

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES SUPREME COURT

DELBERT BOYLE, PERSONAL)
REPRESENTATIVE OF THE HEIRS AND)
ESTATE OF DAVID A. BOYLE, DECEASED,)
)
Petitioner,)
)
v.)
)
UNITED TECHNOLOGIES CORPORATION)
)
)

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

No. 86-492

Pages: 1 through 51

Place: Washington, D.C.

Date: October 13, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DELBERT BOYLE, PERSONAL :
4 REPRESENTATIVE OF THE HEIRS AND :
5 ESTATE OF DAVID A. BOYLE, DECEASED, :
6 Petitioner, :

7 v. : No. 86-492

8 UNITED TECHNOLOGIES CORPORATION :
9 -----x

10 Washington, D.C.

11 Tuesday, October 13, 1987

12 The above-entitled matter came on for oral argument
13 before the Supreme Court of the United States at 11:04 a.m.

14 APPEARANCES:

15 LOUIS STANTON FRANECKE, ESQ., San Francisco, California;
16 on behalf of the Petitioner

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

19 DONALD B. AYER, ESQ., Washington, D.C.
20 amicus curiae, in support of Respondent

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1 Virginia Logan burden of proof.

2 Respondent appealed to the Fourth Circuit, but
3 Respondent did not challenge the Government contractor defense
4 as given by the trial judge in the trial jury charge. However,
5 the Fourth Circuit sua sponte reversed the jury verdict based
6 on (1) the Logan Case in Virginia, and (2) based on a new
7 version of the Government contractor defense just articulated
8 on the same day in the Fourth Circuit case of Tozer.

9 Now, in this Court, we, the Appellant, ask that the
10 jury verdict be reinstated. We further ask and point out the
11 Sikorsky's only response is an unsupportable Government
12 contractor defense and a disagreement with the sanctity of the
13 jury verdict.

14 Appellant, therefore, asks this Court to decide on
15 this first impression several issues. They are: (1) was the
16 jury verdict correct and should it be reinstated. Appellant
17 contends that it was correct and it should be reinstated.

18 (2) Was the Appellant's Seventh Amendment rights of a
19 right to jury trial violated by the Fourth Circuit by the
20 Fourth Circuit announcing law that was not given to the jury
21 and then applying that law to the facts without the benefit of
22 a jury trial. Appellant contends that the Seventh Amendment
23 right were violated.

24 QUESTION: If there had been an authoritative
25 construction of the Government contractor defense that occurred

1 between the trial and the appeal, do you think the Court of
2 Appeals would have been foreclosed from ordering a new trial on
3 the basis of the Right Rule of Law?

4 MR. FRANECKE: Certainly not, Justice White.

5 QUESTION: Well, isn't that what you were just
6 arguing?

7 MR. FRANECKE: What I am arguing, however, is that
8 there was, in fact, a form of the jury -- correction: of the
9 Government contractor defense in fact given. In fact, it was
10 the Agent Orange jury instruction was given to the trial court
11 and, specifically, Mr. Booker, who sits at Respondent's table,
12 here specifically approved that particular --

13 QUESTION: Well, that may be so, but you would say
14 that the Fourth Circuit could not give the benefit of the
15 Correct Rule of Law to a person who had approved the
16 instruction. Is that it? Is that sort of an estoppel?

17 MR. FRANECKE: I am, of course, arguing that the
18 Fourth Circuit's interpretation of what it feels was the
19 correct of Rule of Law was incorrect.

20 QUESTION: I know. But assume it was right. Assume
21 the Court of Appeals was quite right.

22 MR. FRANECKE: In that way, I believe that it is a
23 violation of the Seventh Amendment right not to have remanded
24 the case back down for a jury trial based on the law just
25 announced by the Fourth Circuit.

1 QUESTION: All right. But the court could have
2 granted a new trial anyway?

3 MR. FRANECKE: Yes, it could have.

4 QUESTION: Based on the correct rule, even though
5 your opposition had approved the instruction.

6 MR. FRANECKE: Absolutely.

7 The third issue that I would ask this Court to decide
8 is should there be a Government contractor defense in any form?
9 It is the Appellant's contention that based on several reasons,
10 law and congressional intent that there should not be a
11 Government contractor defense enacted in the Circuits and in
12 the Federal Common Law.

13 QUESTION: Mr. Franecke?

14 MR. FRANECKE: Yes.

15 QUESTION: In your reasons for granting the writ in
16 your petition for sui juris, it strikes me your entire argument
17 there is devoted to what is the Government contractor defense.
18 Did the Fourth Circuit get it right? And almost nothing, in
19 fact, I can see nothing at all to the fact that the Government
20 had approved a jury instruction.

21 MR. FRANECKE: If you will look at also the reply
22 brief, Mr. Chief Justice Rehnquist, the reply brief does
23 address this particular issue specifically.

24 QUESTION: The reply brief to the Government's
25 response to the petition.

1 MR. FRANECKE: That is correct. The reply brief by
2 the Appellant does address this particular issue. And, in
3 fact, you do beg the question that on the fourth issue that I
4 ask this Court to decide is if this Court, by a majority rule,
5 decides that a form of the Government contractor defense should
6 be enacted, what form should that take?

7 QUESTION: Enacted?

8 MR. FRANECKE: Correction. Adopted.

9 Now, addressing the first issue --

10 QUESTION: May I ask?

11 MR. FRANECKE: Yes, Justice Brennan.

12 QUESTION: You said that there ought under no
13 circumstances in any context be a defense -- contractor
14 defense?

15 MR. FRANECKE: I believe that that is correct.

16 QUESTION: Even, for example, if the Government has
17 required by order, compelled, the building of a helicopter
18 precisely in the shape this was in?

19 MR. FRANECKE: First of all, of course, Justice
20 Brennan, it must be looked at to determine whether or not it
21 was time of war or some national emergency where Congress has
22 specifically acted and said, "This is what we have to do."

23 However, the Government contractor defense that we
24 are dealing with here is a civil question and, in most cases,
25 is dealing with a item of equipment which has not been procured

1 for specific time of war application. In fact, as even says --

2 QUESTION: What you are telling me is when this
3 helicopter -- it was not time of war, I gather.

4 MR. FRANECKE: It was built in 1968 in an undeclared
5 war in Vietnam, I believe. However, the issue in this case is
6 also that the defect that was alleged --

7 QUESTION: Yes, but what I am trying to get at is, to
8 understand your position, it is that no matter what the
9 circumstances, that the manufacturer may build the helicopter
10 even if they are given all the plans and all the design and
11 everything else by the Government and said, "Do it this way.
12 No other way." They still do not have a defense?

13 MR. FRANECKE: I believe the answer is the question,
14 the basic question to the Government contractor defense is:
15 Does the Government truly know what it is buying. In other
16 words, if they were given the plans and the specifications as
17 you say --

18 QUESTION: Then I gather your answer to me is, yes,
19 that is your position?

20 MR. FRANECKE: That is my position. That is correct.

21 QUESTION: Now, you are saying that is a position, I
22 take it, as a matter of Federal law, there is no such defense.
23 Would it not be possible that as a matter -- I guess this is a
24 case applying Virginia tort law; is it?

