

NOTE

THE *BOYLE* TEST IS AN INSUFFICIENT STANDARD FOR DETERMINING WHETHER TO ALLOW PRIVATE MILITARY CONTRACTORS TO ASSERT THE GOVERNMENT CONTRACTOR DEFENSE

I. INTRODUCTION

*There is no accountability for the tens of thousands of contractors working [in] Iraq and abroad. Private contractors like Blackwater work outside the scope of the military's chain of command and can literally do whatever they please without any liability or accountability*¹

—Statement by Kathryn Helvenston-Wettengel, the mother of a Blackwater employee killed in the Fallujah ambush²

*[T]here is simply no way at all the State Department's Bureau of Diplomatic Security could ever have enough full-time personnel to staff the security function in Iraq. There is no alternative except through contracts.*³

—Statement by Ryan Crocker, U.S. Ambassador to Iraq

1. *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 71 (2007) (statement of Kathryn Helvenston-Wettengel). Blackwater Security Consulting, LLC ("Blackwater") is a corporation operating in Iraq, contracted to provide security services for the United States government.

2. For the purposes of this Note, the "Fallujah ambush" and "Fallujah incident" refer to the same event and the terms are used interchangeably. The Fallujah ambush was an attack by Iraqi insurgents upon United States contractors working for Blackwater. Part II of this Note explores the events of this ambush in greater detail.

3. *Hearing on Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. (2007) (prepared statement of Erik D. Prince, CEO of Blackwater) (quoting Ryan Crocker, U.S. Ambassador to Iraq), available at <http://oversight.house.gov/documents/20071003153621.pdf>.

These quotations exemplify a growing problem arising from the Iraq War. Private military contractors⁴ are being hired in record numbers by the United States military.⁵ They are contracted to perform security functions including safeguarding perimeters, guarding convoys, and providing private bodyguard services to diplomats and State Department officials.⁶ As a result of the military's extensive reliance on these private military contractors, some problems, such as lack of oversight and unclear legal standards, are beginning to surface.⁷

Blackwater is one of many security contractors operating in Iraq and Afghanistan.⁸ The North Carolina-based contractor has recently been at the center of two horrifying events in Iraq, causing a public backlash that has resulted in Congressional investigations.⁹ Subsequently, the name Blackwater has become synonymous with the growing public concern that the United States' substantial reliance on private military contractors offers insufficient governmental oversight, creating a culture of lawlessness.¹⁰ One such example that caught the media's attention occurred on March 31, 2004, in Fallujah, where four employees of Blackwater were killed in an ambush.¹¹ Questions still remain as to whether Blackwater's negligence caused the deaths and, if so, whether the company should be immune from liability.¹²

4. Private military contractors will also be referred to as private security contractors herein.

5. See *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 4 (2007) (statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov't Reform). Chairman Waxman stressed that little is known about the extent of the United States' reliance on these private security contractors. He concluded, however, that "[w]e know that the war in Iraq has given private contractors an unprecedented role in providing security services. Almost \$4 billion in taxpayer funds has been paid for private security services in the reconstruction effort alone." *Id.*

6. See Brian Bennett, *Outsourcing the War*, TIME, Mar. 26, 2007, at 38.

7. See *id.* at 40.

8. Other contractors include DynCorp and Triple Canopy. See JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY* 165 (2007).

9. See Bennett, *supra* note 6, at 40; see also August Cole, *Obstacles Await Any Charges Against Blackwater*, WALL ST. J., Nov. 15, 2007, at A8. In addition to the Fallujah incident, the FBI and Congress investigated another incident in which Blackwater employees were accused of wrongfully killing seventeen Iraqi civilians. See Cole, *supra*, at A8. The FBI determined that "at least 14 of the 17 Iraqi civilians in the September [2007] incident were unjustified and violated standards in place governing the use of deadly force." *Id.*

10. See James Glanz, *Iraq Plans to Confront Security Firms on Guns*, N.Y. TIMES, Nov. 8, 2007, at A19.

11. See MAJORITY STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., *PRIVATE MILITARY CONTRACTORS IN IRAQ: AN EXAMINATION OF BLACKWATER'S ACTIONS IN FALLUJAH* 4 (Comm. Print 2007), available at <http://oversight.house.gov/documents/20070927104643.pdf> [hereinafter PRIVATE MILITARY CONTRACTORS].

12. See *id.*

This Note examines the legal consequences Blackwater faced in the *Nordan v. Blackwater Security Consulting* litigation that arose out of the Fallujah incident.¹³ This Note also evaluates the current legal standard used to determine the applicability of the government contractor defense¹⁴ and argues that there should be different standards for private military contractors as opposed to supply contractors, corresponding to the inherent differences between the two types of contracts. In response to the insufficiency of the current legal standard, this Note proposes a test, called the “Blackwater Rule,” that is tailored to the unique intricacies of private military contractors and intended to preserve the initial purpose of the government contractor defense, immunizing the government’s discretion.

Part II of this Note introduces the facts that gave rise to the Fallujah incident and the litigation that followed. Specific attention is paid to the contractual relationship between Blackwater and the general contractors that procured Blackwater’s security services.

Part III chronicles the origins of the government contractor defense as created by *Boyle v. United Technologies Corp.*,¹⁵ detailing how the defense was derived from the discretionary exception to the Federal Tort Claims Act (“FTCA”).¹⁶ Additionally, Part III describes in detail the *Boyle* Court’s three-prong government contractor defense test.

Part IV examines how different courts have interpreted *Boyle*, analyzing how the lower courts have inconsistently treated the question of whether performance contractors¹⁷ should be able to assert the government contractor defense. Part IV concludes that a uniform rule resolving this inconsistency is necessary in order to have a consistent legal framework within which to address this national legal issue.

Part V argues for the adoption of the Rule proposed by this Note, the “Blackwater Rule.” The Blackwater Rule provides clear standards for private military contractors who wish to invoke the government contractor defense. This Part first contends that all contracts involving

13. *Nordan v. Blackwater Sec. Consulting, LLC*, 382 F. Supp. 2d 801, 805 (E.D.N.C. 2005).

14. The government contractor defense protects a contractor from liability when the government exercises discretion over the contractor’s conduct and the contractor subsequently carries out the government’s wishes. Part III of this Note provides a comprehensive analysis and background of the government contractor defense.

15. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 511 (1988).

16. *See* 28 U.S.C. § 1346(b)(1) (2000) (codifying the FTCA); 28 U.S.C. § 2680(a) (2000) (enumerating the exceptions to the FTCA).

17. Performance contractors are contractors that perform a task or service as compared to supply contractors that manufacture a product.

private military contractors involve a “uniquely federal interest.”¹⁸ Additionally, in order to determine if a “significant conflict”¹⁹ exists between a federal interest and state law, the Blackwater Rule stipulates that a “significant conflict” exists if: (1) the performance contract with the government provided precise specifications and the contractor complied with the specifications; (2) the performance contract with the government explicitly and lawfully delegated the government’s discretion to the private military contractor; or (3) in the absence of explicit contractual instructions, the government substantively reviewed and approved the use of the procedure prior to the event that led to liability.²⁰ This Part will also describe the standards that private military subcontractors would need to meet in order to assert the government contractor defense.

Finally, Part VI of this Note will apply the Blackwater Rule to the facts of *Nordan*.²¹ This Part illustrates how the Blackwater Rule works and evaluates what evidence, beyond the facts that are publicly available, would be needed in order for Blackwater to meet the requirements of the Rule. In addition, Part VI describes how, if these standards were met, the use of the government contractor defense would be consistent with the discretionary rationale for which the defense was initially created. Part VI concludes that the Blackwater Rule provides an incentive for the government and private military contractors to develop a system of drafting and performing security contracts with increased oversight, transparency, and contemplation.

II. THE FALLUJAH INCIDENT: A SERIES OF SUBCONTRACTS AND MISTAKES

On March 31, 2004, Scott Helvenston, Mike Teague, Jerko Gerald Zovko, and Wesley Batalona were victims of one of the most shocking acts of violence of the Iraq War.²² Their convoy was ambushed in the

18. The existence of a “uniquely federal interest” is necessary to fulfill the requirements of the first step of the *Boyle* test. *Boyle*, 487 U.S. at 504. Part III of this Note provides further explanation of this term and its relationship to the government contractor defense.

19. In addition to the “uniquely federal interest” requirement, a contractor must also prove that there is a “significant conflict” between the federal interest and state law in order to invoke the government contractor defense. *Id.* at 507.

20. The private military contractor can assert the government contractor defense if it satisfies one of the prongs of the Blackwater Rule.

21. *Nordan v. Blackwater Sec. Consulting, LLC*, 382 F. Supp. 2d 801, 804-06 (E.D.N.C. 2005).

22. See PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 4.

streets of Fallujah.²³ They were shot, pulled from their vehicles, mutilated, burned, and two of their bodies were ultimately hung from a bridge.²⁴ A bloodthirsty mob of more than three hundred Iraqis took part, encouraged, and stood witness to these events, which were reminiscent of those that occurred a little over a decade before in Somalia.²⁵ One noteworthy difference was that private military contractors as opposed to soldiers, were the victims of the violence.

The four victims of the violence were employees of Blackwater and were providing security for the convoy that was ambushed.²⁶ The events that preceded the Fallujah incident are becoming clearer as Congressional investigations and lawsuits, brought by the families of these employees, shine light on the actions taken by Blackwater prior to the ambush.²⁷ An analysis of the contractual web that led Blackwater to assume the security function of the convoy is necessary in order to understand how the contractor neglected its responsibilities to its employees.

