

## DERIVATIVE IMMUNITY: THE IMPACT OF CAMPBELL-EWALD CO. V. GOMEZ

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### ABSTRACT

*On January 20, 2016, the Supreme Court released its slip opinion in Campbell-Ewald Co. v. Gomez<sup>1</sup> addressing derivative immunity. This was the first time in seventy-six years that the Court expounded upon this common law doctrine. In fact, its very existence has been questioned since its controversial inception in Yearsley v. W.A. Ross Construction Co.<sup>2</sup> Subsequently, courts have languished in a state of confusion as to when a federal contractor providing a service can claim immunity. Courts have historically borrowed indiscriminately from among the different immunity doctrines in extending immunity to these private entities. This prior lack of any defined test or path of reasoning for extending immunity to these contractors has contributed to the false impression that the courts are extending immunity beyond its necessary limits.*

*This Article distinguishes between the different theories the courts have utilized in the past to extend immunity to third parties and explains the resulting common law test for qualified immunity that can be discerned from the Court's limited analysis in Campbell-Ewald Co.<sup>3</sup>*

### I. INTRODUCTION

As the complexity of society grows, so will the demands on government. Consequently, government must rely on private entities to perform certain governmental services. The prudent use of private entities can improve efficiency and decrease the costs involved in delivering services. However, issues arise concerning liability when individuals or businesses are harmed by these private entities.

Traditionally, government is sovereignly immune from liability unless such immunity is waived. Though it is the prerogative of Congress to statutorily waive its sovereign immunity, it is the courts that have actually determined the extent of a sovereign's actual liability. Private entities naturally seek to utilize such immunity to decrease

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1. 136 S. Ct. 663 (2016).

2. 309 U.S. 18 (1940).

3. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016).

their risk of liability arising from civil actions. The general rule is that these private entities that contract with the government cannot claim immunity from tort liability. However, this general rule has an ever-growing number of exceptions.

These exceptions depend upon the type of claim and the function the contractor performs. The focus of this Article is on the common law exception first introduced in *Yearsley v. W.A. Ross Construction Co.*<sup>4</sup> and recently examined in *Campbell-Ewald Co. v. Gomez*.<sup>5</sup> What has been referred to as *Yearsley* or derivative immunity concerns those situations where a federal contractor who was performing a service, can claim immunity from liability.<sup>6</sup> Although the United States Supreme Court has clarified what will be referred to in this Article as derivative immunity, many questions affecting the scope of this common law doctrine remain.

Courts have historically borrowed indiscriminately from among the different immunity doctrines in insulating a contractor from liability. The evolution of derivative immunity is no exception. For the seventy-six years that followed *Yearsley*, courts seem to have languished in a state of confusion and inconsistency in applying a common law immunity to service-providing contractors. This prior lack of any defined test or path of reasoning for extending immunity to this type of affiliated entity has contributed to the impression that the courts are extending immunity beyond its necessary limits.

This Article seeks to distinguish between and explain the different theories the courts have utilized to extend immunity to third parties as it relates to derivative immunity.<sup>7</sup> The future application of this renewed common law doctrine is best explained by systemically looking at the distinguishing characteristics in *Campbell-Ewald Co.*<sup>8</sup> It then becomes apparent that courts have recognized the importance of extending immunity in the past, but have done so by erratically drawing upon the reasoning from the other immunity doctrines. Derivative immunity is a means of extending immunity, but its application is still limited in light of *Campbell-Ewald Co.* However, as the need for private contractors grows, derivative immunity may play an ever-expanding role in accomplishing the interests of government.

The first part of this Article introduces the concept of sovereign immunity, the doctrine from which all other extensions of immunity

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4. 309 U.S. 18 (1940).

5. 136 S. Ct. 663 (2016).

6. Some have also referred to this as “derivative sovereign immunity”; however, the Court’s language in *Campbell-Ewald Co. v. Gomez* indicates that a more accurate phrasing would be “derivative immunity.”

7. See *infra* notes 137-213 and accompanying text.

8. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

are compared.<sup>9</sup> The second part discusses the multiple forms of official immunity.<sup>10</sup> The third part analyzes the role of the Federal Tort Claims Act<sup>11</sup> (“FTCA”) and specifically the impact of *Boyle v. United Technologies Corp.*,<sup>12</sup> upon the extension of immunity to federal contractors regarding procurement contracts with the military.<sup>13</sup> The fourth part of this Article examines the common law doctrine of derivative immunity as a distinct defense to liability.<sup>14</sup> Here, the Article studies the principal cases that influenced the Court’s decision in *Campbell-Ewald Co.* and the impact and ultimate scope of this influential holding.<sup>15</sup> The last part of the Article discusses the main philosophical themes associated with the recognition of derivative immunity.<sup>16</sup>

## II. THE EVOLUTION OF IMMUNITY

The original form of immunity is sovereign immunity. Consequently, it is reasonable to assume all other iterations of immunity stem from or share traits with this foundational doctrine. Therefore, any discussion of derivative immunity must begin with a brief summary of sovereign immunity. At its core, sovereign immunity prevents a sovereign from being held liable in its own courts without the sovereign’s consent. A sovereign enjoys absolute or unqualified immunity from liability. This doctrine has been a favorite target of academics over the years. Its very existence, supposedly given legitimacy by the passage of time, has even been called a mistake.<sup>17</sup> The exact origin of sovereign immunity remains an issue of debate.

The phrase sovereign immunity was not yet coined, but the concept existed in ancient Greece. The philosopher, Plato, discussed the concept of how the city benefited people in so many ways throughout their lives, and for that reason, the people should not be able to accuse

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9. See *infra* notes 17-37 and accompanying text.

10. See *infra* notes 38-80 and accompanying text.

11. 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (2012).

12. 487 U.S. 500 (1988).

13. *Boyle v. United Techs. Corp.* 487 U.S. 500 (1988); see *infra* notes 81-136 and accompanying text.

14. See *infra* notes 137-213 and accompanying text.

15. See *infra* notes 137-213 and accompanying text.

16. See *infra* notes 214-238 and accompanying text.

17. See Ross D. Andre, *Compulsory (Mis)joinder: The Untenable Intersection of Sovereign Immunity and Federal Rule of Civil Procedure 19*, 60 EMORY L.J. 1157, 1161 (2011); see also Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity As an Article III Doctrine*, 92 CAL. L. REV. 1375, 1377 (2004); Donald L. Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443 (2011).

the city of any wrongful acts.<sup>18</sup> A theory of gratitude as the basis of immunity has not been included in contemporary debate as to the foundations of sovereign immunity.

The exact origin of sovereign immunity in England is uncertain, but it likely began during the reign of Edward I, when the Crown had to consent to suit.<sup>19</sup> While the origins of the concept are up for debate, the first usage of the policy took place in England in *Russell v. Men of Devon*,<sup>20</sup> in 1788.<sup>21</sup> In this original usage, the underlying concept was that the King, or the sovereign, would not be held liable because then the King would have to judge his own case.<sup>22</sup>

By the time the Constitution was ratified, immunity of the English sovereign was well established.<sup>23</sup> Given the federalist form of government in the United States, sovereignty has been construed to be in the hands of the people, which is in turn imparted to government.<sup>24</sup> Therefore, the citizenry fundamentally determines sovereignty, which is quite different from the original concept of sovereignty. The usage in the United States is particularly interesting considering that the country was founded on the rejection of the British monarchy, as well as ideals of nobility.<sup>25</sup> However, the United States Supreme Court, under Chief Justice Marshall, demonstrated its support for the doctrine of federal sovereign immunity in 1821.<sup>26</sup> The Court later identified that its general acceptance and incorpora-

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18. PLATO, *PLATO FIVE DIALOGUES* (John A. Cooper ed., G.M.A. Grube trans., Hackett Publishing Company, Inc. 2d ed. 2002) (1981).

19. See Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349, 352 (1925); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953).

20. (1788) 100 Eng. Rep. 359.

21. See Edward W. Taylor, *A Reexamination of Sovereign Tort Immunity in Virginia*, 15 U. RICH. L. REV. 247, 250 (1981) (citing *Russell v. Men of Devon*, (1788) 100 Eng. Rep. 359).

22. See HAMILTON BRYSON, *BRYSON ON VIRGINIA CIVIL PROCEDURE* 177 (3d ed. 1997).

23. See *Alden v. Maine*, 527 U.S. 706, 715 (1999) ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts.").

24. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.").

25. See U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States . . .").

26. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States . . ."); cf. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (Justice Marshall opined that a foreign sovereign enjoys absolute immunity from any claim, thereby making a foreign sovereign not subject to another nation's courts unless it consented to such).

tion of the doctrine had occurred without discussion.<sup>27</sup> Interestingly, the underlying premise of immunity is contrary to the post revolutionary war sentiment regarding distrust for big government, and yet the concept of sovereign immunity was adopted with little debate. Since that time, sovereign immunity has consistently been scrutinized along with the expansion of immunity in general.

Regardless of the specific origin of sovereign immunity, its incorporation into the legal fabric of the United States today is undeniable. Sovereign immunity has been invoked broadly in five contexts: state, federal, government official, tribal, and foreign immunity.<sup>28</sup> Courts consistently utilize similar or symmetrical reasoning in addressing whether to extend immunity among these five instances.<sup>29</sup> Courts have often borrowed the reasoning used in one context only to apply such in a different context.<sup>30</sup> Given the focus of this article, attention is limited to those instances specifically related to the extension of immunity to private contractors who are providing services pursuant to an agreement with the federal government.

There are numerous qualifiers that can affect the extension of immunity to private parties. This article distinguishes between those directly related to the Court's holding in *Campbell-Ewald Co. v. Gomez*.<sup>31</sup> These include whether the federal contractor's agreement is to serve a military or non-military purpose, whether the contract was for procurement of a good or the performance of services, the type of immunity available, and the type of claim asserted.

In its simplest form, the defense of sovereign immunity exists when a private party seeks monetary relief from the sovereign entity in a civil action.<sup>32</sup> However, this basic scenario is quickly complicated

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27. See *United States v. Lee*, 106 U.S. 196, 207 (1882) (“[W]hile the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.”).

28. See Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 769 (2008).

29. Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1090 n.115 (2001).

30. See Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 517-18 (1978) (“In fact, the theory behind the doctrines of state and federal sovereign immunity is sufficiently similar that the reasoning of cases discussing federal sovereign immunity almost always carries over to eleventh amendment cases (and other state sovereign immunity cases) and vice versa.”).

31. 136 S. Ct. 663 (2016).

32. See *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (stating that sovereign immunity applies to “a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury . . .”).

when it is not the sovereign who is directly named in the lawsuit, but a contractor who is engaged to do the work of the sovereign. In each of the five commonly identifiable forms of sovereign immunity, private third parties have claimed they are immune from liability based upon their relationship to the sovereign. In certain circumstances, these private contractors are construed to derive their immunity from the sovereign, hence derivative sovereign immunity. However, not every instance from which a contractor is deemed immune is the same type of immunity enjoyed by a sovereign.