25 MR. FRANECKE: It was tried under Virginia tort law,

1 Justice Stevens.

2 QUESTION: Is it not possible that Virginia might
3 recognize a defense on behalf of a defendant who was just
4 obeying orders and didn't do anything independently?

5 MR. FRANECKE: It is entirely possible that that
6 could be an interpretation in the individual states. However,
7 I would also point out to the Court that our system of tort law
8 under negligent strict liability and breach of warranty already
9 covers all of the elements that are already contained within
10 this proposed Government contractor defense. So, all the
11 various states already have it, as well as the system of
12 Federal law.

13 QUESTION: No, but if you are suing on a design
14 defect, it certainly would be open to the manufacturer to say,
15 "I didn't design it. Somebody else designed it; namely, the
16 United States Navy," or whatever it is. That would be a
17 defense; wouldn't it?

18 MR. FRANECKE: That is a central issue of the
19 Government contractor defense but it comes back to whether or
20 not the Government truly was informed or truly had the
21 knowledge that it was buying a defective product and what that
22 defect was. In that case, then it would be Appellant's
23 position that the Government does have the right to buy it and
24 it would be a form of assumption of the risk, if you will. So,
25 they could accept it under those circumstances. But there are

1 several steps that have to be taken.

2 QUESTION: Who assumes the risk? I mean somebody who
3 is not -- let's assume somebody who is not in the Government is
4 hurt, does he assume the risk? I don't understand.

5 MR. FRANECKE: No, he does not. And that is also
6 part of the central problem with this whole Government
7 contractor defense, Justice Scalia. A person, who, as we know
8 under the law -- a civilian can easily sue a Government
9 contractor if he is riding in a military aircraft or a military
10 product.

11 QUESTION: Take this hypothetical: Suppose --
12 imagine the days when the Post Office was actually a Government
13 agency and the Post Office buys a whole bunch of right-hand
14 drive vehicles so he can put the stuff in the mailboxes. Now,
15 that is obviously a dangerous place to have the steering wheel.
16 Right? It is apparent. The Government orders it, though. An
17 accident occurs with a private vehicle on the street and the
18 manufacturer who made these defective vehicles with right-hand
19 drive is sued by the person who is hurt by the accident. That
20 manufacturer has no defense?

21 MR. FRANECKE: That manufacturer --

22 QUESTION: If the state chooses to allow such a suit.

23 MR. FRANECKE: First of all, that manufacturer has
24 every defense that is afforded to them under negligent strict
25 liability and breach of warranty.

1 QUESTION: Oh, yes, it is negligent to drive on the
2 right side of a vehicle.

3 MR. FRANECKE: But the point is they can then show
4 that the Government in fact said, "That is where I want that
5 steering wheel. I specifically want it that way, therefore,
6 here it is." And that is why the contractor builds it that
7 way. That comes under negligence. The contractor isn't
8 negligent if it followed the Government's specific request.
9 Strict liability, also the test would be applied: Did the
10 contractor warn the Government of all of the inherent risks of
11 the right-hand drive so that the Government can make an
12 intelligent choice.

13 QUESTION: Mr. Franecke, what was the basis of
14 Federal jurisdiction in this case? Was it diversity of
15 citizenship?

16 MR. FRANECKE: Yes, it was diversity.

17 QUESTION: So, the Fourth Circuit is simply applying
18 Virginia law?

19 MR. FRANECKE: It was by agreement because the
20 aircraft crashed within one and a half miles, the Death on the
21 High Seas Act did not apply. So, Virginia law applied.

22 QUESTION: And, so, we are just basically reviewing a
23 question here of Virginia tort law?

24 MR. FRANECKE: No, we are reviewing here, I believe,
25 the whole issue of the Government contractor defense.

1 QUESTION: Well, what is the source of law? Is it
2 Virginia law?

3 MR. FRANECKE: Only because --

4 QUESTION: Well, I mean answer my question. I asked
5 you: Is it Virginia law? Do you answer that question, yes?
6 Or do you answer it, no?

7 MR. FRANECKE: I answer that it was the Federal law
8 as announced by the various Circuits prior to this case in
9 articulating the Government contractor defense.

10 QUESTION: And what is the source of the Federal law?

11 MR. FRANECKE: Source of the Federal law goes back to
12 the Agent Orange case in the Eastern District of New York in
13 the McKay v. Rowell out of the Ninth Circuit.

14 QUESTION: And what is the source that they say the
15 Federal has in those opinions?

16 MR. FRANECKE: They go back historically to the
17 Yearsley Case which came out, I believe, in 1940, which was a
18 question, to answer Justice Scalia's question where the
19 Government specifically formulated construction plans for a
20 dam.

21 QUESTION: No, I don't mean the substance of the
22 defense, but we are dealing with a case that ordinarily would
23 be decided strictly under Virginia law. And you say, no, there
24 is a Federal element in it here.

25 MR. FRANECKE: That is correct.

1 QUESTION: The Fourth Circuit had to apply a
2 particular rule as to Government contractors, even though
3 perhaps the Supreme Court of Virginia wouldn't. And why is
4 that?

5 MR. FRANECKE: Because they evidently, the Circuit
6 Courts feel that there is an overriding Federal interest
7 involved here because the Sikorsky helicopter was a Federal
8 product -- correction: It was a contractor who sold it to the
9 Federal Government. It was a Marine who was killed in this
10 particular crash and we had an overriding question of other
11 circuits which had announced forms of the Government contractor
12 defense and the trial judge believed that a Government
13 contractor defense should be given.

14 QUESTION: You know, but I realize the trial judge,
15 but I would like to hear more from you about why this is -- why
16 there is an element of a Federal question here rather than
17 something that Virginia is free to decide for itself. What is
18 the closest case from this Court on the point?

19 MR. FRANECKE: In the Fourth Circuit --

20 QUESTION: I asked you: What is the closest case
21 from this Court.

22 MR. FRANECKE: This case, none. Feres/Stencel
23 Doctrine would be the only one --

24 QUESTION: Stencel.

25 MR. FRANECKE: Would be the only one that would start

1 getting close to it.

2 QUESTION: Or Yearsley?

3 QUESTION: What about Clearfield Trust?

4 QUESTION: What about Yearsley?

5 MR. FRANECKE: Yearsley may. I think, though, the
6 Feres/Stencel Doctrine is actually a closer articulation in
7 modern times of what the actual question is.

8 In Yearsley, there was such a specific compulsion by
9 the Government to build the particular dam a specific way, that
10 the contractor had absolutely no discretion, assuming he didn't
11 do it negligently. And, in fact, he didn't do it negligently.
12 The dam failed. And he said, "Well, the Government told me to
13 build it that way."

14 That is, in a sense, an extension of what we are
15 dealing with here under the Government contractor defense, but
16 the Feres/Stencel Doctrine seems to be the overriding policy
17 question that we are dealing with here as to whether or not a
18 Serviceman has the same rights as you and I do if they are
19 using a defective product that is not in a combat situation in
20 time of war.

