procure electronic counter measures equipment or jet fighters by having a contractor punch out those items with a cookie cutter provided by the Government in the form of specifications. The product has to be developed by an interactive process, refinement as it goes along. And without that kind of an interaction, we are not able to get the kind of equipment that we want.

QUESTION: Yes. But Mr. Ayer how does that differ from say sophisticated airline equipment of one kind or another. You have a question of who is going to bear the risk of loss if a mistake is made. The parties negotiate it out. They generally don't say we'll just let the consumer bear the risk.

MR. AYER: The difference is in the concept of mistake. In the context of a consumer item, and I list an airliner as a consumer item because it's for consumer use, it is generally agreed --

QUESTION: But pilots are consumers of the military aircraft, too.

MR. AYER: Well, but the military are consumers of military aircraft and I think therein lies the issue. The issue is, who shall define the appropriate standard of safety

in the military context. Safety in the military context --

QUESTION: You can phrase it that way or you should ask who shall bear the risk of loss if somebody bungles.

MR. AYER: Well, but I disagree with your characterization of the word, bungling. Because there are choices to be made. There are choices in terms of yes, we could produce a better ejection seat on a certain plane. But a better ejection seat would mean that the plane would weigh another 150 pounds. And another 150 pounds would mean that the plane would fly 20 miles an hour slower and to 100 miles an hour less far. And the result of that in the military context where maybe there is a mission need to go from here to there, is that you can't get there from here.

And the equipment which is maybe marvelously safe for the operator is horrendously unsafe for the troops on the ground and for the mission that it's designed to perform. So that judgment, it goes back to this Court's traditional deference to military judgments in the context of war time and the national defense.

It is necessary to leave those judgments to the military because the military best knows what is, quote, safe, given all of the issues that are involved, not simply the question of operator safety.

QUESTION: Does the Government's position depend at all on the discretionary function exemption in the Federal Tort

Claims Act?

MR. AYER: Well, that's a hard question to answer. And the reason why is that we feel as though this case with all that is in it, including I think clear application of the discretionary function clause, is the clearest case almost that one can imagine for application of the defense. If you took that away, that would be one argument in support of recognizing the defense here which would not be there. And frankly my answer is that it would be appropriate for this Court or another court when that case came up to scratch its head and say, should we or should we not extend the defense which has been recognized in this case to that one.

I think my answer to you is, no, ultimately it should not. Because what we are trying to do, what we should be trying to do with this defense is protect the procurement process, the procurement of military equipment in particular.

QUESTION: But for you to argue that this is appropriate for the military but not say for the Forest Service sounds to me very much like the kind of thing the legislature ought to decide.

MR. AYER: Well, --

QUESTION: Unless you have a series of statutes you want to point us to in the military procurement area.

MR. AYER: I am not here saying what you have attributed to me that it is not appropriate. I am saying that

the involvement of military --

QUESTION: Well, your whole argument has been war powers, etcetera.

MR. AYER: It relies on an area of lawful Federal activity and because it's the military and because it's sophisticated weaponry, it's in an especially critical area of Federal activity. And I think no doubt this case is stronger than the case of Forest Service equipment.

But some of the same arguments, the procurement argument itself is there I think in a less emphatic form. I do not believe that this is a case where one can easily say categorically that the defense should apply in these areas and not in those areas, but what is true is that this Court has traditionally recognized Federal common law in the context where, without it, there will be a significant interference and a disruption of the ability of the Federal Government to function.

You look at the Federal Employee Immunity issue, you look at the Act of State Doctrine. Both of those cases where private parties were in litigation with each other, and yet the interest of the functioning of the Federal Government caused the Court to step in and say, --

QUESTION: Well, in the Act of State doctrine, there really is no state law that supervenes because the United States acts as a sovereign in foreign affairs.

MR. AYER: Well, but the real question was, I think, whether the functioning of the Federal Government and the functioning of the Executive Branch in the area of foreign affairs must be recognized over the claims of a court. And I think it is rather similar.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.

Mr. Franecke, you have eight minutes remaining.

ORAL ARGUMENT OF LOUIS S. FRANECKE, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. FRANECKE: Thank you, Mr. Chief Justice.

I would like to clarify just a few points.