The Fallujah ambush arose from a contractual obligation between Blackwater and Regency Hotels (“Regency”), a Kuwaiti business.²⁸ The contract required Blackwater to provide security services for ESS Support Services Worldwide (“ESS”), a European food company.²⁹ Figure 1 displays the complex contractual relationship between Regency, ESS, Kellogg, Brown & Root (“KBR”), Fluor Corporation, the United States Army, and the United States Air Force.

23. Bennett, *supra* note 6, at 36.

24. *Id.*

25. SCAHILL, *supra* note 8, at 103. In 1993, Somali rebels dragged the bodies of American soldiers, who had been shot down in a United States Blackhawk helicopter, through the streets of Mogadishu. *Id.* at 107.

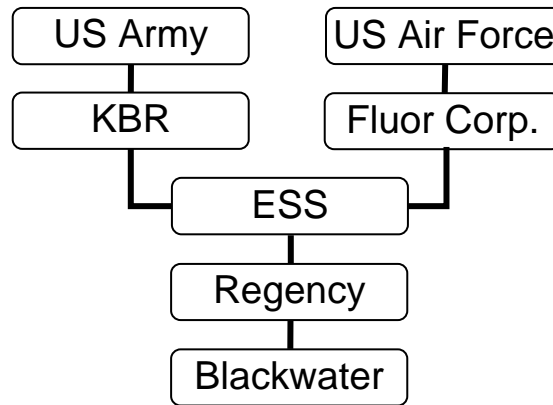
26. PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 4.

27. See generally *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 1 (2007) (compiling Congressional findings and testimony); see also *Nordan v. Blackwater Sec. Consulting, LLC*, 382 F. Supp. 2d 801, 804-06 (E.D.N.C. 2005).

28. *Nordan*, 382 F. Supp. 2d at 804; PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 7.

29. *Nordan*, 382 F. Supp. 2d at 804.

Figure 1: Blackwater Subcontract Diagram



ESS was a subcontractor under two different companies operating in Iraq. The first company, KBR, had a Logistics Civil Augmentation Program (“LOGCAP”) contract with the United States Army.³⁰ A LOGCAP contract is a type of contract made between the Army and a contractor for non-combat services such as providing food or housing for the military.³¹ Fluor Corporation, the second company that ESS had a subcontract with, held its general contract with the United States Air Force.³² Fluor’s contract covered reconstruction efforts involving water programs and restoring electricity.³³ Neither the LOGCAP contract with KBR nor the contract between the Air Force and Fluor permitted the general contractors to subcontract for security.³⁴

Although complicated, this web of subcontracts is the norm in Iraq and has resulted in a lucrative market for middlemen such as Regency.³⁵

30. PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 7.

31. For a further analysis describing how the structure of LOGCAP contracts gives contractors an incentive to inflate costs, see Erik Eckholm, *Democrats Step up Criticism of Halliburton Billing in Iraq*, N.Y. TIMES, June 28, 2005, at A12.

32. PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 7.

33. See *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 133 (2007) (statement of Tom Flores, Senior Director, Fluor Corp.).

34. See *id.* at 183-84.

35. See *Private Security Firms Standards, Cooperation and Coordination on the Battlefield: Hearing before the Nat’l Sec., Emerging Threats and Int’l Relations Subcomm. of the H. Gov’t Reform Comm.*, 109th Cong. 5 (2006). This hearing was held to investigate the prevalent practice of overcharging the government at every level of subcontracting. *Id.*

These middlemen contract to provide services and find another company, such as Blackwater, to actually perform the work under the contract. As Representative Henry A. Waxman explained during the 2007 House of Representatives' investigation into contractor waste, "[i]t is remarkable that the world of contractors and subcontractors is so murky that we can't even get to the bottom of this, let alone calculate how many millions of dollars taxpayers lose in each step of the subcontracting process."³⁶

Blackwater represented the last link on this subcontracting chain and assumed the role of security subcontractor under Regency.³⁷ Blackwater inherited this contract from Control Risk Group ("CRG") and the ambush occurred shortly following the transfer of responsibilities from CRG to Blackwater.³⁸ In fact, the victims of the ambush were traveling on one of the first missions attempted pursuant to this newly assigned contract.³⁹

Many accounts of the incident, including the House of Representatives report, suggest that Blackwater was to blame for the unpreparedness that resulted in the deaths of its four employees.⁴⁰ The first of these allegations is that the men were not properly trained for their mission because Blackwater took on the contract too hastily without learning the specifics from the prior contractor, CRG.⁴¹ A CRG project manager recalled that during the transition period, Blackwater "did not use the opportunity to learn from the experience gained by CRG on this operation, this leading to inadequate preparation for taking on this task . . ."⁴² In addition, Blackwater's internal report conceded that the personnel "[h]ad no time to perform proper mission planning."⁴³

The second allegation against Blackwater in connection with the Fallujah incident is that the crew was understaffed.⁴⁴ According to a

36. *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 2 (2007) (statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov't Reform).

37. See PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 7.

38. *Id.*

39. Bennett, *supra* note 6, at 39.

40. See Press Release, Comm. on Oversight and Gov't Reform, Incident Reports Fault Blackwater in Fallujah Ambush (Sept. 27, 2007), available at <http://oversight.house.gov/story.asp?ID=1503>.

41. PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 7.

42. *Id.*

43. *Id.* at 8.

44. *Id.* at 10.

Blackwater internal report, the team size of six employees was cut to four immediately before the team left for the convoy mission.⁴⁵

The third allegation blaming Blackwater for the deaths of its employees is that the men were not properly equipped.⁴⁶ Instead of driving fully armored vehicles, the Blackwater employees were driving Mitsubishi Pajeros.⁴⁷ In addition, the victims' families allege that Blackwater "did not provide [its employees] with heavy automatic machine guns, but instead merely with semi-automatic rifles, which had not even been tested or sighted."⁴⁸ The House report also concluded that the Blackwater employees were not given proper maps.⁴⁹ The victims' families testified before the House Committee on Oversight and Government Reform that "when [Scott Helvenston] asked for a map of the route, he was told, 'It is a little too late for a map now.'"⁵⁰

Beyond these allegations of negligence, the victims' families also contend that Blackwater breached its contract with Regency as well as the contract between Blackwater and its own employees.⁵¹ The contract between Blackwater and Regency set minimum standards that Blackwater needed to meet while providing security for the convoys. The contract stated that "to provide tactically sound and fully mission capable Protective Security Details, the minimum team size is six operators with a minimum of two vehicles to support the ESS movements."⁵² Additionally, the contract stipulated that "[e]ach escort team (2 vehicles) will contain a minimum of 5 personnel."⁵³ The fact that these provisions seem to be inconsistent is irrelevant because Blackwater failed to comply with either of these two minimum standards. When the Fallujah incident occurred, the team size had been cut from six operators to four.⁵⁴

45. *Id.*

46. *Id.* at 7.

47. *Id.* at 8. The Pejero, known as the Montero in the United States, is a mid-sized sport utility vehicle.

48. *Nordan v. Blackwater Sec. Consulting, LLC*, 382 F. Supp. 2d 801, 805 (E.D.N.C. 2005).

49. PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 8.

50. *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 73 (2007) (statement of Kathryn Helvenston-Wettengel, Rhonda Teague, Donna Zovko, and Kristal Batalona).

51. *See Nordan*, 382 F. Supp. 2d at 806.

52. Agreement for Security Services between Regency and Blackwater (Mar. 2004), at 15, <http://oversight.house.gov/documents/20061207151614-43671.pdf> [hereinafter Agreement for Security Services].

53. *Id.* at 20.

54. PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 10.

Based on the facts publicly available, Blackwater not only deviated from the stated terms of its contract with Regency but also failed to comply with its employment contracts.⁵⁵ The Independent Contractor Service Agreements, made between Blackwater and its own employees, required that “[e]ach security mission would be handled by a team of no less than six (6) members.”⁵⁶ The contract also stated that the “[s]ecurity teams would be comprised of at least two armored vehicles, with at least three security contractors in each vehicle”⁵⁷ Neither provision was followed on the date of the Fallujah ambush.⁵⁸

The families of the victims inquired into the circumstances surrounding the Fallujah ambush and sought justice by filing separate lawsuits against Blackwater.⁵⁹ The lawsuits, consolidated in *Nordan*, allege that Blackwater’s misconduct and breaches of contract resulted in the wrongful deaths of the four employees.⁶⁰ The complaint argues that the families of the victims are entitled to recover damages under a North Carolina statute, which allows for the recovery of damages “[w]hen a death of a person is caused by a wrongful act, neglect or default of another. . . .”⁶¹

In response, Blackwater unsuccessfully argued for the removal of the suit to federal court based on the Defense Base Act which states that the liability of an employer, qualifying under 33 U.S.C. § 904, is limited to the statutory death benefits.⁶² In addition to this defense, Blackwater

55. See *Nordan*, 382 F. Supp. 2d at 806.

56. *Id.* at 804.

57. *Id.*

58. PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 10.

59. See Carmel Sileo, *Suit by Families of Slain Iraq Contractors Demands Answers*, TRIAL, July 2005, at 102-05.

60. See *Nordan*, 382 F. Supp. 2d at 806.

61. N.C. GEN. STAT. § 28A-18-2 (2008); see *Nordan*, 382 F. Supp. 2d at 803. The common law rule of *lex loci delicti commissi* applies for wrongful death suits in North Carolina and thus the law of the place where the wrong took place, and not North Carolina law, should be applied. See *Boudreau v. Baughman*, 368 S.E.2d 849, 853-54 (N.C. 1988). However, recent cases, applying this rule, have centered on the question of which state law to apply and not the choice between North Carolina law and the law of a foreign country. See, e.g., *id.* (involving a dispute over whether to apply Florida or North Carolina law). As a result of the lack of case law on point and the unchallenged use of North Carolina law in *Nordan*, this Note assumes that the application of the North Carolina wrongful death statute is proper.