21 QUESTION: Why isn't the overriding Federal question
22 the ability of the Federal Government to determine the
23 incidence of Federal contracting which include not just the
24 rights between the Government and the contractor, but the
25 extent to which, on the basis of this contract, the private

1 contractor can be held liable to a third party. So, in other
2 words, Clearfield Trust is what brings us into all of this.
3 Just because a state chooses to eliminate the doctrine, the old
4 doctrine of the necessity of privity of contract before any
5 defect in the product can be sued upon, just because a state
6 chooses to eliminate it, the Federal law of contracts does not
7 necessarily eliminate it.

8 MR. FRANECKE: That is also true, Justice Scalia. I
9 think that is a good point. I think, however, it comes back to
10 the question of whether we have a judiciary question here or
11 whether we have a congressional or legislative question. And
12 that seems to be because this is the first time that this Court
13 has heard the Government contractor defense as to on what basis
14 it should be construed.

15 QUESTION: Well, all the Courts of Appeal, without
16 exception, who have addressed it, have recognized some form of
17 Government contractor defense; have they not?

18 MR. FRANECKE: That is correct, Justice O'Connor.

19 QUESTION: No Court of Appeals has just totally
20 rejected it, as you would have us do?

21 MR. FRANECKE: I think that there have been various
22 rejections of forms of it and that seems to be the main issue,
23 here.

24 QUESTION: Well, they have all accepted a defense.

25 MR. FRANECKE: Yes.

1 QUESTION: There are different formulations of it.
2 You are here saying, "Don't recognize any Government contractor
3 defense at all."

4 MR. FRANECKE: That is correct. And I think that
5 there are ample reasons why it should not be a form of any
6 defense. It is already -- and, of course, the first thing that
7 should be questioned is: Does this Court want to extent
8 Feres/Stencel doctrines of a special relationship of the
9 military to contractors and such that a military person cannot
10 sue a contractor and, if they do sue, are they met with a
11 special defense? In other words, a special defense for a
12 special class of people.

13 QUESTION: Why is it based on Feres, necessarily?
14 You have been calling it the Government contractor defense, not
15 the defense contractor defense?

16 MR. FRANECKE: It seems to be the closest analogy
17 that we have come to in our research to try to understand what
18 policy considerations are to be or should be considered by the
19 Court.

20 QUESTION: Oh, I think the policy considerations are
21 the ability of the Government to determine the incidence of
22 Government contracts -- of a Government contract. Now, you have
23 in the Federal Tort Claims Act an immunity that is retained for
24 the Government with respect to discretionary functions.

25 MR. FRANECKE: Yes.

1 QUESTION: And that, it seems to me, goes down the
2 tube once you say that although the Government can't be sued,
3 whenever the Government buys anything from a contractor, as it
4 universally does, especially in the military field, the
5 Government can end up paying the bill indirectly because,
6 although the discretionary function can't be brought home to
7 the Government, it can to the contractor. The contractor's
8 price goes up. It is just the same as if we didn't have that
9 provision in the Tort Claims Act. Why isn't that a Federal
10 policy that is served, quite apart from Feres.

11 MR. FRANECKE: Without addressing the discretionary
12 function portion of the Federal Tort Claims Act, there are
13 several empirical evidence that has been brought forth in my
14 briefs regarding the fact that the cost factor is not really an
15 issue. For instance, Congress, we believe, has the purview to
16 enact whatever it may want with regard to military suits
17 against contractors. They were presented with all of these
18 cost arguments in 1984 in the -- I think it's Section 794 of a
19 procurement act cited in my briefs. The Congress rejected
20 those arguments and in essence said, "Yes, there might be a
21 slight increase in the cost of the various products, but what
22 has happened in the past is is that we have bought tremendously
23 expensive products and they haven't worked because they weren't
24 designed right in the first place. Isn't it better to spend a
25 little more in the testing and the design in the first place

1 than it is to spend the billions down the line to repair it?"

2 I give you an example like the shuttle, which is a
3 good example of it. That was a specific design by Morton
4 Thiokol, which we lost not only a billion dollars in a orange
5 puff of smoke, we also lost a second billion dollars when we
6 have to replace the shuttle and 350 million dollars to redesign
7 the booster, let alone seven lives. That was poor design in
8 the first place. And that, we believe, and is Appellant's
9 position that it is Congress' decision as to how and what
10 procedure it should have with regard to its procurement
11 process.

12 QUESTION: Well, it would seem to me that Congress
13 could always step into the act. If this Court recognized a
14 Government contractor defense, obviously, Congress can come in
15 and grant immunity or make adjustment if it sees fit.

16 MR. FRANECKE: That is, of course, correct. I would
17 also point out that Congress has not enacted a Government
18 contractor defense. Congress has also --

19 QUESTION: Well, that is perhaps because Congress
20 doesn't know what our Court would have to say about whether it
21 exists or doesn't exist. We have never spoken on the issue.

22 MR. FRANECKE: That is perhaps correct, however, I
23 think Congress has given a lot of indications of how it feels.
24 For instance, the Federal Tort Claims Act, the only exception
25 under the Federal Tort Claims Act that applies to military

1 people specifically is that a military person cannot sue, under
2 the Federal Tort Claims Act -- correction, the exception of the
3 combat situations. Other than that, they have every other
4 right to sue the Government.

5 QUESTION: Well, maybe the Government contractor
6 defense should not be limited to the military.

7 MR. FRANECKE: That is a question, of course, that
8 the Respondents are asking you to reach that point. However, I
9 again point out to the Court that every element in the
10 Government contractor defense is still contained within every
11 element of negligence, strict liability, and breach of warranty
12 which applies across the board.

13 QUESTION: Well, it isn't. It depends on how it is
14 formulated because the general contract specification defense
15 typically available in state tort law would extend perhaps only
16 to specifications that are very precise and not necessarily to
17 the kind of situation that may have been involved here where
18 the contractor participates in the design or for a performance
19 type specification.

20 MR. FRANECKE: That is entirely possible and that is
21 correct, that there is that element of how much participation
22 was there. However, by sanctifying a Government contractor
23 defense, you are saying that it is the Government that holds
24 the ultimate expertise in the procurement process rather than
25 the private contractors who hold out their expertise for profit

1 and who are supposedly the ones who have been building the
2 particular product. Remember, we are talking about products
3 that go all the way from refrigerators to missiles, from jets
4 to beans: everything. 52,000 procurement contracts a day by
5 some of the statistics I've read. That we are going to be
6 talking about a defense all across the board.

7 QUESTION: I suppose though that you do have the kind
8 of situation where, perhaps, the Government wants to design
9 some exotic product and doesn't know how to do it itself and
10 might want to rely, at least in part, on the expertise of the
11 private industry.

12 MR. FRANECKE: Absolutely. And I think that that is
13 already covered by the existing law under negligence, strict
14 liability, et cetera. It is a question of if you look at
15 whether or not the Government knows specifically what it is
16 purchasing. If it is specifically purchasing a specific
17 defect. What we find in these cases on the practical sense is
18 we find nut and bolt defects, not exotic defects, as such.

