Justices' Review Of Fluor May Alter Gov't Contractor Liability

By **Lisa Himes** (July 2, 2025)

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On June 2, the U.S. Supreme Court granted certiorari in Hencely v. Fluor Corp.,[1] a case that has wide-ranging implications for federal government contractors supporting the U.S. military.

The issue before the court is whether the combatant activities exception to the Federal Tort Claims Act can preempt state-law claims against federal government contractors in suits arising out of the combatant activities of the U.S. military.

The Supreme Court previously denied several petitions for a writ of certiorari on this very issue.[2] But now the court has decided to take on the issue and in so doing, grapple with the 1988 landmark Supreme Court case, Boyle v. United Technologies Corp.[3]

As it takes on Boyle, the court will review key constitutional and preemption principles that underlie this area of the law.

Through its review in Hencely, the court will for the first time in decades address what the late Justice Antonin Scalia referred to in Boyle as the "limiting principle to identify those situations in which a significant conflict with federal policy or interests does arise."[4]

That limiting principle is the uniquely federal interests underlying the statutory exceptions to the Federal Tort Claims Act — i.e., the exceptions to the FTCA's general waiver of sovereign immunity.[5]

The question remains where the court will draw the line — a decision that could have significant repercussions for federal government contractors.

Background

This case arises out of a 2016 suicide bombing attack on a U.S. military base in Afghanistan. The petitioner, Winston Hencely, was serving as a soldier in the U.S. Army, stationed at Bagram Airfield in Afghanistan as part of Operation Freedom's Sentinel.[6]

The bombing occurred on Nov. 12, 2016, near the starting line for a Veterans Day race at Bagram Airfield.[8] After being confronted by Hencely and others, Nayeb detonated an explosive vest he was wearing, which killed Nayeb and five others, and severely injured 17 more, including Hencely.[9] The Taliban took credit for the bombing.[10]

The Army's AR 15-6 investigation determined that the military knew Nayeb was a former Taliban member, but that it had sponsored Nayeb in an effort at reintegration.[11] The AR 15-6 report also indicated that during the military's counterintelligence screening interviews with Nayeb months before the bombing, his answers to questions appeared to be coached.[12] The Army's investigation further concluded that intelligence from the night before the bombing indicated an attack was imminent.[13]

The U.S. Court of Appeals for the Fourth Circuit held that the military did not notify Fluor that Nayeb had ties to the Taliban, and Fluor did not have access to the military intelligence

regarding the impending attack.[14]

In its AR 15-6 report, however, the military concluded that a major contributing factor in the attack was Fluor's lack of supervision of its personnel.[15] The report criticized Fluor for, among other things, not adequately supervising Nayeb.[16]

Hencely sued Fluor in February 2019 in the U.S. District Court for the District of South Carolina. Hencely's amended complaint, which is the operative complaint, alleges that Fluor was negligent in supervising, escorting and retaining Nayeb.[17] Hencely also claims vicarious liability, negligent control and breach of contract.[18]

Procedural History

District Court Decisions

Fluor first moved to dismiss Hencely's claims as nonjusticiable based on the political question doctrine.[19] In 2020, the U.S. District Court for the District of South Carolina denied Fluor's motion and ordered discovery to proceed.[20]

Fluor moved for judgment on the pleadings as to Hencely's breach of contract claim, which the district court granted.[21]

Fluor ultimately moved for summary judgment on the remaining claims based on the combatant activities exception to the FTCA and in 2021 the district court granted summary judgment for Fluor.[22]

Fourth Circuit Decision

Hencely appealed the district court orders to the Fourth Circuit, and Fluor reasserted its argument that the case was nonjusticiable based on the political question doctrine.[23] The Fourth Circuit affirmed both lower court decisions dismissing Hencely's claims, but denied Fluor's reassertion of the political question doctrine.[24]

As a threshold issue, the Fourth Circuit addressed the political question doctrine to determine whether it had jurisdiction to hear the case. The court concluded that the record did not rise to the level of plenary control by the military over Fluor's conduct required to satisfy the political question doctrine.[25]

After determining that it had jurisdiction, the Fourth Circuit addressed the federal preemption of Hencely's negligence claims under the combatant activities exception to the FTCA.[26]

The court explained that "Hencely does not contest that, applying this Court's precedent, Fluor was 'integrated into combatant activities' at Bagram Airfield," and the court agreed that Fluor's actions qualified.[27]

