



2006

Post-Katrina Reconstruction Liability: Exposing the Inferior Risk-Bearer

Steven L. Schooner

George Washington University Law School, sschooner@law.gwu.edu

Erin Siuda-Pfeffer

Follow this and additional works at: http://scholarship.law.gwu.edu/faculty_publications

 Part of the [Government Contracts Commons](#)

Recommended Citation

43 *Harvard Journal on Legislation* 287-327 (2006)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

POST-KATRINA RECONSTRUCTION LIABILITY: EXPOSING THE INFERIOR RISK-BEARER

STEVEN L. SCHOONER^{*}
ERIN SIUDA-PFEFFER^{**}

I. INTRODUCTION: EXPOSING THIRD PARTIES TO HARM

In this young century, both the September 11, 2001 terrorist attacks and Hurricane Katrina have graphically reminded Americans that they do not live in a perfect world. The aftermath of both events continues to weigh heavily upon the public and dramatically affect the nation's fiscal outlook. Moreover, the two events demonstrate that unanticipated crises such as these -- and the responses to them -- can cause unimaginable destruction and injury¹

^{*} Associate Professor and Co-Director of the Government Procurement Law Program, George Washington University Law School; B.A., Rice University, 1982; J.D., College of William & Mary, Marshall-Wythe School of Law, 1985; LL.M., George Washington University Law School, 1989. This Article derives from testimony given at a hearing before the Subcommittee on Superfund and Waste Management of the United States Senate Committee on Environment and Public Works in November 2005. The authors thank John Duffy, Kathryn Kelly, Frederick Lawrence, Richard Pierce, Heidi Schooner, and Sonia Suter for their helpful comments, acknowledge the generous support of the Seymour Herman Faculty Research Fund in Government Procurement Law, and note that last year marked the passing of John Cibinic (1930 – 2005), who left behind a remarkable legacy in the literature, pedagogy, and practice of government contract law. *See generally* 35 PUB. CONT. L.J. 3 (2005); 47 GOV'T CONTRACTOR ¶ 332 (2005); CONT. MGMT., Oct. 2005, at 70; and PROC. LAW., Fall 2005, at 20.

^{**} B.A., Amherst College, 2001; J.D., George Washington University Law School, 2006.

¹ *See, e.g.*, GOV'T ACCOUNTABILITY OFFICE, GAO-04-1068T, SEPTEMBER 11: HEALTH EFFECTS IN THE AFTERMATH OF THE WORLD TRADE CENTER ATTACK 1 (2004), *available at* <http://www.gao.gov/new.items/d041068t.pdf> [hereinafter GAO, WTC HEALTH EFFECTS] (“When the [World Trade Center] buildings collapsed on [September 11], nearly 3,000 people died and an estimated 250,000 to 400,000 people were immediately exposed to a mixture of dust, debris, smoke, and various chemicals.”); GOV'T ACCOUNTABILITY OFFICE, GAO-05-1053T, HURRICANE KATRINA: PROVIDING OVERSIGHT OF THE NATION'S PREPAREDNESS, RESPONSE, AND RECOVERY ACTIVITIES 1 (2005), *available at* <http://www.gao.gov/new.items/d051053t.pdf>. (“[Hurricane Katrina] affected over a half million people [S]tanding water and high temperatures have created a breeding

as well as impose tremendous financial burdens on society.² As all levels of government in the United States increasingly rely on the private sector to provide essential services to the public,³ post-disaster recovery efforts have come to involve a progressively larger pool of

ground for disease Hurricane Katrina also resulted in environmental challenges, such as water and sediment contamination from toxic materials released into the floodwaters.”).

² See, e.g., GOV’T ACCOUNTABILITY OFFICE, GAO-06-461R, AGENCY MANAGEMENT OF CONTRACTORS RESPONDING TO HURRICANES KATRINA AND RITA 1 (2006), available at <http://www.gao.gov/new.items/d06461r.pdf> [hereinafter GAO, AGENCY MANAGEMENT OF KATRINA CONTRACTORS] (“Congress has appropriated over \$62 billion as an initial commitment . . . to the Gulf Coast states impacted by the . . . hurricanes.”). These costs are dwarfed by the costs associated -- directly and indirectly -- with the September 11th attacks on New York City and Washington, D.C. Congress initially appropriated \$40 billion to assist with disaster recovery. 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220. Shortly thereafter, it supplemented this amount with an open-ended appropriation for the establishment of the Victim Compensation Fund. See September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42 § 406(b), 115 Stat. 230, 240 (codified at 49 U.S.C. § 40101 note (Supp. II 2002)). Indirect costs include, among other things, forgone federal taxes, see Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (codified in scattered sections of 26 U.S.C. and other titles), and lost state and city revenue, see GOV’T ACCOUNTABILITY OFFICE, GAO-05-269, SEPTEMBER 11: RECENT ESTIMATES OF FISCAL IMPACT OF 2001 TERRORIST ATTACK ON NEW YORK (2005), available at <http://www.gao.gov/new.items/d05269.pdf>.

³ New Public Management (NPM), which gained hold in the United States in the mid-1990s under the moniker “reinventing government,” is a movement to transform the public sector. For the two works that are largely responsible for popularizing “reinvention” principles in this country, see generally AL GORE & NAT’L PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993), and DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR FROM SCHOOLHOUSE TO STATE HOUSE, CITY HALL TO PENTAGON (1992). NPM seeks to apply traditionally private sector business techniques to the provision of public services and to thereby enable government to provide such services with greater productivity and efficiency. See Jamil E. Jreisat, *The New Public Management and Reform*, in HANDBOOK OF PUBLIC MANAGEMENT PRACTICE AND REFORM 539, 541 - 42 (Kuotsai Tom Liou ed., 2001). Proponents of NPM advocate increased privatization and the “contracting out” of government services. See GRAEME A. HODGE, PRIVATIZATION: AN INTERNATIONAL REVIEW OF PERFORMANCE 40 (1999); see also Robert B. Denhardt & Janet Vinaznt Denhardt, *The New Public Service: Serving Rather Than Steering*, 60 PUB. ADMIN. REV. 549 (2000); E. S. Savas, *Privatization and the New Public Management*, 28 FORDHAM URB. L.J. 1731, 1731 - 32 (2001) (providing several examples of privatization -- both domestic and international -- ranging

contractual arrangements,⁴ many hastily drafted and poorly managed.⁵ As was graphically demonstrated at Ground Zero of the World Trade Center attacks, when the government and its contractors rush to respond, those who physically carry out the response bear the consequences of their haste. Many individuals who selflessly assisted at the World Trade Center site were badly injured.⁶ Many anticipate that relief workers will be subjected to a similar level of harm in the wake of Hurricane Katrina.⁷

The risks faced by disaster area residents and relief workers can only be exacerbated when the parties who can best alleviate such risks fail to act responsibly and when the law fails to otherwise hold them accountable. The doctrine of sovereign immunity limits the *government's* legal liability for harms related to disaster relief,⁸ and, through the

from the protection of North Atlantic salmon to the renovation of military housing).

⁴ See GAO, AGENCY MANAGEMENT OF KATRINA CONTRACTORS, *supra* note 2, at 1 (“The private sector is an important partner with the government in responding to and recovering from natural disasters [S]uch partnerships increasingly underlie critical government operations.”).

⁵ See *id.* at 2 – 4 (reporting that government contracts awarded in the wake of Hurricanes Katrina and Rita suffered from inadequate planning, did not clearly communicate responsibilities, and did not sufficiently utilize oversight personnel).

⁶ See generally Ctrs. for Disease Control & Prevention, *Physical Health Status of World Trade Center Rescue and Recovery Workers and Volunteers – New York City, July 2002 - August 2004*, 53 MORBIDITY & MORTALITY WKLY. REP. 807 (2004), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5335.pdf> [hereinafter *MMWR Report*].

⁷ See, e.g., 151 CONG. REC. H10235, 40 – 42 (daily ed. Nov. 16, 2005) (statement of Rep. Major Owens, and Letter from the National Council for Occupational Safety and Health (Oct. 6, 2005)); Michelle Chen, *Relief Workers May Be Next Wave of Katrina Victims*, NEWSTANDARD, Sept. 23, 2005, <http://newstandardnews.net/content/index.cfm/items/2395>. The Centers for Disease Control and Prevention has published guidelines and recommendations for Hurricane Katrina relief workers in an effort to address health and safety issues preemptively. See Ctrs. for Disease Control & Prevention, *Hurricane Information for Response and Cleanup Workers*, <http://www.bt.cdc.gov/disasters/hurricanes/workers.asp> (last visited Apr. 15, 2006).

⁸ The doctrine of sovereign immunity is a relic of royalty -- originating from the English common law premise that the King could do no wrong -- and its continued life under American jurisprudence is not easily justified. See *United States v. Lee*, 106 U.S. 196, 207 (1882) (“[W]hile the exemption of the United States . . . from being subjected . . . to ordinary actions in the courts has . . . 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.”); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 12.1, at 342 – 43 (1993) (citations omitted). *But see* *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (“A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the

government contractor defense, its contractors have been able to enjoy some of that immunity.⁹ As contractors assume a greater portion of the government's duties, they are increasingly voicing their desire for increased legal protection¹⁰ where the government, shielded by sovereign immunity, would not face liability for negligent harms.

In the wake of Hurricane Katrina, Congress is currently considering legislation intended to provide insulation against liability for contractors involved in disaster relief and reconstruction. The Gulf Coast Recovery Act (GCRA)¹¹ would broadly apply the government contractor defense and thereby forestall private tort litigation arising from contractors' work in the wake of Hurricane Katrina and other similar disasters.¹² Not surprisingly, the GCRA enjoys strong support amongst contractors.¹³ Cognizant of the government's current (and future) fiscal crisis,¹⁴ deficit hawks are reluctant to pursue any alternative program in which the government would indemnify contractors.¹⁵ Additionally,

authority that makes the law on which the right depends."); AMAN & MAYTON, *supra*, § 14.1.3, at 532 (suggesting a functionalist justification for the doctrine of sovereign immunity, namely, that the doctrine insulates the government's official actions from undue influence) (citations omitted). Indeed, many academics have expressed dissatisfaction with the doctrine of sovereign immunity. *See, e.g.*, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) ("Sovereign immunity is inconsistent with a central maxim of American government: no one, not even the government, is above the law."); David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 548 (1997) ("Sovereign immunity is a rotten idea. If states commit wrongs, they should be accountable for them.").

⁹ *See infra* text accompanying notes 55 - 65.

¹⁰ *See* Press Release, Associated Gen. Contractors of Am., Senate Bill Would Limit Contractors' Risk of Law Suits for Aiding in Rescue and Recovery Efforts in Gulf Coast (Sept. 22, 2005), available at <http://www.agc.org/galleries/pr/05-094.doc> [hereinafter AGC Press Release].

¹¹ S. 1761, 109th Cong. (2005).

¹² *See id.* § 5.

¹³ *See* AGC Press Release, *supra* note 10.

¹⁴ *See* Gov't Accountability Office, Our Nation's Fiscal Outlook: The Federal Government's Long-Term Budget Imbalance, <http://www.gao.gov/special.pubs/longterm/> (last visited Apr. 15, 2006) ("Absent policy change, a growing imbalance between expected federal spending and tax revenues will mean escalating and ultimately unsustainable federal deficits and debt."); PETER G. PETERSON, RUNNING ON EMPTY 9 - 10 (2004) ("[I]n just three years [(2001 to 2003)] U.S. voters witnessed a negative swing of over \$10 trillion in the ten-year federal deficit outlook. By the year 2014, that will amount to \$90,000 in additional federal debt for every household."); Rudolph G. Penner & Alice M. Rivlin, *Dimensions of the Budget Problem*, in RESTORING FISCAL SANITY 2005: MEETING THE LONG-RUN CHALLENGE 17, 17 - 34 (Alice M. Rivlin & Isabel Sawhill eds., 2005).

¹⁵ Deficit hawks, who place great emphasis on keeping the federal budget under control

critics of the plaintiffs' and class-action bars support such situational immunity for contractors as a logical step towards tort reform.¹⁶

This Article, however, asserts that the GCRA grossly misses the mark when judged against two commonly suggested normative goals of tort law: the GCRA neither serves the ends of justice and fairness by compensating victims, nor does it minimize the costs of harm by deterring contractors from acting negligently.¹⁷ This Article first criticizes the GCRA's doctrinal structure, which is primarily founded upon an improper use of the government contractor defense. By jettisoning the traditional predicate to the defense, that a government contractor has explicitly followed government direction to its detriment, the

and the federal deficit low, have become increasingly alarmed at the rate of government spending in the wake of Hurricane Katrina. *See* Donald Lambro & Amy Fagan, *Defer Drug Benefit to Offset Katrina, Deficit Hawks Urge*, WASH. TIMES, Sept. 20, 2005, at A2 ("Deficit hawks both inside and outside of Congress say adding the cost of recovery and rebuilding to the deficit is a bad idea."). If the government were to provide contractors with indemnification, it would essentially be insuring its contractors against liabilities they incur to individuals injured by the contractors' negligence, resulting in further government expenditures after national disasters. *See infra* notes 173 – 175 and accompanying text (discussing indemnification for unusually hazardous risks). Under the GCRA, however, the government would bear no economic responsibility for harm resulting from contractors' negligent acts.

¹⁶ The Senate hearing on the GCRA included frank disparagement of the plaintiffs' bar. *See infra* text accompanying notes 132, 136 - 138. This is to be expected in light of the political leanings of the GCRA's sponsor (Sen. John Thune (R-S.D.)) and co-sponsors (Sen. Jim DeMint (R-S.C.); Sen. Michael B. Enzi (R-Wyo.); Sen. James M. Inhofe (R-Okla.); Sen. Trent Lott (R-Miss.); Sen. Lisa Murkowski (R-Alaska); Sen. Rick Santorum (R-Pa.); Sen. Ted Stevens (R-Alaska); and Sen. David Vitter (R-La.)). *See* 151 CONG. REC. S10378 (2005); 151 CONG. REC. S10514, 10515 (2005); 151 CONG. REC. S10594, 10596 (2005); 151 CONG. REC. S11130, 11131 (2005). *See generally* REPUBLICAN NAT'L COMM., 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA (2004), available at <http://www.gop.com/media/2004platform.pdf> ("America's litigation system is broken. Junk and frivolous lawsuits are driving up the cost of doing business in America by forcing companies to pay excessive legal expenses to fight off or settle often baseless lawsuits . . ."); Nathaniel L. Bach, Note, *Trial Lawyer on the Ticket: Electoral Rhetoric and the Depiction of Lawyers in the 2004 Presidential Campaign*, 19 GEO. J. LEGAL ETHICS 317, 319 - 36 (2006) (analyzing the tort reform "cornerstone" of the Bush-Cheney domestic policy agenda during the 2004 presidential election).

¹⁷ *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24 (1970). This is not, of course, to suggest that the GCRA's only flaw is its failure to address the principle goals of tort law. *See infra* note 79 (discussing the GCRA's encroachment upon states' rights). Such problems, however, are beyond the scope of this Article.

GCRA unmoors the defense from its logical underpinnings -- the insulation of the discretionary functions of government from liability.¹⁸

This Article further bemoans the economic inefficiencies likely to result from this distortion of the government contractor defense. First, the GCRA fails to allocate the risks of disaster relief efforts to the parties who can best access information about the potential risks associated with such work and can most effectively avoid or protect themselves against these risks.¹⁹ Instead, it shifts these risks to individuals who lack the opportunity to assess, avoid, or insure against them.²⁰ Second, by alleviating contractors' accountability for negligent actions, the GCRA creates a moral hazard, diminishing the incentives for responsible contractor behavior and potentially increasing the incidence of harmful behavior.²¹ This Article advocates allocating the risks of disaster relief work to those parties who can most effectively minimize the costs of these activities or who can best bear the risks inherent in such work,²² a solution superior to that embodied by the GCRA. In other words, Congress should allocate these risks to the party in the best position to understand, anticipate, assess, avoid, mitigate, insure against, or, ultimately, bear the potential loss.²³

¹⁸ See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511 – 12 (1988). For a more extensive discussion of the government contractor defense, see *infra* Part III.A.

¹⁹ See *infra* text accompanying notes 113 - 119.

²⁰ As discussed *infra* Part III.B, the GCRA does not preserve the possibility of victim compensation by either diluting the government's sovereign immunity or mandating that the government indemnify its contractors. It merely leaves individuals without a remedy if they are injured by the tortious acts of contractors involved in, among other things, debris removal or reconstruction work in disaster zones.

²¹ See *infra* notes 121 - 124 and accompanying text.

