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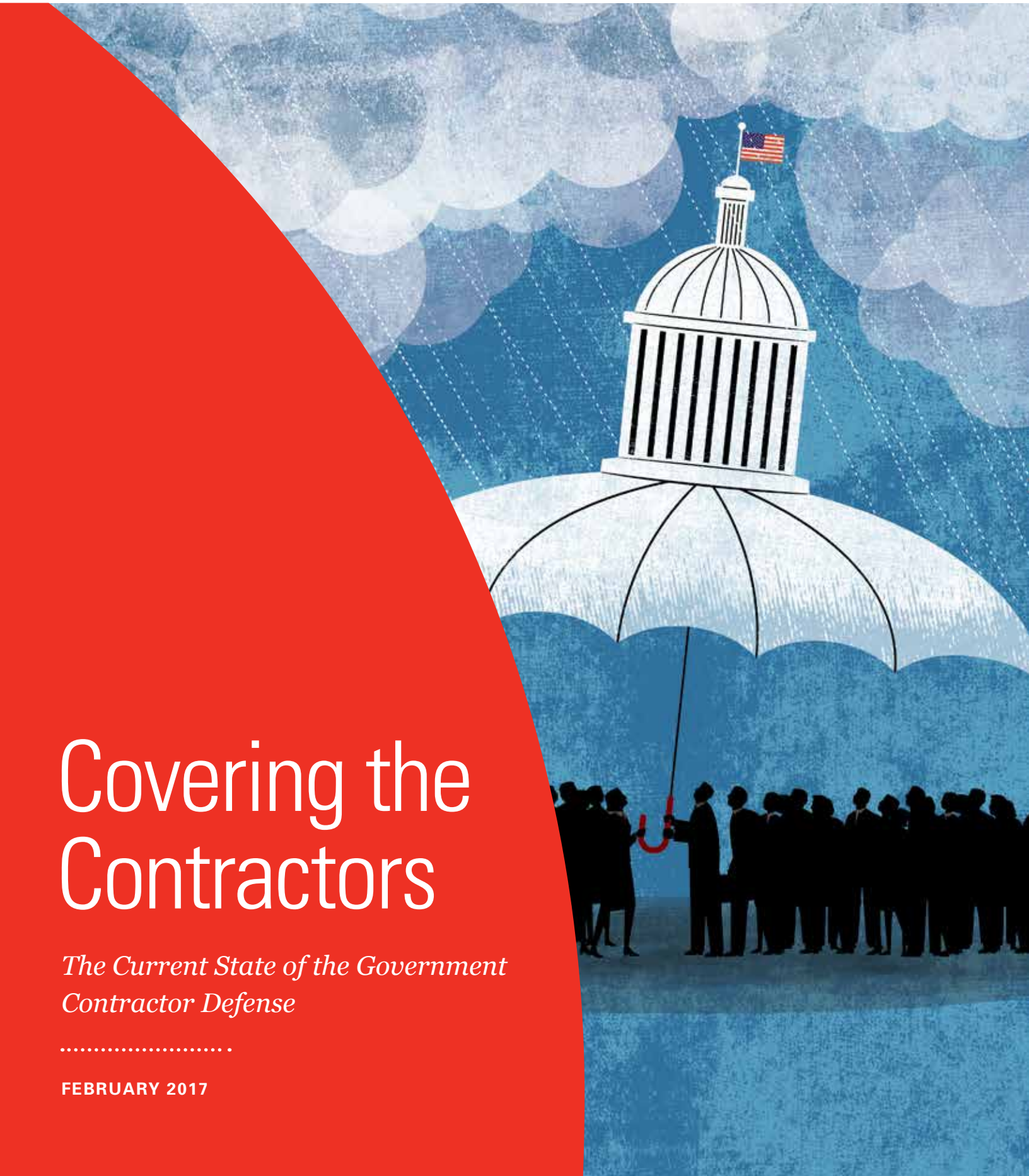

Covering the Contractors

The Current State of the Government Contractor Defense

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Executive Summary

In 1983, U.S. Marine pilot David Boyle was killed when the helicopter in which he was flying crashed into the ocean off the coast of Virginia. Boyle survived the impact, but he was unable to escape from the helicopter and drowned. His father sued the helicopter's manufacturer, alleging that the manufacturer had defectively designed the emergency escape hatch.