19 QUESTION: Can I ask about the space shuttle thing.
20 Your position is that if the Government had produced that
21 shuttle, itself, there wouldn't have been any suit possible
22 because the engineering defect, whatever it was, would clearly
23 come within the discretionary function provision of the Tort
24 Claims Act; right?

25 MR. FRANECKE: No, I don't agree with that particular

1 narrow view of the discretionary function under the Federal
2 Tort Claims Act.

3 QUESTION: I thought that was a broad view.

4 MR. FRANECKE: Well, in the sense that -- in the
5 sense that certainly there is discretionary function to provide
6 by the Government certain rules and regulations; however, it
7 has been the interpretation that the execution of those rules
8 and regulations is not precluded by the discretionary function.
9 Now, I grant you, of course, there is a gray area.

10 QUESTION: This isn't in the execution of a rule or
11 regulation. It is an engineer sitting down saying, "What is
12 the best way to do this?" If that isn't a discretionary call,
13 I really don't know what is.

14 Anyway, assume that that's covered, you would say
15 that even though be Government couldn't be sued, if the
16 Government contracts with someone else to do the same job and
17 participates actively in designing it with that person, then
18 the Government can't be sued, but the other person can be sued?

19 MR. FRANECKE: That is correct. And part of the
20 defense would be, even under the basic law now in place, is to
21 show whether or not it was the Government who specifically,
22 knowledgeably said, "This is what we want, even though it is a
23 defect," like your example of the right-hand drive, or whether
24 the Government just rubber stamped a design submitted by the
25 contractor.

1 QUESTION: Oh, well, then you are acknowledging a
2 Government contractor defense but you say it only applies when
3 the Government has actively participated.

4 MR. FRANECKE: It applies in any other context of any
5 other contract. If you or I go down and buy a Ford automobile
6 off the show room floor, we are, in essence, contracting
7 saying, "We are accepting that product." Now, I may be a
8 mechanic or an engineer and I may have superior knowledge, but
9 if those brakes fail, just because I approve the purchase of
10 that contract doesn't mean I don't have the right to be able to
11 sue back because of the defect design of Ford.

12 QUESTION: No, but if a third party is injured --

13 MR. FRANECKE: Yes.

14 QUESTION: If a third party is injured and I have
15 cooperated in the design of that car, it seems to me I would be
16 suable; wouldn't I?

17 MR. FRANECKE: If you had participated, then it is
18 covered under assumption of the risk, which is not a Government
19 contractor defense but an existing negligence, strict liability
20 test in the various Circuits or in the various states.

21 QUESTION: The third party assumes the risk?

22 MR. FRANECKE: Well, no, not the third party. Of
23 course, the third party could then sue -- perhaps could sue you
24 depending on your participation, of course. That is correct.

25 QUESTION: That is what we are talking about here.

1 MR. FRANECKE; Yes. The issue here, however, is
2 that we have a military person suing a Government contractor.
3 There isn't a third party, necessarily. He is employed by the
4 Government and that is where the Feres/Stencel starts coming in
5 as to whether or not he can or cannot incident to military
6 service sue further on while he is using a Government product.
7 It is a very thorny issue.

8 I would like to reserve, unless there are any further
9 questions, I would like to reserve the balance of my time, if I
10 may, Mr. Chief Justice.

11 CHIEF JUSTICE REHNQUIST: Yes, you may, Mr. Franecke.
12 We will hear now from you, Mr. Lacovara.

13 ORAL ARGUMENT OF PHILIP A. LACOVARA

14 ON BEHALF OF RESPONDENT

15 MR. LACOVARA: Thank you, Mr. Chief Justice, and may
16 it please the Court:

17 Before turning to the contours of the military
18 contractor defense as virtually all of the Courts of Appeals
19 but one have defined that defense, I would like to undertake to
20 show why this case does squarely present that issue and no
21 other issue. Counsel --

22 QUESTION: First, though, Mr. Lacovara, you are going
23 to insist on calling it the military contractor defense,
24 although you want it expanded to cover all contractors, and
25 your opponent insists on calling it the Government contractor

1 defense, although he would limit it if it exists at all to
2 military contractors, just as long as we have our terminology
3 in mind, I guess we can live with it.

4 (Laughter.)

5 MR. LACOVARA: We have used the term military
6 contractor defense in our brief, Justice Scalia, somewhat
7 designedly. The only argument that we are making before this
8 Court is that the defense -- this defense, there may be others
9 including the contract specification defense to which Justice
10 O'Connor referred, that would apply to providers of civilian
11 products. The argument in favor of the defense that we have
12 invoked in this case is that it applies because of the nature
13 of military procurement and the constitutional system under
14 which that process takes place, as well as other doctrines that
15 this Court has recognized that are unique to the military
16 relationship. So, we have chosen to use the term --

17 QUESTION: I take it the unique doctrine is that this
18 Court has the power to make rules for the regulation of the
19 Army and the Navy?

20 MR. LACOVARA: No. Quite the contrary. What we are
21 suggesting is that as a corollary of the separation of powers,
22 the courts should not intervene in reexamining design decisions
23 when those decisions are at bottom decisions made by the
24 political branches of the Government. That is what tort
25 litigation challenging the design of a military product

1 involves if the contractor meets the standards that we say were
2 met here.

3 QUESTION: But what you are asking us to do, Mr.
4 Lacovara is to formulate a Federal Common Law rule that
5 protects Government contractors in this situation where
6 ordinarily state law would govern.

7 MR. LACOVARA: That's correct. The Court of Appeals,
8 Mr. Chief Justice, in this case, relied on its separate opinion
9 in a companion case, the Tozer Case, decided the same day by
10 the same panel. In that case, the panel expressly stated in the
11 concluding footnote that this is a matter of Federal Common Law
12 even where the case arises under the diversity jurisdiction.
13 Almost all of the court -- all of the Courts of Appeals that
14 have addressed the question have reached that conclusion.

15 The reasons for treating this as a matter of Federal
16 Common Law are similar to those to which Justice Scalia
17 referred. This Court has held in two, I would submit, closely
18 analogous areas that Federal Common Law does govern.

19 QUESTION: Are you going to go on with those?

20 MR. LACOVARA: I will mention them at this point,
21 Mr. Chief Justice. The Standard Oil Case in which the Court
22 said that the relationship among the United States, its
23 soldiers and third parties who allegedly injure soldiers is to
24 be governed by Federal Common Law and then, more recently, in
25 the Stencel Aero Case where the issue was specifically

1 relationship between a military contractor and the United
2 States concerning liability for an accident involving a
3 military product, the Court again held, in so many words, that
4 the relationship between the United States and its contractors
5 is to be governed --

6 QUESTION: But that was a Federal Tort Claims Act
7 Case, Stencel. Was it not?

8 MR. LACOVARA: Yes, but what the Court was deciding
9 was that the underlying law that would be applied -- indeed, in
10 Stencel, the Court said, "As a matter of Federal law, we will
11 not recognize a claim, a tort claim or an indemnity claim."
12 The Tort Claims Act, Mr. Chief Justice, as you know, simply
13 waives the Government' sovereign immunity and leaves it subject
14 to suit if there is some underlying basis for a claim.