Absolute or unqualified immunity bars subject matter jurisdiction to any court. Qualified immunity, as found in *Campbell-Ewald Co.*, is a defense to liability based upon the merits of the action and can be overcome. The degree of immunity that a private contractor retains depends upon the situation and type of claim. There is a difference between state tort claims brought against a contractor and claims deemed constitutional torts.

As demonstrated in *Boyle v. United Technologies Corp.*,<sup>33</sup> the Court has effectively created a distinguishable test for military procurement contracts albeit generally labeled as the “government contractor defense.”<sup>34</sup> This defense is factually distinguishable from cases involving non-military, service-providing contractors as in *Yearsley v. W.A. Ross Construction Co.*<sup>35</sup> and *Campbell-Ewald Co.* In the past, private parties have indiscriminately borrowed from *Boyle* to justify extending immunity regardless of its rather narrow focus. With the Court’s ruling in *Campbell-Ewald Co.* the factual dissimilarities between the cases that embody derivative immunity and the government contractor defenses should alleviate this confusion in the future.

For the purposes of this Article, Government and its referenced instrumentalities and agencies herein are synonymous with the sovereign.<sup>36</sup> However, a sovereign, like a corporation, must act through its agents. Under traditional agency principles, any tort liability must flow to the sovereign from the actions of its agents. Thus, an action against an employee who acts in accordance with his agency relationship with the sovereign is an action against the sovereign itself. Therefore, if the sovereign can claim immunity, so should the agent.

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33. 487 U.S. 500 (1988).

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

35. 309 U.S. 18 (1940).

36. There are issues regarding what agencies of government can claim sovereignty, but unless specifically addressed otherwise herein, such has been left for future exploration.

However, this is not always the case, giving rise to a logical inconsistency.<sup>37</sup>

### III. OFFICIAL IMMUNITY

No court can have jurisdiction over the sovereign since it implies a greater power than the sovereign itself.<sup>38</sup> Under this theory, it would be impossible for the sovereign to be fallible, but the administrative agents of the sovereign can be held liable.<sup>39</sup> According to this theory, the sovereign is above reproach, but its agents may not be. It is axiomatic that government officials working on behalf of the sovereign as well as those who are contracted to perform a function equivalent to a government employee may claim some immunity. The federal government has an ever-growing number of agents. These agents hold positions in every branch of government. They drive vehicles, work in hospitals, construct roads, and perform any other myriad of functions. However, not all enjoy the same degree of civil immunity.

To explain the confusion associated with third party derivative immunity in civil tort matters, one must understand government official immunity in general. More accurately, in what circumstances can a government official enjoy absolute immunity versus qualified immunity?

The courts have consistently found that government officials are deserving of some form of immunity from civil actions.<sup>40</sup> These ac-

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37. See *Hafer v. Melo*, 502 U.S. 25, 31 (1991).

38. Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 7, at 239, 241-42 (Oxford, Clarendon Press 1765-1769)) (“the King can do no wrong” to the royal prerogative, which he defines as “that special preeminence which the King hath over and above all other persons, and out of the course of the common law, in right of his royal dignity The law ascribes to the King the attribute of sovereignty”; he is “sovereign and independent” within his own dominions and “owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction over him, for all jurisdiction implies superiority of power.”).

39. See Borchard, *supra* note 38, at 45 (citing JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVE OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT ch. 1, at 5 (London, 1820)) (providing:

The inviolability of the King is essential to the existence of his powers as supreme magistrate; and therefore his person is sacred. The law supposes it impossible that the King himself can act unlawfully or improperly. It cannot distrust him whom it has invested with the supreme power; and visits on his advisors and ministers the punishment due to the illegal measures of government. Hence the legal apothegm that the King can do no wrong.).

40. See *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974) (“Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.”), *overruled by* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

tions are generally distinct from actions levied against a sovereign itself.<sup>41</sup> Similar to the justifications given regarding the doctrine of derivative immunity, courts have identified the conflicting concerns of an injured plaintiff's right to a remedy with the efficient functioning of government in the context of governmental official liability.<sup>42</sup> The prevailing theory suggests that without protection from lawsuits, a government official's ability and willingness to make effective decisions for the public good would be hindered by his fear of individual liability for his actions.<sup>43</sup>

Historically, government officials enjoyed absolute immunity. Subsequently, two separate degrees of immunity have evolved over time: absolute immunity and qualified immunity.<sup>44</sup> The type of immunity available to a government official depends upon the function the official performs and the type of claim that is brought.<sup>45</sup> Certain officials enjoy absolute immunity regardless of the type of claim. However, this is limited to a very select few who perform particular functions. Most officials' degree of immunity depends upon whether the claim is a constitutional tort, or a tort action under a state's common law.

Based on the facts of a case, a plaintiff may seek a private civil remedy from an agent of the Government for a "constitutional tort," or a tort action under a state's common law.<sup>46</sup> A state common law action often involves a claim of negligence or other wrongful act committed by the official. A "constitutional tort" occurs where a

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41. This would occur where the United States or any of its agencies or instrumentalities are named as the individual defendants or where a government official is being sued in his "official-capacity."

42. See *Barr v. Matteo*, 360 U.S. 564, 564-65 (1959).

43. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) (Judge Learned Hand stated: "[a]s is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.").

44. See *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976) ("An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity.").

45. See *Butz v. Economou*, 438 U.S. 478 (1978).

46. See *Bruce Jones*, *Qualified Immunity for Federal Officials: A Proposed Standard for Defamation Cases*, 58 TEX. L. REV. 789, 790 (1980) ("Official immunity from liability has both constitutional and common law bases.").

governmental official has violated the Constitution<sup>47</sup> or federal law,<sup>48</sup> thereby causing injury to the plaintiff.<sup>49</sup>

#### A. CONSTITUTIONAL TORT

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>50</sup> the United States Supreme Court expanded personal liability to federal officials for violating constitutional or federal statutory rights of plaintiffs.<sup>51</sup> *Bivens* created an implied constitutional cause of action against federal officials.<sup>52</sup> In response to the trend of expanding individual official liability, the doctrine of qualified immunity emerged.<sup>53</sup>

A litigant can raise a qualified immunity defense if the official's action in question violated a statutory or constitutional right and if that action violated clearly established law at the time of the challenged conduct.<sup>54</sup> Although this test does not emphasize the discretionary function aspect of an employee's actions, qualified immunity seems to not be available where the employee is determined to not have performed a discretionary function.<sup>55</sup> However, given that most officials' actions can be considered discretionary for such a purpose, this is typically not a difficult hurdle to surmount.<sup>56</sup>

Qualified immunity is an affirmative defense and must be pled accordingly. Subsequently, courts are predisposed to rule upon qualified immunity early on in the litigation process and defendants can

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47. See, e.g., *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

48. See, e.g., *Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999).

49. See *Carey v. Phipps*, 435 U.S. 247, 254 (1978) (stating that “[t]he basic purpose of [42 U.S.C.] § 1983 damages award is to compensate persons for injuries caused by the deprivation of constitutional rights . . .”).

50. 403 U.S. 388 (1971).

51. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

52. *Bivens*, 403 U.S. at 388.

53. Qualified immunity applies to the majority of government employees including, but not limited to, cabinet officials, judges performing administrative functions, school teachers, law enforcement, and individuals who are working temporarily for a government.

54. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

55. See *Holloman v. Harland*, 370 F.3d 1252, 1282-84 (11th Cir. 2004) (involving a 42 U.S.C. § 1983 action where a public school teacher was found to not be exercising a discretionary function in leading a class in silent prayer and, thus, was not able to utilize qualified immunity).

56. See *Butz v. Economou*, 438 U.S. 478, 504 (1978) (relating to immunity matters, courts have traditionally not distinguished between 42 U.S.C. § 1983 cases, that involve suits brought against state officials, and those actions brought against a federal official for constitutional violations).

seek an immediate appeal from a trial court's ruling contrary to their early motions. This is in line with the defense of any individual immunity in general because it is in the interest of effective government to spare a defendant the hassle of weathering an unnecessarily drawn out litigation.<sup>57</sup> In carving out this form of immunity, courts continue to struggle with the rights of the few versus the many.<sup>58</sup>

The second form of immunity available to government officials sued for money damages for an injury caused by a "constitutional tort" is that of absolute immunity. The contemporary foundation for officials claiming absolute immunity is rooted in a decision where a federal official was deemed absolutely immune from a common law cause of action of libel.<sup>59</sup> Thus, absolute immunity has its foundations in common law, but its scope has since been narrowed to only apply to a limited set of instances.<sup>60</sup> Absolute immunity in this context blocks any action against certain officials who are performing a particular government function.<sup>61</sup> Traditionally, to establish an entitlement to absolute immunity a governmental official would have to prove that the function of his office was "so sensitive as to require a total shield from liability"<sup>62</sup> and that the official was "discharging the protected function when performing the act for which liability is asserted."<sup>63</sup> Those officials who seek to avail themselves of absolute immunity must demonstrate that public policy warrants such immunity.<sup>64</sup> The focus of courts has been on the nature of the office and not the specific decision made.<sup>65</sup> Consequently, very few officials have been extended

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57. See *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.").

58. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.").

59. See *Barr v. Matteo*, 360 U.S. 564 (1959).

60. See, e.g., *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (applying to Legislature for their legislative functions and judges for their judicial functions); *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (applying to the President); *Butz*, 438 U.S. at 513–17 (applying to Executive Branch officials engaged in adjudicative functions).

61. See *Bogan v. Scott-Harris*, 523 U.S. 44, 54–55 (1998) (discussing legislative and judicial functions).

62. *Harlow*, 457 U.S. at 801.

63. *Id.*

64. *Id.* at 800 ("Federal officials seeking absolute immunity from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.").

65. *Forrester v. White*, 484 U.S. 219 (1988) ("[T]he nature of the function performed, not the identity of the actor who perform[s] it, that inform[s] our immunity analysis.").

absolute immunity. Some have argued that based on their relationship with other officers who have been extended absolute immunity, they too may be entitled to derivative sovereign immunity.<sup>66</sup> Given the significance of absolute immunity, this argument has largely been ineffective. To have absolute immunity is to be immune from all suits and such immunity remains limited.

#### B. STATE COMMON LAW TORT

Where a government official is being sued for money damages for a state common law tort, and not a constitutional tort, the extension of absolute immunity is permitted as long as the tort was committed within the scope of employment. The original rule permitted a federal official to claim absolute immunity if the employee's "act in question was within the scope of the employee's official powers or the outer perimeter of such employee's line of duty."<sup>67</sup> It was generally left to the courts to determine when absolute immunity would be extended to the individual based upon considerations of basic agency principals.