A jury found in Boyle's favor, but the court of appeals reversed, on the theory that the manufacturer could not be liable because it had built and delivered the helicopter to government specifications. The Supreme Court agreed. In a landmark 1988 opinion, *Boyle v. United Technologies Corp.*, the Court defined what has become known as the "government contractor defense." The Court held that the federal government's unique interests in having government contractors perform their contractual obligations may preempt duties of care that state tort law would impose on government contractors, thus shielding contractors from liability.[1]

> *"[T]he federal government's unique interests in having government contractors perform their contractual obligations may preempt duties of care that state tort law would impose on government contractors, thus shielding contractors from liability."*

The federal government has long depended on private contractors to provide certain products and services, including equipment, food, transportation, and maintenance. But in the nearly three decades since *Boyle*, the government has steadily increased its reliance on contractors to perform additional services, especially for the U.S. military in connection with its conflicts in Afghanistan and Iraq. Between 2000 and 2014, Department of Defense contract obligations increased from $190 billion to roughly $290 billion—64% of the federal government's contract obligations.[2] Today, private contractors perform a vast array of activities that extends far beyond traditional service and procurement roles. They manage prisons, interrogate detainees, secure our nation's borders, and conduct aerial surveillance—functions that might be considered inherently governmental.[3]

The increasing prominence of private actors throughout the federal government raises important questions about how to permit contractors to carry out their activities without the interference of expensive and burdensome tort litigation, while ensuring accountability and oversight. The trend toward privatization, however, has outpaced the development of the legal framework. The Supreme Court has not spoken in this area since its decision in *Boyle* and has declined numerous petitions for review. Lower courts have recognized various extensions to the doctrine, but their decisions have not always been uniform. The federal government itself periodically files amicus briefs in lawsuits against government contractors, although the Executive Branch's involvement is neither routine nor uniformly in support of the contractor.

This article provides an overview of the current state of the government contractor defense, describing the established principles and some of the unsettled questions that continue to percolate through the courts, as well as the role of the federal government in lawsuits against government contractors.

Origins of the Government Contractor Defense

The concept of a government contractor defense had been circulating in the courts well before *Boyle*. In 1940, the Supreme Court held that a construction contractor could not be liable under state law for erosion caused by the contractor's work constructing dikes for the government.[4] A number of lower courts drew on that decision to shield government contractors from liability for acts committed while performing a government contract in compliance with government specifications.[5]

It was not until *Boyle*, however, that the Supreme Court fully articulated the rationale underlying the government contractor defense. The Court noted that, as a general matter, absent a "clear statutory prescription" or a "direct conflict between federal and state law," federal law does not prevent the application of state tort law.[6] But the facts of *Boyle*, where the defendant had built the helicopter—including the allegedly defective escape hatch—to government specifications, presented a situation that warranted preemption of usual state-law tort rules.

The Court explained that civil liability arising from performance of a government procurement contract implicates "uniquely federal interests."[7] To identify those federal interests, the Court turned to the Federal Tort Claims Act (FTCA). In that statute, enacted in 1946, Congress provided a limited waiver of the federal government's sovereign immunity, authorizing citizens to sue the government and recover damages for certain tort claims.[8] But Congress preserved the government's immunity from tort claims arising out of performance of "discretionary functions."[9]

The FTCA applies only to suits against the government and not to suits against private contractors. But the Court in *Boyle* explained that state-law duties of care that would prevent a contractor from satisfying the government's procurement specifications conflict with the federal interest in preserving the government's discretion in military procurement—an interest expressed and protected by the

FTCA's discretionary-function exception.[10] Moreover, contractors would simply pass the risks of adverse tort judgments to the government by raising their prices to insure against contingent liability.[11] As the Court explained, "[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."[12]

The Court established a three-part test to determine whether a contractor may invoke the government contractor defense to liability: (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.[13]

> *"[I]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."*

Immunity from Suit or a Defense to Liability?

