Nos. 09-1298 & 09-1302

IN THE
Supreme Court of the United States

GENERAL DYNAMICS CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

THE BOEING COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit

BRIEF FOR PETITIONER GENERAL DYNAMICS CORPORATION

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QUESTION PRESENTED

Whether the government can maintain its claim against a party when it invokes the state-secrets privilege to completely deny that party a defense to the claim.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 24.1(b) and Rule 29.6, the following list identifies all the parties to the proceeding before the United States Court of Appeals for the Federal Circuit:

General Dynamics Corporation, appellant below, has no parent corporation. No publicly held company owns ten percent or more of the stock of General Dynamics Corporation.

McDonnell Douglas Corporation, appellant below, was a wholly owned subsidiary of The Boeing Company prior to January 1, 2010. On that date, McDonnell Douglas Corporation merged into The Boeing Company, which is now the corporate successor of McDonnell Douglas Corporation. As of December 31, 2009, two companies disclose, in filings with the U.S. Securities and Exchange Commission, beneficial ownership of ten percent or more of the outstanding stock of The Boeing Company: State Street Corporation, a publicly held company whose subsidiary State Street Bank and Trust Company acts as trustee of The Boeing Company Employee Savings Plan Master Trust; and Evercore Trust Company, N.A., which acts as investment manager of The Boeing Company Employee Savings Plan Master Trust and which is a subsidiary of the publicly held Evercore Partners, Inc.

The United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES AND REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

OPINIONS BELOW

The Federal Circuit's opinions (Pet. App. 1a-34a, 178a-211a, 250a-79a) are reported at 182 F.3d 1319, 323 F.3d 1006, and 567 F.3d 1340. The Federal Circuit's order denying panel rehearing and rehearing *en banc* (Pet. App. 444a-45a) is unreported. The pertinent Court of Federal Claims opinions (Pet. App. 35a-177a, 212a-49a, 280a-443a) are reported at 29 Fed. Cl. 791, 35 Fed. Cl. 358, 37 Fed. Cl. 270, 40 Fed. Cl. 529, 50 Fed. Cl. 311, and 76 Fed. Cl. 385.

JURISDICTION

The Federal Circuit's judgment was issued on June 2, 2009. On November 24, 2009, the Federal Circuit denied petitioner's timely petition for panel rehearing or rehearing *en banc.* Chief Justice Roberts extended the time for filing a petition for certiorari to April 23, 2010, and the petition was filed that day. On September 28, 2010, this Court granted the petition in part and consolidated this case with *Boeing Co. v. United States*, No. 09-1302. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The following statutes and regulations are set out at Pet. App. 446a-72a: 41 U.S.C. § 605; 48 C.F.R. § 49.402-3; *id.* § 52.249-2; *id.* § 52.249-9.

STATEMENT OF THE CASE

The government terminated a multi-billion-dollar weapon system development contract with General Dynamics Corporation and McDonnell Douglas Corporation (together, the "Contractors") for default based on projected schedule delays – a forfeiture that exposed the Contractors to onerous penalties. That default would have become enforceable as a judgment if not timely put in issue. The Contractors therefore filed suit in the Court of Federal Claims, effectively vacating the default decision, requiring the government to prove its default claim *de novo* in court, and giving the Contractors their only opportunity to raise defenses. The Contractors' primary defense was that the government caused the delay that was the basis for the default by breaching its duty to share "superior knowledge" – that is, critical information unknown to the Contractors. The trial court found that the Contractors made a *prima facie* showing of a factual basis for this defense. But the government's assertion of the state-secrets privilege stripped the defense from the case, barring the Contractors from using even non-privileged evidence to raise it. The trial court recognized that the government had military secrets that needed protection, but expressed serious concern that the government was using secret information for its own purposes in the case and otherwise manipulating the judicial system to obtain a litigation advantage. Nevertheless, without any adjudication of the Contractors' primary defense, the trial court entered judgment for the government on its default claim. The Federal Circuit affirmed

because it gave dispositive weight to the fact that this is a civil case and the Contractors are nominal "plaintiffs."

A. Factual and Legal Background

In December 1986, the Navy sought proposals for full-scale design and production of a state-of-the-art weapon system called the "A-12 Avenger." Pet. App. 382a-83a & n.2; JA 349-50, 401. The A-12 was to be a stealth aircraft that would build on stealth technologies already in use in other government programs. Pet. App. 179a, 353a-54a.

