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NEWSLETTER

Immunities and Defenses for Government Contractors, Part 1: Tort Claims

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Getting sued is an unfortunate occupational hazard for government contractors. Whether the plaintiff brings a tort claim, a constitutional challenge, or a patent infringement suit, the contractor's first question is usually the same: What is the fastest path to dismissal? The good news is, federal law gives contractors a layered set of immunities and defenses – some constitutional, some statutory, some common-law – that can dispose of a case at the pleading stage or on summary judgment.

The contours of these doctrines have shifted recently, however. For example, the U.S. Supreme Court's October 2025 Term has already produced two consequential decisions directly touching contractor liability. On February 25, 2026, the Court issued a unanimous decision with separate concurring opinions in *GEO Group, Inc. v. Menocal* that resolves a long-running circuit split over the scope of the so-called *Yearsley* defense, a doctrine protecting contractors from liability for work performed under government direction. And on April 22, the Court decided *Hencely v. Fluor Corp.*, significantly narrowing the battlefield preemption doctrine that several circuits had extended to shield contractors from state tort liability in combat zones. Together, the decisions reset expectations for how contractors budget, staff, and price risk on federal contracts.

They also reinforce a unifying principle across doctrines that a contractor is *protected* when it does what the government directed, and *exposed* when it exercises independent discretion. These cases invite a closer look at the doctrines potentially available to contractors facing a tort claim: *Yearsley*, *Boyle*, and qualified

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immunity. We examine each below.

The *Yearsley* Defense

In 1940, the Supreme Court held that a contractor building dikes along the Missouri River under a War Department contract was not liable when the project eroded a neighboring landowner's property. Because the contractor had done exactly what the government directed, within the scope of valid congressional authorization, the Court reasoned that holding the contractor liable would effectively hold the government liable – and the government had not consented to be sued. For decades, courts and practitioners read *Yearsley* as conferring something close to sovereign immunity on contractors, with many lower courts labeling the doctrine "derivative sovereign immunity," implying it bore the same procedural force as true government immunity. That characterization had important procedural consequences: If *Yearsley* was a true immunity from suit, a contractor denied its protection could immediately appeal under the collateral order doctrine, staying the case in the process. Several circuits agreed with this interpretation, and others did not.

GEO Group resolved that split. GEO Group, while operating an Immigration and Customs Enforcement (ICE) detention facility in Colorado, was sued by a group of detainees under the Trafficking Victims Protection Act and Colorado's unjust enrichment law, alleging that GEO's sanitation policy, which required detainees to clean common areas under threat of solitary confinement, and its $1-per-day work program were unlawful. The district court denied GEO's motion to dismiss based on *Yearsley*, finding GEO had "far exceeded" ICE detention standards by independently developing its labor programs. GEO immediately appealed. The Tenth Circuit dismissed for lack of jurisdiction, and the Supreme Court granted certiorari.

Justice Kagan, writing for seven of the Justices, drew a straightforward distinction: A merits defense is not an immunity from suit. The collateral order doctrine permits immediate appeal only where the right at stake would be irretrievably lost if trial proceeds, which is true of genuine immunities, but not of *Yearsley*. Because *Yearsley* turns on whether the contractor's conduct was lawful, it can be reviewed after final judgment like any other merits defense. The Court also rejected the "derivative sovereign immunity" label outright, holding that sovereign immunity belongs to the government alone.

After *GEO Group*, the *Yearsley* path to early review is gone, though one potential avenue remains: District courts have discretion to certify a *Yearsley* denial for interlocutory appeal under 28 U.S.C. § 1292(b) (which permits appeal of non-final orders presenting controlling questions of law) if immediate review materially advances the litigation. But that certification is discretionary and rarely granted. And many questions about contractor immunity or immunity-type defenses remain.

GEO Group's practical consequence is that more potential plaintiffs will likely sue, knowing that contractors cannot immediately exit cases via interlocutory appeal, and more disputes will likely proceed through discovery and potential trial before appellate review. Contractors with elevated *Yearsley* exposure may want to revisit their risk-pricing assumptions as a result.