²² The law and economics literature suggests the desirability of allocating risk to the party who can most effectively reduce the costs of harm or who can best bear the risk. See Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) (proposing that liability should rest with the party best positioned “to make the cost-benefit analysis between accident costs and accident avoidance costs, and to act on the decision once made”); see also Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 88 - 92 (1977) (analyzing risk allocation in the context of contract impossibility). See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

²³ Guido Calabresi's categorization of accident cost reduction efforts into three tiers of “subgoals” is instructive. See CALABRESI, *supra* note 17, at 26 - 31. “Primary” cost reduction encompasses efforts to reduce the number and severity of accidents. *Id.* at 26 - 27. “Secondary” cost reduction addresses the societal costs that indirectly result from the accident, such as rehabilitation and care of the injured. *Id.* at 27 - 28. Societal costs may be reduced, and possibly minimized, by spreading accident losses -- shifting the risk of these

This Article finally proposes that the GCRA is undesirable absent empirical evidence of either (1) a dearth of qualified companies willing to compete for the government's business or (2) a market failure in the insurance industry. This Article concedes that contractors involved in disaster relief may face risks for which sufficient insurance is unavailable. Nonetheless, among all alternative solutions, the GCRA is one of the least appropriate; in all likelihood, it would compound the effects of the devastation it was intended to address. Congress does not lack for more appropriate solutions to deal with whatever risks arise in post-catastrophe clean-up. For example, the government could model risk management on the third-party liability provisions of the Federal Acquisition Regulations (FAR)²⁴; or the hazardous risk indemnification allowed by Public Law 85-804,²⁵ which permits contractual relief under extraordinary circumstances such as high-risk research and development involving nuclear power or highly volatile missile fuels.²⁶ Alternatively, the government could establish a victim compensation fund, drawing upon models such as the September 11th captive insurance fund²⁷ or the Vaccine Injury Compensation Program.²⁸ Each of these options is preferable to the GCRA's unnecessary, inefficient, and unfair allocation of risk to the residents of disaster areas and the relief workers who come to their aid.

II. OPPORTUNISTIC POST-CRISIS BEHAVIOR

costs from individuals (i.e., potential injurers and victims) to society in the aggregate. *See id.* at 39 - 42. Finally, tertiary cost reduction involves managing the transactional costs of the administrative or market machinery that is used to achieve primary and secondary cost reduction. *Id.* at 64 - 66. From this, Calabresi persuasively argues that the party best equipped to reduce the costs of the accident should bear those costs. *Id.* at 40 - 42.

²⁴ 48 C.F.R. § 52.228-7 (2005). The FAR "is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies." *Id.* § 1.101.

²⁵ Act of Aug. 28, 1958, Pub. L. No. 85-804, 72 Stat. 972 (codified as amended at 50 U.S.C. §§ 1431 - 1435 (2000)); *see also* 48 C.F.R. §§ 50.403-1 to -3 (2005).

²⁶ *See* Patrick E. Tolan, Jr., *Environmental Liability Under Public Law 85-804: Keeping the Ordinary Out of Extraordinary Contractual Relief*, 32 PUB. CONT. L.J. 215, 260 - 61 (2003) (explaining that the legislative history of Public Law 85-804 indicates that indemnification should be limited to research, development, and production in the fields of nuclear power or highly volatile missile fuels); Michael Abramowicz, *Predictive Decisionmaking*, 92 VA. L. REV. 69, 108 - 113 (2006) (suggesting nuclear safety regulation as a candidate for "predictive decisionmaking," as an alternative to the limited liability model found in, for example, the Price-Anderson Act, 42 U.S.C. § 2210 (2000)).

²⁷ Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, div. K, tit. III, 117 Stat. 11, 517 - 18 (2003).

²⁸ 42 U.S.C. §§ 300aa-10 to -34 (2000).

Congress intended the GCRA to protect contractors.²⁹ While the GCRA would do so, it does not serve the public interest.³⁰ Specifically, it seeks to capitalize upon Hurricane Katrina's devastation to obtain, for the contractor community, long-sought after, and long-denied, insulation from liability in post-crisis situations.³¹ Unfortunately, this legislative initiative reflects a broader, disconcerting trend of seemingly opportunistic post-crisis behavior. Under the guise of exigency, both the Bush administration and Congress have utilized Hurricane Katrina to effectuate public policies that are unnecessary and untenable, and thus might not otherwise have survived debate or scrutiny.

For example, in its \$51.8 billion post-Katrina emergency supplemental appropriation, Congress hastily raised the "micro-purchase threshold" (which, in effect, serves as the government charge card purchase cap)³² to \$250,000 for purchases relating to relief and recovery from Hurricane Katrina.³³ That hundred-fold increase on the existing

²⁹ Section two of the GCRA lists the congressional findings supporting the bill's proposed relief. These findings emphasize that government contractors provide vital assistance in responding to national disasters and that fears of future litigation may discourage this assistance. *See* S. 1761, 109th Cong. § 2 (2005). The GCRA is thus intended "to ensure that . . . contractors continue to answer the governmental requests for assistance in times of great need." *Id.* § 2(12)(a).

³⁰ *See* Richard S. Markovits, *Liberalism and Tort Law: On the Content of the Corrective-Justice-Securing Tort Law of a Liberal, Rights-Based Society*, 2006 U. ILL. L. REV. 243, 249, 287 (2006) (arguing that governments of "rights-based [s]tates" are obligated to "maximize the rights-related interests" of their citizens, and thus should have "legally enforceable . . . duties" to (1) avoid committing torts against their citizens, (2) reduce the occurrence of torts between citizens, and (3) provide victims of tortious conduct with appropriate opportunities to seek redress). Markovits concludes that "government officials can promulgate goal-oriented tort legislation if, but only if . . . the legislation in question does not on balance disserve the rights-related interests of the relevant society's members and participants." *Id.* at 250; *see also id.* at 283 - 85. Responsible government should focus on serving the public interest. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514 (1992) ("[G]overnment's primary responsibility is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good.").

³¹ *See infra* notes 128 and 135 discussing bills to reduce contractor liability proposed in the mid-1980s.

³² *See* 48 C.F.R. § 13.201(b) (2005) (making government purchase cards the "preferred method" for micro-purchases).

³³ Second Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising from the Consequences of Hurricane Katrina, 2005, Pub. L. No. 109-62, § 101(2), 119 Stat. 1990, 1992. Although government purchase cards were first used during the Reagan administration in the late 1980s, their use gained momentum in the early 1990s with former Vice President Al Gore's National Performance Review, which strongly urged

\$2500 limit³⁴ far exceeded the already flexible \$15,000 ceiling Congress had previously made available during contingencies and emergencies.³⁵ While pressure quickly forced the administration to bar further use of this authority,³⁶ the fact that the \$250,000 threshold became law at all, without meaningful discussion, is shocking.³⁷ At the time of the threshold increase, more than 300,000 government purchase cards were in circulation,³⁸ and a mountain of Inspector General reports, Government Accountability Office studies, and congressional hearings had demonstrated that the government's management of its charge

agencies to increase their reliance on government purchase cards. See Neil S. Whiteman, *Charging Ahead: Has the Government Purchase Card Exceeded Its Limit?*, 30 PUB. CONT. L.J. 403, 407 - 11 (2001). The 1994 enactment of the Federal Acquisition Streamlining Act, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.), fueled government purchase card activity by (1) creating a \$2500 "micropurchase" threshold (and thereby exempting purchases under that threshold from many of the onerous regulations that govern most procurements), see 41 U.S.C. § 428(b), (f) (2000), and (2) allowing agencies' procurement organizations to delegate purchasing authority to nonprocurement card-holding personnel, see *id.* § 428(c); see also Whiteman, *supra*, at 411 - 12.

³⁴ 41 U.S.C. § 428(f); 48 C.F.R. § 2.101 (2005).

³⁵ After the attacks of September 11, 2001, the micro-purchase threshold for supplies or services acquired by the Department of Defense for the purpose of defending the United States against terrorist attacks was increased to \$15,000. Federal Acquisition Regulation; Temporary Emergency Procurement Authority, 67 Fed. Reg. 56,120 - 56,121 (Aug. 30, 2002) (codified in scattered sections of 48 C.F.R.).

³⁶ See Memorandum from Clay Johnson III, Deputy Dir. for Mgmt., Office of Mgmt. & Budget, Executive Office of the President, Limitation on Use of Special Micro-purchase Threshold Authority for Hurricane Katrina Rescue and Relief Operations (Oct. 3, 2005), available at http://63.161.169.137/omb/procurement/micro-purchase_guidance_10-03-05.pdf (requesting that agencies not use the increased micro-purchase authority unless there are "exceptional circumstances"). Nonetheless, purchase card usage appears robust. The Inspector General of the Department of Homeland Security estimated the value of Katrina-related purchase card transactions, as of December 30, 2005, at approximately \$50.9 million. See PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY, PCIE 12-17-05 TO 12-30-05 BIWEEKLY REPORTING PERIOD: HURRICANE KATRINA AGENCY DATA, available at http://www.dhs.gov/interweb/assetlibrary/OIG_PCIE_123005.pdf [hereinafter HURRICANE KATRINA AGENCY DATA].

³⁷ See Bill Marsh, *Here Is Your New Federal Credit Card, Here Is Your New Purchase Limit*, N.Y. TIMES, Sept. 18, 2005, § 4, at 14; Steven L. Schooner, *Fiscal Waste? Priceless*, L.A. TIMES, Sept. 14, 2005, at B13.

³⁸ FED. PROCUREMENT DATA CTR., U.S. GEN. SERVS. ADMIN., FEDERAL PROCUREMENT REPORT FY 2003 § 1, at 13 (2003), available at http://www.fpdnsng.com/downloads/FPR_Reports/FPR2003a.pdf.

cards was abysmal.³⁹ Not only does the temptation of poorly supervised purchase cards encourage fraudulent behavior,⁴⁰ but such programs also run counter to the fundamental procurement principles of transparency, integrity, and competition.⁴¹ In August 2005, the White House recognized these systemic problems and issued long overdue (and slow to be implemented) purchase card guidance, mandating fundamental training and risk management policies.⁴² Not only would the micro-purchase increase have exacerbated the existing purchase card management debacle, but it would have devastated many small businesses,⁴³ which receive approximately two-thirds of all federal procurement dollars

³⁹ See generally *The Use and Abuse of Government Purchase Cards: Hearing Before the H. Subcomm. on Governmental Efficiency, Financial Management and Intergovernmental Relations of the H. Comm. on Governmental Affairs*, 107th Cong. (2002); OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., REP. NO. D-2002-029, DOD PURCHASE CARD PROGRAM AUDIT COVERAGE (2001), available at <http://www.ignet.gov/randp/cards/dod-D-2002-029.pdf>; GEN. ACCOUNTING OFFICE, GAO-02-676T, GOVERNMENT PURCHASE CARDS: CONTROL WEAKNESSES EXPOSE AGENCIES TO FRAUD AND ABUSE (2002), available at <http://www.gao.gov/new.items/d02676t.pdf>; GEN. ACCOUNTING OFFICE, GAO-04-717T, PURCHASE CARDS: INCREASED MANAGEMENT OVERSIGHT AND CONTROL COULD SAVE HUNDREDS OF MILLIONS OF DOLLARS (2004), available at <http://www.gao.gov/new.items/d04717t.pdf>.

⁴⁰ For a lengthy discussion of the purchase card program's fundamental flaws, which lead to widespread abuse and fraud, see Jessica Tillipman, *The Breakdown of the United States Government Purchase Card Program and Proposals for Reform*, 2003 PUB. PROCUREMENT L. REV. 229, 234 – 41 (2003).

⁴¹ See Steven L. Schooner & Neil S. Whiteman, *Purchase Cards and Micro-Purchases: Sacrificing Traditional United States Procurement Policies at the Altar of Efficiency*, 2000 PUB. PROCUREMENT L. REV. 148, 158 – 64 (2000); Whiteman, *supra* note 33, at 442 - 55. But see Jeff P. MacHarg, Note, *Doing More With Less -- Continued Expansion of the Government Purchase Card Program by Increasing the Micropurchase Threshold: A Response to Recent Articles Criticizing the Government Purchase Card Program*, 31 PUB. CONT. L.J. 293, 305 - 11 (2002).

⁴² See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR NO. A-123, MANAGEMENT'S RESPONSIBILITY FOR INTERNAL CONTROL app. B, at 6 - 13 (2005), available at http://www.whitehouse.gov/omb/circulars/a123/a123_appendix_b.pdf.

⁴³ Typically, government purchases between \$2500 and \$250,000 would be set aside for small businesses. See 48 C.F.R. §§ 19.501, .502-1(b), .502-2(a), .502-2(b) (2005); see also Schooner, *supra* note 37, at B13 (“Anecdotal information and experience suggests that the lion's share of purchase card transactions benefit large businesses. That's not surprising, given the convenience offered by stores such as Wal-Mart, Staples, Home Depot and Best Buy.”); Whiteman, *supra* note 33, at 456 (“The Government makes the bulk of its purchase card transactions from large businesses.”).

awarded through contracts under \$250,000.⁴⁴

Similarly, the Bush administration capitalized on the post-Katrina sense of urgency by suspending the Davis-Bacon Act in the counties damaged by the hurricane.⁴⁵ The Davis-Bacon Act is a pro-labor compensation regime which requires that federal construction workers be paid no less than prevailing wage rates.⁴⁶ Thus, prolonged suspension of the Davis-Bacon Act would have permitted contractors to profit from the massive reconstruction effort without ensuring that their workers receive wages sufficient for entry into the ranks of the lower middle class. The administration's putative explanation -- that the suspension would save taxpayers' money and guarantee a sufficient supply of labor⁴⁷ -- proved unpersuasive. After widespread criticism,⁴⁸ the administration reversed the suspension.⁴⁹

In both of these examples, reason ultimately overcame opportunistic encroachments upon established procurement policies. Hopefully, reason also will prevail over the GCRA. It may well be that contractors engaged in post-disaster work struggle and sometimes fail to obtain sufficient insurance. Nonetheless, prospectively releasing contractors from commonly anticipated liabilities allocates the risk of harms caused by contractor negligence

⁴⁴ Telephone Interview with Paul Murphy, President, Eagle Eye, in Fairfax, Va. (Sept. 9, 2005). Eagle Eye is a commercial service that processes and repackages government procurement data. See Eagle Eye, Inc., About Eagle Eye, <http://www.eagleeyinc.com/Search.FPC?pg=10> (last visited Apr. 15, 2006).

⁴⁵ Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/20050908-5.html>.

⁴⁶ 40 U.S.C. § 3142 (Supp. II 2002). To be clear, the Davis-Bacon Act does not mandate that firms employ only union workers: it merely requires that firms pay "prevailing" wage rates and benefits, which typically correlate with those enjoyed by union workers. See *id.*

⁴⁷ See Proclamation No. 7924, 70 Fed. Reg. at 54,227 ("The wage rates imposed by [the Davis-Bacon Act] increase the cost . . . of providing Federal assistance to [areas affected by Hurricane Katrina] . . . Suspension of [the Davis-Bacon Act] will result in greater assistance to these devastated communities and will permit the employment of thousands of additional individuals."); see also News Release, Congressman Charlie Norwood, Administration Grants Norwood Request for Temporary Suspension of Davis-Bacon Act Restrictions on Rebuilding After Katrina (Sept. 8, 2005), available at http://www.house.gov/apps/list/press/ga09_norwood/DavisBacon.html.

⁴⁸ See, e.g., Editorial, *A Shameful Proclamation*, N.Y. TIMES, Sept. 10, 2005, at A16; Thomas B. Edsall, *Bush Suspends Pay Act in Areas Hit by Storm*, WASH. POST, Sept. 9, 2005, at D3; Susan Jones, *Democrats, Unions Blast Bush Over Federal Rebuilding Effort*, CNSNews.com, Sept. 9, 2005, <http://www.cnsnews.com/Politics/Archive/200509/POL20050909a.html>.

⁴⁹ Proclamation No. 7959, 70 Fed. Reg. 67,899 (Nov. 3, 2005), available at <http://www.whitehouse.gov/news/releases/2005/11/20051103-9.html>.

to the victims harmed by such negligence.⁵⁰ That cannot be the optimal solution. If the liability insurance market truly fails, the government -- as the party best able to assess the risk, avoid, mitigate, or insure against harm, and, should it be necessary, bear the costs of harm -- may ultimately need to indemnify its contractors, or otherwise finance the compensation of victims.⁵¹ Katrina's devastated communities, however, should not bear the brunt a second time.

III. PRIVATE VERSUS PUBLIC INTEREST

A. *Distorting the Government Contractor Defense*

The GCRA, which would grant virtually unprecedented liability protection to a contractor's recovery work in disaster zones,⁵² is as inconsiderately drafted as it is misguided. Its most startling (and, ultimately, problematic) provision extends a rebuttable presumption that the government contractor defense applies to contractors certified as "necessary for the recovery of a disaster zone."⁵³ This solution disregards the premise that government direction serves as the touchstone for the government contractor defense.⁵⁴ Moreover, the formulaic certification process provided by the GCRA, coupled with the federal government's increasingly unstructured and chaotic contracting practices, renders this alteration of the defense particularly pernicious.

⁵⁰ See *infra* Part III.B.

⁵¹ "[I]ndividual moral rights holders whose tort-related rights have been sacrificed by [their] government['s] failure[] [to secure these rights by legislation] will have a moral right to receive compensation from the government" Markovits, *supra* note 30, at 291.

⁵² Similar liability protection can be found in the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. §§ 441 – 44 (Supp. II 2002). As discussed *infra* Part III.A.3, however, the GCRA is vastly different from the SAFETY Act, chiefly because the SAFETY Act applies only to extraordinarily risky and evolving technologies. Although the SAFETY Act was a unique approach to liability protection when passed in 2002, Congress has indicated its intention to use the SAFETY Act as a model for other private sector industries not only through the proposal of the GCRA, but also through the Public Readiness and Emergency Preparedness Act (PREP Act), Pub. L. 109-148, div. C, 119 Stat. 2680, 2818 – 32 (2005) (to be codified at 42 U.S.C. §§ 247d-6d to -6e), discussed *infra* Part III.A.3.

⁵³ S. 1761, 109th Cong. § 5(d) (2005).