62. 33 U.S.C. § 904 (2000). The Defense Base Act is codified at 42 U.S.C. § 1651 (2000). Although this defense will likely be invoked by Blackwater in addition to the government contractor defense, this Note will only focus on the government contractor defense. For more information on the likelihood that Blackwater will succeed in raising the Defense Base Act defense in *Nordan*, see Jeffrey F. Addicott, *Contractors on the “Battlefield:” Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations*, 28 HOUS. J. INT’L L. 323, 368 (2006). See also *Fisher v.*

has also claimed immunity under the government contractor defense, which would preempt the state law claim.⁶³ If the North Carolina court agrees with the security contractor, this defense would completely immunize Blackwater from liability.

The government contractor defense has a well-developed history which resulted in a comprehensive rule used to determine if the defense applies in cases involving supply contracts. The Supreme Court, however, has yet to define a comparable rule for performance contractors. Consequently, *Nordan* represents the heart of this controversy and may be the forum in which this issue is decided. Should private security contractors, fulfilling performance contracts for the government, be able to assert immunity in order to defend against claims arising from their contractual obligations? If so, what standards should be used to determine if this rule can be invoked? The following two Parts of this Note explore how the courts have failed to provide a consistent answer to these questions, and Part v. offers a possible solution to this controversial issue.

III. THE GOVERNMENT CONTRACTOR DEFENSE WAS CREATED TO IMMUNIZE GOVERNMENTAL DISCRETION

The government contractor defense was created in *Boyle v. United Technologies Corp.*⁶⁴ In *Boyle*, the father of a United States Marine helicopter co-pilot brought wrongful death claims against the helicopter manufacturer, the Sikorsky Division of United Technologies Corporation (“Sikorsky”).⁶⁵ The suit arose from a helicopter crash in which the co-pilot survived the impact of the crash but subsequently drowned when he could not escape from the aircraft.⁶⁶ The complaint alleged that Sikorsky defectively designed the escape hatch. The plaintiff contended that the door was ineffective when submerged under water because it opened outward instead of inward so that water pressure prevented the door from opening.⁶⁷ In response, Sikorsky argued that because the government gave the corporation reasonably precise

Halliburton, 390 F. Supp. 2d 610, 613-14 (S.D. Tex. 2005) (holding that the Defense Base Act does not apply when an employer acts with the specific intent to injure its employees).

63. Brief for Petitioner-Appellant at 29, *Blackwater Sec. Consulting v. Nordan*, Nos. 05-2033, 05-2034 (4th Cir. Oct. 31, 2005).

64. 487 U.S. 500 (1988).

65. *Id.* at 502.

66. *Id.*

67. *Id.* at 503.

specifications as to the design of the escape system, it was immune from liability under the “military contractor defense.”⁶⁸

Step one of the *Boyle* Court’s application of the government contractor defense centered on whether federal law preempted the state law claim.⁶⁹ Prior to *Boyle*, the Supreme Court, in most areas, refused to find federal preemption in the absence of either a clear statutory prescription or a direct conflict between federal and state law.⁷⁰ The Court, however, recognized an exception to this rule for a few areas involving “uniquely federal interests,” so committed to “federal control that state law is pre-empted and replaced”⁷¹

The *Boyle* Court concluded that the liability arising from the fulfillment of a government contract is one of these areas involving “uniquely federal interests.”⁷² State laws imposing liability on federal government contractors involve an area of “uniquely federal interests” because the cost of this liability would be transferred to the federal government. The Court reasoned that “[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price.”⁷³ The *Boyle* Court concluded that “[e]ither way, the interests of the United States will be directly affected.”⁷⁴ Simply stated, the rule emerging from *Boyle* states that when state law imposes liability on a federal government contractor the law infringes on an area involving “uniquely federal interests.”⁷⁵

The existence of a “uniquely federal interest merely establishes a necessary, not sufficient, condition for the displacement of state law.”⁷⁶ In order for displacement to occur, there must be a significant conflict between the state law and the federal policy or interest.⁷⁷

Step two of the *Boyle* Court’s analysis determines whether a significant conflict exists between this “uniquely federal interest” and

68. *Id.* Prior to *Boyle* the government contractor defense was also referred to as the “military contractor defense.” *Id.*

69. *See id.* at 504.

70. *See id.*

71. *Id.*

72. *Id.* at 505-06.

73. *Id.* at 507.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

the state law.⁷⁸ The *Boyle* Court analyzed an exception to the FTCA in order to determine if a “significant conflict” existed between the federal interests and the state law.⁷⁹ The FTCA authorizes claims against the United States for the recovery of damages caused by the negligent or wrongful conduct of government employees.⁸⁰ An exception to the FTCA, however, was drafted in order to preserve immunity when government negligence occurs in situations where the government exercises discretion in balancing many technical considerations. The discretionary exception to the FTCA states that the government is immune from suit for “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”⁸¹ The purpose of this exception was to prevent state courts from second-guessing complicated federal decisions.⁸²

The Court in *Boyle* relied upon this exception to the FTCA in order to identify the existence of a significant conflict between federal interests and state law.⁸³ Justice Scalia, writing for the majority, reasoned that to impose liability on contractors who were merely following the government’s orders would “produce the same effect sought to be avoided by the FTCA exemption,” because the overall cost of litigation would be passed on to the government.⁸⁴ The Court added that “[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.”⁸⁵ Subsequently, the Court concluded that in order to preserve the purpose of the discretionary exception to the FTCA, immunity must be transferred to contractors in situations where they are merely exercising the discretion of the government.⁸⁶ When the exception to the FTCA applies, as was the case in *Boyle*, there is a “significant conflict” between federal interests and

78. *See id.*

79. 28 U.S.C. § 1346(b)(1) (2000). *See Boyle*, 487 U.S. at 511 (discussing the FTCA).

80. 28 U.S.C. § 1346(b). This statute was enacted to minimize the scope of federal sovereign immunity in which the government is immune from all suits unless it has consented to be sued.

81. *Id.* § 2680(a) (2000).

82. *See Boyle*, 487 U.S. at 511.

83. *Id.* at 512.

84. *Id.* at 511-12.

85. *Id.* at 512.

86. *Id.* at 511.

state law.⁸⁷ In cases involving a “significant conflict,” state law is displaced and the state cause of action will be dismissed.

Step two of the *Boyle* test establishes a three-prong rule for determining whether a “significant conflict” exists between state law and the federal interests described in the discretionary exception to the FTCA.⁸⁸ This rule states that a contractor is immune from liability “when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.”⁸⁹ As the Court explained, “[t]he first two of these conditions assure that the suit is within the area where the policy of the ‘discretionary function’ would be frustrated . . .”⁹⁰ The third condition was established to prevent abuse of the immunity conveyed in the defense.⁹¹

The Court in *Boyle* reiterated its emphasis on governmental discretion as the key factor in applying the government contractor defense by distinguishing the *Boyle* test from the doctrine created in *Feres v. United States*.⁹² *Feres* consolidated three separate cases. In each, the plaintiff was a member of the armed forces, on active duty, and injured as a result of the negligence of another member of the armed forces.⁹³ The *Feres* Court held that “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”⁹⁴ The *Feres* Court concluded that the government is immune from liability arising from the negligent conduct of members of the military because the relationship between the government and military personnel is exclusively controlled by federal law.⁹⁵ The Court reasoned that the FTCA did not alter the supremacy of federal law because Congress did

87. *Id.* at 512.

88. *See id.* It is important to note that since *Boyle* involved liability arising from a supply contract, the test created in *Boyle* is explicitly tailored to address design defects in military equipment.

89. *Id.* All three of these conditions must be met in order to meet the requirements of the *Boyle* test.

90. *Id.*

91. *Id.*

92. *See id.* at 510; *Feres v. United States*, 340 U.S. 135, 146 (1950).

93. *Feres*, 340 U.S. at 138.

94. *Id.* at 146. The term “service” within this quotation refers to military service. *Id.*

95. *See id.* at 145.

not explicitly create a new state law cause of action for military injuries.⁹⁶

Thirty-eight years after *Feres*, the Court in *Boyle* was reluctant to extend this theory of immunity to contractors because it was both too broadly and too narrowly defined. The immunity was too broad because any time the government purchased equipment, even when the government had no say in its design, the contractor would be immune from all suits in connection with the use of the product.⁹⁷ The immunity was also too narrow because it limited the application of the defense to litigation arising from injuries to military personnel.⁹⁸ As a result, government contractors would not be able to invoke the government contractor defense in suits brought by civilians, even when the contractor was directly following the government's instructions.⁹⁹ In assessing these problems, the *Boyle* Court rejected the *Feres* doctrine as the foundation for the government contractor defense and instead grounded the defense in the discretionary exception to the FTCA.¹⁰⁰ As a result, based on *Boyle*, government contractors are permitted to assert the government contractor defense in cases brought by both service members and civilians, as long as the government exercised its discretion in directing the contractors' activities.

The *Boyle* Court explained that this was the proper scope of the defense because the government was exercising sufficient control over the contract and the contractor was merely exercising the will of the sovereign.¹⁰¹ The Court reasoned that in these cases the contractor should be immune from liability as if the government itself was producing the equipment.¹⁰² Based on the Supreme Court's strong emphasis on governmental discretion as a necessary element for invoking the government contractor defense, any future application of the defense should be consistent with this principle.

96. *Id.* In addition, the *Feres* Court found that federal remedies in the form of compensation systems were a superior means of compensating for these types of injuries. *Id.*

97. *Boyle*, 487 U.S. at 510.

98. *Id.* at 510-11.

99. *Id.*

100. *See id.*

101. *See id.* at 511-12.

102. *See id.* at 512. The *Boyle* Court ultimately remanded the case to ensure that the lower court's decision was based on a determination that no reasonable jury could have found, based on the facts that the defendant, Sikorsky, failed to meet the standards of the government contractor defense test. *See id.* at 514.