Boyle and *Hencely*

The next doctrine potentially available to government contractors is the *Boyle* doctrine. *Boyle v. United Technologies Corporation* arose when a Marine helicopter pilot drowned after a crash. His estate sued the manufacturer under Virginia tort law, alleging that the helicopter hatch was defectively designed because it opened outward instead of inward; the government's specifications, however, required the outward opening hatch design. The Supreme Court's 1988 decision held that state tort law is displaced, as a matter of federal common law, where it would conflict with the government's discretionary procurement decisions. Although the Federal Tort Claims Act (FTCA) waives the government's sovereign immunity for most tort claims, it preserves it for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function." The Court reasoned that where state tort law creates a "significant conflict" with uniquely federal interests (such as national defense, procurement, or the FTCA discretionary function exception), state law will be displaced.

Deciding how a military helicopter escape hatch should be designed is precisely the kind of discretionary procurement judgment that the exception protects. If the government itself cannot be sued for that decision, it would be anomalous – and futile as a matter of policy – to allow plaintiffs to achieve the same result by suing the contractor that built to the government's specifications. Courts have extended *Boyle* beyond its military equipment origins in the years that followed. The Fourth Circuit applied *Boyle*-type reasoning to burn pit operations claims in *In re KBR, Inc. Burn Pit Litigation*, and the D.C. Circuit in *Saleh v. Titan Corp.* held that claims against contractors integrated into combatant activities are preempted under a broad federal interest analysis.

The Third, Seventh, and Eleventh Circuits have applied *Boyle* to civilian contracts, reasoning that the federal interest in protecting discretionary government functions is not unique to defense procurement. The Ninth Circuit has generally declined, limiting *Boyle* to military equipment. Whether *Boyle* extends to service contracts remains contested across circuits and will likely be the subject of future litigation, and perhaps, another Supreme Court decision.

But *Hencely* significantly narrows that possibility. In 2016, a Taliban operative employed at Bagram Airfield through the military's "Afghan First" program – and hired by a Fluor Corporation subcontractor – carried out a suicide-bomb attack that killed five people and wounded 17 others. The Army's investigation found that Fluor's alleged failure to comply with contractual security and escort obligations was the "primary contributing factor" enabling the attack. Former Army Specialist Winston Hencely, permanently disabled while intercepting the bomber, sued Fluor in South Carolina federal court alleging various forms of negligence under South Carolina law. The Fourth Circuit barred his claims under a broad "battlefield preemption" doctrine that immunized contractors engaged in wartime combatant activities, even if the state tort suit alleged that the contractor violated its instructions from the military. The Court granted Hencely's petition for a writ of certiorari to decide "whether a state-law suit premised on a military contractor's activities in a war zone is preempted even when the contractor was not required or authorized to take the action at issue."

In a 6-3 opinion by Justice Thomas, the Court held that the Fourth Circuit erred in finding Hencely's state-law tort claims preempted. First, the Court observed that no constitutional provision and no federal statute expressly preempted Hencely's suit. Regarding the Federal Tort Claims Act combatant-activities exception, the Court confirmed that 28 U.S.C. § 2680(j) preserves the government's sovereign immunity for combat-related claims but creates no corresponding shield for private contractors, as the Court had previously held in *United States v. Orleans*. This is a straightforward but important holding-it forecloses the theory, adopted by the Fourth and D.C. Circuits, that Congress' decision to immunize the government for combatant activities implies an intent to extend that same protection to contractors connected with those activities.

Next, the Court reaffirmed that the *Boyle* government contractor defense protects a contractor only in the "special circumstance" where the Government directed the contractor to do the very thing the plaintiff challenges. This defense requires a genuine conflict: The contractor must be unable to comply with both state law and its federal obligations. Because Fluor allegedly departed from rather than followed its military instructions, no such conflict existed. Notably, the Court also observed that *Boyle* involved a procurement contract and that the Department of Defense itself had previously warned contractors that *Boyle* does not extend to nonprocurement performance contracts and that contractors should not expect "to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States."

Moreover, the Court held that a contractor is not protected from state tort law claims "simply because it is working for the Federal Government and state law is at issue." The Court emphasized a long-standing principle: Contractors "do not perform governmental functions" and do not share the government's constitutional immunity simply by virtue of working for it. Absent a statute to the contrary, states may regulate or impose liability on federal contractors "even where the party asserts an indirect burden on federal activities."