⁵⁴ See *infra* note 62 (discussing of the importance of government direction, and consequent lack of contractor discretion, in the application of the government contractor defense).

1. Ignoring the History of the Government Contract Defense

The GCRA misuses the government contractor defense and, in so doing, damages its viability. Although its roots trace to the 1940s,⁵⁵ the modern government contractor defense grew out of the Federal Tort Claims Act (FTCA)⁵⁶ and later found solid footing

⁵⁵ In *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 20 - 22 (1940), the Supreme Court refused to hold a public works contractor liable for erosion of the plaintiff's property allegedly caused by construction performed under a federal government contract, applying agency principles to extend the government's sovereign immunity to the contractor. After *Yearsley*, lower courts struggled to apply the defense to a wider range of cases, specifically to those involving products manufactured according to government specifications. See Randal R. Craft, Jr., *The Government Contractor Defense: Evolution and Evaluation*, in *THE GOVERNMENT CONTRACTOR DEFENSE: A FAIR DEFENSE OR THE CONTRACTOR'S SHIELD?* 3, 7 - 9 (Juanita M. Madole ed., 1986) (discussing relevant opinions between 1940 and 1980).

⁵⁶ Enacted in 1946, FTCA, ch. 753, §§ 401 - 24, 60 Stat. 812, 842 - 47 (codified as amended in scattered sections of 28 U.S.C.), initially exposed the military to liability. See, e.g., *Brooks v. United States*, 337 U.S. 49, 50 - 52 (1949) (holding that service members can pursue negligence claims against the government for injuries not incident to service). Soon after passage of the FTCA, however, the Supreme Court ruled that the government is not liable under the FTCA when service members' injuries "arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). After *Feres*, defense supply contractors became the target of choice in product liability suits because the government was no longer an available defendant. That situation proved unfair, because contractors, compelled to execute clear government directives, did not exercise independent discretion. The Court further complicated the legal treatment of military contractors in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), a case in which malfunctions in a government-specified, contractor-manufactured, aircraft ejection system injured a serviceman. When the serviceman alleged negligence against both the contractor and the United States, the contractor cross-claimed seeking indemnity from the government, alleging that "any malfunction . . . was due to faulty specifications, requirements, and components provided by the United States." *Id.* at 667 - 68. The Court relied on *Feres* to dismiss both the serviceman's claim against the government and the contractor's request for indemnification. See *id.* at 669, 673 - 74. *Feres* and *Stencel* thus placed military contractors in a bind. See R. Todd Johnson, Comment, *In Defense of the Government Contractor Defense*, 36 CATH. U. L. REV. 219, 227 (1986) ("The *Feres*-*Stencel* doctrine created an insurmountable dilemma . . . by excusing the government both from suit by serviceman and from indemnification actions brought by the contractor."). Their only option was to assert the still-developing government contractor defense discussed in this section. See, e.g., *id.* at 224 - 27; Kateryna

with *In re “Agent Orange” Product Liability Litigation*.⁵⁷ *Agent Orange* required that contractors manufacturing products for the government prove three elements to successfully assert the government contractor defense: that (1) the government established the product specifications, (2) the product met the specifications in all material respects and (3) the government knew as much or more than the contractor about the hazards associated with the product.⁵⁸ In *Boyle v. United Technologies Corp.*,⁵⁹ the Supreme Court modified and clarified these elements.⁶⁰ Contractors may assert the affirmative defense when (1) the United States approved reasonably precise design specifications, (2) the equipment conformed to those specifications and (3) the contractor warned the government about relevant dangers known to it, but not the government.⁶¹ The first two elements “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.”⁶² Although *Boyle* addressed a

Rakowsky, Note, *Military Contractors & Civil Liability*, 2 STAN. J. C.R. & C.L. (forthcoming 2006).

⁵⁷ 534 F. Supp. 1046 (E.D.N.Y. 1982), *aff’d*, 818 F.2d 187 (2d Cir. 1987).

⁵⁸ *Id.* at 1055. The court elaborated on the third element by explaining that a contractor was required to inform the government of information known to it, but unknown to the government, regarding the hazards of the product. *Id.* at 1057. The *Agent Orange* approach was adopted in large part by the Ninth Circuit in *McKay v. Rockwell International Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), which modified the first prong to allow the defense where the government either established or approved reasonably precise design specifications. Thereafter, most courts followed the *McKay* formulation of the government contractor defense. *See* Craft, *supra* note 55, at 14 – 25. However, the Eleventh Circuit remained a notable exception. *See* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740, 745 - 46 (11th Cir. 1985) (allowing use of the defense only if the contractor either participated only minimally in design specifications or warned the government of all known risks and disclosed known alternative designs).

⁵⁹ 487 U.S. 500 (1988). *Boyle* involved the death of a serviceman who drowned when he was unable to release the escape hatch of a submerged helicopter. *Id.* at 502. The plaintiff sued the contractor that supplied the military with the helicopter, alleging, among other things, that the escape hatch was defectively designed to be outward-opening, which made it impossible for his son to release the hatch when subject to water pressure. *Id.* at 503.

⁶⁰ *Id.* at 511 - 12.

⁶¹ *Id.* at 512.

⁶² *Id.* Focusing on the discretionary function exception to the FTCA, the Court reasoned that it makes little sense to subject a contractor to state tort suits for manufacturing products that conform to designs fashioned or approved by a federal official when the federal official would enjoy immunity from similar suits. Although the FTCA waives the government’s sovereign immunity for negligent or wrongful acts or omissions, 28 U.S.C. § 2674 (2000), it expressly exempts matters in which the government exercises a discretionary function, *id.*

military product (or supply), lower courts have extended its application to nonmilitary products.⁶³ Today, lower courts increasingly allow contractors to assert the defense with

§ 2680(a). In an earlier case, *Berkovitz v. United States*, 486 U.S. 531 (1988), the Supreme Court elaborated on the requirements that must be met before the discretionary function exemption may be applied. First, a mandatory statute or regulation prescribing a specific course of action must not have constrained the government decision being challenged. *Id.* at 536. Second, the government decision, when not so constrained, must have been grounded in social, economic, or political policy. *Id.* at 536 - 37. Thus under the FTCA's discretionary function exemption, the government's right to assert sovereign immunity is most likely to be engaged when a government official exercises discretion. In contrast, the protection offered by the government contractor defense as established in *Boyle* will most often be engaged when the contractor demonstrates its lack of discretion. Because such a lack of contractor discretion necessarily implies the presence of discretion on the part of government officials, the government contractor defense ensures that contractors are afforded liability protection only in those cases where the government itself would receive such protection under the FTCA's discretionary function exemption. *See* Peter C. Brown, *Blowing the Lid Off Pandora's Box: A Look at the Effect of the Design-Build Contract on the Government Contractor Defense*, CONSTRUCTION LAWYER, July 1997, at 17, 17. *Sanner v. Ford Motor Co.*, 364 A.2d 43 (N.J. Super. Ct. Law Div. 1976), decided before *Boyle*, illustrates the importance of establishing the element of government discretion in any assertion of the government contractor defense. In *Sanner*, a passenger, who sustained injuries after being thrown out of a vehicle manufactured by Ford for the military, alleged that the company negligently failed to install safety belts. *Id.* at 43 - 44. Prior to manufacturing the vehicle, Ford offered the Army a design that included safety belts, which the Army rejected, "because occupants could be compromised due to deterred egress and escape in tactical situations as well as enhancing injuries in the event of a roll-over." *Id.* at 44 - 46. The court accepted the government contractor defense, finding that "Ford had no discretion to exercise with respect to installation of seat belts, roll bars or other restraints. The decision was that of the . . . Army[, which] specifically rejected the installation of these so-called safety devices." *Id.* at 47.

⁶³ *See, e.g.*, *Carley v. Wheeled Coach*, 991 F.2d 1117, 1123 - 28 (3d Cir. 1993) (civilian ambulance manufacturer); *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710, 717, 719 - 21 (D. Md. 1997) (manufacturer of keyboard equipment for the United States Postal Service); *Andrew v. Unisys Corp.*, 936 F. Supp. 821, 829 - 32 (W.D. Okl. 1996) (manufacturer of letter sorting machines for the United States Postal Service); *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 966 - 68 (W.D. Ky. 1993) (company in charge of operating a nuclear facility for the Department of Energy). *But see, e.g., In re Haw. Fed. Asbestos Cases*, 960 F.2d 806, 810 - 12 (9th Cir. 1992) (precluding insulation supplier from asserting the government contractor defense because its products were not military equipment).

regard to service contracts⁶⁴ in addition to product or supply contracts.⁶⁵

While the GCRA purports to apply the government contractor defense in the context of disaster relief with only a procedural variation, the GCRA effectively eviscerates the substantive legal underpinnings of the defense. For certified contractors, the GCRA would create a “rebuttable presumption that . . . all elements of the government contractor defense are satisfied; and . . . the government contractor defense applies in the lawsuit.”⁶⁶ This ignores the first requirement of *Boyle* -- that the government approve, in a reasonably precise manner, the scope of the work. Again, the ordinary government contractor defense protects contractors who explicitly follow government direction to their detriment.⁶⁷ Although the government need not create the specifications or otherwise withhold all discretion from the contractor,⁶⁸ some sort of meaningful government choice or decision is required before the defense can come into play.⁶⁹ To the extent that contractors exercise

⁶⁴ The FAR distinguishes contracts for services (from custodial to clerical and medical) from those for supplies (end items or widgets, from furniture to fighter aircraft) and construction (building, repairing, or renovating structures or improving real estate). Service contracts “directly engage[] the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply.” 48 C.F.R. § 37.101 (2005).

⁶⁵ See, e.g., *Hudgens v. Bell Helicopter/Textron*, 328 F.3d 1329, 1334 - 45 (11th Cir. 2003) (accepting government contractor defense of a company providing helicopter maintenance to the Army); *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 421 - 24 (D.S.C. 1994) (applying the defense to a company supplying decontamination services to the Environmental Protection Agency). In the context of a service contract, the *Boyle* test remains essentially the same: (1) the government must have approved reasonably precise procedures to be followed in providing the service, (2) the contractor’s performance must have conformed to those procedures and (3) the contractor must have warned the government about dangers in those procedures that were known to it, but not to the government. See *Hudgens*, 328 F.3d at 1335. This test continues to focus on the “overriding question of who, the government or the contractor, ultimately had the most significant discretion in controlling the end result.” Paul M. Laurenza & Michael W. Clancy, *The Government Contractor Defense: Post-Boyle Expansion and the SAFETY Act*, 80 FED. CONTRACTS REP. 477, 481 (2003).

⁶⁶ S. 1761, 109th Cong. § 5(d)(1) (2005).

⁶⁷ See *Boyle*, 487 U.S. at 512.

⁶⁸ See *Carley*, 991 F.2d at 1125 (“[I]t is necessary only that the government approve, rather than create, the specifications . . .”).

⁶⁹ See *Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989) (“The mere signature of a government employee on the ‘approval line’ . . . , without more, does not establish the government contractor defense.”). Guidelines for contractors regarding the successful assertion of the defense emphasize the need to ensure that the government actually approved precise specifications or procedures. For example, one author has

significant amounts of discretion in the performance of their contracts, however, the defense has not protected them.⁷⁰ As summarized by Ralph Nash and John Cibinic,

[T]he Supreme Court has given a set of straightforward requirements -- the most important of which is the Government approval requirement. . . . [W]here the Government agency is a full participant in the design process, the defense can be predicted to be a winner. In contrast, if the Government has not participated in design the contractor will find it very hard to use the defense.⁷¹

Thus, without a governmental act of discretion, there is little legal or policy justification for extending the government's sovereign immunity to the contractor.

2. Violating the Spirit and Intent of the Government Contractor Defense

The GCRA's supporters assert that the legislation "implements the requirements already set forth by the Supreme Court,"⁷² thereby avoiding costly litigation involving the

advised that to assert a successful government contractor defense,

the actual approving authority . . . should prepare to discuss not only what the Government wanted in terms of design, but the level of expertise among the government design approval team, and how dependent the approval officials were on the contractor's designers for purposes of contract review [T]he Government should also provide a record of communications between the contractor and the Government, documenting the 'give and take' in the design process that shows conscious government approval of every design suggestion and change.

John J. Michels, Jr., *The Government Contractor Defense: The Limits of Immunity After Boyle*, 33 A.F. L. REV. 147, 160 (1990); see also Carl L. Vacketta et al., *The "Government Contractor Defense" in Environmental Actions*, BRIEFING PAPERS, Dec. 1989, at 7 (advising government contractors to "do whatever [they] can to facilitate Govt [sic] review and inspection of every aspect of [their] contract work"). Conversely, plaintiffs are advised that their "best line of attack" in response to a defendant's assertion of the government contractor defense is to argue that the government did not exercise the requisite discretion over specifications. See Charles E. Cantu & Randy W. Young, *The Government Contractor Defense: Breaking the Boyle Barrier*, 62 ALB. L. REV. 403, 420 - 22 (1998).

⁷⁰ See, e.g., Raymond B. Biagini & Ray M. Aragon, *The Government Contractor Defense: Limiting Product Liability in the New Procurement Environment*, 39 GOV'T CONTRACTOR ¶ 169, at 3 (1997) ("[Only] the contractor that proves 'the Government made me do it' can share in the Government's sovereign immunity.").

⁷¹ Ralph C. Nash & John Cibinic, *Postscript: The Circuit Court View of the Government Contractor Defense*, 4 NASH & CIBINIC REP. ¶ 52 (1990).

⁷² *Oversight Hearing on the Impact of Certain Governmental Contractor Liability*

Boyle elements and increasing certainty and uniformity.⁷³ The argument that the certification requirement fulfills *Boyle*'s first element,⁷⁴ however, rings hollow, because the purely perfunctory certification process fails to consider the amount of discretion enjoyed by the contractor in performing the work.

Contractors seeking certification would submit a request to the Corps of Engineers.⁷⁵ To issue the certification, the Chief of Engineers need only conclude that (1) the work takes place in a disaster zone⁷⁶ and (2) at least one-half of the work falls within specified categories, including routine activities such as debris removal, reconstruction work, and search and rescue operations.⁷⁷ Unlike the judicial predicate for applying the government contractor defense, the Chief of Engineers need not consider the amount of discretion the contractor enjoyed in performing the work.⁷⁸ Moreover, certification would control federal, state, or local government contracts.⁷⁹ If certification involved a

Proposals on Environmental Laws: Hearing on S. 1761 Before the Subcomm. On Superfund and Waste Management of the S. Comm. on Environment and Public Works, 109th Cong. 79 (2005) [hereinafter Hearing] (statement of Craig S. King, government contracts attorney). Craig King has further argued that “[u]nder Supreme Court standards, the Government contractor defense would apply to disaster relief efforts without S. 1761.” *Id.* at 75.

⁷³ See *Hearing, supra* note 72 (written statement of Craig S. King).

⁷⁴ See *id.* at 78 (statement of Craig S. King).

⁷⁵ S. 1761, 109th Cong. § 5(d)(4)(B) (2005) (referring to “the submission of a request for a certification”). The GCRA would encompass both past performance and future performance. See *id.* (defining certification as a determination that “a government contract *was or will be* necessary for the recovery of a disaster zone,” and focusing the certification inquiry in part upon “the scope of work that the government contract *does or will require*”) (emphasis added). Because the language of the GCRA does not specify the source of the submission, it leaves open the possibility that a request could be submitted either by the government, a contractor, or another entity, such as an insurance company. See *id.* § 5(d)(4)(A) (providing that the Chief of Engineers is responsible for reviewing “any government contract that any person or entity, including any governmental entity, claims to be necessary for the recovery of a disaster zone from a disaster for the purpose of establishing a government contractor defense”).

⁷⁶ Pursuant to the GCRA, the term “disaster zone” includes those geographical areas affected by Hurricane Katrina as well as any other region affected by a major disaster requiring federal assistance exceeding \$15 billion. *Id.* § 3(1).

⁷⁷ *Id.* § 5(a)(1), (d)(4).

⁷⁸ See *id.* § 5(d)(4)(c); *cf. supra* text accompanying notes 67 - 71 (emphasizing that the ordinary government contractor defense only protects contractors who explicitly follow government direction and limit their own exercise of discretion).

⁷⁹ S. 1761 § 3(2)(A)(ii) (defining “government contract” to include contracts entered into by federal, state, and local governments). In other words, the Corps certification would

comprehensive review of the discretion retained by the government or delegated to the contractor, it might appear reasonable to presume that the elements of the government contractor defense would be satisfied. The GCRA certification process, however, ignores the presence or absence of governmental approval of either the contractor's methods or means of contract performance. Whereas the sort of liability protection provided by the GCRA is usually reserved for government entities and those acting under their discretion, the GCRA extends this protection to parties whose decisions cannot be attributed in any way to the government.