15 QUESTION: Under the law of a particular state.

16 MR. LACOVARA: That is correct. And in this Court,
17 in Stencel Aero, the Court said, "Congress has waived the Tort
18 Claims Act immunity from suit." We then have to look to see
19 whether there is a claim for relief that the contractor may
20 assert against the Government. And the Court held that
21 question is to be determined by Federal Common Law. And the
22 Court decided as a matter of Federal Common Law not to permit
23 the claim. But I think all of the reasons --

24 QUESTION: That was the claim against the United
25 States?

1 MR. LACOVARA: Against the United States. But the
2 underpinning of the decision as in the Standard Oil Case was
3 that where you are talking about a matter of this sort, the
4 relationship which is really tripartite, the United States, its
5 service personnel, and the contractors who are hired by the
6 United States to provide material for the war and defense
7 efforts, the incidence of that relationship have to be treated
8 as a matter of Federal Common Law. And I think that is not
9 disputed by Petitioner.

10 QUESTION: I know it isn't disputed by Petitioner,
11 but why isn't something Congress could settle much more easily
12 than we could: define the proper terms to this act.

13 MR. LACOVARA: There is no doubt that Congress could
14 address the issue, Justice Stevens.

15 QUESTION: Well, which is the more capable law making
16 entity in this particular area?

17 MR. LACOVARA: I would say that the courts have quite
18 adequate competence in the matter and should undertake this
19 responsibility. We are, after all, talking about doctrines of
20 liability to which this is a defense. And those are
21 court-created liabilities.

22 QUESTION: The question the Federal court created
23 liabilities --

24 MR. LACOVARA: They may or may not be.

25 QUESTION: None of them are.

1 MR. LACOVARA: Half of these cases, Justice Stevens
2 arise under the Death on the High Seas Act or some equivalent
3 matter where there is direct Federal jurisdiction.

4 QUESTION: I'm sorry. You are right. There are a lot
5 of those.

6 MR. LACOVARA: One of the things that I'm pointing
7 out is that it makes no sense in administering a system in this
8 part of the century to have disparate rights. And that is one
9 reason for having Federal law rather than 50 or 51 jurisdiction
10 laws --

11 QUESTION: Well, of course, that is an argument
12 against the way the Federal Tort Claims Acts is structured,
13 too.

14 MR. LACOVARA: Congress has decided, because most of
15 the torts that Congress had in mind were automobile accident
16 cases and things of that sort where the primary interest that a
17 jurisdiction might have in deciding what the rules of law would
18 be would be that of the locale where the accident occurred. It
19 is a very different situation, as the Court said in Standard
20 Oil and Stencil Aero, where you are talking about military
21 relationships.

22 QUESTION: Well, isn't it possible that this court
23 might decide to, quite logically, adopt such a defense in DOHSA
24 cases, Death on the High Seas Act cases, but not adopt it in a
25 case where it simply turns on state tort law?

1 MR. LACOVARA: Well, that is conceivable outcome. The
2 Court has to decide what legal regime, what jurisdictions law
3 will apply. We have spent five or six pages in our brief
4 explaining why all of the Courts of Appeals that have addressed
5 the issue have sensibly concluded that this needs to be
6 resolved as a matter of uniform Federal Common Law. It is
7 purely fortuitous where one of these helicopters or a jet
8 aircraft of the type involved in several of the other cases may
9 be operating, this accident happened to occur just short of the
10 three-mile limit in the Atlantic Ocean. It is purely
11 fortuitous where it occurred. It would make no sense, I submit,
12 Mr. Chief Justice, to say that if the accident had occurred in
13 another mile seaward, Federal law would apply, but the
14 contractor here has liability --

15 QUESTION: But, in a way, Congress has already said.
16 It has said where the DOHSA law, act applies. That wouldn't be
17 some novel thing that the Court goes out and says, "Well, two
18 and a half miles is a good idea." Congress has said that in the
19 DOHSA.

20 MR. LACOVARA: Yes. I agree that there are lines
21 that have to be drawn and that there are conceivable places
22 that someone might draw the line other than applying Federal
23 Common Law. My submission is that the best policy arguments
24 for choosing a rule of law, and a rule of law has to be chosen,
25 support fashioning a Federal uniform common law.

1 Now, the question that was asked by Justice Stevens
2 was: Shouldn't this be left to Congress?

3 And I think the answer is, although Congress plainly
4 has power under Article 1 to fashion or redefine the defense,
5 as Justice O'Connor indicated.

6 QUESTION: Or do away with it.

7 MR. LACOVARA: Or do away with it. The point is that
8 we are talking about a determination in court what is the
9 appropriate limit of liability if any for a contractor who
10 complies with a Government approved design and provides a
11 product that the Department of the Navy decided was appropriate
12 for military use. That is a question of judicially fashioned
13 law. All of the doctrines to which Mr. Franecke referred are
14 court-created doctrines. The courts have felt quite
15 comfortable fashioning appropriate defenses to deal with those
16 doctrines of negligence or breach of implied warranty or strict
17 liability.

18 I submit that as this Court has said on other
19 occasions, despite *Erie v. Thompkins* --

20 QUESTION: You have to refer a Federal law. You have
21 to say, "This is a defense that we, the courts, hold as
22 required by Federal law."

23 MR. LACOVARA: Yes, sir. Well, let me say that I
24 think the outcome would be the same if state law governed.

25 QUESTION: Well, I know, but we are saying it is

1 Federal law.

2 MR. LACOVARA: We are urging that this Court agree
3 with the lower courts that this is an appropriate area for
4 development and recognition of Federal interests which justify
5 applying Federal law in this case.

6 QUESTION: And you would say this even though the
7 state, under state law, there would be no such a defense?

8 MR. LACOVARA: Yes. Absolutely. Because of the
9 interests that we think are at stake, it should not be
10 permissible for a state to say, "We will impost liability on a
11 contractor for executing the will of the Department of the Navy
12 in providing equipment that the Navy wants provided in order to
13 provide for the national defense." That is a matter of primary
14 interest to the national government under the allocation of
15 powers between Federal and state governments. And I think
16 Standard Oil is exactly that kind of case, as is Stencel Aero.

17 QUESTION: Standard Oil was a case in which the Court
18 first held that the issue is one that should be controlled by
19 Federal law. But then, rather than fashioning the novel
20 remedy, the Court said, "It is up to Congress because they are
21 much better equipped than we are to make the rules."

22 MR. LACOVARA: In that situation, where you --

23 QUESTION: It seems to me that case cuts against you.

24 MR. LACOVARA: Where you were talking about a
25 situation where there were going to be no operational impacts

'1 on the conduct of the Armed Forces, the question was: What are
2 the financial consequences for the Government when a soldier is
3 injured in an automobile accident?