Then in *Westfall v. Erwin*,<sup>68</sup> the United States Supreme Court emphasized that a federal employee is not absolutely immune from liability by merely being an employee who was acting within the outer perimeters of his duties, but only if such action was also discretionary in nature.<sup>69</sup> The Court said that unless the official is utilizing independent judgment or decision-making discretion, the threat of personal liability is not a factor affecting an official's decision or course of action.<sup>70</sup> This was a significant deviation from extending absolute im-

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66. *Harlow*, 457 U.S. at 809-13 (explaining how presidential aides, who were sued for damages based upon their official acts, argued unsuccessfully that they were entitled to derive the absolute immunity enjoyed by the President of the United States); cf. *Gravel v. United States*, 408 U.S. 606 (1972) (holding that the Speech and Debate Clause derivatively applied to legislative acts of a Senator's aides).

67. *Gogek v. Brown Univ.*, 729 F. Supp. 926, 929 (D.R.I. 1990) (referencing *Barr v. Matteo*, 360 U.S. 564, 575 (1959)).

68. 484 U.S. 292, 295 (1988).

69. *Westfall v. Erwin*, 484 U.S. 292, 295 (1988).

70. See *Westfall*, 484 U.S. at 296-97 (providing:

The central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.' *Barr v. Matteo*, *supra*, 360 U.S., at 571, 79 S.Ct. at 1339. Because it would not further effective governance, absolute immunity for nondiscretionary functions finds no support in the traditional justification for official immunity . . . . [A]bsolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature.).

munity to an official for merely acting within the outer parameters of his duties.<sup>71</sup> *Westfall* made it more difficult for officials to avail themselves of absolute immunity than what was permitted previously. Congress subsequently passed the Federal Employees Liability Reform and Tort Compensation Act of 1988<sup>72</sup> (“Westfall Act”), which was intended to return to the original rule of providing immunity from personal liability for actions taken in the course and scope of an official’s employment.<sup>73</sup>

Congress was also concerned that if absolute immunity was limited to acts of discretion, it would have had the procedural effect of dragging out litigation by preventing a case from being dismissed in its initial stages because an issue of fact must always then be determined: did the official exercise discretion in making his decision.<sup>74</sup>

Prior to *Westfall*, the Federal Tort Claims Act<sup>75</sup> (“FTCA”) only applied to an employee being sued in his individual capacity for harm caused from the operation of a vehicle within the scope of his employment.<sup>76</sup> The Westfall Act expanded the application of the FTCA to all instances where a federal official is sued via a common law action for a negligent or wrongful act committed within the scope of his employment. Thus, the Westfall Act ultimately increased the types of agent activities that could receive sovereign immunity.

Consequently, the Westfall Act in turn made the FTCA the exclusive remedy for any state common law action against a federal employee whose negligent or wrongful act was committed within the scope of his employment.<sup>77</sup> Thus, in such an action, the defendant employee shall be dismissed from the action and the United States is substituted as the sole defendant for a state law tort claim, thereby making the exclusive remedy available to a claimant, an action against the United States.<sup>78</sup> The government may then raise the insurmountable defense of sovereign immunity. As long as it can be determined that the government official was acting within the scope of his employment, sovereign immunity will ultimately bar any further claims. It should be noted that the FTCA does not affect actions for

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71. See *Gogek*, 729 F. Supp. at 930.

72. 28 U.S.C. § 2679 (2012).

73. H.R. REP. No. 100-700, at 2-4 (1988), as reprinted in 1988 U.S.C.C.A.N. 5945, 5946-47.

74. See *id.*

75. 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680.

76. See *Gogek*, 729 F. Supp. at 929.

77. See 28 U.S.C. § 2679(b)(1); see also *In re Supreme Beef Processors, Inc.*, 468 F.3d 248 (5th Cir. 2006) (explaining the exclusive remedy for tort claims); *Couden v. Duffy*, 446 F.3d 483 (3d Cir. 2006) (discussing the exclusive remedy for non-constitutional tort claims).

78. See 28 U.S.C. § 2679(d)(2).

constitutional torts given that a private person could not be held liable under the United States Constitution.<sup>79</sup>

*Westfall* did more than just induce Congress to pass the Westfall Act to protect federal employees. It had the intended or unintended consequence of preserving the use of common law sovereign immunity as it relates to employee liability.<sup>80</sup>

Congress's reaction to the prospect of limiting absolute immunity for individual employees resulted in the passage of legislation to preserve its more general application. Thus, the greater public interest of preserving decision-making freedom outweighs the interests of a litigant seeking a remedy for harm caused by the tortious acts of a government employee.

#### IV. FEDERAL TORT CLAIMS ACT

The original notion of sovereign immunity acted as an absolute bar to any suit against any sovereign entity. However, the government has tempered this absolutism by statute and via common law erosion regarding the extent of its immunity.<sup>81</sup> The federal government's most general waiver regarding civil tort liability was the Federal Tort Claims Act ("FTCA").

Until the passage of the FTCA, the federal government was absolutely immune to any common law tort action.<sup>82</sup> Originally, an injured party seeking redress for an injury caused by the federal government would have to seek a private bill.<sup>83</sup> This procedure was utilized until, by most accounts, it became a burden and, with the growth of government, administratively unsustainable.<sup>84</sup>

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79. See *McAfee v. 5th Circuit Judges*, 884 F.2d 221 (5th Cir. 1989); *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994); *Ready Transp., Inc. v. Military Traffic Mgmt. Command*, 86 F. App'x. 561 (4th Cir. 2004) (per curiam).

80. See *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447 (4th Cir. 1996); see also *Beebe v. Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1289 (D.C. Cir. 1997) (noting that *Westfall* remains the common law rule for official immunity).

81. These waivers to sovereign immunity are expressly stated in multiple statutes and often accompany, in varying degrees, specific legislation. For example, the Tucker Act waived sovereign immunity regarding certain monetary claims arising from contractual disputes with the federal government.

82. See Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 265 (2009).

83. See *United States v. Muniz*, 374 U.S. 150 (1963); see also *Dalehite v. United States*, 346 U.S. 15 (1953).

84. See Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687, 693-94 (1989).

In 1946, Congress passed the FTCA, thereby statutorily waiving its absolute immunity for certain tort claims.<sup>85</sup> This act allows plaintiffs to bring a civil action against the federal government where the federal government's actions would impart liability as if it were a private party being sued under the same circumstances.<sup>86</sup> Consequently, the federal government has "accepted liability for money damages for injuries caused by the negligent or wrongful acts or omissions of Government employees while acting within the scope of their office or employment at agencies or entities that are performing governmental functions."<sup>87</sup> Although the FTCA waives immunity for the federal government, such waiver is mitigated by thirteen enumerated exceptions to the waiver.<sup>88</sup> In other words, the general rule that one cannot bring a civil action against a sovereign is still preserved by the exceptions to the waiver rule. For example, the federal government has not waived its sovereign immunity for actions that concern eleven intentional state torts.<sup>89</sup> The reason for creating these exceptions was to ensure "that 'certain governmental activities' not be disrupted by the threat of damages suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the Act to suits for which adequate remedies were already available."<sup>90</sup>

The federal district courts have exclusive jurisdiction for claims under the FTCA.<sup>91</sup> Thus, if one of the listed exceptions applies, the courts have often granted the defendant's motion to dismiss for lack of subject matter jurisdiction.<sup>92</sup> However, where a government contractor is sued for a common law tort, the action often originates in a state trial court. The FTCA generally leaves monetary damage limits up to the states and places no set limits on the amount that can be recovered, but it does restrict such calculations to compensatory damages,

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85. Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (2012)).

86. See 28 U.S.C. § 2674 ("The United States shall be liable [for] tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .").

87. 14 HELEN HERSHKOFF, FEDERAL PRACTICE AND PROCEDURE § 3658 (4th ed. 2016).

88. See 28 U.S.C.A. § 2680(a)-(n) (West 2012).

89. See 28 U.S.C.A. § 2680(h) (arising claims of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contractual rights are exempt).

90. *Kosak v. United States*, 465 U.S. 848, 858 (1984).

91. 28 U.S.C.A. § 1346(b).

92. See Thomas E. Bosworth, *Putting the Discretionary Function Exception in Its Proper Place: A Mature Approach to "Jurisdictionality" and the Federal Tort Claims Act*, 88 TEMP. L. REV. 91, 97 (2015) (arguing that the discretionary function exception should be treated as an affirmative defense and not a jurisdictional issue).

barring any punitive damage recovery.<sup>93</sup> Additionally, prejudgment interest is not available, but post-judgment interest is available if the government appeals and is unsuccessful.<sup>94</sup>

As discussed above, the Westfall Act<sup>95</sup> made the FTCA the only means by which an injured party may seek relief from a government employee who caused said harm acting within the scope of his employment.<sup>96</sup> Thus, the FTCA looks to state common law to determine whether a cause of action exists, but to federal law as to who can bring an action. The determination of whether an employee has exceeded the scope of employment is an issue of state law and is frequently litigated.<sup>97</sup> If a court decides that an employee or agent was acting outside of the scope of his employment, then the employee may be personally liable in state court. Whether one is deemed an independent contractor or government employee depends on the amount of control government wields over the entity.<sup>98</sup> The degree of control is a question that warrants further exploration and may, in certain circumstances, extend immunity to entities not originally contemplated to fall within the FTCA. Additionally, the government is usually liable for the actions of its federal agencies. Under section 2671 of the Torts Claims Procedures,<sup>99</sup> a “Federal agency” includes “corporations primarily acting as instrumentalities or agencies of the United States, but [the term] does not include any contractor with the United States.”<sup>100</sup>

None of the exceptions to the FTCA specifically provide for the extension of immunity to government contractors; however, courts have nonetheless looked to the Act in imputing immunity to private contractors in certain contexts. Tort actions brought against federal contractors are also based upon state causes of action. These actions can be generally distinguished by whether the contractor is fulfilling a military contract or a civil contract and whether the contractor is providing a service or manufacturing a good. For the purposes of comparing derivative immunity as articulated in *Campbell-Ewald Co. v.*

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93. See 28 U.S.C. § 2674.

94. See *id.*

95. 28 U.S.C. § 2679 (2012).

96. See *Osborn v. Haley*, 549 U.S. 225 (2007).

97. See 28 U.S.C.A. § 1346(b).

98. See *Logue v. United States*, 412 U.S. 521, 527–28 (1973) (Control “is the authority of the principal to control the detailed physical performance of the contractor”); see also *B & A Marine Co., Inc. v. Am. Foreign Shipping Co., Inc.*, 23 F.3d 709 (2d Cir. 1994) (“For purposes of the FTCA, the common law of torts and agency defines the distinction between an independent contractor (for whose torts the Government is not responsible) and an employee, servant or agent (for whose torts the Government is responsible).”).