The GCRA would not only provide inappropriately broad access to the government contractor defense, but it would leave little procedural room for a plaintiff to defeat its preclusive force. Once granted a certificate of need under the GCRA, contractors and subcontractors could raise the government contractor defense to defeat claims brought by a negligently injured party. Specifically, the GCRA would entitle the contractor to a "rebuttable presumption" that all the elements of the government contractor defense were satisfied and that the government contractor defense applied to the lawsuit.⁸⁰ Yet the presumption offered by the GCRA hardly seems rebuttable on its merits; if anything, the GCRA's presumption is more analogous to a government official's defense of qualified immunity.⁸¹

override negotiated or legislated allocations of risk in state, local, or municipal contracts, even if the federal government was not a party to those contracts. This is not an isolated intrusion on state authority; the GCRA establishes exclusive federal jurisdiction for lawsuits arising out of the performance of a contract in a disaster zone. *See id.* § 5(a). Thus, in the unlikely event that a contractor has not been granted certification (meaning that the government contractor defense would not insulate it from liability), a negligently harmed individual can assert state tort claims only in *federal* court. Moreover, individuals injured by a Corps-certified state or local government contractor are denied recourse in a wide range of federal causes of action. The GCRA expressly prohibits any action against a contractor engaged in disaster-recovery work (whether certified or not) under federal laws or regulations that are administered by the Secretary of the Army, the Secretary of Transportation, or the Administrator of the Environmental Protection Agency. *Id.* § 4(a). This means that individuals cannot hold contractors accountable for violations of, for example, the Clean Water Act, 33 U.S.C. §§ 1251 – 1387 (2000), which is administered by the Environmental Protection Agency, *see id.* § 1251(d). The propriety and constitutionality of these encroachments upon states' rights, however, are beyond the scope of this Article.

⁸⁰ S. 1761 § 5(d)(1), (2).

⁸¹ The defense of qualified immunity protects "government officials [as opposed to private parties such as contractors] . . . 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). An official's qualified immunity is overcome only by showing that the government official

Typically, a rebuttable presumption merely shifts the burden of proof to one challenging the presumption, who may then attempt to rebut the presumption by producing evidence to the contrary.⁸² Here, however, no effect would be given to even the production of specific, unequivocal evidence demonstrating the lack of those conditions traditionally requisite to the success of a government contractor defense. The only way to overcome the GCRA's presumption is through evidence that the entity seeking certification acted fraudulently or with willful misconduct in submitting information to the Corps of Engineers.⁸³ Logically, a statutory certification system should be subject to reasonable constraints on the legal consequences of certification, informed by the substance of the threshold requirements for certification. The pro forma certification provided for in the GCRA, however, violates such expectations; it offers no more than a procedural rubber stamp with a nearly indelible ink.

Advocates of the GCRA suggest that the second element of *Boyle* -- that the contractor performed in accordance with the approved scope of the work -- is met because the GCRA only protects a contractor for work done within the scope of its contract.⁸⁴ But reality belies this theory as well. Post-September 11th experience has demonstrated that, particularly in emergency contracting, the government loosely describes its contractors' work, if the work is defined at all.⁸⁵ Contractors concede that this norm -- including oral

knew or should have know that his or her actions would cause injury to the plaintiff. *See id.* at 818 - 19. Similarly, the showing required to overcome the GCRA's rebuttable presumption is quite taxing. *See* S. 1761 § 5(d)(3). However, qualified immunity operates somewhat differently than a "mere defense to liability" of the sort provided by the GCRA; qualified immunity is "an entitlement not to stand trial under certain circumstances" and may be "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985); *see also* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 190 (1993).

⁸² *See* BLACK'S LAW DICTIONARY 1224 (8th ed. 2004) (defining a rebuttable presumption as "[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence") (citations omitted).

⁸³ S. 1761 § 5(d)(3).

⁸⁴ *See, e.g., Hearing, supra* note 72, at 78 - 79 (statement of Craig S. King).

⁸⁵ *See* GAO, AGENCY MANAGEMENT OF KATRINA CONTRACTORS, *supra* note 2, at 1 ("The [hurricane] response efforts . . . suffered from [i]nadequate planning and preparation . . . [and i]nsufficient numbers and inadequate deployment of personnel to provide for effective contractor oversight."); *see also* GOV'T ACCOUNTABILITY OFFICE, GAO-05-274, CONTRACT MANAGEMENT: OPPORTUNITIES TO IMPROVE SURVEILLANCE ON DEPARTMENT OF DEFENSE SERVICE CONTRACTS (2005), *available at* <http://www.gao.gov/new.items/d05274.pdf> (finding that twenty-six out of ninety contracts reviewed suffered from insufficient quality assurance surveillance); GOV'T ACCOUNTABILITY OFFICE, GAO-04-605, REBUILDING IRAQ: FISCAL YEAR 2003 CONTRACT AWARD PROCEDURES AND MANAGEMENT CHALLENGES 5 (2004), *available at* <http://www.gao.gov/new.items/d04605.pdf> ("The agencies encountered

agreements and handshake deals⁸⁶ -- pervades the post-Katrina recovery efforts.⁸⁷ When a skeletal, overcommitted government acquisition workforce rushes to identify contractors, hastily drafts contracts (or relies upon open-ended, vague statements of work), and fails to manage contract performance, the government essentially delegates any exercise of

various contract administration challenges . . . stemming in part from . . . lack of clearly defined roles and responsibilities [D]efining key terms and conditions of the contracts remain[s a] major concern[.]”)

⁸⁶ “A letter contract is a written preliminary contractual instrument that authorizes a contractor to begin . . . manufacturing supplies or performing services.” 48 C.F.R. § 16.603-1 (2005). Because letter contracts permit work to proceed before the contracting parties achieve a meeting of the minds, they offer a recipe for disaster. Although Congress permits use of these “undefinitized contractual actions,” “[t]he general policy has been to greatly restrict the use of such transactions because they are open-ended arrangements that place the risk of excessive costs largely on the Government.” JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1073 - 74 (1998); *see also* 48 C.F.R. § 16.603-3 (2005) (imposing procedural limitations on letter contracts).

⁸⁷ Anthony Zelenka, President of Bertucci Contracting Corporation, explained that his company went to work on an oral agreement to execute a written contract. *Hearing, supra* note 72, at 24 (statement of Anthony Zelenka). Warren Perkins, Vice-President of Boh Brothers Construction Company, indicated that his company was doing work “on little more than a handshake We did not demand the time we would normally take to scrutinize contractual terms and conditions.” *Id.* at 36 (statement of Warren Perkins). Further, Mr. Perkins stated that “the work that was asked of us had no specifications, had nothing to rely on, no design specifications, no specifications whatsoever.” *Id.* at 44. Mr. Perkins expressed doubt in the government’s ability to adequately direct disaster relief efforts. *See id.* at 22 (“[T]he contracting agencies have to guide and direct the recovery effort. . . . [But] we cannot be sure that the agencies are in charge.”). This open-ended style of contracting is not unique to post-Katrina recovery efforts. Sweeping changes in the procurement environment emphasizing outcome over process have made the government more akin to a commercial purchaser; this trend has minimized government’s involvement in, and control over, product design. *See* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 630 - 31 (2001) [hereinafter Schooner, *Fear of Oversight*] (explaining that, at a macro level, the reinvented procurement system is (1) defined by greater purchaser discretion, (2) less encumbered by bureaucratic constraint and internal oversight, and (3) more businesslike). *See generally* Steven L. Schooner, *Commercial Purchasing: The Chasm Between the United States Government's Evolving Policy and Practice*, in PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION 137 (Sue Arrowsmith & Martin Trybus eds., 2003) [hereinafter Schooner, *Commercial Purchasing*]. As the government delegates more discretion to contractors, “the new regime . . . casts doubt on contractors’ ability to enjoy the Government contractor defense’s protection.” Biagini & Aragon, *supra* note 70, at 3.

discretion to contractors.⁸⁸ Such open-ended arrangements fail to provide the specific direction or approval historically required for application of the government contractor defense.⁸⁹

The government's failure to provide contractors engaged in post-Katrina clean-up work with an appropriate level of direction for invocation of the government contractor defense is due, in large part, to its current dearth of contracting or acquisition personnel. Congress was quick to authorize more auditors and inspectors general to scrutinize Hurricane Katrina-related contracting,⁹⁰ but made no corresponding call for more

⁸⁸ The lack of competition utilized in awarding contracts, although an inexact proxy, gives credence to the disturbing picture of Katrina-related contracting practices derived from anecdotes. Despite the competition mandates of the Competition in Contracting Act (CICA) of 1984, Pub. L. No. 98-369, §§ 2701 – 2753, 98 Stat. 494, 1175 – 1203 (codified as amended in scattered sections of 10 U.S.C., 31 U.S.C. and 41 U.S.C.), that pervade the federal acquisition system, competitive contract awards have been the exception, not the rule. *See generally* 48 C.F.R. pt. 6 (2005). As of December 30, 2005, of the 579 contracts in excess of \$500,000 awarded by the Department of Homeland Security for Katrina relief, only 115 (or just under 20%) employed full and open competition. HURRICANE KATRINA AGENCY DATA, *supra* note 36; *see also* 48 C.F.R. § 6.102 (2005) (listing “[t]he competitive procedures available for use in fulfilling the requirement for full and open competition”). In contrast, 378 (65%) of those contracts were awarded “no bid/sole source.” HURRICANE KATRINA AGENCY DATA, *supra* note 36. Government-wide, a similar trend emerges: of the 905 contracts in excess of \$500,000, only 246 (just over 25%) employed full and open competition, while 542 (approximately 60%) were awarded “no bid/sole source.” *Id.*

⁸⁹ Over time, contrary to Congress's intent to reduce litigation, the GCRA might provoke *increased* litigation against the government pursuant to the FTCA. The GCRA would insulate *contractors* from liability even when the government aggressively outsources disaster-area work without giving proper attention to contract drafting or engaging in any meaningful oversight. Under the GCRA, a negligently injured individual in need of compensation would have only one option remaining -- to sue the government. The FTCA waives the government's sovereign immunity and permits a suit in tort absent an exercise of discretion. Here, an injured party might assert that the government delegated the exercise of discretion to its contractor. This could be perceived to be an abdication, rather than an exercise, of discretion. In other words, the discretionary function exemption might not apply when the government did not, for example, provide the contractor with clear guidance or ongoing oversight. Thus, the government might find itself being held directly liable for the individual's injury.

⁹⁰ Charles R. Babcock, *600 People Monitoring Hurricane Contracts*, WASH. POST, Jan. 13, 2006, at D2 (“The federal government has sent nearly 600 auditors and investigators to the Gulf Coast region to monitor \$8.3 billion in contracts awarded to help victims of last year's hurricanes, according to year-end figures released by the Department of Homeland Security.”).

contracting experts to perform the functions necessary for the procurement system to operate efficiently.⁹¹ Sadly, the government's acquisition workforce has been strained to the breaking point.⁹² Nor has the Bush administration suggested any reason for optimism that the issue will be addressed in the foreseeable future.⁹³

⁹¹ See Steven Kelman & Steven L. Schooner, *Scandal or Solution?*, CONT. MGMT., Jan. 2006, at 62, 62. The contracting workforce has desperately required a dramatic recapitalization after the bipartisan, post-Cold War, 1990s initiative to reduce the contracting workforce. See generally GEN. ACCOUNTING OFFICE, GAO-03-443, FEDERAL PROCUREMENT: SPENDING AND WORKFORCE TRENDS (2003), available at <http://www.gao.gov/new.items/d03443.pdf>; OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., REP. NO. D-2000-088, DoD ACQUISITION WORKFORCE REDUCTION TRENDS AND IMPACTS (2000), available at <http://www.dodig.osd.mil/audit/reports/fy00/00-088.pdf>; Schooner, *Fear of Oversight*, supra note 87, at 671 - 72.

⁹² The 1990s workforce reductions left the government woefully unprepared for the dramatic increase in procurement spending since September 11th and Hurricane Katrina. In the last four years, after years of stagnation, government contracting dollars have increased dramatically, with yearly rates of growth between 6.5% and 22.1%. See FED. PROCUREMENT DATA CTR., U.S. GEN. SERVS. ADMIN., TRENDING ANALYSIS REPORT FOR THE LAST 5 YEARS, http://www.fpdsg.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls (last visited Apr. 15, 2006). However, these increased expenditures on government contracts have not been accompanied by a corresponding increase in the workforce. See supra note 91. See generally Steven L. Schooner, *Feature Comment: Empty Promise for the Acquisition Workforce*, 47 GOV'T CONTRACTOR ¶ 203 (2005), available at <http://ssrn.com/abstract=719685>; Griff Witte & Robert O'Harrow, Jr., *Short-Staffed FEMA Farms Out Procurement*, WASH. POST, Sept. 17, 2005, at D01. At some level, this problem is exacerbated by pressure from the current administration to outsource. Outsourcing, or its more palatable pseudonym, "competitive sourcing," has been one of five government-wide initiatives in the Bush management agenda. See, e.g., OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S MANAGEMENT AGENDA, FISCAL YEAR 2002 17 - 18 (2002), available at www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf; Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 83 (2003) ("President Bush is a major advocate of . . . hiring private firms to do the government's work.") (citing David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231, 232 (1998)); see also Matthew Diller, *Form and Substance in the Privatization of Property Programs*, 49 UCLA L. REV. 1739, 1763 (2002) ("Governor Bush sought to hand administration of the state's welfare system over to . . . Lockheed Martin . . . and Electronic Data Systems.").

⁹³ David Safavian, while serving as Administrator for Federal Procurement Policy under the Bush administration, made clear that the administration had no plans to invest in a recapitalization of the acquisition workforce. See David H. Safavian, *Feature Comment:*

The government needs a massive influx of experienced professionals to identify and select quality suppliers, ensure fair prices, draft contracts, manage and evaluate contractor performance, and provide proper oversight.⁹⁴ The negative ramifications of poorly planned, vaguely written, and ill-managed contracts in this context are obvious: they allow contractors to weigh, among other things, haste versus caution, or, to some extent, profits versus care. For example, in removing debris from New Orleans a contractor might face significant economic choices with regard to (1) the experience of its personnel (drivers with spotless safety records might demand higher wages), (2) the quality and maintenance of its equipment (newer, better maintained trucks likely cost more to purchase or lease), (3) the

Delivering Results for the Acquisition Workforce, 47 GOV'T CONTRACTOR ¶ 267 (2005) (responding to Schooner, *supra* note 92, by claiming that “[a]n across-the-board call for more billets is an overly simplistic approach to a complex and challenging issue. . . . OMB does not support an increase in billets merely to establish an arbitrary level for the acquisition corps.”). Sadly, Safavian’s indictment for obstructing investigations and making false statements during his prior position at the General Services Administration set back, and may have crippled, serious procurement reform for the remainder of the Bush administration. Press Release, U.S. Dep’t of Justice, Former GSA Chief of Staff David H. Safavian Indicted for Obstruction of Proceedings and False Statements (Oct. 5, 2005), available at www.usdoj.gov/opa/pr/2005/October/05_crm_521.htm.

⁹⁴ A simple “lesson learned” in Iraq was that, if the government relies heavily upon contractors, the government must maintain, invest in, and apply appropriate professional resources to select, direct, and manage those contractors. Unfortunately, insufficient contract management resources were applied. See, e.g., *Hearing on Contracting Issues in Iraq: Hearing Before the Subcomm. on Readiness and Management Support of the S. Comm. on Armed Services*, 109th Cong. 2 (2006) (statement of Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction), available at http://www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_06-001T.pdf (“[T]he important lesson is that oversight works But, it works more efficiently the earlier it is put in place. Provisions for formal oversight of Iraq reconstruction should have been established at the very beginning of the endeavor.”); Major Gen. George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, in INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB 1, 52 (2005), available at <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf> (“[T]here was no credible exercise of appropriate oversight of contract performance at Abu Ghraib.”). See generally Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549 (2005). Indeed, this problem exists across the entire spectrum of government contracts. See Steven Kelman, *Strategic Contracting Management*, in MARKET BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE 88, 89 - 90, 93 (John D. Donahue & Joseph S. Nye Jr. eds., 2002) (“[T]he administration of contracts[,] once they have been signed, has been the neglected stepchild of [the procurement system reform] effort[.]”).

means of performance (minimally acceptable environmental practices likely cost less than the most modern, clean, and safe technologies) and (4) time management (truck drivers might save time and money by transporting hazardous waste through, rather than around, residential communities). Responsible governance would not entail ceding such decisions to contractors.⁹⁵ Also, without an indication of true necessity, the government should not insulate its contractors against suits by parties injured as a result of the contractors' negligent actions. To do so would unnecessarily expose residents and relief workers in disaster areas to the detriments of contractor decisions unconstrained by democratically accountable government.

3. Form Over Substance: Misuse of the SAFETY Act Model

The GCRA makes more sense if considered in the context of the model upon which it is based,⁹⁶ the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act).⁹⁷ The SAFETY Act, a post-September 11, 2001 initiative, encourages the development and protects the use of new or evolving (and, implicitly, unproven) technologies. Once the Under Secretary of the Department of Homeland Security (DHS) certifies a technology as a qualified anti-terrorism technology (QUATT), a rebuttable presumption of the government contractor defense applies to lawsuits "arising out of, relating to, or resulting from an act of terrorism" when the QUATT has been deployed in defense against, in response to, or in recovery from the terrorist act.⁹⁸ The SAFETY Act's underlying assumption is that, without insulation from liability, contractors

⁹⁵ See Seidenfeld, *supra* note 30, at 1514.

⁹⁶ *Hearing, supra* note 72, at 95 (statement of Craig S. King, government contract attorney) ("There is no doubt on earth this statute is patterned after the SAFETY Act.").

⁹⁷ 6 U.S.C. §§ 441 – 44 (Supp. II 2002). See generally Alison M. Levin, Note, *The SAFETY Act of 2003: Implications for the Government Contractor Defense*, 34 PUB. CONT. L.J. 175 (2004).