IV. POST-BOYLE DEVELOPMENTS

Following the creation of the government contractor defense in *Boyle*, lower courts have inconsistently interpreted how the rule should be applied to performance contracts.¹⁰³ Some lower courts have held that the government contractor defense cannot be asserted by performance contractors because *Boyle* only created the government contractor defense for cases involving supply contracts.¹⁰⁴ Other courts have held that the government contractor defense can be invoked by performance contractors as long as the contractor meets the requirements of step one and all three prongs of step two of the *Boyle* test.¹⁰⁵ An analysis of these inconsistent treatments demonstrates the need for a uniform national rule in order to determine if and when a performance contractor can assert the government contractor defense.

Although a majority of courts have accepted the proposition that the government contractor defense can be invoked by performance contractors, some district courts have been reluctant to extend immunity to these contractors.¹⁰⁶ For example, in *Fisher v. Halliburton*, truck drivers or surviving family members alleged that Halliburton, a company providing services to the United States Army, used them as a decoy for another convoy.¹⁰⁷ The truck drivers sued Halliburton for the resulting injuries that occurred after they were attacked by anti-American insurgents in Iraq.¹⁰⁸ Defendant Halliburton argued for the application of the government contractor defense and the court refused to extend the defense to the performance contractor, concluding that the work performed by performance contractors does not fall within the discretionary exception to the FTCA.¹⁰⁹ The court rejected the government contractor defense, concluding that the defendants cited no cases in which an exception to the FTCA barred “claims against a defense contractor other than in situations in which the contractor has provided allegedly defective products, and this Court’s research has

103. See, e.g., *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 616 (S.D. Tex. 2005); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. 2003). For the purposes of this Note, supply contracts refer to contracts involving the manufacturing of a product whereas performance contracts refer to contracts that require the contractor to perform a task or service for the government.

104. See, e.g., *Fisher*, 390 F. Supp. 2d at 616.

105. See, e.g., *Hudgens*, 328 F.3d at 1334.

106. See, e.g., *Fisher*, 390 F. Supp. 2d at 616.

107. *Id.* at 612.

108. *Id.*

109. *Id.* at 615-16.

found none.”¹¹⁰ The Texas district court was unwilling to extend the government contractor defense to any situation beyond the facts of *Boyle*, subsequently restricting the defense to those fulfilling supply contracts.

Other district courts have similarly limited the government contractor defense to the facts of *Boyle*. In *Amtreco, Inc. v. O.H. Materials, Inc.*, a Georgia district court held that the government contractor defense could not be applied to performance contracts.¹¹¹ In *Amtreco*, the owners of property upon which the Environmental Protection Agency (“EPA”) conducted a clean-up operation sued the contractor that performed the clean-up operation for property damages.¹¹² The contractor sought to have the cause of action dismissed by asserting the government contractor defense.¹¹³ The court refused to extend immunity to the contractor because it concluded that there is no comparison between a design defect resulting from a supply contract and a claim of intentional misconduct stemming from a performance contract.¹¹⁴ This decision, just as in *Fisher*, reinforced a stringent distinction between supply and performance contracts, limiting the government contractor defense to supply contractors.

The Ninth Circuit has issued decisions with similar rhetoric but has yet to deny the government contractor defense to a contractor fulfilling a military-related performance contract.¹¹⁵ In *Snell v. Bell Helicopter Textron*, the court was presented with the issue of whether the defendant, Bell, was entitled to judgment as a matter of law based on the government contractor defense.¹¹⁶ The court stated that the government contractor defense “is only available to contractors who design and manufacture military equipment.”¹¹⁷ Although *Snell* did not actually present the question of whether performance contractors, performing tasks for the military, could use the government contractor defense, the rhetoric of the court suggests that it would be unwilling to allow any performance contractor to invoke the defense. As a result, it appears that the Ninth Circuit is willing to limit the government contractor defense to

110. *Id.*

111. 802 F. Supp. 443, 445 (M.D. Ga. 1992).

112. *Id.* at 444-45.

113. *Id.* at 445.

114. *Id.*

115. See *Snell v. Bell Helicopter Textron*, 107 F.3d 744, 746 n.1 (9th Cir. 1997); *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806, 811 (9th Cir. 1992).

116. *Snell*, 107 F.3d at 746.

117. *Id.* at 746 n.1.

the facts of *Boyle*, restricting military performance contractors from being able to raise the defense.

Contrary to these decisions, a majority of lower courts assessing the issue of whether performance contractors are protected by the government contractor defense have concluded that performance contractors are protected by the defense as long as governmental discretion is exercised.¹¹⁸ For example, in *Hudgens v. Bell Helicopter/Textron*, the court held that the government contractor defense could be used to defend against a lawsuit resulting from improper helicopter maintenance.¹¹⁹ In this case, Army helicopter pilots brought a suit against a maintenance contractor.¹²⁰ The court concluded that “[a]lthough *Boyle* referred specifically to [supply] contracts, the analysis it requires is not designed to promote all-or-nothing rules regarding different classes of contract.”¹²¹ The court applied the *Boyle* test and held that since the “formulation of design specifications and the articulation of maintenance protocols involve the exercise of the very same [governmental] discretion” as was meant to be protected by the government contractor defense, the performance contractor met the requirements of the *Boyle* test and was immune from liability.¹²²

Richland-Lexington Airport District v. Atlas Properties, Inc. was another case in which a lower court extended the government contractor defense to a performance contractor.¹²³ This case involved a property damage suit brought by a landowner against a contractor employed to clean-up a hazardous waste site for the EPA.¹²⁴ As a result, the court was presented with the issue of whether to apply the *Boyle* test to a nonmilitary performance contractor. In response to the first question of whether to allow nonmilitary contractors to assert the defense, the court concluded that, “[t]he United States is extending its sovereign immunity to the contractor, and there is simply no reason why a nonmilitary contractor should be barred from enjoying this extension”¹²⁵ In

118. See, e.g., *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. 2003) (holding that a helicopter maintenance contractor could assert the government contractor defense).

119. *Id.*

120. *Id.* at 1330.

121. *Id.* at 1334. Judicial opinions, as in this case, often refer to supply contracts as procurement contracts and performance contracts as service contracts. For the purposes of this Note, the nomenclature used by the courts is adjusted in order to maintain consistency when referring to these specific types of contracts.

122. *Id.* at 1334, 1345.

123. *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 422-23 (D.S.C. 1994).

124. *Id.* at 405-06.

125. *Id.* at 421.

response to the second question of whether to allow performance contractors to assert the defense, the court concluded, “[t]he dispositive issue is not one of performance versus [supply], but whether there is a uniquely federal interest in the subject matter of the contract.”¹²⁶ In this case, the court found that a “uniquely federal interest” existed and applied the *Boyle* test.¹²⁷ The court concluded that the *Boyle* test was met because the EPA approved the site for clean-up, determined the best method to execute the clean-up, and determined the location of the stockpile.¹²⁸ These specifications were precise enough to meet the *Boyle* test and the court dismissed the claim against the contractor based on the government contractor defense.¹²⁹ *Richland-Lexington* is a representative case in which the court was willing to extend the government contractor defense to a performance contractor and used the test created in *Boyle* to determine the applicability of the defense.¹³⁰

Another case that addressed this question in the context of a performance contractor performing a military-related contract was *Askir v. Brown & Root Service Corp.*¹³¹ In *Askir*, the plaintiff alleged that his property was unlawfully possessed by a contractor providing logistical support for the United States and the United Nations in Somalia.¹³² The court applied the *Boyle* test and concluded that,

both the United States and the United Nations approved “reasonably precise specifications” for defendant Brown & Root’s logistics support activities at the Compound . . . [and,] at all times during its participation in the Somalian operation, defendant Brown & Root operated under the direction and control of the United States and the United Nations.¹³³

126. *Id.* at 422.

127. *Id.* at 423.

128. *Id.*

129. *Id.* at 424.

130. Other courts have also been willing to apply the *Boyle* test to the operator of a gaseous diffusion plant, the operator of a metals production plant, and a security guard. *Guillory v. Ree’s Contract Serv., Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994) (stating that “this court finds more persuasive the reasoning of those courts which have determined that the defense applies to all contractors, not just military contractors, and that it applies to performance contracts, not just [supply] contracts”); *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 966 n.7 (W.D. Ky. 1993) (stating that “this Court finds no reason to limit *Boyle* to [supply] contracts, as opposed to performance contracts”); *Crawford v. Nat’l Lead Co.*, 784 F. Supp. 439, 445-46 n.7 (S.D. Ohio 1989) (holding that “[a]lthough the *Boyle* court discussed the government contractor defense within the context of a [supply] contract, the defense is viable with regard to performance contracts”).

131. No. 95 Civ. 11008, 1997 WL 598587 at *6 (S.D.N.Y. 1997).

132. *Id.* at *1.

133. *Id.* at *6.

The court found that this evidence was sufficient to meet the *Boyle* test and dismissed the claim based on the government contractor defense.¹³⁴

The disparate approaches taken by different lower courts in determining whether the government contractor defense can be asserted by a performance contractor have resulted in a murky legal standard. As a result, a contractor might not be able to invoke the government contractor defense in one jurisdiction although, based on the same facts, the contractor would be able to assert the defense in a different jurisdiction. These inconsistencies have led to great uncertainty for performance contractors fulfilling contracts that are not confined to one state or region, but are rather national and international in scope. A uniform rule must be articulated by the Supreme Court or Congress in order to have a consistent legal framework within which to address this national legal issue.¹³⁵

V. THE “BLACKWATER RULE”: A LEGAL STANDARD TAILORED TO PRIVATE SECURITY CONTRACTORS

The Blackwater Rule may be stated as follows:

The government contractor defense can be invoked by a private military contractor if:

- (1) the performance contract with the government provided precise specifications and the contractor complied with the specifications,
- (2) the performance contract with the government explicitly and lawfully delegated the government’s discretion to the private military contractor, or
- (3) in the absence of explicit contractual instructions, the government substantively reviewed and approved the use of the procedure prior to the event that led to liability.