99. 28 U.S.C. §§ 2671-2680 (2012).

100. *Id.*

*Gomez*<sup>101</sup> the focus of the analysis herein is only on those instances where a nonmilitary contractor can claim immunity for tort actions regarding service contracts. Thus, the examination that follows is narrow and limited to only those situations where all three of these qualifying facets exist.<sup>102</sup>

#### A. DISCRETIONARY FUNCTION EXCEPTION OF THE FTCA

The discretionary function exception (“DFE”) of the FTCA preserves sovereign immunity where a claim is “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.”<sup>103</sup> Though the FTCA supposedly does not apply to contractors, courts have extended this immunity to contractors under the discretionary function exception.<sup>104</sup> This exception is a means of facilitating sovereign immunity—it releases the sovereign, its employees, and its agents from liability where their actions “involve an ‘element of judgment or choice’” and are not compelled by statute or regulation and . . . the judgment or choice in question [is] grounded in ‘considerations of public policy’ or susceptible to policy analysis.”<sup>105</sup>

If the DFE applies, a federal district court must dismiss the claim for lack of subject matter jurisdiction, which is consistent with traditional notions of sovereign immunity. The purpose of the DFE is to allow government the freedom necessary to conduct business and create policy. Moreover, the United States Supreme Court emphasized that it “was Congress’ desire 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.’”<sup>106</sup> However, the DFE has been criticized for circumventing the purpose of the FTCA by immunizing government from liability in those circum-

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101. 136 S. Ct. 663 (2016).

102. Historically, contractors confronting actions under these parameters have generally asserted immunity under the discretionary function exception to the FTCA (“government contractor defense”), nonjusticiability of torts under the political question doctrine, and contractual indemnification. However, beyond the government contractor defense, detailed explanations of these other arguments are outside the scope of this Article.

103. 28 U.S.C. § 2680(a) (2012).

104. See VIVIAN S. CHU & KATE M. MANUEL, CONG. RESEARCH SERV., R41755, TORT SUITS AGAINST FEDERAL CONTRACTORS: AN OVERVIEW OF THE LEGAL ISSUES (2011).

105. *Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000) (citing *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988); *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991)); see also *Dalehite v. United States*, 346 U.S. 15, 36 (1953) (“Where there is room for policy judgment and decision there is discretion.”).

106. *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988) (citing *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)).

stances where a private person would be deemed individually liable.<sup>107</sup>

Government contractors have received immunity under the DFE even though they are themselves nongovernmental entities. This extension of immunity has generally been limited to military procurement contracts. This has given rise to what has become known as the government contractor defense.<sup>108</sup>

#### B. GOVERNMENT CONTRACTOR DEFENSE

The government contractor defense<sup>109</sup> insulates government contractors from tort claims arising from harm sustained from a product provided or from services rendered by a contractor of a governmental entity.<sup>110</sup> There is debate as to whether the government contractor defense is applicable to nonmilitary contractors and performance contracts. The contemporary use of this defense stems from the Supreme Court's sentinel decision in *Boyle v. United Technologies Corp.*<sup>111</sup>

*Boyle* concerned a co-pilot who was killed during a training exercise when his helicopter crashed off of the coast of Virginia. The father of the deceased co-pilot brought a diversity action in federal district court against the contractor who supplied the helicopter under the theory that the escape hatch was negligently designed and thus, facilitated the death of the co-pilot. The trial court ruled for the plaintiff, but the United States Court of Appeals for the Fourth Circuit reversed. The Supreme Court, applying Virginia law, found that the government requested the escape hatch and the contractor was immune from liability like the government itself. Though this case was brought under a state common law theory, it was displaced by federal law since “[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts[,]”<sup>112</sup> thus, creating a “‘significant conflict’ between state law and a federal policy or interest.”<sup>113</sup>

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107. See *Nat'l Union Fire Ins. v. United States*, 115 F.3d 1415, 1422 (9th Cir. 1997) (“Application of the exception is often troubling, because it may be a shield for carelessness and poor judgment. (We do not intimate that it was in this case.) Private actors generally must pay for the harm they do by carelessness.”).

108. Though the Combatant Activities Exception to the FTCA overlaps with the discretionary function exception, it is outside the purview of this Article and is only referenced as it relates to reasoning regarding immunity for nonmilitary matters.

109. Sometimes referred to as Government Contractor Immunity.

110. See Lawrence S. Sher, *The Government Contractor Defense: A Potential Shield Against Tort Liability For Service Contractors*, 22 No. 5 ANDREWS GOV'T CONT. LITIG. REP. 2, July 14, 2008.

111. 487 U.S. 500 (1988).

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

113. *Boyle*, 487 U.S. at 502. “State law is displaced where judgment against the contractor would threaten a discretionary function of the Government.” *Id.* at 501.

The Court looked to the FTCA and specifically the DFE as the statutory basis for determining that federal law would supersede if a significant conflict exists.<sup>114</sup> The Court specifically stated that selecting the “appropriate design for military equipment . . . is assuredly a discretionary function within the meaning of [28 U.S.C. section 2680(a)].”<sup>115</sup> The Court went on to say that allowing “state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption.”<sup>116</sup> The majority stated that even absent statutory authorization, federal law supersedes state tort law where there are “uniquely federal interests” at issue.<sup>117</sup>

The two interests invoked by the facts concerned the “obligations to and rights of the United States under its contracts”<sup>118</sup> and “the civil liability of federal officials for actions taken in the course of their duty.”<sup>119</sup> The Court said that even though the case concerns contractor tort liability, it arose from a federal contract and thus is sufficient to meet the first interest. The second interest was also invoked, despite the fact that a federal official was not directly involved in a role as an employee, because there is a common policy “interest in getting the Government’s work done.”<sup>120</sup> The Court identified that absent a government contractor defense, there would be adverse economic consequences to subjecting contractors to liability and a contractor’s exposure to state tort actions would conflict with federal interests—hence, the reason why some refer to this as the pre-emption doctrine. In other words, the government contractor defense, a species of federal common law, is invoked where there is a unique federal interest at stake and a significant conflict between federal policy and state law exists.<sup>121</sup>

Consequently, *Boyle* has been identified as possessing two separate tests: the “two-prong test to determine when state law should be displaced[,]”<sup>122</sup> as described in the preceding paragraph, “and a three-part test to determine the scope of displacement.”<sup>123</sup> The three-part test involved: “(1) the United States approved reasonably precise spec-

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114. *See id.* at 511.

115. *Id.* (“It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.”).

116. *Id.*

117. *Id.* at 504 (“state law is pre-empted and replaced, where necessary, by federal law”).

118. *Id.*

119. *Id.* at 505.

120. *Id.*

121. *Id.* at 507.

122. VIVIAN S. CHU & KATE M. MANUEL, CONG. RESEARCH SERV., R41755, TORT SUITS AGAINST FEDERAL CONTRACTORS: AN OVERVIEW OF THE LEGAL ISSUES (2011).

123. *Id.*

ifications; (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.”<sup>124</sup> The first two elements of the three-part test assure that the government is performing a discretionary function, invoking the DFE, and the third part ensures that the contractor conveys all necessary information to the governmental decision-maker.<sup>125</sup>

Some have viewed *Boyle* as extending absolute immunity associated with sovereign immunity derivatively to contractors.<sup>126</sup> The majority never referred to sovereign immunity, but instead chose to ground its decision as a matter of preemption. Justice Brennan, in his dissent, opined that the majority’s decision to shield a third party from liability, thereby denying the plaintiff the right to recovery under state law, should be left to Congress and not created through federal common law.<sup>127</sup>

Although *Boyle* did not directly relate its holding to the doctrine of sovereign immunity, other cases that have followed *Boyle* have mistakenly viewed it as extending sovereign immunity in military procurement contracts. This confusion is only compiled by the attempt of some courts to draw upon the reasoning of *Boyle* to extend immunity outside of the military procurement context to nonmilitary service contractors as well, but not without controversy and inconsistency.<sup>128</sup>

Extending some form of immunity to a contractor who provides a service through a performance contract is not new. In fact, it preexisted *Boyle*. In 1940, the Supreme Court extended immunity to a con-

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124. *Boyle*, 487 U.S. at 512. Liability for design defects in military equipment cannot be imposed on a contractor, when all three elements have been met. *Id.*

125. *See id.* at 512 (providing:

The first two of these conditions assure that the suit is within the area where the policy of the ‘discretionary function’ would be frustrated—*i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability.).

126. *See* Lawrence S. Sher, *The Government Contractor Defense: A Potential Shield Against Tort Liability For Service Contractors*, 22 No. 5 ANDREWS GOV’T CONT. LITIG. REP. 2, July 14, 2008 (“Thus, the court essentially extended the government’s sovereign immunity derivatively to contractors, recognizing that they perform discretionary functions for the United States.”).

127. *See Boyle*, 487 U.S. at 516 (Brennan, J., dissenting) (adeptly raising the political question doctrine and justiciability of extending immunity to an entity separate from the sovereign itself).

128. *See Carley v. Wheeled Coach*, 991 F.2d 1117, 1123 (3d Cir. 1993) (concluding that the government contractor defense was available to nonmilitary contractors regarding a design defect manufactured by the contractor pursuant to the government’s specifications).

tractor for a performance contract in *Yearsley v. W.A. Ross Construction Co.*<sup>129</sup> The opinion in *Boyle* not only references *Yearsley*, but states that, “[t]he federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction.”<sup>130</sup> The doctrinal difference between *Boyle* and *Yearsley* has proven to be particularly confusing for the courts and parties, including for the parties in *Campbell-Ewald Co.*<sup>131</sup>

Despite the seemingly natural extension of immunity under the government contractor defense to nonmilitary performance contracts, there is still disagreement among the federal circuits. Some circuits contend that *Boyle* only applies to military contractors<sup>132</sup> or relating to procurement contracts alone,<sup>133</sup> while others extend the government contractor defense to military contractors for both procurement and performance contracts.<sup>134</sup> Contrary to even these divisions, some courts have applied the government contractor defense and reasoning from *Boyle* to nonmilitary performance contracts as well.<sup>135</sup>

With the ruling in *Campbell-Ewald Co. v. Gomez*<sup>136</sup> and the subsequent clarification of the common law doctrine of derivative immunity, it is reasonable to anticipate that courts will refrain from extending *Boyle* beyond matters of preemption, but will continue to struggle with the scope of *Boyle* regarding whether it is limited to just matters involving military contractors and procurement contracts.

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129. 309 U.S. 18 (1940).

130. *Boyle*, 487 U.S. at 506.

131. See *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 879 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (Mem.) (2015), *aff'd*, 136 S. Ct. 663 (2016), *as revised*, (Feb. 9, 2016) (“Gomez contends that *Yearsley* is outdated and inapposite, and that the district court should have applied the standard articulated in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed.2d 442 (1988).”); see also *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204–07 (5th Cir. 2009).