First of all, we do in fact of course challenge the Government contractor defense because of the Court of Appeals. Since the Respondents didn't challenge the Government contractor defenses given by the jury charge at the trial level, we didn't have any reason to brief it or to even argue against what the Respondents had appealed to the Fourth Circuit. Which is why of course it was a sua sponte surprise to the Petitioner as to what the Fourth Circuit did.

QUESTION: Well, I would think you would have a reason to challenge it if you thought there was no Government contractor defense and the District Court had given your instruction on the nature of that defense.

MR. FRANECKE: True. But we had won at the trial

level. The jury had already said that the Respondent had not met its burden of proof. All we were doing was showing we had provided sufficient facts to overcome the Government contractor defense as had been given by the jury charge.

So we didn't have to challenge it at that point.

QUESTION: Because you were the appellee.

MR. FRANECKE: Absolutely. Absolutely.

The second thing that I would also like to clarify is is that while we have in our briefs, because this is the first time this Court has been faced with the Government contractor defense, espoused a Shaw test as perhaps being one of the better of the Government contractor defenses, this is only an alternative argument on our part.

We are only saying this if this Court feels, in light of all of the other arguments that have been made in our briefs and here before you now, that some form of a Government contractor defense either should be advised to Congress as being the thinking of the Court, or should be a part of the decision in this case, we feel that the Shaw test at least comes reasonably close to allow further cases to come up from the lower levels to, let's say, examine the boundaries of this particular new area of law.

Now, under Clearfield Trust, for instance, obviously we're talking about a check system having to do with Federal Government. But Westfall, which was recently decided, talked

about Federal common law but said it was Congress. Standard Oil, which was raised in the previous argument, had to do with the Tort system was also kicked to Congress.

There's a case on an antitrust having to do with Texas Industries which also kicked it to Congress because of the combinations of so many different factors that were involved.

It is the Petitioner's position clearly that what we're dealing with here are real people who get killed and injured like the shuttle. I used that example before and it is still just as apt. The shuttle went down in an orange puff of smoke. A billion dollars went up in that puff of smoke as well as seven lives.

And Morton Thiokol was at fault. And they are getting another $500 million, I read in the paper, to redesign the booster as well as the Government is also requiring another billion dollars of taxpayers' money to be spent to build another shuttle to replace the Challenger that went down.

And yet if the Government contractor defense is put in place, Morton Thiokol will not be responsible in all likelihood.

I think that is improper and I think at worst it is Congress that should determine that balance that whole scheme that the Constitution says is its purview and which it has already spoken to in many other different indications under the

Federal Tort Claims Act, under the Veterans Benefit Act, and various other matters. And under even, for that matter, preemption.

Of course, if preemption were even an issue, I would even cite the question, why don't we have a national law having to do with automobiles. We have a national interstate system, yet we have individual states that provide the laws for those particular accidents that may take place on a particular highway. Why isn't there an automobile contractor defense because there might be some interest in --

QUESTION: Because I suppose the Federal Government doesn't design automobiles.

MR. FRANECKE: We think it does not. Obviously they --

QUESTION: That example isn't really very close to this one, I don't think.

MR. FRANECKE: Okay. Granted. But, however, many automobiles obviously are purchased by the military and utilized in military affairs. And I would see that this defense could then be applied down into the civilian sector if it were put into place saying, well, the Government told us to build the brake system this way, and yet, they sell the same brake system down into the civilian level and you would be immune from suit, or immune from at least --

QUESTION: I think the Government agrees with you

entirely that if the Government has cooperated with a contractor to build a tank and that tank gets into an accident on the highway because of some feature in its system that is unsafe, that this defense would -- I don't think you're scaring them with this example.

MR. FRANECKE: I wish I had a better one at the moment.

Unless there are any further questions, I think this Court obviously has heard almost two hours of this, and I think that we would submit the case on the argument.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Franecke.

The case is submitted.

(Whereupon, at 1:57 p.m., the case in the above matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-492

CASE TITLE: DELBERT BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF DAVID A. BOYLE, DECEASED

HEARING DATE: April 27, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the SUPREME COURT OF THE UNITED STATES.

Date: April 27, 1988

Margaret Daly

Official Reporter

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