Boyle did not specify whether the government contractor defense provides immunity from suit or only from liability. Immunity from suit would insulate government contractors not only from damages, but also from the expense and burden of litigation and discovery. While some courts have held that the doctrine provides immunity from state tort suits,[14] the more recent trend is to treat the defense as an affirmative defense to liability.

The rationale is that the government contractor defense is grounded in preemption doctrine. Denials of preemption claims are generally not viewed as denials of immunity from suit. Moreover, a contractor's entitlement to the defense is heavily fact-dependent, and some discovery and fact-finding is often necessary to determine whether the defense applies in a given case.[15]

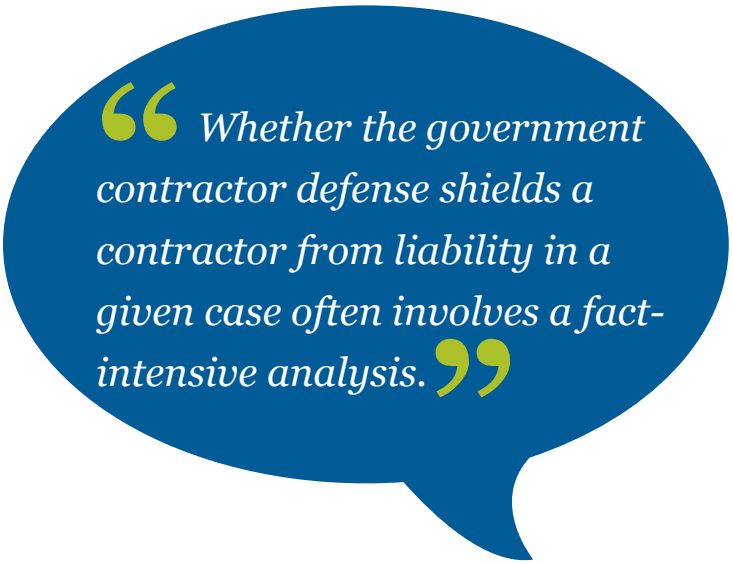
Applying these principles, the Ninth Circuit in 2010 distinguished the government contractor defense from forms of immunity (such as qualified immunity) that "include the right not to be required to go to trial, as well as a defense against a judgment."[16] And in *Al Shimari v. CACI International, Inc.*, the Fourth Circuit likewise held in 2012 that the government contractor defense provides only a defense to liability.[17] In that case, the federal government took the position in an amicus brief that the government contractor defense is merely a defense to liability and therefore not immediately appealable—thus recognizing that the defense does not provide immunity from suit.

Although the government cautioned that "unfettered discovery proceedings could affect military readiness," it nevertheless stated that the district courts could manage and limit discovery and proceedings to minimize the distraction of litigation.[18] Perhaps recognizing the difficulty its position could cause contractors, the government reserved the possibility that "if experience demonstrates otherwise, the United States will reconsider its position."[19]

Application in the Lower Courts

In recent years, courts have had ample opportunity to apply the defense to myriad government contracts, particularly those pertaining to military activities in Iraq and Afghanistan. Courts have considered claims arising from helicopter accidents during military operations,[20] products-liability claims for allegedly defective machine guns,[21] claims for negligent performance of services such as water treatment, waste management, or electrical maintenance at military bases,[22] and intentional tort claims against contractors who provided interrogation services at detention facilities.[23]