The Blackwater Rule incorporates the first step of the *Boyle* test because this step applies to performance and supply contracts alike.¹³⁶

134. *Id.*

135. Congress would usually be the preferred choice for the articulation of a uniform national rule. However, given that the government contractor defense was born from federal common law and the federal legislature has since been silent on this issue, the Supreme Court seems more likely than Congress to resolve this issue.

136. Relying on *Yearsley*, in which the Supreme Court held that a dam construction contractor was not liable for damages that arose from its government contract, the Court in *Boyle* held that the “uniquely federal interest” in supply contracts exists to the same extent as the “uniquely federal interest” in performance contracts. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940).

The Blackwater Rule, however, replaces the entire second step of the *Boyle* test with a new three-pronged test that is tailored to the intricacies of private military contractors as opposed to supply contractors. Despite this difference, the Blackwater Rule maintains the same aim of the second step of the *Boyle* test, protecting defendants that exercise the government's discretion.

According to *Boyle*, the first step of the inquiry as to whether a contractor can assert the government contractor defense is to determine if the conduct in question involves "uniquely federal interests" so committed to "federal control that state law is pre-empted and replaced."¹³⁷ The *Boyle* Court concluded that state laws imposing liability on federal government contractors involved an area of "uniquely federal interests" because the cost of this liability would be transferred to the federal government.¹³⁸ The Court reasoned that "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price."¹³⁹ Private military contractors will always meet the requirements of this first step because the contractors' vulnerability to lawsuits involves an area of "uniquely federal interests," in that the resulting costs directly affect the terms of the government's contracts.

Another reason the use of private military contractors involves "uniquely federal interests" is that the contractors provide military-type services which are typically a federal governmental function. The United States Constitution places the responsibility of waging war on the federal government.¹⁴⁰ The federal government has recently decided to allow private military contractors to assist in this duty and, as a result, contractors have become a necessary piece of the United States war machine.¹⁴¹ Ryan Crocker, U.S. Ambassador to Iraq, stated that the United States could not perform the security functions needed in Iraq without private military contractors.¹⁴² In fact, over half of the

137. See *Boyle*, 487 U.S. at 504. This is a concise summary of the first step of the *Boyle* test, discussed in greater detail in Part III of this Note.

138. See *id.* at 507.

139. *Id.*

140. U.S. CONST. art. I, § 8, cl. 1, 13; U.S. CONST. art. 2, § 2, cl. 1.

141. See Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 554 (2005).

142. *Hearing on Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. (2007) (prepared statement of Erik D. Prince, CEO of Blackwater) (quoting Ryan Crocker, U.S. Ambassador to Iraq), available at <http://oversight.house.gov/documents/20071003153621.pdf>.

reconstruction contracts examined by the Government Accountability Office in July of 2005 contained security costs in excess of fifteen percent of the total contract.¹⁴³ This substantial reliance on private military contractors has resulted in a scenario in which the military efforts of the United States would be irreparably harmed if private military contractors were unable to carry out the tasks assigned to them by the military. As a result, the federal government has a “uniquely federal interest” in ensuring they can continue to provide these services without undue restraints.¹⁴⁴ The unique federal interests standard is thus satisfied in all cases involving private military contractors because the cost of liability would be transferred to the federal government and the contractors that provide military-type services, an inherently federal governmental function.

The second step of the government contractor defense inquiry is to determine whether the conflict between the federal interest and the state law is a “significant conflict.”¹⁴⁵ In *Boyle*, the Court concluded that if the government exercised discretion, consistent with the purpose of the FTCA, then there is a “significant conflict” between the federal interest and state law, and the state law is displaced.¹⁴⁶ *Boyle* created a three-prong test that set standards to determine whether the government exercised discretion consistent with the purpose of the discretionary exception.¹⁴⁷ The *Boyle* test has been widely used by the lower courts with fairly consistent results in cases involving supply contracts.¹⁴⁸ Despite being a comprehensive test for supply contractors, however, the *Boyle* test is insufficient when used to determine if the conduct of a performance contractor falls within the definition of the discretionary exception to the FTCA. The reason for this shortcoming is that the *Boyle* test was never designed to evaluate the conduct of performance contractors, and the differences between the two types of contracts makes it difficult to apply the *Boyle* test in this way.¹⁴⁹ As a result of the

143. See Memorandum from the H. Comm. on Oversight and Gov’t Reform 2 (Feb. 7, 2007) (on file with the Hofstra Law Review).

144. Cf. *Boyle*, 487 U.S. at 507 (postulating the economic impact of contractor liability absent immunity).

145. *Id.*

146. *Id.* at 512.

147. *Id.*

148. See, e.g., *Tate v. Boeing Helicopters*, 140 F.3d 654, 658-60 (6th Cir. 1998) (applying the *Boyle* test to determine if the government contractor defense immunized the manufacturer of an Army helicopter).

149. The *Boyle* Court explicitly tailored the rule to cover “design defects in military equipment.” *Boyle*, 487 U.S. at 512.

inherent differences between supply and performance contracts, a separate rule for performance contractors is needed.

One major difference between supply and performance contracts is that supply contracts are typically much more specific than performance contracts. In fact, supply contracts almost always detail every feature of the product sought by the government, even down to the exact ball bearings to be used in a helicopter engine.¹⁵⁰ The level of specificity in these contracts makes it easy to establish when the government exercises its discretion in approving a design.

In contrast, performance contracts can be far less detailed, especially when they involve the conduct of security companies.¹⁵¹ For example, the contract that gave rise to the action in *Guillory v. Ree's Contract Service, Inc.*, provided for flexible standards governing the actions of the security guards.¹⁵² The contract assigned duties including "maintain[ing] law and order" and performing such "functions as may be necessary in the event of situations or occurrences such as civil disturbances."¹⁵³

The differences between the level of specificity in performance and supply contracts makes it difficult to apply a uniform standard to both types of contracts in order to determine if the government exercised discretion. The lack of specificity in supply contracts means the government did not exercise its discretion whereas the lack of specificity in performance contracts may have resulted from the government exercising its discretion. Supply contracts are drafted in explicit detail because all of the conditions faced by the contractor are known at the time the contract is drafted and the government is able to specify exactly how the equipment will be built. If the government fails to specify whether it would like a helicopter door to open in or out, the reason for this omission is that the government did not exercise its discretion in the design of the helicopter door. As a result, the *Boyle* test, which uses the presence of precise specifications as a means of determining whether the government exercised discretion in the design of the equipment, is a sufficient standard for supply contracts.

150. See, e.g., *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67, 71 (3d Cir. 1990) (the Army approved the incorporation of ball bearing number 6876008 into the T63 engine that allegedly caused the plaintiff's injuries).

151. See, e.g., *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 347 (S.D. Miss. 1994) (illustrating the lack of specificity in a contract governing the conduct of security guards).

152. *Id.*

153. *Id.*

However, the lack of specificity in performance contracts is not always an indication that the government failed to exercise discretion in directing the conduct of the contractor. This is especially true for contracts governing the conduct of private military contractors. In most cases, it is impossible for the government to anticipate, at the time the contract is drafted, all of the scenarios a private military contractor will face. As opposed to supply contractors, the situations faced by private military contractors are similar to those encountered by military field commanders in the line of duty.¹⁵⁴ When planning to engage an enemy in an unpredictable environment, the military allows its field commanders to use their best judgment on the ground, instead of prescribing a specific course of action. Based on the similarities between the work performed by private military contractors and that performed by the military itself, the government may decide that it would prefer to treat the contractors similarly to members of the military, allowing the contractors to act based on their own judgment in unforeseeable situations. If the government was forced to describe precise specifications for these scenarios, governmental discretion would be greatly hindered and the United States' military effort could be negatively affected. As a result, the *Boyle* test, which uses the presence of precise specifications as a means of determining whether the government exercised discretion, is an insufficient standard to govern the conduct of private military contracts because the lack of precise specifications in these contracts could be the direct result of governmental discretion.

The inability of the *Boyle* test to sufficiently determine whether the government exercised discretion in directing the conduct of performance contractors, such as private military contractors, necessitates a rule tailored to performance contractors in order to protect the government's discretion. The Rule proposed by this Note is intended to fill this void. The Blackwater Rule has the same aim as the *Boyle* test, to determine if governmental discretion was exercised consistent with the purpose of the discretionary exception to the FTCA. However, unlike the *Boyle* test, the Blackwater Rule is designed to evaluate the conduct of performance contractors and in particular the conduct of private military contractors.

154. In fact, if the government chose not to use private military contractors, the tasks performed by these contractors would be assumed by the military, which at the present time is unable to staff the security function in Iraq. See *Hearing on Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. (2007) (prepared statement of Erik D. Prince, CEO of Blackwater) (quoting Ryan Crocker, U.S. Ambassador to Iraq), available at <http://oversight.house.gov/documents/20071003153621.pdf>.

The discretionary exception to the FTCA states that the government is immune from suit for “any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”¹⁵⁵ The *Boyle* Court emphasized the discretionary aspect of the law and created a rule to determine if the government exercised discretion when authorizing the contractor to perform the task in question. The Blackwater Rule similarly seeks to determine if the government exercised discretion when drafting a contract with a private military contractor. The difference between the two tests is that the Blackwater Rule allows the government to prove that it exercised its discretion in more ways than the *Boyle* test, which requires that the contract must state precise specifications. As a result, the Blackwater Rule permits the government to exercise more discretion by not forcing federal agencies to limit contractors to specific courses of action in cases where the government would prefer the contractors to evaluate a given scenario and make decisions based on conditions on the ground.