⁹⁸ 6 U.S.C. § 442(d)(1). Note that there is a difference between designation as a QUATT and certification as a QUATT. Compare 6 C.F.R. §§ 25.3, 25.5 (2005) (contemplating QUATT designation), with *id.* §§ 25.6, 25.7 (contemplating QUATT certification). Although a QUATT designation triggers certain liability limitations, the rebuttable presumption of the government contractor defense only applies to a technology that has received QUATT certification. See *id.* § 25.6. QUATT certification is only available once a technology has been designated a QUATT. See *id.* § 25.7(f). It entails a further level of government review than that required for QUATT designation. Compare *id.* § 25.3(b) (listing the criteria to be considered for designation), with *id.* § 25.6(a) (listing the additional criteria to be considered for certification).

might not otherwise permit the government to deploy these QUATTs to combat terrorism.⁹⁹ These contracts involve unusual types of work or technologies, or unusual uses of technologies, that are perceived as extraordinarily risky.¹⁰⁰

Recently, Congress also borrowed from the SAFETY Act model to create the Public Readiness and Emergency Preparedness Act (PREP Act),¹⁰¹ which provides broad legal protection to parties involved in the production and distribution of covered “countermeasures,”¹⁰² when the Secretary of Health and Human Services identifies their countermeasure in a public health emergency declaration.¹⁰³ Unlike the PREP Act, the GCRA would apply the unique SAFETY Act model to far more common, if not mundane, tasks.¹⁰⁴ Although they are clearly important, the contracts that the GCRA would cover by and large involve routine tasks such as search and rescue; demolition and repair; debris removal; and dewatering of flooded property.¹⁰⁵ For services such as these, it seems far less reasonable to shield contractors from liability for all but the most egregiously wrongful actions. These are not the types of work that can only be performed by an extremely limited pool of contractors or that require the use of unique facilities.

⁹⁹ For a discussion of the SAFETY Act’s purpose and legislative history, see Levin, *supra* note 97, at 176 - 78; *see also* Laurenza & Clancy, *supra* note 65, at 482 (“[P]rotection for contractors against the potential extraordinary liability that may result from an act of terrorism is essential if the federal government is to be able to work effectively with the private sector in the development and procurement of anti-terrorism technologies.”).

¹⁰⁰ This point cannot be overemphasized. For a cogent articulation of this principle (in the context of indemnification), see, for example, Tolan, *supra* note 26, at 260 - 61 (emphasizing the unique and extraordinary nature of the contractual requirements, particularly in research and development, that proved uninsurable because they involved, for example, nuclear power or highly volatile missile fuels).

¹⁰¹ Pub. L. 109-148, div. C, 119 Stat. 2680, 2818 – 32 (2005) (to be codified at 42 U.S.C. §§ 247d-6d to -6e).

¹⁰² PREP Act sec. 2, § 319F-3(a)(1), 119 Stat. at 2818 (to be codified at 42 U.S.C. § 247d-6d(a)(1)). The PREP Act includes a rather confusing definition of “covered countermeasure.” *See id.* sec. 2, § 319F-3(i)(1), 119 Stat. at 2827 – 28 (to be codified at 42 U.S.C. § 247d-6d(i)(1)). Essentially, the term encompasses drugs, biological products, or devices that are authorized for use in diagnosing, mitigating, preventing, treating, or curing a pandemic or epidemic.

¹⁰³ *Id.* sec. 2, § 319F-3(b)(1), 119 Stat. at 2819 – 20 (to be codified at 42 U.S.C. § 247d-6d(b)(1)). Like the SAFETY Act and the GCRA, the PREP Act makes an exception for willful misconduct. *Id.* sec. 2, § 319F-3(d), 119 Stat. at 2824 (to be codified at 42 U.S.C. § 247d-6d(d)).

¹⁰⁴ *See* S. 1761, 109th Cong. § 5(a)(1) (2005).

¹⁰⁵ *See id.* While the scope of Hurricane Katrina’s destruction may be unprecedented, describing the work as routine reflects the nature of the work, rather than the importance of the work.

Contrast the private sector's virtually unlimited capacity to provide, for example, demolition and repair services with its extremely limited capacity to develop the type of technologies certified under the SAFETY Act, such as "lamp-based infrared countermeasure missile-jamming systems that can be deployed on fixed-wing aircraft to defeat . . . heat-seeking . . . missiles" or "a computer network that screens and validates, using biometric screening techniques, the identity of persons entering or leaving the United States."¹⁰⁶ Although certified SAFETY Act technologies may involve "the normal work that [the companies producing the technologies] do,"¹⁰⁷ they are not widely available in the commercial marketplace. Thus, while it may be "normal" for the specialized firms to produce these technologies, nothing suggests that a significant capacity exists for the private sector to produce them.

As discussed above, the GCRA process through which contractors would be able to obtain liability protection -- certification by the Chief of Engineers -- lacks any substantive inquiry into the circumstances surrounding contractual performance.¹⁰⁸ This process bears little resemblance to the highly judgmental and discretionary decisions to be made by the DHS Under Security under the SAFETY Act.¹⁰⁹ Specifically, the SAFETY Act employs seven criteria,¹¹⁰ most of which are absent in the GCRA. For example, it is difficult to imagine a scenario in which there would be a "[s]ubstantial likelihood that [for example, debris removal] technology will not be deployed unless protections under [the GCRA, as opposed to the SAFETY Act] are extended."¹¹¹ Furthermore, QUATT certification is only

¹⁰⁶ Both the missile-jamming systems, produced by BAE Systems Information and Electronic Systems Integration, and the computer network, produced by Accenture, have been certified as QUATTs. Dep't of Homeland Security, Recent SAFETY Act Designations/ Certifications, <https://www.safetyact.gov/dhs/sac/home.nsf/Awards?OpenForm> (last visited Apr. 15, 2006).

¹⁰⁷ *Hearing, supra* note 72, at 96 (statement of Craig S. King).

¹⁰⁸ *See supra* Part III.A.2.

¹⁰⁹ *But see Hearing, supra* note 72, at 95 (statement of Craig S. King) ("Basically all the same types of protections that we are talking about [in the SAFETY Act] would be [in S. 1761]. There would be a certification process, the whole sort of thing.").

¹¹⁰ The criteria are (1) prior United States Government use or demonstrated substantial utility and effectiveness, (2) availability of the technology for immediate deployment in public and private settings, (3) existence of extraordinarily large or unquantifiable potential third-party liability risk exposure to seller (or another provider of the technology), (4) substantial likelihood that the technology will not be deployed unless SAFETY Act protections are extended, (5) magnitude of risk exposure to the public if the technology is not deployed, (6) evaluation of all scientific studies that can be feasibly conducted to assess the capability of the technology to substantially reduce risks of harm and (7) whether the technology would be effective in facilitating the defense against acts of terrorism. 6 U.S.C. § 441(b) (Supp II 2002).

¹¹¹ *See id.* § 441(b)(4); *infra* notes 130 - 135 and accompanying text (discussing the lack

granted after the DHS Under Secretary conducts a “comprehensive review” to determine whether the technology will perform as intended, conform to the seller’s specifications, and be safe for use as intended,¹¹² while the GCRA requires no analogous review. Thus, the SAFETY Act certification involves a significant, meaningful act of governmental discretion and thereby approximates the judicial inquiry applied to the government contractor defense. By forgoing such scrutiny, however, the GCRA abandons this traditional limitation on the liability protection provided to government contractors -- a limitation without which the extension of such protection loses its ordinary doctrinal justification.

B. Misallocating Risk

As a policy matter, the GCRA is unfair, inefficient, and unwise. The GCRA improperly allocates risk of harm between negligently injured parties, contractors, and the government.¹¹³ As a matter of policy, a better solution allocates risk to the superior risk bearer or, alternatively, the least cost risk avoider.¹¹⁴ For most every activity that would be

of empirical evidence that threats of liability will significantly inhibit the market for the disaster relief activities covered by the GCRA).

¹¹² 6 U.S.C. § 442(d)(2).

¹¹³ Generally, the government expects contractors to purchase insurance and, accordingly, the government willingly pays contractors to obtain that insurance. Prospective indemnification is employed only under extraordinary circumstances (for example, in the nuclear industry) in which contractors either cannot obtain insurance for a certain risk or cannot afford prohibitively priced premiums. *See, e.g.*, Act of Aug. 28, 1958, Pub. L. No. 85-804, 72 Stat. 972 (1958) (codified as amended at 50 U.S.C. §§ 1431 - 1435 (2000)); 48 C.F.R. §§ 50.403-1 to -3 (2005) (allowing government indemnification of contractors for unusually hazardous or nuclear risks). Thus, indemnification -- through which the government, in effect, directly insures contractors rather than reimbursing the contractor for its insurance costs -- derives from a market failure in the insurance industry. *See generally* Ralph C. Nash & John Cibinic, *Risk of Catastrophic Loss: How to Cope*, 2 NASH & CIBINIC REP. ¶ 44 (1988). Bear in mind, however, that the indemnification debate focuses upon prospective allocation of risk between the government and its contractors -- it does not suggest that members of the public, if injured, should have no remedy.

¹¹⁴ In addition to fairness, economic efficiency also appears to dictate that the costs incurred as a result of accidents be allocated to “the party or activity which can most cheaply avoid them.” *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View at the Cathedral*, 85 HARV. L. REV. 1089, 1096 - 97 (1972); *see also* Posner & Rosenfield, *supra* note 22, at 88 – 92. *But see* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 515 - 18 (1999) (suggesting that the allocation of risk to the

covered by the GCRA, it is apparent that pursuit of either policy goal would require either the government or its contractors to bear the risk of their negligent decisions or actions.

The superior risk bearer is the party best positioned to (1) appraise, in advance, the likelihood that the risk will occur and the magnitude of the harm if it does occur, (2) insure against the risk, either through self-insurance or market insurance and (3) bear the cost of the harm.¹¹⁵ In the unique context of post-disaster clean-up and reconstruction, the party harmed by negligent contractor behavior typically is less able to anticipate, assess, insure against, or avoid contractor negligence.¹¹⁶ Both the contractor -- through market-supplied

party best able to bear the risk is less appropriate when the government is one of the contracting parties). Hadfield asserts that private sector assumptions of efficiency fail when transported to the public sector because “[t]o the extent that government has superior risk-bearing capacity, it does not act in order to profit from this characteristic.” *Id.* at 516. In other words, the government transfers risk for reasons other than efficiency. *See id.*

¹¹⁵ Posner and Rosenfield defined the superior risk-bearer as the party better able to insure against the risk, which is determined by its (1) ability to determine, in advance, the probability that the risk will occur and the magnitude of the loss if the risk does in fact occur and (2) ability to diversify the risk away by pooling it with other uncertain events. Posner & Rosenfield, *supra* note 22, at 90 - 92. Economist Christopher Bruce has similarly focused on the parties’ abilities to mitigate damages resulting from the occurrence of the risk through insurance. *See* Christopher J. Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEGAL STUD. 311, 322 - 23 (1982).

¹¹⁶ In *Dalehite v. United States*, 346 U.S. 15, 24 (1953), the Supreme Court held that the FTCA prohibited a claim against the government by victims of the explosion of ammonium nitrate fertilizer stored in a ship at the docks in Texas City. A negligence suit was filed against the government because the fertilizer involved “had been produced and distributed at the instance, according to the specifications and under the control of the United States.” *Id.* at 18. Although *Dalehite* involved the issue of government liability rather than contractor liability, the dissenting opinion of Justices Jackson, Black, and Frankfurter emphasized the irrationality of imposing the cost of harm on the injured parties who quite obviously were the inferior risk bearers:

The disaster was caused by forces set in motion by the Government, completely controlled or controllable by it. Its causative factors were *far beyond the knowledge or control of the victims*; they were not only incapable of contributing to it, but could not even take shelter or flight from it.

Id. at 48 (Jackson, J., dissenting) (emphasis added). For additional information on the Texas City disaster, see generally HUGH W. STEPHENS, *THE TEXAS CITY DISASTER 1947* (1997); Samuel B. Kent, *The Texas City Disaster, 1947*, *Hugh W. Stephens*, 28 J. MAR. L. & COM. 675, 677 (1997) (book review); Local 1259, Int’l Ass’n of Fire Fighters, *The Texas City Disaster: April 16, 1947*, <http://www.local1259iaff.org/disaster.html> (last visited Apr. 15, 2006) (detailing the events of the tragic day through an historical account, pictures, and

insurance -- and the government -- through indemnification, should market-supplied insurance not be available -- are far better positioned than the potential victims of contractor negligence to insure against the risk of such accidents and to thereby bear the cost of this risk. Nonetheless, by expanding the liability protection of the government contractor defense beyond its ordinary bounds,¹¹⁷ the GCRA imposes the cost solely on the negligently injured individual.

Similarly, the least cost risk avoider is the party best positioned to take steps to avoid or minimize the harm.¹¹⁸ Even when a harm is nearly inevitable, a party may be able to either reduce the probability that the harm will occur or decrease the harm's magnitude.¹¹⁹ For example, consider a contractor hired to demolish private homes in the New Orleans area that the government has deemed damaged beyond repair.¹²⁰ Imagine that the contractor destroys the wrong house -- i.e., a house that poses no danger and was capable of being restored -- because either (1) the government was ambiguous when it designated the houses for destruction and the contractor did not seek clarification or (2) the contractor was negligent in its communications with the government about which houses were slated for demolition. Whereas the contractor could have avoided a costly accident with the exercise of reasonable care, the homeowner would not even know of a need to take precautions that would have reduced the risk of the home's destruction. Yet under the GCRA, the homeowner would bear this loss.

In so doing, the GCRA would reduce the contractor's incentive to adopt prudent risk avoidance strategies (e.g., to inquire or confirm whether the house must be destroyed) when faced with such an ambiguity.¹²¹ Under the GCRA, contractors could only be held liable

personal stories).

¹¹⁷ See *supra* Part III.A.1.

¹¹⁸ The least cost risk avoider is often conflated with the superior risk bearer. For example, Posner and Rosenfield perceive that the superior risk bearer is not only better able to insure against the risk, but is also better able to prevent the risk from materializing in the first place. See Posner & Rosenfield, *supra* note 22, at 90.

¹¹⁹ See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 3 (1985) ("Even when necessary or unavoidable, an accident . . . causes harm. The affected parties, however, can usually take steps to reduce the probability or magnitude of the harm. The parties to a tortious accident can take precautions to reduce the frequency or destructiveness of accidents.").

¹²⁰ Certification under the GCRA would most likely be granted in this case: the majority of the contractor's work was the performance of demolition activities in a declared disaster zone. See S. 1761, 109th Cong. §§ 5(a)(1), 5(d)(4) (2005); *supra* text accompanying notes 77 - 81.

¹²¹ See *Hearing, supra* note 72, at 31 (statement of Dr. Beverly Wright, Director, Deep South Center for Environmental Justice, Xavier University) ("If contractors no longer fear legitimate legal liability, where is the incentive to do good work?"); *id.* at 55 (statement of Dr. Joel Shufro, Executive Director, New York Committee for Occupational Health and

for negligent actions if they engaged in reckless or willful misconduct.¹²² By thus lowering the bar, the GCRA creates a moral hazard,¹²³ increasing the possibility that third parties will suffer harm as a result of contractor behavior.¹²⁴

Safety) (“What S. 1761 does is to shift the costs of personal injuries and property damage from the government contractors to the workers and/or the residents in the disaster areas.”); *id.* at 10 (statement of Sen. Barbara Boxer) (“[The GCRA] sends a . . . message . . . to the contractors, well, do your best, because if you make a mistake, if you burn toxics, if you do some other things, you know, you won’t be held responsible.”).

¹²² At the Hearing, Senator Thune emphasized that the GCRA “would not in any way limit any contractor’s liability for recklessness or willful misconduct.” *Hearing, supra* note 72, at 4 (statement of Sen. John Thune). However, by limiting contractors’ liability for negligent acts, the GCRA insulates contractors from the consequences of a significant portion of their activities.

¹²³ “[M]oral hazard’ refers to the tendency for insurance against loss to reduce incentives to prevent or minimize the cost of loss.” Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 239 (1996) (citing Joseph E. Stiglitz, *Risk, Incentives and Insurance: The Pure Theory of Moral Hazard*, 8 GENEVA PAPERS ON RISK & INS. 4 (1983) (“[T]he more and better insurance that is provided against some contingency, the less incentive individuals have to avoid the insured event, because the less they bear the full consequences of their actions.”)); *see also* Kenneth J. Arrow, *The Economics of Moral Hazard: Further Comment*, 58 AM. ECON. REV. 537, 537 – 38 (1968); Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 961 - 62 (1963); Mark V. Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531, 535 (1968). Baker also explained that “economists’ models demonstrate[] . . . that insurance inevitably increases the occurrence, magnitude, or cost of that which is insured against.” Baker, *supra*, at 241. In other words, “[c]ontrol of moral hazard is essential to prevent . . . dissipat[ion of] any deterrent force that the tort system possesses.” Seth J. Chandler, *The Interaction of the Tort System and Liability Insurance Regulation: Understanding Moral Hazard*, 2 CONN. INS. L.J. 91 (1996). In the context of contracting activities, moral hazard can result when a contractor is insulated from liability for negligent behavior during the course of performance and thus has a reduced incentive to take reasonable precautions against risky activities. *See* Samir B. Mehta, *Additional Insured Status in Construction Contracts and Moral Hazard*, 3 CONN. INS. L.J. 169, 182 (1996). In *Dalehite v. United States*, 346 U.S. 15 (1953), not only did the dissenting Justices point out the irrationality of imposing harm on the inferior risk bearer, *see id.* at 24, but they also quite reasonably anticipated the moral hazard problem that results when parties are insulated from liability, *see id.* at 50 (Jackson, J., dissenting) (“It is our fear that the Court’s adoption of the Government’s view in this case may inaugurate an unfortunate trend toward relaxation of private as well as official responsibility.”).

