

# Are State Tort Claims Against Military Contractors Preempted? High Court Weighs Combatant-Activities Exception

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On November 3, 2025, the U.S. Supreme Court is scheduled to hear oral arguments in the case *Hencely v. Fluor Corp.* This case [concerns](#) a former servicemember bringing state tort claims against military contractors (Fluor) for injuries sustained on a U.S. military base in Afghanistan during [Operation Freedom's Sentinel](#). The issue before the Supreme Court is whether the [combatant-activities exception](#) (CAE) to federal government civil liability under the [Federal Tort Claims Act](#) (FTCA) preempts state tort claims against military contractors for conduct that breached their contracts and violated military orders. Both the U.S. [District Court for the District of South Carolina](#) and the [U.S. Court of Appeals for the Fourth Circuit](#) held that it does. In reaching their conclusions, the lower courts relied on *Boyle v. United Technologies Corp.*, a 1988 Supreme Court decision that extended an exception to federal government liability under the FTCA—the [discretionary function exception](#) (DFE)—to preempt state tort claims against government contractors in certain circumstances. The lower courts found that, like in *Boyle*, there are a number of factors that weigh in favor of extending the CAE, reasoning that the CAE represents unique federal interests in carrying out armed conflict and preventing state regulation of battlefield conduct and decisionmaking. Accordingly, the lower courts determined that, regardless of any failings on Fluor's part, permitting state tort claims against Fluor, which was found to have been involved with combatant activities, would significantly conflict with the aforementioned federal interests, and the claims were preempted.

This Legal Sidebar briefly describes federal preemption, the FTCA, and the CAE. The sidebar then discusses the Supreme Court's *Boyle* decision, how federal appellate courts have applied the CAE in cases involving military contractors since *Boyle*, and the procedural history of *Hencely v. Fluor Corp.*, including arguments thus far presented by the parties to the Supreme Court.

## Federal Preemption

Article VI, Clause 2 of the Constitution (the Supremacy Clause) [provides](#) that federal law is “the supreme Law of the Land.” The Supreme Court has [interpreted](#) this provision to mean that federal law can

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*expressly* or *impliedly* preempt state law. Express preemption entails federal law explicitly displacing state law in an area. Implied preemption entails a federal law's structure or purpose evincing Congress's intent to displace state law in an area. The Supreme Court has further identified two types of implied preemption: (1) field preemption, where federal regulation is so pervasive that it leaves no room for state regulation; and (2) conflict preemption, where compliance with both federal and state law is impossible. For more information on federal preemption, see this CRS report.

## The FTCA and the CAE

As a general matter, the doctrine of sovereign immunity bars private actors from suing the federal government without its consent. The FTCA, enacted in 1946, provides that consent. It instituted a "broad waiver" of sovereign immunity with regard to tort claims stemming from federal officers and employees acting within the scope of their employment. The FTCA generally authorizes tort lawsuits against the United States in federal court if claims (1) seek money damages; (2) for injury to or loss of property, or personal injury or death; (3) caused by a federal officer's or employee's negligent or wrongful conduct; (4) while acting within the scope of their office or employment; and (5) in circumstances where the United States, if a private person, would be liable to the plaintiff under the law of the place where the conduct occurred. There are, however, numerous exceptions to the FTCA's waiver of sovereign immunity, including the CAE.

The CAE is a statutory exception to federal government civil liability under the FTCA. The CAE was enacted as part of the FTCA in 1946. The CAE provides that the federal government is not liable for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

## Military Contractors and Exceptions to the FTCA

Several federal appellate courts have held that the CAE preempts state tort claims against military contractors in certain circumstances, despite FTCA exceptions to liability under Section 2680 of Title 28 specifically applying to "claims against the United States" under Section 1346(b)(1), and Section 2671 specifically excluding contractors from the definition of "federal agency" under the FTCA. These courts have relied on the Supreme Court's 1988 *Boyle* decision that conditionally preempted state tort claims against contractors under the DFE. This section describes *Boyle* and the federal appellate court opinions addressing the CAE and military contractors.

### *Boyle v. United Technologies Corp.*

*Boyle* concerned a Marine helicopter pilot who died when the helicopter he was flying crashed off the coast of Virginia Beach, Virginia, in 1983. He survived the immediate crash but thereafter drowned because he was unable to escape the helicopter. Boyle's father sued the helicopter's manufacturer for, in relevant part, defectively designing the emergency escape hatch such that it opened outward and was therefore ineffective underwater due to water pressure. The Court was asked to decide "when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect."

The Supreme Court, in relevant part, engaged in a systematic assessment of when a federal law, in the absence of either a "clear statutory prescription . . . or a direct conflict between federal and state law," controls in a situation. The Court explained that in situations "involving 'uniquely federal interests'" that are in "significant conflict" with state law, state law is "pre-empted and replaced, where necessary,

by . . . so-called ‘federal common law.’” The Court, in examining the facts of this case, listed several factors as to why state law should be displaced.