As a premise of its acquisition strategy, the government planned to "shar[e] information" about these other programs, including the Air Force's B-2 aircraft program, with the A-12 contractors. *Id.* at 354a n.6; *see also* JA 646, 689; Pls' Mot. for Summ. J. at 8-9, Nov. 22, 1993 (Navy's Request for Proposals provided that contractors would make use of stealth technologies that were under development by the Air Force in the B-2 program). The Secretary of the Navy himself regarded it as an "unquestioned assumption . . . that [the Navy] would have full and unimpeded access to all of the B-2 technology," since that would save "an enormous amount of money" as well as "time and development process." Pet. App. 354a n.6. And the Deputy Assistant Secretary of Defense for Procurement, who initially opposed "putting the A-12 out for bids on a fixed-price contract[,] . . . relented only with assurance that the Government would share its stealth technology with the contractors. Otherwise, she predicted, it cannot be done." *Id.* at 64a n.16.

The Contractors were well aware of the government's plan to share information about stealth technology, which they had no other way of obtaining, and thus "had reason to expect that they would be granted . . . access." *Id.* at 353a-54a; *see also* JA 689. But the government did not grant access before submission of the Contractors' bid. JA 686-89.

A second bidder was Northrop Corporation, which built the B-2 bomber and therefore had extensive experience with stealth technology. Although it was not disclosed to the Contractors, Northrop's A-12 bid was $1.14 billion higher than the Contractors', for fewer aircraft, and its estimate of the weight of the aircraft was thousands of pounds heavier. *Id.* at 244-46, 1188-90; Pls.' Mot. for Summ. J. at 9, Nov. 22, 1993. Northrop also refused to bid on a fixed-price basis, as required by the Navy's solicitation, and capped its liability at $400 million. Pet. App. 384a n.3; JA 244-47.

The government knew Northrop's bid was probably "more realistic" because Northrop "had experience" that General Dynamics and McDonnell Douglas lacked. JA 45. But the government provided the Contractors neither relevant information nor a warning. Instead, in January 1988, it awarded the Contractors a fixed-price contract – on which they bore an unlimited risk of loss – to design, build, and test a series of increasingly sophisticated aircraft over a period of years.

To perform, "[t]he contractors wanted and needed highly sensitive technical information for the A-12, and the Navy wanted them to have it." Pet. App. 52a n.9. Indeed, the Navy promised that it would comply with its duty to share the relevant knowledge. JA 646-47, 658-62, 687, 689. But "the United States Air Force chose not to share its highly sensitive stealth information sufficiently to avoid technical difficulties and delay." Pet. App. 52a. The government ultimately did share a small amount of information, but it was too little and too late to be useful. JA 690-92.

As the Contractors learned lessons the government already knew, it became apparent that some of the "A-12 performance specifications were impossible to accomplish within the original time and cost projections." Pet. App. 355a. After extraordinary efforts, the Contractors informed the Navy that they could not meet the original weight specification or contract schedule. *Id.* at 55a-57a, 385a-87a. The Navy responded by accepting the Contractors' heavier design, *id.* at 57a, 388a-89a, and extending the schedule for delivery of the first eight aircraft, *id.* at 71a. The Contractors also sought financial relief, which the government denied. *Id.* at 95a-96a. Nonetheless, the Contractors informed the Navy they had made significant progress and remained committed to the A-12 program, and they continued to expend hundreds of millions of dollars every month to perform. *Id.* at 148a-49a & n.82.

Meanwhile, political support for the A-12 program was waning. With the Cold War over, the

military was reviewing its spending priorities, and the A-12 program fell victim to that review when then-Secretary of Defense Cheney decided to terminate it. *Id.* at 95a-97a, 395a n.9, 410a-11a. In so doing, Secretary Cheney "was not aware of the procedure or proper bases for terminating a contract" and "did not have a working knowledge of the contractors' . . . excuses for alleged non-performance," including the government's failure to share information about other stealth programs with the Contractors. *Id.* at 397a.

The Secretary's termination order came the day before the Navy was scheduled to obligate an additional $553 million in funds to the contract. *Id.* at 106a, 399a. The contracting officer and Navy counsel were therefore forced to cobble together a termination memorandum in haste. *Id.* at 397a-403a. They chose to terminate the contract for default on the theory that the Contractors had failed to "[p]rosecute the work" so as to make adequate progress, 48 C.F.R. § 52.249-9(a)(1)(ii) – even though the Contractors had not missed any unwaived deadlines, and even though the Navy had accepted the Contractors' design for the aircraft. Pet. App. 57a, 126a.

"Termination for default is a very serious sanction that rarely is applied by the Government." *Id.* at 229a n.11. In government-contract law, as reflected in the provisions of the A-12 contract, the government has the option of terminating for its convenience on a no-fault basis, in which case it is not liable for damages and need only reimburse the

contractor for costs reasonably incurred in performance to date. *See* 48 C.F.R. § 52.249-2. A termination for default, in contrast, is appropriate only if the contractor is in material breach of fundamental contract obligations. Such a termination imposes grave penalties on a contractor, amounting to a "forfeiture." Pet. App. 114a (quoting *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969)). Not only does the government escape responsibility for paying the contractor's unreimbursed costs, but it also may seek return of payments it has previously advanced, as well as other monies, and may disadvantage or debar the contractor with respect to awards of future contracts. *See, e.g.*, 48 C.F.R. §§ 49.402-2(a), -6(c), -7(a); *Bannum, Inc. v. United States*, 91 Fed. Cl. 160, 171-72 (Fed. Cl. 2009).