132. See *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 731 (9th Cir. 2015) (stating that the government contractor defense applies only to military contractors).

133. See *In re Haw. Fed. Asbestos Cases*, 960 F.2d 806, 810–12 (9th Cir. 1992).

134. See *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1344 (11th Cir. 2003) (reasoning that a similar type of discretion in choosing design specifications exists in determining maintenance protocols as does in a procurement contract); *In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 461 (5th Cir. 2010) (involving the Army Corp of Engineers and a contractor that provided engineering, construction, and management services and who was sued for negligence).

135. See *Carley v. Wheeled Coach*, 991 F.2d 1117, 1128 (3d Cir. 1993); *Lamb v. Martin Marietta Energy Sys.*, 835 F. Supp. 959 (W.D. Ky. 1993); *O'Connor v. Boeing N. Am.*, No. CV 97–1554 DT (RCx), 2005 WL 6035255, at \*19 (C.D. Cal. Aug. 18, 2005); *Richland-Lexington Airport Dist. v. Atlas Props.*, 854 F. Supp. 400 (D.S.C. 1994); *Crawford v. Nat'l Lead Co.*, 784 F. Supp. 439, 445 n.7 (S.D. Ohio 1989); *Arnhold v. McDonnell Douglas Corp.*, 992 S.W.2d 346, 347–48 (Mo. Ct. App. 1999).

136. 136 S. Ct. 663 (2016).

## V. DERIVATIVE IMMUNITY

The government contractor defense is not the only means by which third party contractors have sought to avoid state civil liability. As it relates to nonmilitary service oriented contracts, some third party contractors have looked to what should now be referred to as derivative immunity.

Derivative immunity, or what some previous cases referred to as derivative sovereign immunity, has rarely been identified as a distinct doctrine. In the past, it was used as a means to describe the general circumstance of a third party claiming some form of immunity of a sovereign in response to a civil action. Though some courts recognized it as a distinct doctrine, others ruled that it was subsumed by *Boyle v. United Technologies Corp.*,<sup>137</sup> under the government contractor defense. Some circuits questioned whether derivative immunity even existed.<sup>138</sup> Although there has been significant confusion amongst the courts regarding what derivative immunity is, those private entities that have traditionally sought to utilize it as a distinct doctrine via a defense have relied upon *Yearsley v. W.A. Ross Construction Co.*<sup>139</sup> and traditional principles of agency theory. It has been practically described as a long shot defense by many who represent government contractors. With the Court's recent ruling in *Campbell-Ewald Co. v. Gomez*,<sup>140</sup> the defense of derivative immunity is much more viable and possibly opens the door for further extension of immunity.

## A. YEARSLEY V. W.A. ROSS CONSTRUCTION CO.

In *Yearsley v. W.A. Ross Construction Co.*,<sup>141</sup> a contractor had a contract with the United States government to construct dams along the Missouri River.<sup>142</sup> The contract was part of a federal project authorized by Congress.<sup>143</sup> The plaintiff in *Yearsley* sued the contractor for erosion caused by the dams' construction.<sup>144</sup> The United States Supreme Court held that the contractor was an agent of the government and thus entitled to the same immunity that the government itself enjoys unless the contractor exceeded its authority or was never

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137. 487 U.S. 500 (1988).

138. See *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) ("We have never upheld a claim of derivative sovereign immunity, although the theory has been presented to us on several occasions. We have, however, imposed a limitation on derivative sovereign immunity, if it in fact exists.").

139. 309 U.S. 18 (1940).

140. 136 S. Ct. 663 (2016).

141. 309 U.S. 18 (1940).

142. See *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 19-21 (1940).

143. *Yearsley*, 309 U.S. at 19-21.

144. *Id.*

conferred such authority.<sup>145</sup> *Yearsley* seems to have based its holding upon common agency principles. However, the Court never elaborated upon the relationship between the contractor and government; thus, it never ruled if there was an agent or if the contractor was acting within the scope of its agency. Regardless of this discrepancy, many have viewed *Yearsley* as allowing a third party contractor to avoid liability if authority was bestowed and the contractor did not exceed that authority. Despite certain restrictive components of the decision the Court's seeming reliance upon common agency theory shielded a nonmilitary contractor who was performing a service contract from liability.<sup>146</sup> However, *Yearsley* did not involve a state tort claim nor did the Court determine whether any immunity would apply. Despite the rather limited opinion of *Yearsley*, it is attributed with the origination of derivative immunity.<sup>147</sup>

Since *Yearsley*, only a few courts have distinguished the government contractor defense from the defense utilized in *Yearsley*, and only in varying degrees.<sup>148</sup> This could be in part due to the lack of explanation given by the Court in *Yearsley* or confusion as to where it fits among the conflicting theories of immunity. It is important to note that *Yearsley* predated the Federal Tort Claims Act<sup>149</sup> ("FTCA") and the progeny of cases that flowed from the FTCA. Though some courts have referenced *Yearsley* as supporting derivative sovereign immunity, the Court never mentioned immunity or sovereign immunity—let alone derivative sovereign immunity—in its opinion. This confusion is understandable given the amount of cases that have misapplied or attempted to reconcile conflicting theories surrounding the granting of immunity to contractors. In at least one unique case, a

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145. *Id.* at 21 ("Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.")

146. *Id.* A public works contractor could not be negligent in following government generated specifications, and an agency relationship exists.

147. See *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) ("The doctrine of derivative sovereign immunity had its origin in *Yearsley v. W.A. Ross Construction Co.*").

148. See *McMahon*, 502 F.3d at 1331; *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204–07 (5th Cir. 2009) (applying *Yearsley* for a public works project involving dredging); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (finding that a private contractor who followed commands of a foreign sovereign can claim derivative sovereign immunity as in *Yearsley*); *Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963) (applying *Yearsley* to property loss resulting from highway construction); *Papagianakis v. Samos*, 186 F.2d 257, 260–62 (4th Cir. 1950); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 1014 (5th Cir. 1969); *Conner v. Quality Coach, Inc.*, 750 A.2d 823, 829-30 (Pa. 2000).

149. 28 U.S.C. §§ 1346(b), 2671-2680.

court, relying upon *Barr v. Matteo*<sup>150</sup> and *Westfall v. Erwin*,<sup>151</sup> held that a government contractor and its employees were “absolutely immune from state tort liability based on any statements made and information given in response to queries made in the course of [an] Air Force[ ] investigation,”<sup>152</sup> thereby extending the common law immunity traditionally reserved for individual officials to a private contractor. Regardless of the past differences in opinion as to the scope of immunity under *Yearsley*, *Campbell-Ewald Co. v. Gomez*<sup>153</sup> can be said to have expounded on what was originally introduced so many years ago. Until *Campbell-Ewald Co.*, the Supreme Court had not explicitly addressed whether derivative immunity differed from the other immunity doctrines. Consequently, circuits have been divided over when federal contractors could claim immunity and the scope of that immunity.

*Yearsley* prompted many iterations of derivative immunity. The Court in *Yearsley* was the impetus for extending a common law immunity to a contractor, albeit concerning a constitutional tort. Can one extend some form of immunity to private contractors for state tort claims? Although this question has not fully been answered yet, the *Campbell-Ewald Co.* Court’s interpretation of *Yearsley* seems to have taken a step in that direction.

#### B. CAMPBELL-EWALD CO. V. GOMEZ

The United States Supreme Court’s recent decision in *Campbell-Ewald Co. v. Gomez*<sup>154</sup> not only lends support to the existence of deriv-

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150. 360 U.S. 564 (1959).

151. 484 U.S. 292 (1988).

152. *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996). An Air Force Colonel and his wife brought an action against a contractor for alleged torts. A private contractor answered questions via a government investigation, which prompted the plaintiff’s common law action for injury to their reputation. The contractor raised the defense of sovereign immunity, which the district court denied, but the appellate court reversed, stating a private contractor cannot be subject to state tort law regarding a governmental investigation. The court looked to *Barr v. Matteo* and *Westfall v. Erwin*, where absolute immunity was extended to individual federal officials regarding state tort actions where the official exercised discretion in performance of an act that was within the scope of his employment. The *Mangold* case drew upon the traditional absolute immunity reasoning of *Barr*, *Westfall*, and the reasoning behind the government contractor defense of *Boyle* to arrive at the conclusion that immunity from state tort action can be extended to private contractors who perform a discretionary governmental function. The court’s reliance upon these arguably different doctrines epitomizes the confusion regarding federal contractor liability. The court in *Mangold* made no mention of how close of a relationship a contractor must have with the government before they can invoke sovereign immunity. *Mangold*’s precedential value is limited and has not really been extended beyond the narrow set of circumstances regarding government investigations. *Mangold*, 77 F.3d at 1444-46.

153. 136 S. Ct. 663 (2016).

154. 136 S. Ct. 663 (2016).

ative immunity as a doctrine distinct from *Boyle v. United Technologies Corp.*,<sup>155</sup> but outlines when derivative immunity may be extended pursuant to common law agency principles. The Court specified in its ruling that a contractor is not entitled to derivative sovereign immunity merely because one is a government contractor.<sup>156</sup> However, the Court went on to distinguish between derivative sovereign immunity, which would be akin to the unqualified or absolute immunity of government, and that of derivative immunity for contractors that would be qualified.<sup>157</sup> *Campbell-Ewald Co.* has clarified the type of immunity available to private contractors regarding federal or constitutional claims and established a test for such claims based upon, at least in some part, agency principles as articulated in *Yearsley v. W.A. Ross Construction Co.*<sup>158</sup>

One of the issues in *Campbell-Ewald Co.*, and the least addressed, concerned the violation of the Telephone Consumer Protection Act<sup>159</sup> (“TCPA”) and whether immunity should be extended to a government contractor.<sup>160</sup> *Campbell-Ewald Co.* had a contract with the United States Navy to develop a recruiting campaign that included sending text messages to individuals in a targeted demographic who had opted-in to receive such soliciting messages. *Campbell-Ewald Co.* then contracted with MindMatics LLC, a subcontractor who generated a list of recipients who supposedly were within the Navy’s target audience and had opted-in to receiving said text messages.<sup>161</sup> Jose Gomez was one of over 100,000 to receive the Navy’s recruiting message. However, Gomez was forty years old (not within the Navy’s targeted age group) and allegedly did not consent to receive such marketing texts.<sup>162</sup>

Gomez brought a class action against *Campbell-Ewald Co.* for violation of the TCPA in the United States District Court for the Central District of California.<sup>163</sup> Neither the Navy nor MindMatics was named as a party to the suit.<sup>164</sup> The federal district court held that *Campbell-Ewald Co.* was acting as a Navy contractor and was therefore “immune from liability under the doctrine of derivative sovereign

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155. 487 U.S. 500 (1988).

156. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666 (2016).

157. *Campbell*, 136 S. Ct. at 672.

158. 309 U.S. 18 (1940).

159. 47 U.S.C. § 227 (2015).

160. *Campbell*, 136 S. Ct. at 666-67.

161. *Id.* at 667.

162. *Id.*

163. *Id.*

164. It is undisputed that the Navy enjoys absolute sovereign immunity. Although MindMatics was a subcontractor and the actual entity that dispatched the texts, under federal common law principles of agency, vicarious liability exists for TCPA violations.

immunity.”<sup>165</sup> The United States Court of Appeals for the Ninth Circuit reversed the district court’s grant of summary judgment and held that Campbell-Ewald Co. was not entitled to derivative immunity under *Yearsley*, *Filarsky v. Delia*,<sup>166</sup> or *Boyle*.<sup>167</sup> The Supreme Court, with Justice Ginsburg opining for the Court,<sup>168</sup> focused upon *Yearsley* and found that “[a] federal contractor who simply performs as directed by the Government may be shielded from liability for injuries caused by its conduct.”<sup>169</sup> However, “no ‘derivative immunity’ exists when the contractor has ‘exceeded [its] authority’ or its authority ‘was not validly conferred.’”<sup>170</sup> Consequently, Campbell-Ewald Co. was not entitled to immunity given that the contractor failed to follow “Government’s explicit instructions” and violated federal law.<sup>171</sup>

In the seventy-six years since *Yearsley*, derivative immunity was limited in scope—if it was even recognized at all. With the decision in *Campbell-Ewald Co.*, the Court indicated that derivative immunity should not be narrowly construed. The Court specifically criticized the Ninth Circuit for holding that the application of *Yearsley* applied only to cases involving property damage caused by public works projects.<sup>172</sup> *Campbell-Ewald Co.*, like *Yearsley*, involved a performance contract. Additionally, both cases involved claims of violations of federal and constitutional law respectively. The derivative immunity principle embodied by these cases is equivalent to a *Bivens* action for official immunity described above. Therefore, where a private contractor is confronted with a constitutional tort, derivative immunity may be available—as long as the contractor follows the directions of

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165. *Gomez v. Campbell-Ewald Co.*, No. CV 10-02007 DMG CWX, 2013 WL 655237, at \*6 (C.D. Cal. Feb. 22, 2013), *vacated*, 768 F.3d 871 (9th Cir. 2014), *aff’d*, 136 S. Ct. 663 (2016), *as revised*, (Feb. 9, 2016).

166. 132 S. Ct. 1657 (2012).

167. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 879-82 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015) (Mem.), *aff’d*, 136 S. Ct. 663 (2016), *as revised*, (Feb. 9, 2016).

168. Justices Kennedy, Breyer, Sotomayor, and Kagan joined in the majority opinion with Justice Thomas filing a concurring opinion in the judgment. Justice Roberts filed a dissenting opinion joined by Justice Scalia and Justice Alito who also filed a dissenting opinion. Justice Thomas’s concurring opinion does not address the issue of derivative immunity, nor do any of the dissenting opinions.

169. *Campbell-Ewald Co.*, 136 S. Ct. at 666 (citing *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 20-21 (1940)).

170. *Id.*

171. *Id.* (stating that Campbell-Ewald Co. failed to follow the Navy’s instructions by sending texts to someone who had not “opted-in” to receive such texts and violated federal law by not complying with the TCPA).

172. *See id.* at 673 n.7.

government, and does not violate federal law that he should be aware of.<sup>173</sup>

The Court was direct in stating that federal contractors do not share in government's unqualified immunity from liability.<sup>174</sup> However, the Court did recognize "that government contractors obtain certain immunity in connection with work they do pursuant to their contractual undertaking with the United States."<sup>175</sup> Although the Court found that contractors are not entitled to unqualified immunity, as is often denoted by derivative sovereign immunity, its reasoning reflects that a contractor would be able to claim qualified immunity, better described as derivative immunity.<sup>176</sup> In making this distinction in doctrine, the Court likened the qualified immunity that a governmental employee may enjoy under the code section titled the Civil Action for Deprivation of Rights<sup>177</sup> with that of a private service contractor.<sup>178</sup> In reaching this conclusion, the Court relied upon *Filarsky* where a private attorney was "temporarily retained by the government to carry out its work [and was found to be] entitled to seek qualified immunity from suit under [section] 1983."<sup>179</sup> As described previously in this article, section 1983 involves limiting state government officials' liability via qualified immunity arising out of constitutional violations.<sup>180</sup> The Court in *Campbell-Ewald Co.* adopted the reasoning of *Filarsky* and made no distinction between public employees and contracted private individuals performing a public service function—at least as it relates to violation of a federal statute or a constitutional right. The availability of qualified immunity versus absolute immunity further evidences that derivative immunity is a *Bivens* action defense for private contractors.

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173. *See id.* at 672 ("When a contractor violates both federal law and the Government's explicit instructions, as here alleged, no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation.").

174. *See id.* at 665-66 ("Unlike the United States and its agencies, federal contractors do not enjoy absolute immunity.").

175. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943).

176. *See Campbell-Ewald Co.*, 136 S. Ct. at 672. As indicated by the language used by the Court, what some have mistakenly referred to previously as derivative sovereign immunity is now best referenced as merely derivative immunity as it concerns private contractors. In making this point, the Court criticized *Campbell-Edwald Co.* for seeking derivative sovereign immunity and "offer[ing] no authority for the notion that private persons performing Government work acquire the Government's embrace immunity." *Id.*

177. 42 U.S.C. § 1983 (1996).

178. *See Campbell-Ewald Co.*, 136 S. Ct. at 673.

179. *Filarsky v. Delia*, 132 S. Ct. 1657, 1658 (2012) (extending qualified immunity to a private contractor hired by a municipal government in response to constitutional violations brought pursuant to 42 U.S.C. § 1983).

180. 42 U.S.C. § 1983 actions have been likened to *Bivens* actions in the federal context and, thus, their reasoning is reflective.

Qualified immunity, like absolute immunity, has traditionally been deemed to mean immunity from suit, and thus, a denial of such by the trial court at the outset of litigation is immediately appealable.<sup>181</sup> Unlike absolute immunity, “[q]ualified immunity may be overcome . . . if the defendant knew or should have known that his conduct violated a right ‘clearly established’ at the time of the episode in suit.”<sup>182</sup> Given that the case on appeal arose from a motion for summary judgment, the Court in *Campbell-Ewald Co.* did not directly address the question of whether similar cases against contractors for federal law violations enjoy immunity from suit at the outset of litigation. However, in *Adkisson v. Jacobs Engineering Group, Inc.*,<sup>183</sup> the United States Court of Appeals for the Sixth Circuit concluded that “*Yearsley* immunity is not jurisdictional in nature.”<sup>184</sup> Although *Adkisson* preceded *Campbell-Ewald Co.* by a few months, its reasoning on this point is instructive.<sup>185</sup> *Campbell-Ewald Co.* made it clear that this was not a case of derivative sovereign immunity; thus, it may be difficult to dismiss a case under *Campbell-Ewald Co.* for subject matter jurisdiction. Moreover, a party can remove a matter originally filed in state court where, as in *Campbell-Ewald Co.*, a contractor has violated a federal statute or constitutional right. Further, if a private contractor seeks derivative immunity from a state tort brought in a state court, it is unlikely that the contractor would be able to remove to a federal district court.<sup>186</sup>

In extending qualified immunity to contractors instead of absolute immunity under the FTCA, there is a question as to whether there should be some act of discretion, even if such is often assumed, on the part of the party seeking to avail itself of qualified immunity.<sup>187</sup> The Court explained in *Westfall v. Erwin*,<sup>188</sup> that an employee would enjoy the same protection as the sovereign where the employee exercises discretionary decision-making, thus protecting the

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181. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (“The entitlement is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.”).

182. *Campbell-Ewald Co.*, 136 S. Ct. at 673 (quoting *Filarsky*, 132 S. Ct. at 1668).

183. 790 F.3d 641 (6th Cir. 2015).

184. *Adkisson v. Jacobs Eng’g Grp., Inc.*, 790 F.3d 641, 645 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 980 (2016).

185. *Adkisson*, 790 F.3d at 647 (“*Yearsley* immunity is, in our opinion, closer in nature to qualified immunity for private individuals under government contract, which is an issue to be reviewed on the merits rather than for jurisdiction.”).

186. This would only be applicable if *Yearsley* and *Campbell-Ewald Co.* can be extended to claims other than constitutional torts.

187. See *Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (identifying the need for a party claiming qualified immunity to exercise discretionary functions); *but see Filarsky*, 132 S. Ct. at 1667 (dismissing *Wyatt* and not expounding upon the need for a party claiming qualified immunity to exercise discretion).

188. 484 U.S. 292 (1988).

decision-making process not the individual.<sup>189</sup> The presence of discretionary action has been suggested in the past relating to the application of qualified immunity to officials in a *Bivens* action, but this element was not addressed by *Yearsley* or *Campbell-Ewald Co.*<sup>190</sup> Any discretionary act on the part of a contractor would be contrary to the agency principles introduced in *Yearsley* and *Campbell-Ewald Co.* The Court in *Campbell-Ewald Co.* did not address whether discretion was necessary or if discretion was even part of the test. This makes it difficult to reconcile the traditional instances from which qualified immunity has been extended in the past. Too much discretion on the part of a contractor or agent means he is acting without the close direction of and possibly outside the scope of his authority. In dropping the requirement of exercising discretion on the part of the party claiming qualified immunity, the Court may have set forth down the path of creating a common law means of extending qualified immunity to federal contractors that is distinguishable from the traditional notions of qualified immunity of government officials.

“Where the Government’s ‘authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress . . . there is no liability on the part of the contractor’ who simply performed as the Government directed.”<sup>191</sup> The Court went on to state that “[a] federal contractor who simply performs as directed by the Government may be shielded from liability for injuries caused by its conduct.”<sup>192</sup> The Court essentially laid out the test for derivative immunity according to what was originally articulated in *Yearsley*. A contractor would be able to claim derivative immunity as long as its authority was validly conferred and the contractor has not “exceeded [its] authority.”<sup>193</sup> Thus, *Campbell-Ewald Co.* evidences a three part test to determine whether a private third party contractor would enjoy qualified immunity: 1) Government has to have the constitutional right to confer authority, 2) Government actually granted authority to the contractor, and 3) the contractor did not exceed its authority by complying with Government direction.

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189. See *Westfall v. Erwin*, 484 U.S. 292, 295 (1988) (“The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits.”).

190. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

191. *Campbell-Ewald Co.*, 136 S. Ct. at 665 (citing *Yearsley*, 309 U.S. at 20–21).