4 We are talking here and I think the Solicitor General
5 will be addressing these issues in a moment about something
6 that is much more fundamental, more important and more
7 immediate in determining what the effect will be on the system
8 of Federal military procurements. This is a matter that the
9 courts have not only fashioned out of whole cloth. That is not
10 the way, an accurate way of describing this, as Petitioner
11 would suggest. This is an area where the courts have taken long
12 established Common Law doctrines, including several doctrines
13 that this Court, itself, has fashioned: the Yearsley Case
14 involving one aspect of the Government specifications defense.

15 QUESTION: That was a condemnation case. The claim
16 there was that there was condemnation. The defense was then
17 you remedy is against the United States. That is entirely
18 different.

19 MR. LACOVARA: I think that understates the
20 significance of the case, Justice Stevens. Other courts have
21 interpreted it more broadly as the rationale in the Court's
22 opinion would suggest: the focus was not so much on the
23 availability of a possible Fifth Amendment remedy against the
24 United States, but on the unfairness of imposing liability on
25 the contractor. But to take the case back another 30 years to

1 the Spearin Case which is also cited in our brief, there was no
2 condemnation element there and the Court said, in so many
3 terms, "When a contractor complies with the specifications
4 provided by the United States, the contractor is not
5 responsible for the consequences of compliance with those
6 specifications." That is a generally recognized Common Law
7 doctrine recognized not only by this Court, but recognized in
8 the restatement of Torts and what the Federal and state courts
9 have done, and Justice O'Connor is absolutely correct in saying
10 no court, Federal or state, has rejected this defense. What
11 they have said is, as liability law has been allowed to evolve,
12 it is appropriate for the courts to fashion appropriate limits
13 or defenses for evolving liability claims and to apply the
14 analogous doctrines to recognize the defense in cases of this
15 sort where, as the proof shows, the Department of the Navy
16 specifically approved those very design features that Plaintiff
17 claims are the basis for a monetary award.

18 QUESTION: In the trial of this case, did you argue
19 that there was any such defense as a matter of Virginia law?

20 MR. LACOVARA: No. The issue, when it was submitted
21 to the court in request for instructions was framed by both
22 parties with citations to the McKay Case, the Tillett Case and
23 other -- Koutsoubos in the District Court, other Federal cases
24 that had eventuated by that time. Now, there were other state
25 law defenses that were made, but, as I was about to suggest to

1 the Chief Justice, the outcome might be the same, probably
2 would be the same under state law because the states, when they
3 have been confronted with cases of this sort, have also
4 recognized a military contractor defense, but our submission is
5 that, although that underscores one of the reasons why the
6 Court wouldn't be displacing state policy by adopting Federal
7 Common Law, it is a factor that the Court should recognize in
8 feeling that Federal Common Law is the appropriate way to
9 assure uniformity for products that will be used fortuitously
10 throughout --

11 QUESTION: There certainly is a difference, rather
12 sharp difference of opinion in the courts below as to the shape
13 that such a defense should take. Its contours.

14 MR. LACOVARA: I think that there is only one
15 exception to what I would say is the uniform approach of the
16 Federal courts. That is the Eleventh Circuit's decision in
17 Shaw.

18 I think it is fair to say, Justice O'Connor, that
19 when you read all of the --

20 QUESTION: Well, if it is a performance type
21 specification or a situation where the contractor participates
22 with the Government in designing the product, is there a duty
23 of the contractor to warn of defects that it knows or should
24 know exist?

25 MR. LACOVARA: That is the single question that has

1 divided the Eleventh Circuit from the other courts. All of the
2 other Courts of Appeals that have addressed this have now said
3 that the defense applies where the contractor either gets
4 specifications promulgated by the Government, which is rare, or
5 participates in the design.

6 The one point of division is what is the nature of
7 the contractor's duty to warn. The Eleventh Circuit said, "The
8 contractor has a burden of reasonable inquiry," which we and
9 the Government say would actually disrupt the process and lead
10 to less safety than more.

11 All the other Courts of Appeals have said the issue
12 is simply: Does the contractor actually know of something, a
13 hazard in the design about which the Government is ignorant.

14 QUESTION: Are Government contractors permitted to
15 include costs of getting liability insurance; do you know?

16 MR. LACOVARA: That can be an overhead cost under
17 certain kinds of relationships. If it is a fixed price
18 contract, however, and I believe the record here indicates that
19 the contract for these helicopters which were procured for
20 military service in Vietnam during the war, was a fixed price
21 contract.

22 QUESTION: And then it could be incorporated in the
23 price?

24 MR. LACOVARA: It depends on the negotiation process.
25 I think another point on that, really a side light, I think, in

1 terms of the mission before the Court, is that when these
2 contracts were let and when these helicopters were being
3 designed, it was in the 1960's when a liability suit of this
4 sort would have been virtually unthinkable. We are in this
5 position 25 years after this contract process began because
6 liability law has evolved far beyond insurance coverage at the
7 time, but I think that is not the real issue on which we reset.

8 I was going to emphasize that the only issue before
9 the Court is that one. In Petitioner's brief before the Court
10 of Appeals, he said on two occasions, and the Court of Appeals
11 took him at his word and expressly reported this in its
12 opinion, that the only issues that were being advanced were the
13 claims that there was a negligent repair of this servo-system
14 and a negligent design of the escape system. Petitioner said
15 that twice in his brief below and that is the way the Court of
16 Appeals characterized the case.

17 I think it is too late now to say that there is
18 another negligent design issue that this Court ought to
19 address. The Logan Case, the Virginia law burden of proof case
20 on page 395 of the transcript was specifically argued as a
21 basis for directing a verdict on the ground that Plaintiff had
22 not borne his burden under Virginia law. That is exactly what
23 the Court of Appeals held on appeal was the case here.

24 So, as the case comes before this Court, the only
25 issue is the one that was framed in the petition: What are the

1 appropriate standards for the military contractor defense. We
2 have explained in our brief why the defense should exist, why
3 it should be recognized as a matter of Federal Common Law and
4 why it is a corollary of important constitutional and legal
5 doctrines. At bottom, it is a separation of powers question.
6 In this kind of suit or any kind of suit, where the Plaintiff
7 is claiming that he is entitled to damages because military
8 equipment has been improperly designed and where the contractor
9 shows that that very feature was approved by the military, what
10 the Plaintiff is asking the Court and civilian jury to do is to
11 say that the military decision to provide him or her with that
12 piece of material was wrongful and should bear consequences.

13 Now, the United States is immunized under either
14 Feres or more generally under the discretionary function
15 exception and the question, therefore, is: Should there be a
16 backdoor attack on the nature of the military decision by
17 exposing the contractor to liability in tort for the
18 consequences of the design decision, that the contractor proves
19 were specifically approved by the military department.

20 QUESTION: What if the helicopter, by reason of some
21 other defect, in the rotor, for example, falls down and hurts
22 some civilians?