Finally, with respect to the *Yearsley* doctrine, the Court drew a clear line: *Yearsley* immunizes a contractor only when it is "sued precisely for accomplishing what the Federal Government requested." Where, as here, the contractor is alleged to have "acted outside the authority the military granted it," the doctrine is unavailable. This analysis reinforces that *Yearsley* immunity is narrow and fact-specific – it turns on whether the contractor faithfully executed the government's will, not merely on whether the contractor held a government contract.

Justice Alito, joined by Chief Justice Roberts and Justice Kavanaugh, dissented. The dissent argued that the Constitution's exclusive grant of war powers structurally preempts state tort claims that would require courts and juries to second-guess military policy decisions – including, here, the decision to clear a former Taliban member for base access as part of a broader counterinsurgency strategy. The dissent also warned of practical consequences: discovery of sensitive security documents, depositions of military commanders, and the potential application of Afghan law under choice-of-law principles.

Boyle was generally not characterized as an immunity from suit before *GEO Group*, and some circuits, including the Fourth, had already held that *Boyle* denials are not immediately appealable. *GEO Group*'s framework reinforces that conclusion. The more significant development for *Boyle* is *Hencely*'s substantive

narrowing: The more discretion a contractor exercises in carrying out a contract, the weaker its *Boyle* argument becomes. For contractors operating in complex performance environments, that distinction has real teeth.

Qualified Immunity

Justice Alito's concurrence and a footnote in the majority opinion both flag an unresolved question worth watching: Can government contractors claim qualified immunity? The implications of this would be outsized, as qualified immunity is a true immunity from suit, meaning denials are immediately appealable under *Mitchell v. Forsyth*, a 1985 decision in which the Supreme Court held that a former attorney general could immediately appeal the denial of qualified immunity because it is an immunity from suit, rather than a defense to liability.

Justice Alito argued in *GEO Group* that a rule treating defenses that depend on the lawfulness of a defendant's conduct as categorically non-immunities is difficult to reconcile with qualified immunity. Qualified immunity also turns on whether a defendant's conduct violated clearly established law, yet denials of qualified immunity are immediately appealable. The answer to the underlying question is uncertain. Under *Richardson v. McKnight*, private prison guards at for-profit firms are not entitled to qualified immunity in 42 U.S.C. § 1983 actions (the federal statute that allows individuals to sue state actors for constitutional violations). Under *Filarsky v. Delia*, however, a privately retained attorney temporarily performing government functions is.

The Court has never squarely addressed where government contractors as a class fall on that spectrum. If government contractors cannot access qualified immunity, the true-immunity pathway to interlocutory appeal is entirely unavailable. After *GEO Group* and *Hencely*, contractors that are defendants in civil rights or tort litigation arising from government-directed activity now face the prospect of proceeding through discovery and trial before any appellate review of their defenses is available, and without the option of qualified immunity to exit the case early. For those contractors, the practical stakes are real. Justice Alito's concurrence suggests this gap is worth watching.

Conclusion

The October 2025 Term leaves government contractors with a clearer, albeit less forgiving, immunity landscape. *Yearsley* remains a viable merits defense, but the collateral order shortcut is gone. Contractors denied *Yearsley* protection will litigate through discovery and trial before any appellate review. *Boyle* preemption survives, but *Hencely* confirms that it only runs as far as the government's own direction. Where a contractor's independent operational failures are at issue rather than faithful execution of government decisions, neither *Boyle* nor the Constitution's war powers structure provides a shield. Meanwhile, qualified immunity remains an open question for contractors, and an important one since it is the only true immunity from suit remaining.

Taken together, these immunity and preemption theories are not elastic. The animating principle across all these doctrines – that a contractor who did what the government told it to should not bear liability for following the government's directions – is the same. The corollary, sharpened by the Court this term, is that a

contractor that does not follow those directions is on its own. This likely means that more potential plaintiffs will sue knowing that early exits are harder to come by, more cases will run through discovery, and plaintiffs will carry greater settlement leverage as a result. The shift may also affect the government's ability to attract contractors for high-risk or sensitive projects or otherwise increase government costs as contractors begin pricing the additional exposure.

Significant questions remain unresolved: whether contractors can access qualified immunity, how broadly *Hencely* will be read, and how courts will handle performance contracts in non-combat settings where the degree of government oversight is contested. Those questions will continue to be debated in the lower courts.