¹²⁴ *See* Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 260 (1991) (“[T]he immediate

From a policy perspective, protection of the public from harm -- rather than protection of contractors' economic interests -- must come first.¹²⁵ Senator Barbara Boxer (D-Cal.) explained that the government "should be on the side of the people that get hurt directly, and [it] shouldn't be in a situation where [it is] trying to make it more difficult for them to receive compensation[.]"¹²⁶ Senator James Jeffords (Ind-Vt.) also warned that "[n]ow, more than ever, our government's role should be to ensure that citizens are protected from faulty cleanup efforts."¹²⁷ Instead of pursuing either of these goals, the GCRA legislation would create a regime in which (1) the parties harmed by the negligence of contractors would bear risks that they could not effectively reduce and (2) neither the government nor its contractors would bear responsibility for harm inflicted through accidents that could have been insured against or averted with reasonable precautionary efforts. Again, these line-drawing questions regarding contractor liability are not new.¹²⁸ But the solution offered by the GCRA -- that negligently injured parties, rather than the government or its contractors, should bear the risk of loss inherent in ordinary disaster relief work -- is as novel as it is unappealing.¹²⁹

effect of the [government contractor] defense is to place the full cost of mishaps on injured parties who, but for government involvement, would be able to shift that cost to the contractors.") (citations omitted).

¹²⁵ "The most important objective . . . is the assurance of prompt and adequate compensation of the public." A.J. ROSENTHAL ET AL., *CATASTROPHIC ACCIDENTS IN GOVERNMENT PROGRAMS* 12, 72 - 76 (1963).

¹²⁶ *Hearing, supra* note 72, at 9 (statement of Sen. Barbara Boxer).

¹²⁷ *Id.* at 6 (statement of Sen. James Jeffords).

¹²⁸ The Department of Justice (DOJ) objected to a 1985 bill that would have reduced the liability of contractors, because it did not "believe that government indemnification of contractor losses is the appropriate way to solve the problems faced by government contractors because of changing tort liability." *Indemnification of Government Contractors: Hearing on S. 1254 Before the S. Comm. on the Judiciary*, 99th Cong. 21 (1985) (statement of Richard K. Willard, Acting Assistant Attorney General, Civil Division, Department of Justice). Indeed, "[i]n the . . . few years [before 1985], the efforts of government contractors to transfer their product liability exposure to the government [had] increased dramatically." *Id.* at 22. Although DOJ acknowledged "that the changes in the tort system have created problems for contractors, [it did] not believe that indemnification [was] an appropriate response, and certainly it [would not have corrected] the underlying reasons for these problems." *Id.* at 25.

¹²⁹ While some QUATT certifications no doubt shift risk to negligently injured individuals, the underlying policy is that the social good enjoyed by the public derived from individual QUATTs employed in combating terrorism outweighs the risks borne by potential victims. This is analogous to the nuclear industry, which might prove unsustainable without protection from potential liability. *See infra* text accompanying notes 173 - 174. But, as discussed *infra* Part III.C, no empirical evidence suggests any such

C. *Absence of Empirical Necessity*

The GCRA’s drafters asserted that “well-founded fears of future litigation and liability under existing law discourage contractors from assisting in times of disaster.”¹³⁰ Such fears apparently derived from the volume and size of post-September 11th litigation filed against contractors.¹³¹ That anxiety has been fueled by the contracting community, particularly by contractors that pursued post-Katrina government contracts without liability protection beyond that afforded by existing law.¹³² From this public showing of anxiety, the GCRA’s drafters concluded that contractors would not compete for government contracts in times of disaster without extraordinary liability protection, that disaster recovery efforts would consequently prove inadequate, and that the public would suffer. Senator John Thune (R.-S.D.) emphasized that the government would be unable to adequately respond to major disasters without contractor assistance.¹³³ The authors readily concede this point. The relevant issue is whether contractors can, or will, function without the liability protection afforded by the GCRA.

Experience suggests, however, that the GCRA drafters’ premise is hyperbolic or simply incorrect.¹³⁴ No evidence suggests that a significant number of the nation’s (or the

market failure in, for example, debris removal.

¹³⁰ S. 1761, 109th Cong. § 2(10) (2005).

¹³¹ Senator Thune, who introduced S. 1761, explained that

because of the ongoing multi-billion dollar class action cases filed against the contractors who assisted the Government in the cleanup of the World Trade Center, I have concerns that other major disaster cleanups, including Hurricane Katrina, may be stymied due to the potential for future lawsuits being brought against contractors who carry out major disaster cleanups on behalf of the Government.

Hearing, supra note 72, at 3 (statement of Sen. John Thune); *see also id.* at 8 (statement of Sen. David Vitter).

¹³² *See, e.g., id.* at 38 (statement of Warren Perkins) (“I can assure you that responsible contractors throughout the Country are paying close attention. . . . They are aware of the litigation that followed [the September 11 attacks]. . . . [T]hey are deeply concerned.”); *id.* at 25 (statement of Anthony Zelenka) (“Take a look at what happened [to contractors] in New York after the terrorists on 9/11. . . . I believe passing the [GCRA] is **necessary to ensure that contractors like me will be there to do the work in the future without fear of reprisals.**”).

¹³³ *See id.* at 12 (statement of Sen. John Thune).

¹³⁴ At the hearing, Dr. Beverly Wright called this premise a “complete fabrication,” citing local contractors’ dissatisfaction with their lack of opportunity to compete for no-bid contracts for post-Katrina work. Dr. Wright discussed how local contractors were ready and willing to accept the work and the corresponding liability. *See Hearing, supra* note 72,

world's) best contractors have been discouraged from seeking the United States Government's business in the past. The absence of empirical data or concrete information supporting this assertion by the GCRA's proponents is stark, but in light of history, it is not surprising.¹³⁵

While they have thus far failed to put forth empirical proof, GCRA proponents have invoked the familiar critiques of opportunistic trial lawyers,¹³⁶ emboldened by a popular anecdote involving a failed suit.¹³⁷ This storyline has been enriched by rhetorical flourishes

at 32 - 33 (statement of Dr. Beverly Wright).

¹³⁵ At similar hearings twenty years ago, Senator Charles Grassley (R-Iowa) asked the Aerospace Industries Association (AIA) whether *any* members of its association “no longer bid on government contracts because of the fear of liability suits.” *Indemnification of Government Contractors: Hearing on S. 1254 Before the S. Comm. on the Judiciary*, 99th Cong. 88 - 89 (1985). AIA asserted that it lacked sufficient information to respond at the hearing and, in a subsequent written response, was no more convincing. Even responding “on a non-attribution basis,” AIA failed to identify a single firm, and instead merely asserted that “[t]he consequences of unusually hazardous or nuclear risks arising under government contract . . . influence the business decision process.” *Id.* at 96 (Letter from Lloyd R. Kuhn, Vice President of Legislative Affairs, AIA to Sen. Charles E. Grassley, Member, Senate Comm. on the Judiciary (June 28, 1985)). Similarly, one year earlier, when Representative Sam Hall (D-Tex.) requested an estimate of the number of contractors who had restricted their bidding for government contracts due to liability concerns, the National Association of Manufacturers was unable to give him “reliable data,” stating merely that “we do feel that there are clearly contractors who will not bid for certain types of contracts, and that there are certain types of contractors who will not seek this type of business.” *Government Contractors’ Product Liability and Indemnification Acts: Hearing on H.R. 4083 and H.R. 4199 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 39 (1984) (statement of T. Richard Brown, Vice President, Law Department, Electronics and Defense Sector of TRW Inc., on behalf of the National Association of Manufacturers). When Representative Hall revisited the issue with John M. Geaghan of Raytheon Company, Mr. Geaghan admitted that he knew of no instance when the company refused to pursue a government contract due to liability concerns. *Id.* at 161.

¹³⁶ See *Hearing, supra* note 72, at 25 (statement of Anthony Zelenka) (“[T]here are people out there who want to capitalize on this tragedy and others like it. Lawsuits have been filed against contractors who have performed the types of rescue and recovery work my firm has been doing in New Orleans.”). Of course, the GCRA's advocates deny any animosity towards the plaintiff's bar. See *id.* at 38 (statement of Warren Perkins) (“I am not here to bash plaintiff attorneys.”).

¹³⁷ Government contractors have identified a lawsuit filed against Boh Brothers Construction Company as a sign that “[t]he madness has already started in Louisiana.” See *id.* at 26 (statement of Anthony Zelenka). The lawsuit accused Boh Brothers of performing

regarding the putative dichotomy between patriots and trial attorneys.¹³⁸ The GCRA's supporters thus focus on the costs imposed by future lawsuits and class actions while neglecting to identify any ex ante disincentives created by those costs. This mere fact that government contractors experience an ex post aversion to lawsuits is an insufficient policy predicate for legislation extending them liability protection.¹³⁹ Although empirical evidence *could* someday validate the GCRA proponents' argument,¹⁴⁰ the threat of liability has yet to result in a dearth of available contractors.¹⁴¹

Despite the post-disaster hysteria, the current procurement regime contains sufficient flexibility for the government to meet its contracting requirements in times of crisis.¹⁴² In awarding post-Katrina recovery contracts, the Army Corps of Engineers has relied on several FAR procedures that have allowed for increased flexibility in responding to the disaster.¹⁴³ Shortly after Hurricane Katrina, the Corps advertised four contracts for

faulty bridge repair work which was apparently performed by an entirely different contractor, and the suit was dismissed, of course. *See id.* at 26 (statement of Anthony Zelenka); *id.* at 33 (statement of Warren Perkins).

¹³⁸ One contractor beseeched the Senate to "not let the trial lawyers penalize the contractors like me who report for duty." *Id.* at 27 (statement of Anthony Zelenka).

¹³⁹ *See supra* notes 128, 131 (discussing Congress's rejection of proposed bills to reduce contractor liability in the 1980s); *see also supra* note 129 (contrasting the mere desire to avoid ex post liability with the social necessity of averting real market failures in the provision of essential or crucial technologies or services).

¹⁴⁰ *See infra* Part IV.A.

¹⁴¹ *See infra* notes 134 - 135 and accompanying text.

¹⁴² *See* Stan Soloway, *Baghdad's Lessons for New Orleans*, GOV. EXEC., Oct. 1, 2005, at 44 - 45, *available at* <http://www.govexec.com/features/1005-01/1005-01advp2.htm> ("[M]any of the flexibilities contained in the [FAR] . . . are poorly understood . . . includ[ing] limited as opposed to full and open competition, higher levels under which purchases can be made instantly, and more. . . . [T]hese flexibilities enable[] us to meet the demands for speed and agility integral to any recovery effort."); J. Catherine Kunzsee, *Pre-Disaster Contracting: The Use of Indefinite-Delivery/Indefinite-Quantity Contracts*, ANDREWS GOV'T CONT. LITIG. REP., Feb. 27, 2006, at 13 (discussing the importance of indefinite-delivery/indefinite-quantity contracts in responding to national disasters); *see also* OFFICE OF FED. PROCUREMENT POLICY, EMERGENCY PROCUREMENT FLEXIBILITIES: A FRAMEWORK FOR RESPONSIVE CONTRACTING & GUIDELINES FOR USING SIMPLIFIED ACQUISITION PROCEDURES (2003), *available at* http://www.whitehouse.gov/omb/procurement/emergency_procurement_flexibilities.pdf.

¹⁴³ *See Hearing, supra* note 72, at 17 (statement of Major General Don T. Riley, U.S. Army Corps of Engineers). For example, contracts were awarded under shortened time periods under the unusual and compelling urgency exception to the CICA, 10 U.S.C. § 2304(c)(2) (2000); 41 U.S.C. § 253(c)(2) (2000), and on the basis of verbal and letter contracts as authorized by the FAR, 48 C.F.R. § 6.302-2 (2005). *See Hearing, supra* note

large debris removal: twenty-two contractors — eighteen more than the number required — responded.¹⁴⁴ Although the response rates for other contracts were not as high, General Riley could not name a single contract that exhibited insufficient contractor interest.¹⁴⁵

IV. FIRST, DO NO HARM

Nonetheless, in performing government contracts, certain contractors may indeed require protection. It is not surprising that Congress has sought to fashion a remedy to this limited problem. The challenge, however, is for Congress to adopt an appropriate solution, rather than an approach that has the potential to harm disaster area residents and relief workers without fixing the putative problem.

A. *Protection Without Moral Hazard*

This Article does not dispute the premise that certain contractors, involved in certain types of disaster relief, may find themselves unable to obtain adequate insurance to cover their potential liability. Insurance is based on assessing, quantifying, mitigating, and transferring risks.¹⁴⁶ In emergencies, however, a lack of certainty about site conditions and contracting requirements turns the consideration of such elements into an exercise in futility.¹⁴⁷ If insurers are unable to quantify contractors' risks, they may not be willing to

72, at 17.

¹⁴⁴ *Hearing, supra* note 72, at 40 (statement of Major General Don T. Riley).

¹⁴⁵ While General Riley testified that during the few weeks before November 2004, several contracts attracted only between one and five bidders, he did not identify any contracts that failed to attract a single bid. *See id.* (statement of Major General Don T. Riley). General Riley also acknowledged that there may be other reasons, unrelated to liability concerns, to explain the low level of interest in these particular contracts. *See id.* While there may be some indications that the level of competitive bidding for Katrina relief contracts is occasionally less than optimal, there is no evidence of a total incapacity to attract bids and no reason to believe that fear of liability is the primary cause of any deficiencies in contractor interest. *See infra* text accompanying notes 130 - 135.

¹⁴⁶ *See Hearing, supra* note 72, at 86 (statement of Paul Becker, President, Willis Construction Practice); ROBERT E. KEETON, *INSURANCE LAW: BASIC TEXT* § 1.2 (1971) (“Insurance is an arrangement for transferring and distributing risk.”); *see also* KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 64 - 66 (1986) (discussing the importance of accurate assessment and classification of risks).

¹⁴⁷ *See KEETON, supra* note 146 (“As one understands a greater percentage of the relevant facts, the element of guessing in his description of risk is reduced, and his prediction is

provide sufficient coverage for those risks.¹⁴⁸ The contractors working at Ground Zero apparently faced this situation.¹⁴⁹

Moreover, contractors employed in emergency circumstances face a legitimate threat of litigation. The inherently uncertain and unstable nature of disaster zones naturally leads to significant property loss, physical injury, or death.¹⁵⁰ Regardless of whether contractor fault causes these injuries, lawsuits are likely to be filed against them.¹⁵¹ Even unwarranted or frivolous lawsuits can be devastating without adequate insurance. These risks loom large for construction and debris contractors, which tend to be particularly small firms with thin

more reliable.”). Insurance companies have expressed concerns about underwriting contractors working in disaster zones for several reasons: uncertain site conditions; unusual and unknown health hazards; questions regarding chemicals released during clean-up; the limited nature of tools available to assess environmental factors; varying local, state, and federal standards; the fast track nature of the work to be done; and unclear contractual provisions. *See id.* at 86 - 87 (statement of Paul Becker).

¹⁴⁸ “[I]f insurance companies do not or can not [sic] understand the risks they are being asked to insure, they have a very difficult time providing the risk financing which allows companies to operate.” *Id.* (written statement of Paul Becker).

¹⁴⁹ The Executive Vice President of Bovis, a contractor involved in the post-September 11th clean-up, testified that “given the dangerous conditions, the retroactive nature and the unknown aspects of [the post-September 11] unprecedented effort, commercial insurance companies would not provide the coverage needed and ultimately only limited liability coverage was obtained.” *Hearing, supra* note 72, at 51 (statement of Michael Feigin, Executive Vice President, Chief Administrative Officer, Bovis Lend Lease Holdings, Inc.). The President of Willis, a global insurance broker, testified that his company was only able to secure limited insurance coverage for contractors working at Ground Zero. *Id.* at 85 (statement of Paul Becker); *see also* Steven Greenhouse, *Contractors at Ground Zero Denied Insurance for Cleanup*, N.Y. TIMES, Jan. 18, 2002, at B1.

¹⁵⁰ *See* SIERRA CLUB, POLLUTION AND DECEPTION AT GROUND ZERO REVISITED: WHY IT COULD HAPPEN AGAIN 14 (2005), *available at* <http://www.sierraclub.org/groundzero/report2005.pdf> (“Any emergency involving the destruction of a large building is likely to cause a release of hazardous substances.”). The New Orleans area stored massive amounts of toxic chemicals. *See Hearing, supra* note 72 (written statement of Dr. Beverly Wright) (“Dozens of toxic time bombs along Louisiana’s Mississippi River petrochemical corridor, the 85-mile stretch from Baton Rouge to New Orleans, make the region a major environmental justice battleground. The corridor is commonly referred to as Cancer Alley.”).