First, the Court **determined** that “uniquely federal interests” were at issue in the context of “civil liabilities arising out of the performance of federal procurement contracts.” Second, the Court **assessed** whether there was a “significant conflict” between federal interests and state law. Here, it cited the DFE and **held** that “the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision,” and that military contractor liability in certain procurement contexts “would produce the same effect sought to be avoided by the FTCA exception”: state regulation of conduct and decisions over which Congress has given the federal government discretion. In the Court’s view, “[t]he financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself,” which could influence federal decisionmaking. Thus, the Court **concluded** that the DFE “demonstrates the potential for . . . ‘significant conflict’ between federal interests and state law in the context of Government procurement,” including with regard to military contractors, such that federal law displaces state law tort liability in certain circumstances. Third, the Supreme Court **articulated** a test that had been previously adopted by lower courts for determining when, in the context of military contractors, a significant conflict exists between federal interests and state law and federal law displaces state tort law in the context of procurement contracts: liability for design defects under state law is preempted when

(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

The Supreme Court **determined** that the DFE can bar military contractor liability under state tort law in certain circumstances, including in this case. The Court **vacated** and remanded the case for clarification as to whether the lower court properly conducted its sufficiency-of-the-evidence review.

## Preempting State Tort Claims Against Military Contractors Under the CAE

Five federal appellate courts (the U.S. Courts of Appeals for the **D.C.**, **Second**, **Third**, **Fourth**, and **Ninth** Circuits) have addressed whether the **CAE** can preempt state tort claims against military contractors in certain situations, and each has held that it can, although the tests adopted by the courts vary. Each of these courts has reasoned that *Boyle* stands for the proposition that FTCA exceptions can **represent** unique federal interests and that federal courts should **look** to these exceptions to identify significant conflicts between federal interests and state law. Each court also determined that the CAE can preempt state tort claims against military contractors when specific conditions are met because the exception represents unique federal interests in conducting armed conflict. However, these courts have arrived at different tests for resolving whether a significant conflict exists between federal interests and state law in cases involving military contractors such that preemption is warranted. The **D.C.** and **Third** Circuits adopted what is **termed** the “command-authority test”: a significant conflict exists if, when harmful activity occurred, (1) the military contractor was integrated into combatant activities and (2) the military retained command over the military contractor. The Fourth Circuit joined the D.C. and Third Circuits in adopting the command-authority test in its 2014 opinion *In re KBR, Inc., Burn Pit Litigation*. The Second Circuit, in turn, **adopted** a test that requires that “(1) the claim arises out of the contractor’s involvement in the military’s combatant activities, and (2) the military specifically authorized or directed the action giving rise to the claim.” The Ninth Circuit, for its part, **determined** that preemption is warranted with regard to military contractors under the CAE when state tort claims involve “wartime encounters” and “authorized military action” and “[t]he imposition of . . . liability . . . would create a duty of care where the [CAE] is intended to ensure that none exists.”

Some district courts, however, have found that the CAE does not preempt state tort claims against military contractors in the absence of circuit court precedent. The U.S. District Court for the Middle District of Florida, which sits under the U.S. Court of Appeals for the Eleventh Circuit, [asserted](#) that “the FTCA is an explicit legislative preservation of sovereign immunity” and that, “[u]ntil Congress directs otherwise, . . . private contractors may not bootstrap the Government’s sovereign immunity.” The Northern District of Georgia, also under the Eleventh Circuit, likewise did not extend the CAE to military contractors and [stated](#) that preempting state tort claims against military contractors under the CAE represents “an expansion of the holding in *Boyle* that the Supreme Court may or may not have intended.” (The U.S. District Court for the District of New Jersey, prior to the Third Circuit’s CAE [decision](#), reached a similar [conclusion](#).)

## *Hencely v. Fluor Corp.* Background

In November 2016, a suicide bomber [detonated](#) an explosive vest he was wearing at Bagram Airfield in Afghanistan. Fluor had hired the bomber, a known former Taliban member, as part of the military’s program to hire locals. The military vetted and sponsored local hires, controlled base access, and disseminated supervision and retention requirements that contractors had to follow. On the day of the attack, the bomber traversed the base unsupervised after missing a bus that would have taken him to a base exit point after his shift. He detonated the explosive when confronted by servicemembers. A servicemember who was injured in the attack subsequently sued Fluor under South Carolina law, [alleging](#) that Fluor’s “supervision, entrustment, and retention of the bomber were negligent” and that Fluor breached its contract with the U.S. government.

## Lower Court Opinions

### District Court

Pursuant to Fourth Circuit [precedent](#), the district court [stated](#) that the CAE and combatant activities, including those of military contractors integrated with the military, represent uniquely federal interests that can preempt state law when federal interests and state law significantly conflict. The court then [applied](#) the command-authority test and [determined](#) that Fluor was integrated into combatant activities because the situation involved actual violence in a theater of war and Fluor conducted activities “necessary to and in direct connection with actual hostilities.” The court further [stated](#) that the bomber was supervised and retained according to military commands and decisions and that Fluor did not have “sole discretion” in these areas. Accordingly, the court [found](#) that the military retained command authority over Fluor. Allowing the state tort claims to proceed, in the court’s [view](#), would significantly conflict with the uniquely federal interests embodied by the CAE and the military’s ability to determine and carry out base security and force protection measures in armed conflict situations. The district ultimately [ruled](#) that the state tort claims against Fluor were preempted by the CAE.