The Rule proposed by this Note stipulates that the government contractor defense can be invoked by a private military contractor if (1) the performance contract with the government provided precise specifications and the contractor complied with the specifications, (2) the performance contract with the government explicitly and lawfully delegated the government’s discretion to the private military contractor, or (3) in the absence of explicit contractual instructions, the government substantively reviewed and approved the use of the procedure prior to the event that led to liability.¹⁵⁶ If any one of these three prongs is met there is sufficient evidence that the government exercised its discretion, consistent with the purpose of the discretionary exception to the FTCA, and the contractor can successfully invoke the government contractor defense in order to dismiss the state law claim.

The first prong of the Blackwater Rule states that the government contractor defense can be invoked by a private military contractor if the performance contract with the government provided precise specifications and the contractor complied with the specifications. This prong originates from the entirety of the *Boyle* test. The *Boyle* test requires that the “United States approved reasonably precise

155. 28 U.S.C. § 2680(a) (2000).

156. Governmental approval can be either explicit or implied. Also, this third prong requires extensive governmental oversight in order for the government to substantively review and approve of the use of the procedure prior to the event that led to the potential liability.

specifications” and the equipment conformed to these specifications.¹⁵⁷ The Court concluded in *Boyle* that these two conditions “assure that the suit is within the area where the policy of the ‘discretionary function’ would be frustrated”¹⁵⁸ Similarly, the first prong of the Blackwater Rule ensures that the government exercised its discretion by directing the precise conduct of the contractor.

After *Boyle*, every court that has been willing to apply the government contractor defense to performance contracts has used this standard to determine if the defense was applicable.¹⁵⁹ In *Hudgens*, the court found that the government gave a helicopter maintenance contractor reasonably precise specifications set forth in the detailed and lengthy “Army Maintenance Instructions” and “Phased Maintenance Checklist.”¹⁶⁰ Similarly, in *Richland-Lexington*, the court concluded that the *Boyle* test was met by a contractor cleaning up a waste site because the EPA approved the site for clean-up, determined the best method to execute the clean-up and determined the location of the stockpile.¹⁶¹

For these cases, the precise specifications requirement was an appropriate means of determining whether the government exercised discretion over the contractor’s conduct because the tasks that needed to be performed were predictable. As a result, the government was able to anticipate and specify the exact procedure to be used by the contractors in order to achieve the goals of the contracts. Given the foreseeable nature of the work, this standard remains sufficient for determining whether a non-private military performance contractor can assert the government contractor defense.¹⁶²

It is much more difficult to precisely define and direct the conduct performed by private military contractors as compared to that of the maintenance and clean-up contractors in *Hudgens* and *Richland-Lexington*. Contractors such as those in *Hudgens* and *Richland-Lexington* perform jobs that are predictable, and thus the conduct of the contractors can be reduced to manuals and explicit instructions. In

157. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).

158. *Id.*

159. *See, e.g.*, *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334-35 (11th Cir. 2003) (applying the *Boyle* test to determine if the performance contractor met the requirements of the government contractor defense).

160. *Id.* at 1336.

161. *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 423-24 (D.S.C. 1994).

162. The first prong of the Blackwater Rule is also an appropriate standard for determining if a private military contractor can assert the government contractor defense as long as the use of the procedure in question was foreseeable at the time the contract was drafted and the procedure was precisely defined in the contract.

contrast, private military contractors, for the most part, perform unpredictable functions such as safeguarding perimeters that are subject to attack by enemy forces. As a result, the last two prongs of the Blackwater Rule are tailored to the unique characteristics of private military contractors. The second and third prongs of the Blackwater Rule are intended to give greater protection to the government's discretion by allowing the government to exercise its discretion in ways other than stipulating the exact manner in which each task must be completed.

The second prong of the Blackwater Rule enables a private military contractor to assert the government contractor defense if the performance contract with the government explicitly and lawfully delegated the government's discretion to the private military contractor. If the requirements of this prong are met, the contractor is immune from liability because it was merely following a governmental discretionary decision. As stated in *Boyle*, contractors are not liable for fulfilling contracts when the government, if it had carried out the task itself, would have been insulated against financial liability.¹⁶³ The Court concluded that to allow "state tort suits against contractors would produce the same effect sought to be avoided by the FTCA [discretionary] exemption."¹⁶⁴ The resulting rule is that when the government makes a discretionary decision that falls within the discretionary exception to the FTCA, a contractor cannot be held liable for following the government's instructions.

The rule developed in *Berkovitz v. United States*, created to determine when a decision falls within the discretionary exception to the FTCA, provides the framework for the second prong of the Blackwater Rule.¹⁶⁵ In order for a decision that is made by a government agency to fall within the discretionary function exception to the FTCA, the decision must be "the product of judgment or choice"¹⁶⁶ In addition, the decision must be of a kind "that the discretionary function exception was designed to shield."¹⁶⁷ The *Berkovitz* Court concluded that the exception was intended to "prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."¹⁶⁸ As a

163. *Boyle*, 487 U.S. at 512.

164. *Id.* at 511.

165. 486 U.S. 531, 536 (1988). For the discretionary exception to the FTCA, see 28 U.S.C. § 2680(a) (2000).

166. *Berkovitz*, 486 U.S. at 536.

167. *Id.*

168. *Id.* at 536-37 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)).

result, the exception protects “governmental actions and decisions based on considerations of public policy.”¹⁶⁹

The government’s decision to allow private military contractors to use their own judgment in order to react to unique situations in war zones meets the requirements of the *Berkovitz* test. The decision certainly involves an element of judgment and choice. There is no statute governing how military agencies draft the security provisions contained in private military contracts. Instead, government officials who are entrusted with the responsibility of drafting these contracts are given broad discretion to balance many technical, military, and public considerations in order to best utilize the government’s and the contractor’s resources. The decision not to tie the hands of private military contractors who are reacting to unpredictable situations is just one of many judgment calls that these government officials are entrusted to make on a daily basis.

In addition to being a decision that involves an element of choice, the decision to allow private military contractors to use their own discretion in the field is also the type of judgment the discretionary exception of the FTCA was intended to protect from the second-guessing of state court judges. The military, given its expertise in allocating resources in order to defeat foreign threats, is best equipped to determine how private military contractors should act in the field. If the military decides that it is beneficial to allow contractors to use their own judgment in certain situations, the discretionary exception to the FTCA is intended to prevent the judicial “second-guessing” of these decisions. As a result, the decision by the military to allow private military contractors to use their judgment falls within the discretionary exception to the FTCA. Since the government exercises its discretion within the definition of the discretionary exception to the FTCA, a private military contractor that makes a judgment call, in accordance with its contract, is protected by the second prong of the Blackwater Rule.

One potential criticism of the second prong of the Blackwater Rule is that private military contractors would be given free reign to conduct themselves as they please without the fear of legal accountability. Despite this contention, there is an outer limit to the Rule. The second prong requires that the government’s discretion was lawfully delegated to the private military contractor. As a result, a contractor who exceeded the limits of what is permitted of the military could not assert the government contractor defense because the military could not have

169. *Id.* at 537.

lawfully authorized conduct that it could not have performed itself. For example, since torture is a violation of an international norm, the military is not permitted to torture enemy soldiers.¹⁷⁰ Torture cannot be lawfully delegated to a contractor because the military does not have the authority to torture. If the government fails to lawfully delegate its discretion, the private military contractor cannot meet the requirements of the second prong of the Blackwater Rule.

In *Yearsley v. W.A. Ross Construction Co.*, the Court held that “if [the] authority to carry out a project was validly conferred, that is, if what was done was within the constitutional powers of Congress, there is no liability on the part of the contractor for executing its will.”¹⁷¹ Although this rule has been subsequently eroded by decisions such as *Boyle*,¹⁷² it still stands for an outer limit that the government cannot delegate a duty when it has no constitutional power to do so. Based on this limitation, and contrary to the possible criticism that the second prong of the Blackwater Rule might allow private military contractors to operate in a world of lawlessness, the contractors are bound by the same standards of conduct as the military.

The third prong of the Blackwater Rule stipulates that the government contractor defense can be invoked by a private military contractor if, in the absence of explicit contractual instructions, the government substantively reviewed and approved the use of the procedure prior to the event that led to liability. The third prong of the Blackwater Rule borrows from lower court decisions involving supply contractors as well as aspects of agency law.

After *Boyle*, lower courts struggled with the question of whether a supply contractor who designed a specific defect, without governmental instruction, could ever meet the requirements of the government contractor defense.¹⁷³ The court in *Kerstetter v. Pacific Scientific Co.* held that when the government does not specify the exact defect in question, a finding that the government substantively reviewed the design of the equipment is sufficient to prove that the contractor met the

170. While there is some recent debate as to what constitutes torture, a United States court has concluded that official torture has reached the level of a violation of *jus cogens*. See *Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (finding that “the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*”).

171. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940).

172. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

173. See, e.g., *Kerstetter v. Pac. Scientific Co.*, 210 F.3d 431, 435 (5th Cir. 2000) (evaluating whether an aircraft manufacturer could assert the government contractor defense when the government did not prepare the specifications of the aircraft).

precise specifications requirement.¹⁷⁴ The rationale behind decisions such as *Kerstetter* is that even if the government does not design the original equipment, the “length and breadth of the [government’s] experience with the [equipment]—and its decision to continue using it—amply establish government approval of the alleged design defects.”¹⁷⁵ These courts require proof that the government provided a “substantive review or evaluation” of the product, prior to the event that led to liability, in order to establish that the government approved the design.¹⁷⁶ As a result, these courts have concluded that the government exercised its discretion by sufficiently instructing the contractor as to the design of the equipment as long as the government substantively evaluated the equipment and requested its additional production.