Whether the government contractor defense shields a contractor from liability in a given case often involves a fact-intensive analysis. At a minimum, assertion of a plausible entitlement to the defense may provide a valid basis for removal from state to federal court, even if the federal court ultimately finds the defense inapplicable on closer review of the facts.[24]



Litigation often focuses on whether the government exercised meaningful review of the specifications—engaging in a “back and forth” with the contractor as opposed to simply rubber-stamping the contractor’s proposals.[25] The Second Circuit in 2008, for example, conducted a meticulous analysis of the government’s involvement in deciding the chemical specifications for Agent Orange, a herbicide used as a defoliant during the Vietnam War. The court concluded that the government was “plainly the agent of decision” and that the government’s selection of specifications was a discretionary determination, thus triggering the government contractor defense.[26] Other key questions include whether an alleged defect was part of the design or a result of a latent manufacturing defect,[27] and whether the contractor or the United States actually knew about a dangerous defect.[28]

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Due to the fact-intensive nature of such inquiries, courts have stated that "ordinarily because of the standard applied at the summary judgment stage, defendants are not entitled to summary judgment pursuant to the government contractor defense.[29] Nevertheless, courts have granted summary judgment where the defendant satisfies each of the three *Boyle* factors.[30]

While *Boyle* remains the cornerstone of the government contractor defense, in the absence of further guidance from the Supreme Court, some lower courts have extended *Boyle*'s reasoning to a number of other situations that implicate the activities of government contractors.

For example, several courts have held that the government contractor defense applies not only to products-liability claims arising out of procurement contracts as in *Boyle*, but also in cases involving service and supply contracts—such as contracts for security services or maintenance and repair. In 2003, the Eleventh Circuit in *Hudgens v. Bell Helicopters/Textron* held that the government contractor defense was available to a contractor defending against the claim that it had failed to carry out proper maintenance or make necessary repairs to a U.S. Army helicopter.[31] The court noted that *Boyle*'s analysis was "not designed to promote all-or-nothing rules regarding different classes of contract."[32]

Thus, the court tailored the *Boyle* test to the situation before it, explaining that the defense forecloses liability under state tort law where: (1) the United States approved reasonably precise maintenance procedures; (2) the contractor's performance of maintenance conformed to those procedures; and (3) the contractor warned the United States about the dangers in reliance on the procedures that were known to the contractor but not to the United States.[33]

The Sixth Circuit has likewise stated that it was "at least plausible" that the defense could apply to a service contractor. The

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court held (though without reaching the merits of the question) that the defendant had stated a colorable federal defense and was entitled to removal to federal court.[34]

In addition, some lower courts have held that the government contractor defense is available to nonmilitary contractors. The Third Circuit considered the question in a products-liability suit against a company that had manufactured an allegedly defective ambulance pursuant to a federal government contract.[35] The court held that the defense was in principle available, but the contractor had failed to establish, as *Boyle* required, that it had warned the government about dangers in the use of its product that were known to the contractor but not to the government.[36] The Ninth Circuit, in contrast, has stated on multiple occasions, and as recently as 2015, that the government contractor defense "is only available to contractors who design and manufacture military equipment."[37]

In sum, the courts have regularly considered the government contractor defense in recent years. While their decisions on the outer contours of the defense are not always uniform, they have produced a substantial body of case law in the decades since *Boyle*—and will continue to do so as more cases filter through the courts.

The Combatant Activities Exception

One particularly important development in the doctrine in recent years has been the extension of *Boyle* to cases implicating other exceptions to the FTCA's waiver of sovereign immunity. Numerous circuits have held that *Boyle's* preemption rationale protects contractors in cases other than those involving the government's exercise of discretion in procurement. In particular, courts have extended the defense to the FTCA's combatant activities exception—which preserves the government's immunity from claims arising out of military combat activities—especially in the context of the United States' military engagements in Iraq and Afghanistan.