The court further concluded that '"the military retained command authority' over Fluor's supervision of Local National employees on the base."[28]

As a result, the court held that "Hencely's tort claims against Fluor arising out of that combatant activity are preempted."[29]

The Fourth Circuit also affirmed the district court's judgment on the pleadings in favor of

Fluor on Hencely's breach of contract claim.[30] The court found that it had "seen no indication that individual servicemen are entitled to sue for breach of the contracts between the U.S. Government and Fluor."[31]

Supreme Court Granted Petition for Certiorari

In February, Hencely petitioned the Supreme Court to review the case, arguing that the combatant activities exception to the FTCA did not apply to private companies like Fluor.[32]The court granted certiorari on June 2.[33]

Implications for Government Contractors

The court's decision in Hencely could significantly affect cases involving government contractors for decades, just as Boyle has since 1988. The question will be whether the Supreme Court adopts the combatant activities test promulgated by several federal courts of appeal, including the Fourth Circuit in Hencely.

At least one of the justices has addressed this issue — Justice Brett Kavanagh who, as a judge on the U.S. Court of Appeals for the D.C. Circuit, joined in the 2009 Saleh v. Titan Corp. opinion, written by then Senior Circuit Judge Laurence Silberman.

In the frequently cited majority opinion in Saleh,[34] Judge Silberman held that "the plaintiffs' common law tort claims are controlled by Boyle."[35] More specifically, he explained that "the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit."[36]

The Saleh test continues to serve as the key test for the combatant activities exception to the FTCA.

While it is likely the court will focus only on the combatant activities exception to the FTCA, as it is the question before the court, it may address the political question doctrine as an alternate ground for affirming the dismissal.

Even though the district court and Fourth Circuit rejected the defense, with the Fourth Circuit's disclaimer that "the question may be closer than the district court's pre-discovery ruling suggested," the Supreme Court may determine, as an alternate ground, that the case is barred by the political question doctrine.[37]

It remains to be seen how the court will handle this case, but based on my long-standing experience in this area, both the combatant activities exception to the FTCA and the political question doctrine are strong alternatives here.

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[1] No. 24-924, cert. granted (U.S. June 2, 2025).

[2] See, e.g., Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009), cert. denied, 564 U.S. 1037 (2011); Badilla v. Midwest Air Traffic Control Serv., Inc., 8 F.4th 105 (2d Cir. 2021), cert. denied, 143 S. Ct. 2512 (2023); Harris v. Kellogg Brown & Root Servs., Inc., 724 F.3d 458 (3d Cir. 2013), cert. denied, 574 U.S. 1120; In re KBR, Inc. Burn Pit Litig., 744 F.3d 326 (4th Cir. 2014), cert. denied, 574 U.S. 1120 (2015); Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), cert. denied, 508 U.S. 960 (1993).

[3] 487 U.S. 500 (1988).

[4] Id. at 509 (internal quotation marks omitted).

[5] See 28 U.S.C. §2680.

[6] Hencely v. Fluor Corp., 120 F.4th 412, 418 (2024).

[7] Id.

[8] Id. at 420.

[9] Id.

[10] Id.

[11] Id. at 420-21.

[12] Id. at 421.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Id.

[18] Id.

[19] Id. at 423.

[20] See Hencely v. Fluor Corp., Inc., No. 6:19-cv-00489-BHH, 2020 WL 2838687 (D.S.C. June 1, 2020).

[21] See Hencely v. Fluor Corp., No. 6:19-cv-00489-BHH, 2021 WL 3604781 (D.S.C. Aug. 13, 2021).

[22] See Hencely v. Fluor Corp., 554 F. Supp. 3d 770 (D.S.C. 2021).

[23] See Hencely, 120 F.4th at 422.

[24] See id.

[25] Hencely, 120 F.4th at 423-24.

[26] Id.

[27] Id. at 427 (citing Burn Pit Litig., 744 F.3d at 351).

[28] Id.

[29] Id. at 431.

[30] Id. at 432-33.

[31] Id.

[32] Hencely v. Fluor Corp., No. 24-924 (U.S. filed Feb. 24, 2025) (petition for cert.).

[33] No. 24-924, cert. granted (U.S. June 2, 2025).

[34] Saleh, 580 F.3d at 6.

[35] Id. at 5.

[36] Id. at 7.

[37] Hencely, 120 F.4th at 425.