¹⁵¹ Some injured parties sue the contractors simply because they “are the only [people] in there that can be sued.” *Id.* at 56 (statement of Anthony Zelenka); *see also supra* notes 56, 62 (describing the scope of the government’s sovereign immunity under the FTCA). *But see supra* note 89 (arguing that the government’s sovereign immunity may be limited when it abdicates its discretionary function).

profit margins. Once more, the September 11th experience is instructive. Some five thousand claims are currently pending against contractors who assisted with disaster recovery at the World Trade Center site.¹⁵² Even for those contractors facing meritless suits or those that can overcome a negligence standard, litigation defense absorbs significant resources that can threaten firms' survival.¹⁵³

Thus, contractors' desire for financial protection when working in disaster zones under emergency circumstances is understandable. But that desire can be fulfilled in ways other than the dilution of tort law. Broadly eliminating contractor tort liability is patently unfair to parties sustaining property loss or bodily injury as a result of negligent actions. Individuals living and working in disaster zones have suffered, and will continue to suffer, both financially and physically because of contractor irresponsibility and negligence. The continuing negative health effects suffered by Ground Zero workers and lower Manhattan residents are widely recognized,¹⁵⁴ and a "Katrina cough" appears frequently in the New

¹⁵² *Id.* at 48 (statement of Michael Feigin); *see also id.* at 8 (statement of Sen. David Vitter) ("We know from true, recent experience after 9/11 that there could well be a flurry of class action lawsuits to try to profit from the emergency measures that needed to be taken [after Hurricane Katrina] . . ."); *id.* at 25 - 26 (statement of Anthony Zelenka) ("Hundreds of lawsuits were filed against contractors for the heroic work they did to clean up Ground Zero in a short amount of time at the express direction of the Federal, State, and local authorities.").

¹⁵³ *Id.* at 48 (statement of Michael Feigin) ("[T]he problem isn't that we don't believe that we can sustain a standard of negligence. We believe that we've done nothing wrong. . . . But the legal fees alone could put a company like ours . . . out of business."). In response to pressure from the contracting community, Congress eventually appropriated \$1 billion to fund an insurance program covering injuries to workers incurred during clean-up of the World Trade Center site. *See Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, div. K, tit. III, 117 Stat. 11, 517 - 18 (2003);* Jeffrey H. Birnbaum, *Clients' Rewards Keep K Street Lobbyists Thriving*, WASH. POST, Feb. 14, 2006, at A1 ("The [General Contractors Association of New York] paid Carmen [Group Inc.] \$500,000 to persuade the federal government to cover its members' insurance premiums for cleanup work at Ground Zero after the terrorist attacks of Sept. 11, 2001. After three years of lobbying, the government agreed . . ."). The government also appropriated separate funds to ease the burden September-11th-based claims would have on New York's workers' compensation system. Pub. L. No. 107-117, div. B, ch. 8, 115 Stat. 2230, 2312 - 13 (2002). *See generally* GOV'T ACCOUNTABILITY OFFICE, GAO-04-1013T, SEPTEMBER 11: FEDERAL ASSISTANCE FOR NEW YORK WORKERS' COMPENSATION COSTS (2004), *available at* <http://www.gao.gov/new.items/d041013t.pdf>.

¹⁵⁴ Joel Shufro, Executive Director of the New York Committee for Occupational Safety and Health, testified about these health problems at the Hearing:

Unfortunately, four years following the devastating attacks on the World Trade

Orleans area.¹⁵⁵ Nothing suggests that the injured and suffering individuals should, as a matter of course, be denied compensation. As Senator Hillary Clinton (D-N.Y.) explained, the solution provided by the GCRA “ignores and misapplies the lessons of September 11th.”¹⁵⁶

B. Superior Alternatives

Center, respiratory illness, psychological distress and financial devastation have become a new way of life for many of the responders Many of the workers are disabled by chronic pulmonary problems. Some are unable to work. Many have also suffered substantial economic disruption . . . and do not have health insurance and are unable to pay for treatment or needed medicine. . . . [T]here are grave concerns about the potential for workers developing slower starting diseases, such as cancer, in the future.

Hearing, supra note 72, at 54; *see also* GAO, WTC HEALTH EFFECTS, *supra* note 1, at 7 - 15; *MMWR Report, supra* note 6, at 808 (finding that of those Ground Zero workers who participated in a Centers for Disease Control and Prevention study, 60% suffered from lower respiratory symptoms and 74% suffered from upper respiratory symptoms); Greg Sargent, *Zero for Heroes*, NEW YORK MAGAZINE, Oct. 27, 2003, at 28, *available at* http://www.newyorkmetro.com/nymetro/news/politics/columns/citypolitic/n_9384/ (discussing a severe pulmonary disease, and consequent financial stresses, suffered by a contractor employee). Some of these health problems may have directly resulted from contractor negligence. For example, according to a Centers for Disease Control and Prevention study, on the three days following September 11th, when exposure was greatest, only 21% of the participants reported using respiratory protection. *MMWR Report, supra* note 6, at 808. On any given day after that, nearly 50% of the workers were not wearing respiratory protection, something Mr. Shufro attributed to “a management problem.” *Hearing, supra* note 72, at 66 (statement of Dr. Joel Shufro). Although some workers had protection and decided not to wear it, “Ground Zero workers -- lacking proper training and accurate official safety information -- had little incentive to wear the ‘uncomfortable and unmanageable’ respiratory gear.” Michelle Chen, *Ground Zero: The Most Dangerous Workplace*, NEWSTANDARD, Jan. 24, 2005, <http://newstandardnews.net/content/index.cfm/items/1402>. Furthermore, some workers received no more than a paper mask. *Id.*; *Hearing, supra* note 72, at 60 (statement of Dr. Joel Shufro).

¹⁵⁵ *See* Scott Gold & Ann M. Simmons, “*Katrina Cough*” *Floats Around*, L.A. TIMES, Nov. 4, 2005, at A10.

¹⁵⁶ *Hearing, supra* note 72, at 14 (statement of Sen. Hillary Clinton); *see also* Press Release, Office of Commc’ns, New York City Dep’t of Health and Mental Hygiene, Most WTC Health Registry Enrollees Reported New or Worsened Respiratory Symptoms After 9/11/01 (Nov. 22, 2004), *available at* http://www.nyc.gov/html/doh/html/press_archive04/pr151-1122.shtml.

Experience offers superior alternatives to the GCRA that do not sacrifice the interests of negligently injured parties or contractor personnel. The alternatives discussed below represent examples of the government’s prior efforts to solve insurance marketplace failures without denying a recovery to negligently injured individuals.

1. Remedy-Granting Clauses

Ordinarily, parties to government contracts use standardized remedy-granting clauses¹⁵⁷ to allocate the risk of anticipated and unforeseen contingencies¹⁵⁸ between the parties. The implicit premise of these clauses is that they (1) dissuade contractors from padding their bids, offers, or proposals when competing for government business and (2) reassure those contractors that the government will equitably adjust contracts to

¹⁵⁷ See, e.g., Differing Site Conditions Clause, 48 C.F.R. § 52.236-1 (2005) (anticipating subsurface or latent physical conditions that differ from the contract or unknown and unusual site conditions); Changes Clause, 48 C.F.R. § 52.243-1 (2005) (anticipating of potential changes within the scope of the contract); Government Furnished Property Clause, 48 C.F.R. § 52.245-2(a)(3) - (4) (2005) (anticipating potentially defective, or late delivery of, government furnished property); Termination for Convenience Clause, 48 C.F.R. § 52.249-2 (2005) (anticipating the government’s need to end contracts for a host of noncontractual reasons). All of these clauses include a similar remedy for the occurrence of unanticipated contingencies: reimbursement of all allowable costs, plus an allowance for profit. See Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633, 695 - 97 (1996) (discussing the use of standardized clauses to anticipate unforeseeable contingencies in government contracts).

¹⁵⁸ The FAR define a contingency as “a possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminable at the present time.” 48 C.F.R. § 31.205-7(a) (2005).

[Contingencies] that may arise from presently known or unknown conditions, the effect of which cannot be measured so precisely as to provide equitable results to the contractor and to the Government . . . are to be excluded from cost estimates, but should be disclosed separately . . . to facilitate the negotiation of appropriate contractual coverage.

Id. § 31.205-7(c)(2); see also *Foster Constr. C.A. v. United States*, 435 F.2d 873, 887 (Ct. Cl. 1970) (noting the “long-standing, deliberately adopted procurement policy” that bidders “need not consider how large a contingency should be added to the bid to cover the risk”); Richard J. Kendall, *Changed Conditions as Misrepresentations in Government Construction Contracts*, 35 GEO. WASH. L. REV. 978, 979 - 82 (1967).

reimburse for unforeseen contingencies.¹⁵⁹ This “contingency promise” essentially provides that in exchange for the contractor’s willingness not to inflate its contract price to insulate itself against certain potential, although unknown, liabilities, the government agrees to make the contractor whole when such liabilities are incurred.¹⁶⁰

During the performance of government contracts, if an unanticipated contingency arises that requires the contractor to incur additional costs, the parties have a number of options.¹⁶¹ The contracting officer¹⁶² and the contractor can agree upon compensation and bilaterally modify their contract.¹⁶³ Alternatively, the contracting officer can unilaterally determine the additional compensation to be paid.¹⁶⁴ If the contractor is dissatisfied with the amount of compensation, it can file a claim, which commences the disputes process.¹⁶⁵ This orchestrated response to unforeseen liability in government contracts is a far cry from the GCRA’s insulation of contractors from liability. Rather than providing the contractor and the government with several alternative methods by which they may allocate between themselves the costs arising from an unanticipated liability, the GCRA simply imposes these costs upon the negligently injured individual.¹⁶⁶

Generally, the government considers contractor insurance a cost of doing business. Indeed for some contracts, the government requires contractors to maintain a certain amount of insurance and permits reimbursement of the contractors’ insurance costs.¹⁶⁷

¹⁵⁹ Contingency planning strikes at the core of federal procurement policy. See Ralph C. Nash, Jr., *Risk Allocation in Government Contracts*, 34 GEO. WASH. L. REV. 693, 698 - 700 (1966) (“[T]erms and conditions . . . are an attempt . . . to define the remedies of the parties for most foreseeable contingencies that may occur [T]hese standard terms and conditions represent a relatively thorough statement of intended risk allocation.”).

¹⁶⁰ See Schooner, *Fear of Oversight*, *supra* note 87, at 695 – 96.

¹⁶¹ In addition to these options, the contractor may choose to absorb the additional costs and continue performance. For example, the contractor may forego making a claim against the government if its assessment of the 1990s reforms — such as the evaluation of past performance — persuades it that the opportunity cost of pursuing the claim outweighs the value of the claim. See Schooner, *supra* note 94, at 697 - 98.

¹⁶² A contracting officer is a government employee with actual, legal authority to bind the government in contract. See 48 C.F.R. § 1.602-1 (2005) (providing that contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings); see also RALPH C. NASH, JR., STEVEN L. SCHOONER & KAREN R. O’BRIAN, *THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* 127 (2d ed. 1998).

¹⁶³ 48 C.F.R. § 43.103(a).

¹⁶⁴ *Id.* §§ 43.103(b), .201.

¹⁶⁵ *Id.* §§ 33.206, 52.233-1; see also 41 U.S.C. §§ 601 - 13 (2000).

¹⁶⁶ See *supra* text accompanying notes 113 - 120.

¹⁶⁷ 48 C.F.R. § 52.228-7(a), (c)(1) (2005); see also *id.* §§ 28.301, 31.205-19 (2005) (providing a policy prescription and cost principles regarding insurance of government

Further, the government may indemnify a contractor for certain liabilities to third parties (and expenses incidental to such liabilities) above and beyond those covered by insurance when the liabilities arise out of the performance of the contract.¹⁶⁸ The former mechanism allocates the responsibility of procuring adequate insurance to the contractor, after which the government reimburses the contractor for the costs of obtaining such protection against risk; the latter directly gives contractors an extra layer of insurance.

The FAR's third-party liability provisions could serve as a model for government indemnification of contractors engaged in disaster relief.¹⁶⁹ They would, however, need to be modified in at least two respects. First, construction and engineering contracts, both of which are prevalent in disaster recovery efforts, currently are exempted from agreements of this nature.¹⁷⁰ Second, and more problematic, liability protection is subject to the availability of appropriated funds at the time the contingency occurs.¹⁷¹ As discussed below, however, once insurance becomes either unattainable or so expensive that the government is no longer willing to pay for it, the government should be willing to indemnify its contractors.

2. Extraordinary Protection For Extraordinary Risks

contractors).

¹⁶⁸ *Id.* § 52.228-7(c)(2). The government limits its assumption of liability to claims based on death, bodily injury, or property damage arising out of performance of the contract. *Id.* It disallows indemnification for liabilities that, under the terms of the contract, were the responsibility of the contractor or that were attributable to the contractor's "willful misconduct or lack of good faith." *Id.* § 52.228-7(e).

¹⁶⁹ *See* 48 C.F.R. § 52.228-7(a), (c). Under the indemnification provision, contractors are only reimbursed for "final judgments or settlements approved in writing by the Government." *Id.* § 52.228-7(c)(2). Therefore, contractors do not necessarily avoid the up-front costs associated with litigation through this type of contractual agreement. *See Hearing, supra* note 72, at 76 (statement of Craig S. King). Note, however, that when a contractor is facing a third-party suit that may be reimbursable under the FAR, the government is given the option to "settle or defend the claim and to represent the Contractor in or to take charge of any litigation." 48 C.F.R. § 52.228-7(g)(3) (2005). In the event that the government chooses to exercise this right, the contractor is able to avoid litigation expenses.

¹⁷⁰ 48 C.F.R. § 28.311-1 (2005).

¹⁷¹ 48 C.F.R. § 52.228-7(d). In the context of disaster recovery, the potential liability is significant. Thus, it is unlikely that the government would have appropriated sufficient funds, thereby leaving contractors with a large amount of residual liability. *See* Richard A. Smith, *Indemnification of Government Contractors*, BRIEFING PAPERS, Oct. 1982, at 1 (discussing the application of the Antideficiency Act, Pub. L. No. 97-258, 96 Stat. 877 (1982) (codified as amended in scattered sections of 31 U.S.C.)).

With few exceptions,¹⁷² when commercial insurance becomes unavailable or inordinately expensive, the government historically has indemnified contractors and, in effect, become a direct insurer of its contractors.¹⁷³ Under Public Law 85-804, the President may delegate authority to various agencies to provide extraordinary relief for contracts in connection with the national defense.¹⁷⁴ This relief includes indemnification in those extraordinary circumstances when contracts involve “unusually hazardous or nuclear risks” for which commercial insurance is unavailable or insufficient.¹⁷⁵ Granted, this statutory vehicle is a tool of last resort, reserved for truly extraordinary circumstances when the private sector market fails.¹⁷⁶ Also, like the FAR third-party liability clauses, Public

¹⁷² See *supra* Part III.A.3 (discussing the SAFETY Act and the PREP Act).

¹⁷³ See, e.g., H.R. REP. NO. 2232 (2d Sess. 1958) (indicating Congress’s intent to authorize the use of indemnification where commercial insurance was unavailable).

¹⁷⁴ Pub. L. No. 85-804, 72 Stat. 972 (1958) (codified at 50 U.S.C. §§ 1431 - 1435 (2000)). See generally Kevin P. Mullen, *Extraordinary Contractual Relief: Public Law 85-804 in the Homeland Security Era*, PROCUREMENT LAW., Summer 2002, at 1 (providing a comprehensive overview of the history and substance of Public Law 85-804). Other examples of statutory indemnification authority also exist. See 10 U.S.C. § 2354 (2000) (allowing the military to indemnify research and development contractors for “unusually hazardous risks”); 42 U.S.C. § 241(a)(7) (2000) (allowing the Department of Health and Human Services to indemnify contractors under the same terms as the military as outlined in 10 U.S.C. § 2354); 42 U.S.C. § 2458(b) (2000) (allowing the National Aeronautics and Space Administration to indemnify users of space vehicles).

¹⁷⁵ 48 C.F.R. § 50.403-1 (2005); see also *id.* § 52.250-1 (providing a clause to be inserted in contracts that have been approved for indemnification). Like the FAR third-party liability provisions, the government’s liability under Public Law 85-804 does not extend to claims that arise from contractors’ willful misconduct or lack of good faith. Compare 48 C.F.R. § 52.250-1(d) with *id.* § 52.228-7(e). Thus far, thirteen major agencies have been granted indemnification authority: the Atomic Energy Commission; Department of Agriculture; Department of Commerce; Department of Defense; Department of Health and Human Services; Department of the Interior; Department of Transportation; Department of the Treasury; Federal Emergency Management Agency; General Services Administration; National Aeronautics and Space Administration; Tennessee Valley Authority; and Government Printing Office. Exec. Order No. 10,789, 23 Fed. Reg. 8897 § 21 (Nov. 14, 1958), as amended by Exec. Order No. 11,051, 27 Fed. Reg. 9683 (Sept. 27, 1962); Exec. Order No. 11,382, 32 Fed. Reg. 16,247 (Nov. 28, 1967); Exec. Order No. 11,610, 36 Fed. Reg. 13,755 (July 22, 1971); Exec. Order No. 12,148, 44 Fed. Reg. 43,239 (July 20, 1979); Exec. Order No. 13,232, 66 Fed. Reg. 53,941 (Oct. 20, 2001).