In *Koohi v. United States*, the Ninth Circuit in 1992 considered a wrongful-death suit against a weapons manufacturer. The defendant manufactured the air defense system that U.S. Naval Forces had used to mistakenly shoot down a civilian aircraft over the Persian Gulf during the Iran-Iraq War. The court held that the "combatant activities exception" shielded the weapons manufacturer from liability.[38]

The court began by stating that the Supreme Court "has recognized that the exceptions to the FTCA may preempt common-law tort actions against defense contractors under certain circumstances."[39] The court reasoned that "one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as

> *"The imposition of tort liability on the manufacturers of the defense system at issue 'would create a duty of care where the combatant activities exception is intended to ensure that none exists.'"*

a result of authorized military action."[40] The imposition of tort liability on the manufacturers of the defense system at issue "would create a duty of care where the combatant activities exception is intended to ensure that none exists."[41]

More recently, the D.C. Circuit in 2009 reached a similar conclusion in *Saleh v. Titan Corp.*, holding that private military contractors that provided interrogation and interpretation services at the Abu Ghraib detention facility in Iraq could not be liable under state tort law.[42] The FTCA's combatant activities exception defined a uniquely federal interest—"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"—that broadly preempted state tort law.[43]

Accordingly, "during wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted."[44] Other circuits have adopted this analysis, including the Third Circuit in 2013 in a case involving electrical maintenance at a base in Iraq, and the Fourth Circuit in 2014 in a case involving waste disposal and water treatment in Iraq and Afghanistan.[45]

The Federal Government's Role in Litigation

The Executive Branch does not routinely participate in cases where a defendant has invoked the government contractor defense. While the United States does occasionally file briefs in pending cases to present its views, neither the government's participation nor the positions it takes seem to be driven by a general policy of supporting government contractors. Nor could we discern any variation in the government's involvement among Administrations. The cases in which the Executive Branch has weighed in generally involved broader legal issues regarding the scope or application of *Boyle*, or intersections between the government contractor defense and other doctrines.

For example, in *Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.*, the United States submitted a brief in the Second Circuit in support of Dow Chemical. In that case, the plaintiffs asserted a variety of claims under state and federal law, as well as international-law violations under the Alien Tort Statute (ATS). The district court held that the government contractor defense barred the plaintiffs' state claims, but refused to apply the defense to the plaintiffs' international-law claims under the ATS.

The United States took no position on whether the government contractor defense barred the state claims, but stated that if it did, the defense "should have also been applied to the plaintiffs' claims under the ATS."[46] The Second Circuit ultimately dismissed the ATS claims on other jurisdictional grounds, but upheld the dismissal of the non-ATS claims on the basis of the government contractor defense.[47]

Similarly, the United States' submission to the Supreme Court in 2014 in *Kellogg Brown & Root Services, Inc. v. Harris*, reflects

the United States' broader, long-term legal strategy on delineating the scope of the government contractor defense, rather than a desire to support the contractor in that particular case. The Third Circuit had declined to apply the government contractor defense to dismiss claims for negligence in performance of a service support contract with the U.S. military in Iraq.

The United States advocated an expansive view of *Boyle* preemption under the combatant activities exception, arguing that the courts of appeals had adopted an unduly narrow standard.[48] Nevertheless, while the United States contended that the proper test for *Boyle* preemption under the combatant activities exception is an important question that will warrant the Supreme Court's consideration in a suitable case, it ultimately recommended that the Court deny review of the Third Circuit's decision for other procedural reasons.