23 MR. LACOVARA: If it is a negligent manufacture or an
24 aspect --

25 QUESTION: No. A design defect in the rotor.

1 MR. LACOVARA: If it is a design effect concerning a
2 feature of the helicopter that was not before the military
3 department --

4 QUESTION: No, it was before the military department,
5 too.

6 MR. LACOVARA: If it was approved the military?

7 QUESTION: Same as here. Everything is the same as
8 here, only it is the rotor and it hurts a civilian instead of a
9 serviceman.

10 MR. LACOVARA: Okay. What you have there, Justice
11 Scalia, is a different question, obviously. Several of the
12 bases for the military contractor defense would involve or
13 could involve immunity under that circumstance, just as the
14 United States would be immune if the decision that the Court
15 would have to make would be to inquire into the soundness, the
16 reasons of the military judgment to design a helicopter with
17 those rotors, you might very well have the same reasons for a
18 defense even where the civilian is injured.

19 One factor that would not be present that is present
20 in this type of case, and it is the typical case involving
21 military accidents is that Congress has another system of
22 compensation that it has set up equivalent to Workmen's Comp
23 system. So, the balance might be different, but some of the
24 bases for immunity would apply.

25 I have ceded the balance of my time to the Solicitor

1 General. And, if there are no questions from the Court, I
2 would rest at that point.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lacovara.
4 We will hear now from you, Mr. Ayer.

5 ORAL ARGUMENT OF DONALD B. AYER
6 AS AMICUS CURIAE SUPPORTING RESPONDENT

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

9 The United States is in this case as amicus because
10 we believe that the issue here is whether the courts or the
11 military should decide the appropriate standard of operator
12 safety in sophisticated military weapons systems. We also
13 believe that this may be the paradigmatic Federal Common Law
14 case under the Clearfield Trust doctrine because of the
15 uniquely Federal interest which we are dealing with here. We
16 are dealing with the national defense and the ability of the
17 United States Government and the military to procure
18 sophisticated weapons systems.

19 The analogy that I think is closest in terms of --

20 QUESTION: Of course, you could have -- you could say
21 that and still, supposing this helicopter, you know, had simply
22 fallen apart and injured a civilian on the ground, it would not
23 necessarily be the same rule of law that would apply. Would
24 it?

25 MR. AYER: I don't think it would be necessarily,

1 Your Honor. And I would agree with Mr. Lacovara's response to
2 Justice Scalia's question on that point. These are balancing
3 questions, we must confess. And in that sense, we think the
4 closest area of legal doctrine in terms of an analogy is the
5 area of Federal employee immunity.

6 In that instance, you are talking about protecting
7 the general functioning of the Government and that is an area
8 where this Court has, for years and years, dealt with cases
9 involving questions of whether the balance of the interests of
10 defending the Government functioning, outweigh the interests of
11 the plaintiffs in that particular situation.

12 I think in those cases, it has been clear that the
13 Common Law approach has been the appropriate approach. It has
14 been clear to this Court in case after case.

15 QUESTION: Yes, but many of those cases arise under
16 Section 1983, their construction with Federal statute which
17 presumptively adopted Common Law rules that were applied, not
18 just a matter of Federal Common Law, but general Common Law.

19 MR. AYER: Well, that is correct, Your Honor, but
20 many -- a number of cases also have not dealt with
21 constitutional principles or 1983. They have dealt with Common
22 Law actions.

23 QUESTION: Well, most of those against Federal
24 officials, the question really comes down to whether there is
25 an implied cause of action against the Federal official.

1 MR. AYER: Well, that is true. That is correct.

2 QUESTION: And in your Clearfield Case, which of
3 course is the principal example, the United States was a party
4 to that case

5 MR. AYER: That is correct. But we believe that the
6 overriding priority on making sure that the United States
7 Government and, particularly, in the context of military
8 procurement and the involvement in the national defense, that
9 that is a priority that has got to be considered whether the
10 United States is a party or not.

11 QUESTION: Who would you say is better competent to
12 draw the appropriate rules in this area, in the military
13 procurement? Congress or this Court?

14 MR. AYER: Well, certainly, they both, I think, are
15 competent.

16 QUESTION: That is not my question.

17 MR. AYER: Well, I think in terms of case by case --

18 QUESTION: Which do you think is better able to do
19 the job?

20 MR. AYER: I think in terms of stating general
21 principles, it is arguable that it would be more appropriate
22 for Congress to do it. On the other hand, given the fact that
23 cases are going to be coming up with various factual situations
24 that are not susceptible to treatment within a precise rule, it
25 seems the --

1 QUESTION: Surely, you don't want us to decide every
2 case. You want us to lay down some broad general principles.
3 Don't you?

4 MR. AYER: We would like you to decide this case and
5 state a principle which is suitably narrow to deal with this
6 case.

7 QUESTION: Well, what if there were a committee of
8 Congress now to get together and say, "We want to look into the
9 possibility of a Government contractor defense." What do you
10 think their sense would be, looking at what's been decided. Do
11 you think they would say the Federal courts have already
12 established such a defense? Or do you think they would say,
13 "Well, the Supreme Court has never spoken. It is just a brand
14 new issue?

15 MR. AYER: Now, prior to any decision?

16 QUESTION: No, prior to our deciding this case, but
17 looking at the cases that the Courts of Appeals have decided.

18 MR. AYER: Well, I think they would certainly view
19 themselves as free to change the law as it now exists in the
20 Court of Appeals.

21 QUESTION: But do you think they would say the
22 courts, the Federal courts have established a Government
23 contractor defense? Or do you think they would say, "No, the
24 Supreme Court hasn't spoken, so the courts have just done
25 nothing in that area."

1 MR. AYER: Well, they would certainly be aware that
2 courts around the country are applying such a defense. So, in
3 terms of the practical reality, that defense does exist. This
4 court would not have spoken unless they might feel that the
5 issue had not been finally resolved.

6 QUESTION: What field do you think we are better at
7 making law than the Congress is? I mean you say here the
8 Congress is better. Where are we better?

9 MR. AYER: Well, I would qualify --

10 QUESTION: Anywhere?

11 (Laughter.)

12 MR. AYER: I think there are situations, Justice
13 Scalia, where case by case, adjudication is absolutely
14 unavoidable. And we believe that this is such an area. And we
15 believe that the fundamental necessity of allowing the
16 Government to proceed in the area of sophisticated weapons
17 systems by the kind of cooperative relationship with private
18 industry that is involved in this case that that priority makes
19 it possible to say that the defense that we are talking about
20 is really inherent in the power that has been conferred on the
21 Defense Department and the Services to go forward with
22 procurement.

23 QUESTION: Well, what is it at bottom? A separation
24 of powers argument?

25 MR. AYER: Well, it is arguably separation of powers.

1 I think maybe preemption is a little closer, Justice O'Connor.
2 The idea that the power of the Government to get weapons
3 systems without itself manufacturing all of them is a power
4 that I think it is fair to say is inherent in the power to
5 provide for the national defense. And that is really what we
6 are talking about here. We are talking about complex changing
7 technology where it is not practical for all sorts of reason
8 for the United States Government to set up factories to
9 manufacture this equipment which changes every few weeks. And
10 it is perfectly reasonable to enlist the assistance of private
11 industry in doing that.