192. *Id.* at 666.

193. *Id.*

This test cannot be met where a contractor has violated federal law or not followed the government's explicit instructions.<sup>194</sup>

It is evident that the Court drew upon multiple doctrines of immunity in crafting derivative immunity. It borrowed qualified immunity from official immunity relating to actions of federal statutory or constitutional harm, the ability to extend immunity to contractors under *Yearsley* and *Filarsky*, the agency principles of *Yearsley*, and justified its decision for the same reasons stated in *Boyle* under the government contractor defense. In the end, *Campbell-Ewald Co.* has reaffirmed a common law defense of derivative immunity or *Yearsley* immunity. Derivative immunity may best be described as the defense available in a *Bivens* action against a private federal contractor. This is a defense that exists separate and distinct from the government contractor defense of *Boyle* and that of official immunity. *Campbell-Ewald Co.* has shown that derivative immunity is available to private contractors for claims involving federal statutory or constitutional harms and for all types of performance contracts as long as authority exists and the contractor complies with the instructions of government and federal law.

### C. REACH OF DERIVATIVE IMMUNITY

Whether *Campbell-Ewald Co. v. Gomez*<sup>195</sup> reaffirmed or expanded upon *Yearsley v. W.A. Ross Construction Co.*,<sup>196</sup> we have been left with a clearer understanding of when a federal private contractor may claim derivative immunity in response to a constitutional tort. However, post-*Yearsley* jurisprudence has been left to conjecture. What follows is a discussion of those conditions that would affect the reach of derivative immunity specifically, and those circumstances that could affect a private contractor's ability to claim immunity generally.

In *Campbell-Ewald Co.* and *Yearsley*, the Court placed no limiting factors upon the type of contract that is entered into or the type of claim that can be brought. Neither case involved a state tort action brought against a government contractor for performance. Instead, both addressed situations where a constitutional tort was claimed. It is possible that future courts may encounter cases whereby the contractor is sued via a state cause of action and then have to decide whether derivative immunity is applicable.<sup>197</sup> Additionally, both

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194. *Id.* ("When a contractor violates both federal law and the Government's explicit instructions, as alleged here, no immunity shields the contractor from suit.")

195. 136 S. Ct. 663 (2016).

196. 309 U.S. 18 (1940).

197. Actions against federal contractors for common law negligence may constitute exceeding one's authority under *Yearsley*.

cases involved federal contractors who were performing a service versus providing a good through a procurement contract. In theory, derivative immunity could apply in both, contracts for performance or procurement. Additionally, *Yearsley* did not involve a contract with the military, while *Campbell-Ewald Co.* did involve a contract with the Navy. Likewise, neither opinion mentions this as a distinguishing facet of finding derivative immunity. However, if the Court wishes to limit this common law doctrine in the future, it could, under the same terms, expand upon the doctrine.

One of issues resulting from *Yearsley* that remains unaddressed by *Campbell-Ewald Co.* concerns how close a relationship must exist between the contractor and the sovereign or one of its agencies.<sup>198</sup> If one adopts the position that the extension of immunity should follow common law agency principles, which was similar to the Supreme Court's reasoning in *Yearsley*, then a defined relationship must exist.<sup>199</sup> However, neither *Yearsley* nor *Campbell-Ewald Co.* extensively described what kind of relationship is necessary between a contractor and government.<sup>200</sup> In light of *Yearsley* specifying that a contractor would still be liable if it exceeds its authority, a common law agency principle, it stands to reason that a contractor must derive authority to act.<sup>201</sup> However, as indicated above, case law supports the theory that immunity is determined by the "nature of the *function* being performed and not by the office or the position of the particular employee involved."<sup>202</sup> This grant of authority is most evident in the existence of an actual contract between the principal/sovereign and that of the agent/contractor. However, there is little precedent to draw upon to suggest an explicit grant of authority in the form of an actual contract is required.<sup>203</sup>

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198. See *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 22 (1940) (citing *United States v. Lynah*, 188 U.S. 445 (1903) ("The action of the agent is 'the act of the government.'"); *Conner v. Quality Coach, Inc.*, 750 A.2d 823, 830 (Pa. 2000) ("Apparently by virtue of its reliance upon . . . [agency principles], *Yearsley* has been read as supporting an extension of the federal government's sovereign immunity.").

199. *But see Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204 (5th Cir. 2009) ("[W]e have never held that *Yearsley* requires a common-law agency relationship between the government and a contractor.").

200. See *Ackerson*, 589 F.3d at 206 (listing cases where *Yearsley* was applied, but no agency analysis was done).

201. See *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) ("[T]o make out a claim of derivative sovereign immunity in this circuit, the entity claiming the immunity must at a bare minimum have been a common law agent of the government at the time of the conduct underlying the lawsuit."); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1015 (5th Cir. 1969) (stating an entity claiming derivative sovereign immunity must be a common law agent).

202. *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447 (4th Cir. 1996).

203. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988); *United States v. Small Bus. Admin.*, 807 F. Supp. 675 (D. Colo. 1992) (noting how a construction subcon-

The scope of authority that a contractor enjoys should not exceed the function that it was contracted to perform.<sup>204</sup> A contractor exceeds its authority and cannot claim derivative immunity when the contractor violates federal law,<sup>205</sup> or it deviates from the government's "clearly established" instructions.<sup>206</sup> The Court held that qualified immunity would not be available if the defendant contractor "knew or should have known that his conduct violated a right 'clearly established' at the time of the episode in suit."<sup>207</sup> Therefore, if *Campbell-Ewald Co.* could claim it was not aware of the Telephone Consumer Protection Act<sup>208</sup> ("TCPA") requirements or the Navy's instructions, then it may be able to assert derivative immunity. This effectively places the burden upon the contractor to be aware of the law and any other specifications by government at any time of the contract. However, *Campbell-Ewald Co.* does not directly explain whether a contractor accused of a state common law tort, like negligence, would constitute exceeding the scope of the contractor's authority.<sup>209</sup>

Private government contractors appear to be able to assert immunity in three contexts. First, they can assert derivative immunity when a contractor is providing a service that gives rise to a constitutional tort claim. Second, they can assert the government contractor defense as described in *Boyle v. United Technologies Corp.*,<sup>210</sup> where a contractor has an agreement involving procurement with the military. Third, and the least transparent, is a possible scenario where the government's control and influence over the contractor makes both entities so closely related that the contractor could be viewed as an instrumentality of government under the Federal Torts Claims Act<sup>211</sup> ("FTCA").

Some argue that extending immunity beyond the original concept of sovereign immunity is unwise, despite the government interests at

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tractor who had a contract with the general contractor, but not the federal government directly, could not claim it was sovereignly immune).

204. See *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (quoting *Mangold*, 77 F.3d at 4148) ("[C]ourts have extended derivative immunity to private contractors, 'particularly in light of the government's unquestioned need to delegate governmental functions.'").

205. *Yearsley* involved a takings matter pursuant to the Fifth Amendment of the United States Constitution and *Campbell-Ewald Co.* concerned the TCPA.

206. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016).

207. *Campbell-Ewald Co.*, 136 S. Ct. at 673.

208. 47 U.S.C. § 227.

209. See *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 582 (1943) ("[A]gent's right of exoneration or indemnity has not been thought to extend to situations where his liability was based on his own fault.").

210. 487 U.S. 500 (1988).

211. 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680.

stake.<sup>212</sup> Others argue it is necessary to accomplish the ends of government and is a logical continuation of the Court's prior reasoning. The fact remains that these forms of derivative immunity exist and the extent of their scope is increasing. The Court's reluctance to give a more detailed explanation of the parameters of derivative immunity indicates at least a general inclination or knowledge by the Court that this doctrine will continuously be expanding. This is further evidenced by the fact that the traditionally liberal Justices, who generated and joined in the majority opinion, seem in agreement with the more conservative side of the Court who did not challenge the majority's reasoning on the issue of derivative immunity.

Few cases since *Yearsley* mention the defense of derivative immunity as a viable doctrine, until *Campbell-Ewald Co.* The circuits have been divided upon the reach and even existence of derivative immunity until recently. With the Court's most recent holding, derivative immunity is determined to not only exist as a distinct common law defense, but also have a greater reach than what was traditionally contemplated. The same question raised by many in the past remains, is immunity being extended too far?

## VI. PHILOSOPHICAL CONSIDERATIONS OF IMMUNITY

The amorphous beginnings and the constant debate that has ensued over immunity can be traced to the philosophical underpinnings of sovereign immunity itself. Where there is immunity from suit, there will be injured parties who will not be able to seek redress for their harms. Therefore, the citizenry must bear the risk in the functioning of government.<sup>213</sup>

The law constantly seeks balance. An example of this measuring is evident in the general doctrine of sovereign immunity. Courts must weigh the interest of an injured party seeking relief with that of the greater public good often described in many forms: protecting the public treasury, ensuring government's ability to enter into future contracts, etc. This balance has proven to be precarious and at times

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212. See K. Florey, *Sovereign Immunity's Penumbra: Common Law, Accident, and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 767 (2008) (suggesting that sovereign immunity is being extended beyond its traditional parameters, thus creating a "penumbral" of immunity or a "zone of safety" around a sovereign).

213. See Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924) ("Yet it requires but a slight appreciation of the facts to realize that in Anglo-American law the individual citizen is left to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State's functions, an unjust burden which is becoming graver and more frequent as the Government's activities become more diversified and as we leave to administrative officers in even greater degree the determination of the legal relations of the individual citizen.").

inconsistent given the reasoning the deciding court adopts amongst the variety of instances immunity has been applied in the past. However, this unstable equilibrium that has been preserved as a common law doctrine teeters even more precariously when immunity is extended to private entities.

A conversation regarding the extension of immunity begins with understanding the basic ideologies associated with immunity. We can generalize two sides of this discussion. On one side, there is the interest of the one or the few whose advocates argue that it is an injustice even if one person cannot seek relief from a wrong not of his own cause. On the other side, the interest of government whose advocates argue that in certain circumstances, the interests of the one or few must give way to the interests of the many from whom government represents. These opposing views are representative of two commonly recognized philosophies: deontology and consequentialism. Respectively, both are characterized as broad ethical systems: deontology suggests *the means justify the ends*, and consequentialism proposes that *the ends justify the means*.

Deontology emphasizes the means that produce an outcome, and that certain actions are immoral or wrong and therefore should not be taken. Deontology presupposes the existence of a *universal moral truth* from which all actions should comport. Consequentialism focuses upon the outcome of an action, and such should lead to the maximization of happiness for the whole. Consequentialism is premised upon the idea that actions that lead to an outcome maximizing the greater good are predictable, and an action should be judged by the ultimate outcome. However, it is impossible to predict a consistent outcome based upon an action, thus making the ends erroneous, and the only constant is whether the course of action taken is considered right.