¹⁷⁶ The FAR directs agencies not to use their authority under Public Law 85-804 “when other adequate legal authority exists.” 48 C.F.R. § 50.102(a). The FAR also warns agencies to avoid granting indemnification “in a manner that encourages carelessness and laxity on the part of persons engaged in the defense effort.” *Id.*

Law 85-804 neither avoids the government's current fiscal crisis¹⁷⁷ nor allows contractors to escape the litigation process. Litigation expenses, however, are reimbursable.¹⁷⁸ Furthermore, indemnification under this statute is not constrained by congressional appropriations.¹⁷⁹ Given the potential magnitude of third-party claims arising out of disaster recovery work, this would prove especially helpful to contractors engaged in post-Katrina clean-up.¹⁸⁰

Although Public Law 85-804 currently applies only to national security situations, Congress easily could expand it to cover other circumstances where contractors might not be able to obtain sufficient insurance, such as disaster relief. Indemnification is preferable to the GCRA not only because it protects contractors from potentially devastating liabilities, but also because it helps negligently injured individuals receive compensation.¹⁸¹ Contractors "should not be penalized for showing up," nor should negligently injured individuals be left without a remedy. The Public Law 85-804 model would satisfy both of these admirable goals.

3. Funds

Another indemnification model is the \$1 billion liability insurance fund created by Congress to protect contractors and the State and City of New York against claims related to debris removal after the terrorist attacks of September 11, 2001.¹⁸² Contractors that

¹⁷⁷ See *supra* note 14 and accompanying text.

¹⁷⁸ 48 C.F.R. § 52.250-1(b) ("[T]he Government shall . . . indemnify the Contractor against . . . [c]laims (including reasonable expenses of litigation or settlement) by third persons (including employees of the Contractor) for death; personal injury; or loss of, damage to, or loss of use of property.").

¹⁷⁹ Exec. Order No. 11,610, 36 Fed. Reg. 13,755 (July 22, 1971); *cf.* 48 C.F.R. § 52.228-7(d) (subjecting the FAR third party liability provisions to the availability of appropriated funds at the time a contingency occurs).

¹⁸⁰ See *supra* note 171 and accompanying text.

¹⁸¹ See ROSENTHAL, *supra* note 125, at 97 - 108 (discussing the benefits and shortcomings of government indemnification of contractors for catastrophic accidents).

¹⁸² Consolidated Appropriations Resolution, 2003, div. K, tit. III, 117 Stat 11, 517 - 18 (2003) ("[FEMA] is directed to provide . . . up to \$1,000,000,000 to establish a captive insurance company or other appropriate insurance mechanism for claims arising from debris removal . . ."); *see also* U.S. GEN. SERVS. ADMIN., CATALOG OF FEDERAL DOMESTIC ASSISTANCE 1749 - 50 (2005), available at <http://12.46.245.173/CFDA/pdf/catalog.pdf> (detailing the history, objectives, and application process for the creation of the captive insurance company); Act of July 22, 2003, 2003 N.Y. Sess. Laws 839 - 41 (McKinney) (codified at N.Y. INS. LAW §§ 7001 - 7012 (McKinney 2003)) (authorizing formation of a

began work at Ground Zero immediately after the terrorist attacks subsequently failed to obtain sufficient liability insurance due to the uncertain nature of the risks and the potentially large number of liability claims.¹⁸³ Therefore, the Federal Emergency Management Agency (FEMA) appropriated funds for the creation of an insurance company to provide \$1 billion in third-party liability coverage for a period of twenty-five years.¹⁸⁴ The City of New York is the named insured on the fund, with approximately 140 of the city's contractors and subcontractors as additional named insureds.¹⁸⁵ The captive insurance program is currently defending New York City and its contractors in several lawsuits arising from their debris removal efforts.¹⁸⁶ The indemnification provided by the fund is more forward-looking than that granted by Public Law 85-804. Although it was created subsequent to many of the covered injuries, plenty of injuries encompassed by the fund came to light after its creation and, indeed, are continuing to arise today.¹⁸⁷ Because the captive insurance fund has proven to be extremely useful to contractors facing liability

captive insurance company for liability arising out of disaster relief at the World Trade Center after September 11th).

¹⁸³ See U.S. GEN. ACCOUNTING OFFICE, GAO-03-926, DISASTER ASSISTANCE: INFORMATION ON FEMA'S POST 9/11 PUBLIC ASSISTANCE TO THE NEW YORK CITY AREA 16 (2003) [hereinafter GAO, FEMA'S 9/11 ASSISTANCE]; U.S. GEN. ACCOUNTING OFFICE, GAO-04-72, SEPTEMBER 11: OVERVIEW OF FEDERAL DISASTER ASSISTANCE TO THE NEW YORK CITY AREA 26 (2004) [hereinafter GAO, 9/11 FEDERAL ASSISTANCE]; Steven Greenhouse, *Contractors at Ground Zero Denied Insurance for Cleanup*, N.Y. TIMES, Jan. 18, 2002, at B1.

¹⁸⁴ GAO, FEMA'S 9/11 ASSISTANCE, *supra* note 183, at 15 - 16; GAO, 9/11 FEDERAL ASSISTANCE, *supra* note 183, at 26 - 27. Although FEMA initially indicated that the insurance fund would be limited to claims for injuries occurring after September 29, 2001, when the rescue work officially ended, it subsequently backed off from that position. Jennifer Steinhauer, *City May Bear \$350 Million in 9/11 Claims*, N.Y. TIMES, Apr. 9, 2004, at B1; Mike McIntire, *New York and FEMA End Dispute Over 9/11 Medical Claims*, N.Y. TIMES, Apr. 13, 2004, at B3.

¹⁸⁵ *Hearing*, *supra* note 72, at 48 (statement of Michael Feigin).

¹⁸⁶ See *id.* at 51 (statement of Michael Feigin); Complaint, *DiVirgilio v. Silverstein Properties*, 04-CV-07239 (S.D.N.Y. Sept. 10, 2004) (initiating a class action lawsuit on behalf of approximately 800 people involved in the clean-up and rescue efforts at Ground Zero against, *inter alia*, the four government contractors that led the clean-up: Turner Construction; AMEC Construction; Tully Construction; and Bovis Lend Lease).

¹⁸⁷ Concern about the potential long-term health effects of September 11th is widespread and has led to the creation of the World Trade Center Health Registry. See World Trade Center Health Registry, <http://www.nyc.gov/html/doh/html/wtc/index.html> (last visited Apr. 15, 2006); see also Kirk Johnson, *Inquiry Opens Into Effects of 9/11 Dust*, N.Y. TIMES, Sept. 6, 2003, at B1. Any future negative health effects could give rise to lawsuits against the city or its contractors that would be covered by the captive fund.

from their involvement in clean-up after September 11,¹⁸⁸ it frequently is cited as an alternative to the GCRA.¹⁸⁹

The fund was unprecedented¹⁹⁰ and is imperfect. A frequent complaint is that the pool is capped at \$1 billion.¹⁹¹ Injuries continue to mount, and, in all likelihood, will continue to be discovered for years to come.¹⁹² The amount of litigation stemming from contractors' Ground Zero work continues to grow.¹⁹³ Thus, it is unclear whether \$1 billion will be sufficient to cover all third-party liability claims. The amount set aside for the fund, however, was arbitrary, and, should it prove insufficient, the government can increase its size.

Any program modeled on the September 11th insurance fund should, to the extent possible, address the shortcomings with its establishment and administration.¹⁹⁴ Nonetheless, the fund is preferable to the GCRA because it recognizes, to a certain extent, government responsibility for certain third-party injuries incurred during post-disaster clean-up,¹⁹⁵ extends liability protection to contractors assisting the government and ensures

¹⁸⁸ See *Hearing, supra* note 72, at 51 (statement of Michel Feigin) (“But for the WTC Captive [fund] . . . expenses for lawyers and consultants would have exceeded any fees made in a matter of months. . . . In short, absent the captive [fund], responding to a disaster when called would have . . . put us out of business.”).

¹⁸⁹ See, e.g., *id.* at 16 (statement of Sen. Hillary Clinton (D-N.Y.)); *id.* at 69 (statement of Dr. Beverly Wright).

¹⁹⁰ See GAO, FEMA'S 9/11 ASSISTANCE, *supra* note 183, at 30.

¹⁹¹ *Hearing, supra* note 72, at 49 (statement of Michael Feigin).

¹⁹² See Devlin Barrett, *Sept. 11-Related Cancers May Not Appear for Decades, Doctors Say*, BIOTERRORISM WEEK, Sept. 27, 2004, at 11.

¹⁹³ See *Hearing, supra* note 72, at 85 (statement of Paul Becker, President).

¹⁹⁴ For example, the PREP Act, unlike the GCRA or the SAFETY Act, provides for the establishment of a fund to compensate individuals negligently injured by covered countermeasures. See Pub. L. 109-148, div. C, 119 Stat. 2680, 2829 – 32 (2005) (to be codified at 42 U.S.C. § 247d-6e). This use of a fund suggests that Congress looked for guidance on how to manage risk from other prior endeavors besides the SAFETY Act, perhaps to one of the victim compensation funds. To date, however, Congress has appropriated no money for the fund, see *id.* § 257d-6e(a), leading some to question its effectiveness. See Press Release, Sen. Edward Kennedy, Sen. Tom Harkin & Sen. Christopher Dodd, Kennedy, Harkin and Dodd Protest Frist Liability Giveaway (Dec. 21, 2005), available at <http://kenedy.senate.gov/~kenedy/statements/05/12/2005C22413.html> (“Without a real compensation program, the liability protection in the defense bill provides a Christmas present to the drug industry and a bag of coal to everyday Americans.”). Nonetheless, in the PREP Act, Congress recognized the fundamental unfairness of denying injured individuals any compensation, while the GCRA contains no such acknowledgement.

¹⁹⁵ See generally SIERRA CLUB, *supra* note 150 (discussing the federal government's

their survival,¹⁹⁶ and protects individuals negligently harmed by those contractors.

A different fund model can be found in the Vaccine Injury Compensation Program (VICP),¹⁹⁷ created by Congress in 1988 to stabilize the supply of vaccines and establish a streamlined compensation process for vaccine-related injuries.¹⁹⁸ Under the VICP, the government assumes liability for vaccine-related injuries and deaths through a no-fault alternative to the tort system.¹⁹⁹ VICP compensation is paid out of the Vaccine Injury Compensation Trust Fund, which is financed by a seventy-five cent tax on certain vaccines.²⁰⁰

Congress intended the VICP to provide compensation “quickly, easily, and with certainty and generosity.”²⁰¹ Like the September 11th fund, however, the VICP has not

failure to adequately warn, protect, account for, and treat individuals living and working in lower Manhattan after September 11).

¹⁹⁶ Michael Feigin of Bovis Lend Lease claimed that the “current World Trade Center related litigation demonstrates the need for additional clarity, not only to protect contractors from liability, but also to eliminate or discourage the costly and time consuming process of the litigation itself.” *Hearing, supra* note 72, at 52 (statement of Michael Feigin). Earlier, however, he had admitted that Bovis had received compensation for its work at Ground Zero and had fewer litigation expenses and potential liabilities due to the September 11th captive insurance program. *See id.* at 31. Thus, a program based on the September 11th fund would recognize and address the financial threats contractors face when they assist the government in disaster relief.

¹⁹⁷ 42 U.S.C. §§ 300aa-10 to -34 (2000). *See generally* DEP’T OF HEALTH AND HUMAN SERVS., HEALTH RES. AND SERVS. ADMIN., NATIONAL VACCINE INJURY COMPENSATION PROGRAM FACT SHEET (2004), http://www.hrsa.gov/vaccinecompensation/fact_sheet.htm [hereinafter VICP FACT SHEET].

¹⁹⁸ *See* VICP FACT SHEET, *supra* note 197; GEN. ACCOUNTING OFFICE, GAO/HEHS-00-8, VACCINE INJURY COMPENSATION: PROGRAM CHALLENGED TO SETTLE CLAIMS QUICKLY AND EASILY 4 - 5 (1999), *available at* <http://www.gao.gov/new.items/he00008.pdf> [hereinafter GAO, VACCINE INJURY COMPENSATION]. Prior to the creation of the VICP, the threat of litigation faced by vaccine manufacturers resulted in serious vaccine shortages which, in turn, decreased the rate of child immunization. *See Compensating Vaccine Injuries: Are Reforms Needed?: Hearing Before the H. Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Gov’t Reform*, 106th Cong. 106 (1999) (statement of Thomas E. Balbier, Jr., Director, National Vaccine Injury Program).

¹⁹⁹ The Secretary of Health and Human Services is the designated respondent in lawsuits filed under the VICP. VICP FACT SHEET, *supra* note 197. The vaccine manufacturer and administrator are not involved in the proceedings. 42 U.S.C. § 300aa-11(a)(3).

²⁰⁰ 42 U.S.C. § 300aa-15(i)(2); 26 U.S.C. § 9510 (2000). The fund, however, is available to compensate for vaccine-related injuries that occurred both before and after its establishment. 42 U.S.C. § 300aa-15(i).

²⁰¹ H.R. REP. NO. 99-908, pt. 1, at 3 (1986); *see also* GAO/HHES-00-8, *supra* note 198, at

pleased everyone.²⁰² Any indemnification regime based on previously established funds should, of course, incorporate the lessons learned from its predecessors. Although neither fund is perfect, both the September 11th captive insurance company and the VICP are more responsible and equitable approaches to the alleviation of crushing liabilities than the GCRA.

V. CONCLUSION: OF JUSTICE AND EFFICIENCY

As the World Trade Center attacks and Hurricane Katrina violently demonstrated, the government heavily relies upon the private sector's expertise, and its nearly limitless capacity, after national disasters to provide emergency services, restore order, and begin the reconstruction process. Contractors -- drawn both by altruistic interests and profit motives -- promptly answer the government's call. Experience suggests that, in their haste, neither the government nor its contractors obtain sufficient information to assess and avoid the risks associated with critical tasks, such as rescue operations and debris removal. To the extent that haste breeds an absence of, or reduction in, caution, the potential for negligent injury increases.

A legal regime in which injured parties alone bear the costs of contractor negligence is untenable. Accordingly, the government mandates, and reimburses the costs of, contractor insurance. If, due to the immensity of destruction following a disaster or inadequate information in light of a crisis, the insurance industry fails to offer economically feasible protection to contractors, the government must fill the void. The government -- armed with sovereign immunity and able to, on the one hand, widely disperse the burden to the taxpaying public and, on the other hand, incur and carry debt -- may choose to directly insure its contractors. But in no event can the government's recognition that it must provide meaningful protection for its contractors result in unmitigated risk to potential

5 (“VICP features designed to expedite the process include a relaxation of the rules of evidence, discovery, and other legal procedures that can prolong cases in the legal system.”).

²⁰² Concerns raised include the VICP's processing time, the adversarial nature of the process, the imbalance between the resources available to the opposing parties, and the fund balance. See *Compensating Vaccine Injuries: Are Reforms Needed?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Government Reform*, 106th Cong. 32 - 34 (1999) (statement of Linda Mulhauser, a petitioner of the VICP fund); *id.* at 58 - 59 (statement of Marcel Kinsbourne, pediatric neurologist); *id.* at 79 - 91 (statement of Clifford J. Shoemaker, Senior Partner, Shoemaker & Horn); GAO, VACCINE INJURY COMPENSATION, *supra* note 198, at 19 (“While VICP was expected to provide compensation for vaccine-related injuries quickly and easily, these expectations have often not been met.”); *id.* at 7 - 11, 16.

victims of contractor negligence. Legislative solutions must consider the interests of the government, the contractors upon which the government depends, and the public. Governmental indemnification, on an ad hoc basis, has proven effective. Similarly, where the insurance industry cannot provide a market solution, the government, in large part successfully, has experimented with captive funds or pools.

In the end, any legislative solution should endeavor to achieve two potentially synergistic ends: deterring, to the optimal degree, contractors from causing harm and, when harm does result, compensating the victims. Because the two ends are not entirely identical, balance is required. Forcing contractors to internalize all of the costs of harm imposed upon victims -- particularly where there is a failure of the insurance market -- could result in excessively risk averse behavior. Such behavior could impede and potentially frustrate recovery efforts or dramatically increase the government's costs. Conversely, unnecessary or excessive protection might encourage irresponsible behavior or, at a minimum, discourage firms from undertaking a socially desirable level of care. For example, creating a government-financed litigation fund without a cap may prove effective for compensating victims, but it would not serve to deter potential tortfeasors. Conversely, such a cap likely would result in either victims or contractors bearing some portion of the cost of the harms caused.

The sponsors of the Gulf Coast Recovery Act do not appear to have grappled with these thorny issues. Rather, the GCRA smacks of opportunism, and accordingly, merits attention and scrutiny. As a matter of law, it distorts the government contractor defense beyond recognition. As a matter of policy, the breadth and scope of Hurricane Katrina's devastation fail to justify capitulation to the unsubstantiated and oft-rebuffed contractor demands for insulation from liability. No empirical case proves that the insurance market has failed or that broad insulation of disaster-area contractors is necessary. Moreover, the GCRA would not encourage responsible contractor behavior; instead it creates a moral hazard, exposing potential victims to physical injury and financial ruin. Any solution that potentially *increases* the risk of negligent injuries is fundamentally flawed. It also violates basic principles of justice and fairness, particularly after the devastation already caused by Hurricane Katrina. The Gulf Coast Recovery Act's effort to capitalize upon national disasters is not only ill-conceived and inefficient, but harms the credibility of the federal government's procurement process. Congress should examine its own legislative repertoire more fully before going down this perilous path.