The third prong of the Blackwater Rule borrows from the rule that if a product is substantively reviewed by the government and the government requests additional production, the manufacturer is subsequently protected by the government contractor defense. This prong governs situations where the private military contractor was not specifically instructed how to perform a contractual obligation. For example, in a contract for the delivery of supplies to a location, the contractor may have been instructed by the government to deliver supplies from point A to point B, but not instructed on how to get there. If the contractor decided to take a specific route every time it fulfilled the contract and the government substantively reviewed and approved the choice to take the route, there is sufficient evidence that the government exercised its discretion by instructing the contractor to continue taking the route. As a result, the contractor would meet the requirements of the third prong of the Blackwater Rule.

The third prong of the Blackwater Rule is similar to the ratification doctrine developed by agency law.¹⁷⁷ In an agency relationship, a principal can ratify the act of an agent who is performing a task outside of the agent’s actual authority.¹⁷⁸ In order to ratify the act, the principal must have knowledge of the material facts about the agent’s act and the principal must behave in a way that justifies a reasonable assumption

174. *Id.*

175. *Dowd v. Textron, Inc.*, 792 F.2d 409, 412 (4th Cir. 1986).

176. *Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989) (differentiating how governmental discretion is exercised when the government offers an extensive review of a product and approves of its use as compared to merely accepting the product without a thorough review, a process known as “rubber-stamping”).

177. *See* RESTATEMENT (THIRD) OF AGENCY § 4.01 (2006).

178. *See id.*

that it consents to the agent's act.¹⁷⁹ If these conditions are present the principal is bound by the conduct of the agent as if actual authority existed at the time of the agent's act.¹⁸⁰

Similar to the ratification doctrine of agency law, the third prong of the Blackwater Rule does not require the government's approval of the contractor's conduct to be explicit. The third prong of the Blackwater Rule applies even if the government, after substantively reviewing the procedure, did not tell the contractor to continue performing the procedure in question. Using the previous example of the private military contractor choosing to take an unspecified route, the government could impliedly approve of this procedure if it substantively reviewed the choice to take the route, accepted the benefits of the contract, and failed "to make a timely disaffirmance of the unauthorized acts."¹⁸¹ Based on the Blackwater Rule, since the government evaluated the activity, and the government made a discretionary decision not to reprimand the contractor for exceeding its authority, the private military contractor is protected by the government contractor defense for liability arising from taking this route in future situations.

The Blackwater Rule slightly diverges from agency law because not only does the private military contractor need to establish that the procedure being used was approved by the government, the contractor must also demonstrate that this approval occurred prior to the event that led to liability.¹⁸² The reason for this distinction is that the Blackwater Rule protects the government's discretion exercised while directing the contractor's actions. The government, however, cannot instruct the contractor on how to act if the conduct has already been completed. In contrast, by approving a procedure extensively used by the private military contractor, the government exercises its discretion by directing the contractor to continue using the specific procedure for all future missions. As a result, while the contractor is performing these missions that occur after the government approved the continued use of the

179. *See id.* Ratification can be "inferred by words, conduct or silence on the part of the principal that reasonably indicates its desire to affirm the unauthorized act." *Progressive Cas. Ins. Co. v. Ehrhardt*, 518 A.2d 151, 156 (Md. 1986). The court in *Ehrhardt* went on to state that "[c]ircumstances that suggest an intent to ratify include: receipt and retention of the benefits of the unauthorized transaction . . . and a failure to make a timely disaffirmance of the unauthorized acts." *Id.* (citations omitted).

180. *See* RESTATEMENT (THIRD) OF AGENCY § 4.01.

181. *See Ehrhardt*, 518 A.2d at 156.

182. In addition, unlike agency law, the private military contractor does not need to prove that an agency relationship existed between the contractor and the government to fulfill the third prong of the Blackwater Rule. The Blackwater Rule merely borrows from agency law; it does not establish the existence of an agency relationship.

procedure, the contractor is merely following the instruction of the government and the government contractor defense appropriately protects the government's discretion.¹⁸³

Private military subcontractors may also invoke the Blackwater Rule as long as they can establish that the government exercised discretion with regard to their conduct. In order for a private military subcontractor to meet this requirement, the subcontractor must prove that the government permitted the general contractor to hire the subcontractor as well as meet the requirements of one of the prongs of the Blackwater Rule.¹⁸⁴ This additional requirement ensures that the government contemplated and permitted the use of subcontractors for security functions. This condition is necessary because the government cannot exercise discretion over the conduct of a subcontractor if the government does not allow the use of subcontractors to perform the conduct in question.

Additionally, private military subcontractors need to prove that the government exercised discretion over their conduct by satisfying one of the three prongs of the Blackwater Rule. For example, if the subcontractor wishes to assert the government contractor defense based on the first prong of the Blackwater Rule, it must prove that the performance contract between the general contractor and the government provided precise specifications and that these same provisions were included in the subcontract. In order for the subcontractor to prove that it satisfied the requirements of the second prong of the Blackwater Rule, the performance contract between the general contractor and the government must have explicitly and lawfully permitted the subcontractor to use its own discretion. Finally, in order for the subcontractor to successfully prove that it met the conditions of the third prong of the Blackwater Rule, the government must have been placed on notice that the private military contractor was using the procedure that led to liability and the government must have subsequently approved the

183. This prong may be the most difficult for private military contractors to prove in court because the current lack of governmental oversight over contractors makes it unlikely that a contractor would be able to prove that the government reviewed the use of a specific procedure.

184. The extension of the Blackwater Rule to private military subcontractors follows the same reasoning courts have used to extend the *Boyle* rule to supply subcontractors. *See, e.g., Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67, 72 (3d Cir. 1990) (concluding that since the government exercised its discretion by requesting a specific helicopter part, the subcontracted manufacturer of that part was permitted to assert the government contractor defense); *Feldman v. Kohler Co.*, 918 S.W.2d 615, 625 (Tex. App. 1996) (reasoning that if a subcontractor was subjected to liability resulting from the government's discretion, the subcontractor would raise its price to manufacture the part and the general contractor would, accordingly, raise the price it charged to the government).

use of the procedure, prior to the event that led to liability. The standards governing the applicability of the Blackwater Rule for subcontractors ensure that governmental discretion is protected regardless of whether a general contractor or subcontractor is carrying out the government's wishes.¹⁸⁵

The Blackwater Rule is a necessary extension of the government contractor defense. The current test used to determine the applicability of the government contractor defense, the *Boyle* rule, was tailored to supply contracts and is insufficient to govern the conduct of private military contractors fulfilling performance contracts. The standards prescribed by the Blackwater Rule maintain the aim of the *Boyle* rule, protecting the government's discretion, while tailoring them to the specific situations encountered by private military contractors. The result is a comprehensive rule intended to protect the government's decision to use private military contractors in order to face the uncertainties of war.

VI. *NORDAN*: AN APPLICATION OF THE "BLACKWATER RULE"

The facts of *Nordan v. Blackwater Security Consulting, LLC*, although partially available, are presently lacking in some of the details necessary to fully apply the Blackwater Rule to this case.¹⁸⁶ Nevertheless, this Part uses the facts that are publicly available to illustrate how the Blackwater Rule would prevent Blackwater from being able to assert the government contractor defense in connection with its liability arising from the Fallujah incident. Furthermore, this Part describes what additional facts would be necessary to help Blackwater satisfy the conditions of the Rule.

Based on the facts currently available to the public, Blackwater would not satisfy the requirements of the first prong of the Blackwater Rule. In order to meet the standards of the first prong of the Rule, the government must provide precise specifications for the fulfillment of a performance contract and the contractor must comply with these specifications. In cases involving subcontractors, the analysis requires a four step inquiry in order to determine if (1) the government prescribed precise specifications to the general contract, (2) the government allowed the general contractor to hire subcontractors to fulfill these

185. The Blackwater Rule applies to all subcontractors regardless of how far they are removed from the general contractor because to deny the defense to these subcontractors would produce the same result as "that disapproved by the Supreme Court in *Boyle*." See *Feldman*, 918 S.W.2d at 625. However, the Blackwater Rule becomes a much tougher standard the further removed a subcontractor is from the government, as further explained in Part VI of this Note.

186. 382 F. Supp. 2d 801, 804-06 (E.D.N.C. 2005).

duties, (3) the general contractor included the same precise specifications prescribed by the government in its contract with the subcontractor, and (4) the subcontractor complied with these specifications. Applying this standard to the facts of *Nordan*, Blackwater would fail to meet the requirements of the first prong of the Blackwater Rule.¹⁸⁷

Blackwater would fail to meet the first three steps of this inquiry because the government never permitted the general contractors to provide the security services that led to the liability. Congressional hearings on the subject of private military contractors have revealed that the government specifically prohibited the hiring of private security contractors in its contracts with both general contractors KBR and Fluor.¹⁸⁸ Since the government prohibited the general contractors and any subcontractors from carrying out security functions, Blackwater would obviously not be able to prove that the government provided the general contractors with precise specifications. Given these facts, Blackwater would fail to meet the standards of the first prong of the Blackwater Rule.

If, however, the facts suggested that the government allowed the general contractor to subcontract in order to provide the government with security functions and prescribed precise specifications to the general contractors, KBR and Fluor, these facts would be sufficient to satisfy the first two steps of the inquiry as to whether Blackwater met the requirements of the first prong of the Blackwater Rule. Additionally, in order to meet the conditions of the first prong of the Blackwater Rule, the precise specifications would have to be duplicated in the contract between Regency and Blackwater.