Therefore, reasoning that sovereign immunity is justified to protect the majority at the cost of the individual or few follows the philosophy of consequentialism, while reasoning that the individual or few should be able to seek relief from the sovereign is supportive of deontology. As just described, neither is without drawbacks. To recognize the interests of the injured plaintiff may not accomplish the most appropriate outcome of justice or the functioning of the system of governance in its entirety. However, denying relief to an injured plaintiff may not in fact further the validations given to sovereign immunity and instead act as a means of justifying the otherwise immoral act of denying recourse to an injured party.

Regardless of the philosophical outlook one adopts, the balance of an individual's right to recovery and the more nebulous interests of

the greater public good is the central issue in determining whether to extend this immunity to private third parties. Since the focus of this Article is narrow and concerns the extension of federal immunity to private third parties, there is little need to address the common rationales given for sovereign immunity as a general doctrine—for it has been a topic well explored by others. Instead, emphasis is placed upon exploring the justifications for and against extending immunity to private entities and to individual officials from which derivative immunity evolved.

#### A. JUSTIFICATION FOR CONTRACTOR IMMUNITY

Parties who act in the government's interest have consistently been deemed worthy to protect, not out of interest of the decision-maker, but in order to protect the policy interest of government. As to what government interest is furthered has often been articulated in only a general context.

As it relates to federal employees, Judge Learned Hand reasoned that it is better to insulate officials from suit for the decisions they make even if such comes at the cost of an unredressed harm.<sup>214</sup> Insulating government employees who are engaged in the public interest ensures they will not hesitate to perform their duties or suffer “unwarranted timidity” in the performance of their duties.<sup>215</sup> Immunizing these employees encourages talented and qualified candidates to apply for work in government service.<sup>216</sup> Granting immunity to government officials early on in litigation further insulates them from the distractions associated with being involved in a lawsuit.<sup>217</sup>

Private individuals temporarily engaged in public service have also been extended immunity under similar, if not generally the same, theories as full-time employees, in that such private individuals would be otherwise timid in carrying out the public's business.<sup>218</sup> The Court reasoned that such protection is necessary to encourage individuals possessing “specialized knowledge or expertise” to work for government.<sup>219</sup> Contracted private individuals and business entities aptly

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214. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

215. See *Richardson v. McKnight*, 521 U.S. 399, 409 (1997).

216. *Richardson*, 521 U.S. at 408.

217. *Filarsky v. Delia*, 132 S. Ct. 1657, 1659 (2012).

218. *Filarsky*, 132 S. Ct. at 1659 (citing *Richardson*, 521 U.S. at 409) (“[T]he government interest in avoiding ‘unwarranted timidity’ on the part of those engaged in the public's business—which has been called ‘the most important special government immunity-producing concern,’—is equally implicated regardless of whether the individual sued as a state actor works for the government full-time or on some other basis.”).

219. See *id.* (“The government, in need of specialized knowledge or expertise, may look outside its permanent workforce to secure the services of private individuals. But because those individuals are free to choose other work that would not expose them to

cite to similar justifications given in matters involving full-time officials.

Furthermore, the Court has utilized the same rationale for extending immunity to private contracting entities for procurement and performance contracts.<sup>220</sup> As it relates to the government contractor defense of *Boyle v. United Technologies Corp.*,<sup>221</sup> the Court emphasized that the federal interest of procuring equipment was at stake and that permitting liability of government contractors would “affect the terms of Government contracts[.]”<sup>222</sup> *Boyle* specifically states that it did not rely upon the doctrine of official immunity, but references such to illustrate “that the liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest.”<sup>223</sup> In more general terms, to accomplish government’s objective of getting work done, private contractors should enjoy some immunity. The Court in *Campbell-Ewald Co. v. Gomez*<sup>224</sup> also relied upon an analysis of private individuals contracted by government to explain the type of immunity private contractors would enjoy where such a contractor is sued for violating federal law. The Court succinctly stated that, “[q]ualified immunity reduces the risk that contractors will shy away from government work.”<sup>225</sup> This reasoning parallels what the courts have looked to in the many contexts from which immunity has been extended previously.

Proponents of extending immunity to private contracting entities seem to agree that it ultimately protects government itself through limiting its costs of doing business with third parties and preserves the willingness of third parties to enter into contracts with government.<sup>226</sup> This broad justification is rooted in the basic reasoning of sovereign immunity itself.

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liability for government actions, the most talented candidates might decline public engagements if they did not receive the same immunity enjoyed by their public employee counterparts.”).

220. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988) (“The federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction.”).

221. 487 U.S. 500 (1988).

222. *Boyle*, 487 U.S. at 507 (“The 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.”).

223. *Id.* at 532 n.1.

224. 136 S. Ct. 663 (2016).

225. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016).

226. See *Butters v. Vance Int’l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (“Imposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work.”).

## B. POLICY CONSIDERATIONS FOR DERIVATIVE IMMUNITY

Justice Holmes justified sovereign immunity “on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”<sup>227</sup> This rationale shifts a significant burden to the populous regarding risk. Thus, in any organized society, which embraces any form of immunity, individual risk is inevitable. Much of the same rationale for justifying immunity for the sovereign can be applied to affiliated private entities performing governmental functions. However, in doing so, these contractors are avoiding risk themselves and subsequently shifting even more risk on to the individuals in society. The risk to the individual must be weighed with the “public interest in efficient government.”<sup>228</sup> For government to be effective, it must delegate certain governmental functions to the private sector.<sup>229</sup> As it relates to contractors, the United States Court of Appeals for the Fourth Circuit in *Mangold v. Analytic Services Inc.*<sup>230</sup> stated that the “public interest in efficient government outweighs the costs of granting such immunity.”<sup>231</sup> Therefore, one can argue that it is in the public interest to promote public sector delegation through the expansion of immunity to contractors of a sovereign.<sup>232</sup>

Extending immunity to contractors would, in theory, encourage private sector involvement in bidding on contracts, thereby increasing competition. As stated previously, contractors of sovereign entities who can anticipate being immune from certain actions would be more cost effective.<sup>233</sup> The decrease in potential liability should translate into lower bids. Subsequently, without some insulation through immunity, a service or product may be unavailable to the government or, if available, at a higher price point.

Policy dictates that everyone is subject to the law of the land and liable for his or her individual harm. Immunity by reason of a close

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227. *Kawananakoa v. Plyblank*, 205 U.S. 349, 353 (1907).

228. *Mangold v. Analytic Serv., Inc.*, 77 F.3d 1442, 1447 (4th Cir. 1996).

229. *See Mangold*, 77 F.3d at 1448 (noting the “unquestioned need to delegate governmental functions.”).

230. 77 F.3d 1442 (1996).

231. *Mangold*, 77 F.3d at 1447.

232. *See* John L. Grayson, *Derivative Sovereign Immunity: An Idea Whose Time Has Come For Texas?*, CONSTRUCTION LAW JOURNAL, May 22, 2014, [http://cbylaw.com/media/files/Article/666cc668/derivative\\_sovereign\\_immunity.pdf](http://cbylaw.com/media/files/Article/666cc668/derivative_sovereign_immunity.pdf).

233. *See* *Conner v. Quality Coach, Inc.*, 750 A.2d 823, 826 (Pa. 2000) (“ensures that contractors carrying out the discretionary decisions of the Commonwealth are not unjustly subject to liability; encourages contractors to participate in the competitive bidding process for government work without inflating their bids for fear of future litigation; and prevents judicial inquiry into the merits of discretionary political judgments, such as are involved in the funding or procuring of products for use in the performance of government functions.”).

relationship or contractual relationship with a sovereign is a perversion of common law that limits the rights of the private claimant. “The withdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants.”<sup>234</sup> As indicated previously in this Article, there are instances from which, unless a claimant can recover from the private contractor, they could be denied any recovery due to the substitution of government and its privilege of sovereign immunity.

Extending immunity has the direct impact of denying recovery to even more plaintiffs. The burden is shifted to the individual for the purpose of the greater good. Therefore, a balance must be made between the potential harm done to the plaintiff and the interest of the sovereign to effectuate government.<sup>235</sup> The follow-up fear of not limiting the extension of immunity is that it is a slippery slope and eventually what is currently qualified as being within government’s interest (i.e. contracting with private entities) could be further extended beyond reasonable bounds. This fear, though not unrealistic, must be tempered by the current reasoning of the courts and the existing posture of the theories of immunity. This is evidenced by the fact that it took approximately seventy-six years for the Court to expound upon *Yearsley v. W.A. Ross Construction Co.*<sup>236</sup> in *Campbell-Ewald Co.* Moreover, the holding in *Campbell* is limited to constitutional torts by contractors. Courts have continually viewed the overextension of immunity with skepticism.

With the Court’s holding in *Campbell*, the contractor does bear the burden of following the instructions of government and making itself aware of federal law. However, government must be diligent in giving its instructions and exercising its discretion. Although the instrumentalities and officials enjoy immunity presently, some have suggested that increased accountability of officials could provide greater efficiency and a remedy for the injured.

Courts have also reasoned that it is unfair to hold government immune for acts and not a private party under contract with government for the same acts.<sup>237</sup> As a matter of equity, why should one party (contractor) not enjoy the privileges of immunity if its actions

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234. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 581 (1943).

235. *See Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 175 (2d Cir. 2006) (citing *Doe v. McMillan*, 412 U.S. 306, 320 (1973)) (“[I]mmunity is appropriate only when ‘the contributions of immunity to effective government . . . outweigh the . . . harm to individual citizens.’”).

236. 309 U.S. 18 (1940).

237. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (“It 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.”).

are governed by a principal (government)? Where a contractor is performing a function the sovereign would otherwise have to perform itself, it is unfair to permit the sovereign to claim immunity, but not the contractor. Some look to the motivation of contractors. Contractors are motivated by profits, which arguably conflicts with the motivations of a sovereign. Based upon this conflict of inherent interests, it is argued that a private entity should not enjoy the same protections as a sovereign regardless of the greater governmental benefits.

## VII. CONCLUSION

Though one may argue derivative immunity is contrary to traditional notions of justice, it is an apparent necessity for the functioning of an effective government. Despite all of the public works government is involved in, it cannot, nor should it be expected to do everything without help from the private sector. If time has taught us anything, government is not suited for all projects. Therefore, the sovereign must utilize private contractors to assist in the sovereign's work. In light of the rapid evolution of technology and government's ever broadening reliance upon private contractors, the parameters of third party immunity will continue to be tested. The Court's recent decision in *Campbell-Ewald Co. v. Gomez*<sup>238</sup> confirmed the extension of immunity to private contractors regarding constitutional tort claims. This is merely one of many instances from which immunity may be extended. Given the needs of government, it is unlikely to be the last.

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238. 136 S. Ct. 663 (2016).