12 Now, the absence of a defense does not absolutely
13 prohibit that, but it creates burdens which were alluded to by
14 Justice Scalia, quite correctly: burdens which include
15 increasing cost, which include delays in the ability to get the
16 product produced because the contractor is focusing not only on
17 what the Government wants but what state courts in their tort
18 law application responsibility are demanding.

19 The biggest problem that is generated is the
20 incentive that is created to not go forward with a cooperative
21 relationship with the Government. Under the contract
22 specification defense that applies in most states, a contractor
23 will have a defense if he simply does what the Government tells
24 him. And the question here is whether the Government can enter
25 into a cooperative give-and-take relationship to get this kind

1 of equipment or does it have to do it at arms' length, simply
2 saying, "We want this."

3 If the Government can't have that kind of a
4 cooperative relationship, it is going to be impossible to
5 develop the technology that we need on the leading edge of
6 technology around the world.

7 And that is why I say this defense is really inherent
8 in the power to provide for the national defense.

9 I would just like to briefly emphasize that we are
10 concerned that the defense also be limited. We are not
11 foreclosing a similar defense in later different cases, but
12 this defense in this case need only and should only be limited
13 to, (1) military equipment, (2) features of military equipment
14 which can be described as "special order," either an entire
15 system that is special ordered or specific features on a system
16 which is generally available, which are special ordered.

17 We are not in favor of creating a defense for the
18 Government for the contractor when he provides a can of beans
19 which is no different than every other can of beans that it
20 provides, nor when the contractor provides a jeep which is just
21 like every other jeep. Unless the Government says, "We want
22 this one to be different." Or, unless the contractor says,
23 "This is just our standard jeep. Now, for you, in your
24 application, we would like to put on a something or other. We
25 would like to put on a special metal undercoating," or

1 something like that, "to make it safe." And the Government
2 comes back and says, "No, we want it just the way it is." In
3 our view, that would be a special order application. But we
4 are not talking about protecting contractors when they are
5 selling the Government the same thing they sell to everybody
6 else, even if they run blueprints past the Government and the
7 Government signs off and says, "This is what we want."

8 What we are trying to protect is the process, the
9 interaction and the developmental process of products. And we
10 feel that the Government has got to be able to have that
11 flexibility to deal on a close coupled basis with contractors
12 or you are really denying the Government the ability to procure
13 these fundamentally essential weapons systems that it has got
14 to have.

15 The other ways in which the defense is limited in our
16 view and is limited under the McKay test, (1) there is no
17 protection when the manufacturer produces a product negligently
18 or fails to live up to the specifications. So, we are not in
19 favor of simply a blanket immunity such as was embodied in one
20 of the pieces of legislation that was put up for a vote in
21 Congress last year.

22 And, finally, there is, of course, the burden of
23 warning the Government of known hazards.

24 QUESTION: How about hazards they should know of?

25 MR. AYER: We do not believe that there should be a

1 burden to warn of hazards they should have known because that
2 does exactly what we seek to avoid and that is put the decision
3 on the procurement process in the hands of the courts.

4 QUESTION: Even if it doesn't meet general industry
5 standards?

6 MR. AYER: Certainly not, if -- certainly not,
7 looking to civilian industry standards. But we would submit
8 even looking to somewhat amorphous standard of the military
9 industry because we think the Government has got to be able to
10 say, for example, in a crisis situation, "We want this product.
11 We want these specifications, and we want it now. We don't
12 want it in three months after you have had time to run all the
13 tests that you would run if you were trying to produce this
14 under some standard that a court would dictate."

15 I see my time is up. Thank you very much.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.

17 Mr. Franecke, you have four minutes remaining.

18 ORAL ARGUMENT OF LOUIS STANTON FRANECKE

19 ON BEHALF OF PETITIONER - REBUTTAL

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

21 I think it has become abundantly clear at this point
22 that the central issue here is a policy decision. It is, of
23 course, Appellant's view that if Congress wished to enact a
24 Government contractor defense or a defense specific for
25 Government contractors, it could do so. And it has declined to

1 do so despite hearing these same arguments that have been put
2 forth by the Solicitor General and as well as Mr. Lacovara
3 and in other legislation that has worked itself around this
4 issue.

5 I think it should be reminded to the Court that we
6 are talking here about a special defense for special people.
7 And it is Appellant's view that this is especially wrong. What
8 would you be asked next? To enact a stock broker defense? Or
9 an auto maker defense? Or every sector of our American
10 industrial complex that has a special type of area of product:
11 airplane, automobile, boat, will start going into specific
12 rules for those specific manufactures.

13 QUESTION: Or maybe your defense that says a Federal
14 employee can't be sued under state tort law for activities in
15 the discharge of his Federal functions. We made that one up;
16 didn't we?

17 MR. FRANECKE: Yes, I believe you did. And, of
18 course, Congress also enacted a specific exclusion under
19 Federal Employees Benefits Act, but also under the Veterans
20 Benefit Act, Congress said there is no exclusivity. There is
21 nothing implied --

22 QUESTION: Why would we make up that one and not this
23 one? Which ones do you want us to get into and which ones not?

24 MR. FRANECKE: If we did not have any system of law
25 that already applied to this type of a case, of a military

1 person suing a Government contractor, I would say then we would
2 probably have to start interpreting where we are going. But we
3 already have negligence. We already have product liability. We
4 already have breach of warranty. All of these defenses are
5 available to United Technology Sikorsky to prove that
6 supposedly the Government approved this one particular -- or
7 these defects in this helicopter.

8 In the actual record in this case, there was not one
9 military person that testified at the trial and said, "We
10 approved the escape system. We approved the specific defect in
11 the control system." That did not exist in this record. And
12 the military has not said that in this particular case.

13 And I would also again point out to the Court that a
14 jury heard all the evidence, including the Defendant's position
15 on the facts and found for the Appellant, despite even a
16 version of the Government contractor defense having been given.

17 I also think that it is important that if Your Honors
18 are inclined to adopt a form of the Government contractor
19 defense, there are a multitude of issues that have to be
20 balanced because this defense would apply, then, throughout the
21 entire military procurement process. And Congress, instead of
22 wanting something of this nature has in fact in 1984 been
23 enacting legislation that has made the Government procurement
24 complex even more competitive and have been trying to
25 disassociate themselves with the close symbiotic relationship

1 · between the Government and the contractors to create more of an
2 actual competition.

3 Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Franecke.

5 The case is submitted.

6 (Whereupon, at 12:01 p.m., the case in the
7 above-entitled matter was submitted.)

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3 REPORTER'S CERTIFICATE

4 DOCKET NUMBER: 86-492

5 CASE TITLE: Delbert Boyle v. United Technologies Corporation

6 HEARING DATE: October 13, 1987

7 LOCATION: Washington, D.C.

8 I hereby certify that the proceedings and evidence
9 are contained fully and accurately on the tapes and notes
10 reported by me at the hearing in the above case before the
11 Supreme Court of the United States.

12
13 Date: October 20, 1987

14
15
16 M. J. [Signature]
17 Official Reporter

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