187. *See id.*

188. The Secretary of the Army, Francis J. Harvey, wrote a letter to Congressman Christopher Shays, dated July 14, 2006, stating, "Under the provisions of the LOGCAP contract, the U.S. military provides all armed forces protection for KBR, unless otherwise directed. Additionally, the LOGCAP contract states that KBR personnel cannot carry weapons without the explicit approval of the theater commander." *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 184 (2007) (Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov't Reform) (quoting a letter from the Secretary of the Army, Francis J. Harvey). Chairman Henry A. Waxman also noted that "Fluor Corp. has a similar provision in its contract with the Air Force, contractor force protection. The U.S. Government will provide for the security of contractor personnel in convoys . . ." *Id.* at 183. Deputy Assistant Secretary of the Army, Tina Ballard, and Fluor Senior Director of Corporate Security, Tom Flores; both testified before the House Committee on Oversight and Government Reform that these contracts prevented both KBR and Fluor from subcontracting for private security. *See id.* at 158, 183-84.

Some of the contract provisions included in the contract between Regency and Blackwater were specific enough to satisfy the requirements of this step. For example, the contract between Regency and Blackwater stated that “to provide tactically sound and fully mission capable Protective Security Details, the minimum team size is six operators with a minimum of two vehicles to support ESS movements.”¹⁸⁹ If this provision was included in the general contract between the government and the general contractor and duplicated in the subcontract, it would be specific enough to meet the requirements of the first prong of the Blackwater Rule.

Assuming that this provision met the requirements for precise specifications and was included in the general contract with the government, and assuming that the government permitted the subcontracting of these duties, Blackwater would still need to comply with the precise specifications in order to fulfill the requirements of the first prong of the Blackwater Rule. Based on the facts currently available, Blackwater would not satisfy this step because when the Fallujah incident occurred, the team size had been cut from six operators to four, in violation of the terms of the contract.¹⁹⁰ Since Blackwater failed to comply with the terms of its contract with Regency, it did not comply with the precise specifications and thus would fail to meet the standards of the fourth step of this inquiry. If, instead, (1) the government prescribed precise specifications to Fluor or KBR, (2) the government allowed KBR or Fluor to hire subcontractors to fulfill these duties, (3) the same precise specifications prescribed by the government were included in the subcontractor with Blackwater, and (4) Blackwater complied with these specifications, Blackwater would have been able to assert the government contractor defense based on the first prong of the Blackwater Rule.

Based on the facts publicly available, Blackwater would also not be able to meet the requirements of the second prong of the Blackwater Rule. In order to satisfy the second prong of the Blackwater Rule, the private military contractor would have to prove that the government explicitly and lawfully delegated its discretion to the contractor. In the case of a subcontractor, this would require that (1) the government authorized the general contractor to subcontract for the task, and (2) the government explicitly delegated its discretion to the subcontractor. As discussed when analyzing the first prong of the Blackwater Rule, the

189. *Agreement for Security Services*, *supra* note 52, at 15.

190. *See* PRIVATE MILITARY CONTRACTORS, *supra* note 11, at 10.

government did not authorize the use of private security services in its contract with general contractors KBR and Fluor.¹⁹¹ As a result, Blackwater would be unable to satisfy the standards of the second prong of the Blackwater Rule.

If, rather than prohibiting the use of security contractors, the government explicitly delegated its discretion to the private military subcontractor in a manner similar to that exemplified in the contract between Blackwater and Regency, Blackwater would have a much a stronger case for proving that it met the requirements of the second prong of the Blackwater Rule. In the contract between Regency and Blackwater, Regency specifically delegated its discretion to Blackwater. For example, Article 1.2.3 of the contract states that “BLACKWATER shall, at all times, have complete authority and responsibility to make decisions regarding the suitability for movement required by ESS and the type and level of protection required for ESS personnel.”¹⁹² In addition, Article 1.2.4 states that “BLACKWATER shall be under an absolute duty at all times to exercise its own reasonable discretion with respect to safe operations, movement of ESS personnel and the type and level of [s]ecurity [s]ervices provided to ESS”¹⁹³

The second prong of the Blackwater Rule would have been satisfied if the government included these same provisions in its contract with Fluor and KBR and explicitly permitted the general contractors to delegate this discretion to private military subcontractors. This application of the government contractor defense would achieve the purpose of the defense, protecting the government’s discretion, because the government would be making the decision to delegate its discretion to the subcontractor and the subcontractor would be carrying out the will of the sovereign.

Given the facts publicly available, Blackwater would also fail to meet the requirements of the third prong of the Blackwater Rule. The third prong of the Blackwater Rule requires that in the absence of explicit contractual instructions, the government must have substantively reviewed the use of the procedure that led to liability and the government must have subsequently approved the use of the procedure, prior to the event that led to liability. In this case, the government would have needed to know that Blackwater was performing these convoys with fewer men than stipulated in the contract. In addition, the

191. See *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 158, 183-84 (2007).

192. *Agreement for Security Services*, *supra* note 52, at 2.

193. *Id.*

government would also have had to be informed that the equipment did not comply with the standards stated in the contract in order to substantively review these practices. However, not only was there insufficient governmental oversight to place the government on notice as to the actions of Blackwater,¹⁹⁴ but the conduct in question had never been performed by Blackwater on a previous occasion.¹⁹⁵ As a result, Blackwater would not meet the requirements of the third prong of the Blackwater Rule.

If, on the other hand, Blackwater had performed the contractual duties in the same manner, on a previous occasion, these facts would strengthen the argument that Blackwater met the requirements of the third prong of the Blackwater Rule. In addition to these facts, however, Blackwater would also need to prove that the government substantively reviewed the procedures taken by Blackwater and approved of these practices, either explicitly or by failing to make a timely disaffirmance. If Blackwater was able to prove all of these assertions, it would be immune from liability based on the third prong of the Blackwater Rule.

Based on Congressional testimony as well as an overview of the procurement system, the requirements of the third prong of the Blackwater Rule create an extremely difficult standard for private military contractors to meet. Tina Ballard, Deputy Assistant Secretary of the Army, testified that “to my knowledge, we don’t have any system

194. At the time of the Fallujah incident, the general contractors and the government were unaware that Blackwater was performing security services on their behalf. George Seagle, Director of the Security, Government, and Infrastructure Division of KBR testified that during an investigation, following the Fallujah ambush, KBR was “initially told by ESS and Blackwater, both, that Blackwater was not contracted to KBR.” See *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 184 (2007). Tom Flores, Senior Director of Corporate Security for Fluor, also testified that he was unaware that Blackwater was performing security operations under the ESS contract on the day of the ambush. *Id.* In addition, Francis J. Harvey, Secretary of the Army, wrote a letter to Chairman Waxman, stating that when the issue was first brought to the Army’s attention, “[b]ased on all available documentation in contract files and on correspondence from [KBR], [the U.S. Army Material Command] was unable to substantiate a link” between Blackwater and KBR. Letter from Francis J. Harvey, Sec’y, Army, to Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov’t Reform (Feb. 6, 2007) (on file with the Hofstra Law Review). This letter, along with the Congressional testimony, suggests that the general contractors and the government were oblivious to the fact that Blackwater was performing security functions on their behalf.

195. On the date of the Fallujah ambush, Blackwater was performing one of the first missions attempted pursuant to its assigned contract with Regency. See Bennett, *supra* note 6, at 39. As a result, even if there was oversight sufficient to place the government on notice about the actions of Blackwater, the government would not have been able to ratify this conduct because it had not been performed on other occasions prior to the incident that led to the claimed liability.

where we automatically keep track of . . . every subcontract[or].”¹⁹⁶ An October 2005 report by the Inspector General of the Defense Department found that contracting officials failed to develop and implement adequate surveillance plans on eighty-seven percent of contracts reviewed.¹⁹⁷ These systemic problems make it unlikely that a contractor would be able to prove the government reviewed the use of the procedure in question.

Blackwater’s failure to meet the requirements of the Blackwater Rule, based on the facts of *Nordan*, is a representative illustration of the strength of the Rule. This Rule does not create a weak standard that can easily be reached in the absence of governmental discretion. In this case, it would have required the government to contemplate the use of subcontractors and exercise its discretion by strengthening its role while drafting the contract, explicitly delegating its discretion, or sufficiently overseeing the conduct in question. This increased governmental role would benefit the military contracting industry as a whole and result in a greater amount of contemplation, transparency, and accountability in drafting and performing security contracts.

The Blackwater Rule gives the parties who are needed to implement these changes, the contractors and the government, an incentive to do so. Private military contractors would encourage an effort to work more closely with the government in order to receive greater immunity from liability. In addition, the government would also welcome these efforts because the costs charged by the contractors would decline based on the contractors’ reduced vulnerability to lawsuits. As a result, many of the problems associated with private military contractors would diminish as the law begins to creep into this world of virtual lawlessness.

Erik D. Prince, Chairman and CEO of Blackwater, has already expressed a desire to work with Congress and the executive branch to “increase accountability, oversight, and transparency.”¹⁹⁸ The Blackwater Rule not only furthers the purpose of the government contractor defense, immunizing the government’s discretion, but also provides an incentive for the government and private military

196. *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 183 (2007).

197. DEP’T OF DEFENSE, INSPECTOR GENERAL: ACQUISITION: CONTRACT SURVEILLANCE FOR SERVICE CONTRACTS, REP. NO. 2006-010, 4 (2005).

198. *Hearing on Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. (2007) (prepared statement of Erik D. Prince, CEO of Blackwater) (quoting Ryan Crocker, U.S. Ambassador to Iraq), available at <http://oversight.house.gov/documents/20071003153621.pdf>.

contractors to work more closely together in order to achieve the goals of the sovereign. By encouraging this type of cooperation and filling the legal void left in the wake of *Boyle*, the Blackwater Rule provides a sensible solution to a problem that has far-reaching national security implications.

*Justin A. Jacobs**

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