The government's position on the broader legal issues is not always in the contractor's favor, either. For example, in *Al Shimari v. CACI International, Inc.*, the United States filed a brief before the Fourth Circuit arguing—contrary to the defendant's position—that a decision declining to dismiss on the basis of the government contractor defense is not immediately appealable.[49] On the merits, the United States supported broad preemption under *Boyle* where a similar claim against the government would implicate the FTCA's combatant activities exception if the contractor was acting within the scope of its contractual relationship with the federal government.[50] But the United States expressed no views on how that standard applied to the facts of *Al Shimari*, stating that additional factual development was needed on remand.[51]

More recently, in *Campbell-Ewald Co. v. Gomez*, the United States filed a brief to dispute its contractor's immunity for alleged violations of the Telephone Consumer Protection Act. The government argued that its contractors are not entitled to "derivative sovereign immunity" by virtue of their status as contractors.[52] The United States noted that the Navy had never authorized the conduct at issue in this case, thereby precluding the contractor's entitlement to immunity.[53] The Supreme Court agreed and held that contractors do not receive "the blanket immunity enjoyed by the sovereign."[54]

At bottom, government contractors should not expect the Executive Branch automatically to come to their defense if they are sued. On the other hand, a successful assertion of the defense generally does not require the government to formally weigh in to support the defendants. Depositions or other testimony by government officials familiar with the relevant contract or the technology or equipment at issue can provide powerful evidence to establish the contractor's entitlement to the defense.[55]

Conclusion

The government contractor defense has developed far beyond the Supreme Court's seminal decision in *Boyle*. In the absence of further Supreme Court intervention in this area, litigants and the lower courts will undoubtedly continue to try to adapt *Boyle's* principles to new situations.

The U.S. government continues to pay close attention to the courts' development of the government contractor defense in all aspects. Although the government does sometimes file briefs to express its views, its intervention in a particular case is likely motivated by its position on the development of the broader legal principles at stake, rather than a desire to support a government contractor on the facts of a specific case. The United States' ongoing military activities in Iraq and Afghanistan will likely remain a particularly fertile source for questions about the scope of the government contractor defense in cases arising out of combatant activities. The United States itself has signaled that it believes this issue warrants further development and consideration.

In light of the persistent trend toward privatization and the expansion of the role of private contractors throughout the federal government, especially during continuing U.S. military conflicts, the courts and the federal government will likely continue to face questions about the contours of the government contractor defense in the coming years.

"The United States itself has signaled that it believes this issue warrants further development and consideration."

Endnotes

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1 (*Boyle v. United Technologies Corp.*), 487 U.S. 500, 504-06 (1988).

2 Moshe Schwartz, Cong. Research Serv., R44010 *Defense Acquisitions: How and Where DOD Spends Its Contracting Dollars* 2-3 (April 30, 2015), http://www.fas.org/sgp/crs/natsec/R44010.pdf.

3 *See* Barack Obama, Memorandum for the Heads of Executive Departments and Agencies (Mar. 4, 2009), 74 Fed. Reg. 9755, 9756 (Mar. 6, 2009), https://www.gpo.gov/fdsys/pkg/FR-2009-03-06/pdf/E9-4938.pdf.

4 *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940).

5 *E.g.*, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448-449 (9th Cir. 1983); *Bynum v. FMC Corp.*, 770 F.2d 556, 564 (5th Cir. 1985).

6 *Boyle*, 487 U.S. at 504.

7 *Id.* at 505-506.

8 28 U.S.C. § 2674.

9 28 U.S.C. § 2680(a).

10 *Boyle*, 487 U.S. at 511.

11 *Id.* at 511-12.

12 *Id.* at 512.

13 *Id.*

14 *See, e.g.*, *In re Aircraft Crash Litig. Frederick, Maryland*, 752 F. Supp. 1326, 1336 (S.D. Ohio 1990), *aff'd sub nom. Darling v. Boeing Co.*, 935 F.2d 269 (6th Cir. 1991).

15 *Martin v. Halliburton*, 618 F.3d 476, 486–87 (5th Cir. 2010).

16 *Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259, 1266 (9th Cir. 2010).

17 *Al Shimari v. CACI International, Inc.*, 679 F.3d 205, 217 (4th Cir. 2012).