### Appellate Court

The Fourth Circuit began its CAE [analysis](#) by invoking *Boyle* for the proposition that, in situations involving “uniquely federal interests,” FTCA exceptions can demonstrate “significant conflict between federal interests and state law” warranting federal preemption. The court then cited its own precedent in *In re KBR* extending the CAE to preempt state tort law claims against military contractors: “when state tort law touches the military’s battlefield conduct and decisions, it inevitably conflicts with the combatant activity exception’s goal of eliminating such regulation of the military during wartime.” The Fourth Circuit went on to apply the command-authority test it adopted in *In re KBR* for determining whether state

law significantly conflicts with the federal interests represented by the CAE: state tort law claims against military contractors are federally preempted when a contractor is (1) integrated into military combatant activities and (2) subject to military command authority.

The Fourth Circuit [stated](#) that the fact that Fluor was integrated into military combatant activities was uncontested. Supervising local employees at a military base in a theater of armed conflict, in the court's view, qualified as integration into military combatant activities.

With regard to the second prong of the command-authority test, the Fourth Circuit [found](#) that the military maintained command authority over Fluor's supervision and retention of the bomber. In support of this finding, the court noted that the military required locals be hired and specified various supervision and training mandates for such hires. As [recounted](#) by the court, "the military would authorize employment at Bagram Airfield or terminate it, the military dictated when and how the Local National must be supervised, and the military decided what items the Local National should be forbidden to use." Any alleged failure by Fluor to comply with contractual obligations was [irrelevant](#) to the court because "the purpose of the [CAE] is not protecting contractors who adhere to the terms of their contracts; the exception aims to foreclose state regulation of the military's battlefield conduct and decisions."

The Fourth Circuit ultimately held that state tort law claims against Fluor arising out of combatant activities were federally preempted.

## Preview of Arguments Before the Supreme Court

The [question](#) presented to the Supreme Court is whether [Boyle](#) should "be extended to allow federal interests emanating from the FTCA's [CAE] to preempt state tort claims against a government contractor for conduct that breached its contract and violated military orders." This section summarizes arguments that have thus far been submitted to the Supreme Court.

The petitioner [argues](#) that his claims do not conflict with the CAE because neither this exception nor the FTCA more broadly preclude claims against contractors. He maintains that the FTCA [explicitly](#) applies to the federal government and refers to federal contractors once, to exclude them from the definition of "federal agency" in the context of federal government liability. The petitioner also [notes](#) that the CAE refers only to the combatant activities of the "military or naval forces, or the Coast Guard," and therefore only applies to the government, not contractors. The petitioner [cites](#) Supreme Court [precedent](#) that federal preemption analysis begins with the "assumption" that state law is not superseded "unless that was the clear and manifest purpose of Congress." Congress, he [continues](#), would have included contractors in the CAE if it meant to shield them from liability, as it did in the context of [atomic weapons testing](#). Accordingly, the petitioner [asserts](#) that the statutory language does not support excepting his claim.

The respondent also challenges the Supreme Court's legal reasoning in [Boyle](#). He [argues](#) that federal preemption requires actual conflict between federal and state law. He [cites](#) recent Supreme Court [precedent](#) stating that there is no federal preemption unless justified by the Constitution or statute enacted by Congress. He also [argues](#) that [Boyle](#) did not involve a conflict between state law and federal statutory law, but rather between state law and a "court-divined" federal interest. [Boyle](#), in his [estimation](#), therefore does not comport with the Supreme Court's current understanding of federal preemption and should not be extended to support preemption based on the CAE.

Even if the Supreme Court continues to accept [Boyle](#), the petitioner argues that it should not be extended to this case. He [claims](#) that state law could legitimately be viewed as in significant conflict with federal interests if it held contractors liable for adhering to government procurement specifications, as was the case in [Boyle](#). However, "state claims against a contractor who violated its contract and didn't do what the government required" [do not](#) significantly conflict with federal interests.

The respondent had not yet filed its brief as of the writing of this Legal Sidebar (its brief is [due](#) by September 15, 2025). However, it [argued](#) in opposition to the motion seeking certiorari that there is no circuit split and federal appellate courts have uniformly found that state tort claims against military contractors can be preempted pursuant to the CAE. It further [argued](#) that the appellate court's determinations are correct because [Boyle](#) was correctly decided and, in turn, the CAE represents broad, unique federal interests in carrying out armed conflict that significantly conflict with state tort liability for military contractors involved with combatant activities.

Under the respondent's view, the differences between federal appellate courts' tests for significant conflict between federal interests and state law are largely illusory. The Ninth Circuit's test, [according](#) to the respondent, is not meaningfully different from the command-authority test, and the Second Circuit's test would result in the same conclusion as the command-authority test in practice. The respondent asserted that its activities satisfy any test for preemption thus far conceived by federal appellate courts because its supervision and retention of the bomber stemmed from military decisions, not its own. Allowing the petitioner's claims would allegedly interject state regulation into determinations that are meant to be exclusively federal under the CAE.

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