18 Brief for the United States as Amicus Curiae, *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (Nos. 09-1335, 10-1891, 10-1921), 2012 WL 123570, at *5-6.

19 *Id.* at*26.

20 *E.g.*, *Getz v. Boeing Co.*, 654 F.3d 852 (9th Cir. 2011).

21 *McMahon v. Gen. Dynamics Corp.*, 933 F. Supp. 2d 682 (D.N.J. 2013).

22 *Harris v. Kellogg, Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013).

23 *E.g.*, *Al Shimari v. CACI*, 679 F.3d 205 (4th Cir. 2012) (en banc); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005).

24 *See, e.g.*, *Smith v. Union Carbide Corp.*, No. 14-3742, 2015 WL 4068833, at*5 (D. Md. July 2, 2015).

25 *See, e.g.*, *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1154-1155 (3d Cir. 1995).

26 *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 92, 95 (2d Cir. 2008).

27 *See, e.g.*, *Kerstetter v. Pac. Sci. Co.*, 210 F.3d 431, 435-36 (5th Cir. 2000); *Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 421 (5th Cir. 2001); *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317-18 (11th Cir. 1989).

28 *See Kerstetter*, 210 F.3d at 436; *Getz*, 654 F.3d at 866.

29 *Sellers v. Air & Liquid Sys. Corp.*, No. 12-60157, 2014 WL 6736347 at*1 (E.D. Pa. Sept. 30, 2014).

30 *See, e.g.*, *Sequira v. 3M Co.*, 621 F. App'x 458 (9th Cir. 2015); *Haas v. 3M Co.*, 613 F. App'x 191 (3d Cir. 2015); *Getz v. Boeing Co.*, 654 F.3d 852 (9th Cir. 2011); *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3d Cir. 1990).

31 328 F.3d 1329, 1333 (11th Cir. 2003).

32 *Id.*

33 *Id.* at 1335.

34 *Bennett v. MIS Corp.*, 607 F.3d 1076, 1090-91 (6th Cir. 2010).

35 *Carley v. Wheeled Coach*, 991 F.2d 1117, 1118 (3d Cir. 1993).

36 *Id.*

37 *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 731 (9th Cir. 2015); *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 746 n.1 (9th Cir. 1997); *see also Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1455 (9th Cir. 1990).

38 976 F.2d 1328, 1336 (9th Cir. 1992).

39 *Id.*

40 *Id.* at 1337.

41 *Id.*

42 580 F.3d 1, 6 (D.C. Cir. 2009), *cert. denied*, 564 U.S. 1037 (2011).

43 *Id.* at 7.

44 *Id.* at 9.

45 *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 351 (4th Cir. 2014); *cert. denied* 135 S. Ct. 1153 (2015) (Mem.); *Harris* 724 F.3d at 481.

46 Brief of the United States as Amicus Curiae in Support of Defendants-Appellees, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008) (No. 05-1953), 2006 WL 6473185, at 38.

47 517 F.3d 104, 123-24 (2d Cir. 2008).

48 Brief for the United States as Amicus Curiae, *Kellogg Brown & Root Servs., Inc. v. Harris* 724 F.3d 458 (3d Cir. 2013) (No. 13-817), 2014 WL 7185602, at*14.

49 Brief for the United States as Amicus Curiae, *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (Nos. 09-1335, 10-1891, 10-1921) (en banc), 2012 WL 123570 at*5.

50 *Id.* at*13.

51 *Id.* at*26.

52 Brief for the United States as Amicus Curiae Supporting Respondent, *Campbell-Ewald Co. v. Gomez,* 138. S. Ct. 663 (2016) (No. 14-857), 2015 WL 5138588 at*23.

53 *Id.* at*31.

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

55 *See, e.g., Linfoot v. McDonnell Douglas Helicopter Co.*, No. 3:09-cv-00639, 2016 WL 524445, at*5 (M.D. Tenn. Feb. 9, 2016).

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