In terminating for default here, the contracting officer performed no analysis of the Contractors' progress, performance, or reasons for any alleged non-performance, including the government's failure to disclose its knowledge about stealth technology. Pet. App. 410a-11a. Indeed, he "did not believe that the contractors would not perform." *Id.* at 167a; *see also id.* at 248a ("the Navy contracting officer did not want to terminate the contract"). Instead, he simply "cribbed" a prior termination memorandum from an unrelated program, leaving certain critical information blank. *Id.* at 411a. "The entire termination procedure was *pro forma* at best." *Id.* at 412a; *see also id.* at 98a-101a.

Following the default termination, the Navy sent the Contractors a letter demanding the payment of approximately $1.35 billion, plus interest. JA 339-41.

A default termination decision by the contracting officer becomes final and enforceable in a court of law unless the contractor files an action within certain statutory time limits. 41 U.S.C. § 605(b); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 & n.4 (Fed. Cir. 1990). Under the terms of the contract agreed to by both parties, such an action provides the mechanism for a contractor to defend against a default claim on the merits. 48 C.F.R. § 52.233-1 (Disputes clause). In the action, the contracting officer's decision has no force, and the government must start from scratch and prove *de novo* that the contractor was actually in default of its obligations under the contract. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764-65 (Fed. Cir. 1987); 41 U.S.C. §§ 605(a), 609(a)(3). If "it is determined that the Contractor was not in default, or that the default was excusable," the termination for default is converted to a termination for convenience. 48 C.F.R. § 52.249-9(g).

B. Procedural History

1. The Superior-Knowledge Defense Is Asserted.

To present their defenses to the default termination, the Contractors timely filed this action. Their primary defense was that the government failed to share its superior knowledge, *i.e.*, that they "were not in default of their A-12 . . . Contract

obligations by reason of the government's failure to disclose information vital to the Contractors' performance." JA 452. As relief, the Contractors sought a "judgment converting the termination for default to a termination for the convenience of the government" and a "holding that the Navy's demand for return of unliquidated progress payments is of no force and effect." *Id.* at 473.

The superior-knowledge doctrine is a contractual rule of fairness that prevents the government from knowingly allowing a contractor to pursue "a ruinous course of action." *Helene Curtis Indus., Inc. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963). "It is well settled . . . that where the Government possesses special knowledge, not shared by the contractor, which is vital to the performance of the contract, the Government has an affirmative duty to disclose such knowledge." *Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364, 1371-72 (Ct. Cl. 1972); *see* Pet. App. 270a ("This doctrine of superior knowledge is well established in law"). If the government holds its tongue, then it cannot complain of a resulting default.

Accordingly, when the government moved to dismiss the superior-knowledge defense on the ground that it had no duty to share its knowledge, the trial court denied the motion. JA 389, 393 (holding that "the Government had a duty to make *some* disclosure based upon its superior knowledge even though the basis for that knowledge was classified").

2. The State-Secrets Privilege Is First Invoked and the Trial Court Responds.

Shortly after discovery relating to the superior-knowledge issues began, the government filed a declaration by Acting Secretary of the Air Force Michael Donley formally invoking the state-secrets privilege as to certain classified information sought by the Contractors. JA 516-23. The state-secrets privilege is a common-law "privilege against revealing military secrets." *United States v. Reynolds*, 345 U.S. 1, 6 (1953). The privilege "belongs to the Government and must be asserted by it" through a "formal claim of privilege, lodged by the head of the department." *Id.* at 7-8. The court must then inquire whether, "from all the circumstances of the case, . . . there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10; *see also id.* at 11 (noting that once the court determines the assertion of privilege is valid, "even the most compelling necessity cannot overcome the claim of privilege"). In the public version of Secretary Donley's declaration, he explained that "inadvertent, unauthorized disclosure of the information that is described in more detail in my *in camera* declaration could severely jeopardize national security" and that he could not even "confirm or deny the existence of the information" the Contractors sought. JA 521-22.

The trial court accepted the government's assertion of the privilege. However, after reviewing the government's *ex parte* submissions, the court

concluded that the government's litigation team had used the information as to which Secretary Donley had invoked the privilege "for tactical purposes involving the merits of plaintiffs' superior knowledge claim." *Id.* at 524; *see also id.* at 550 ("[S]ensitive information was used not only to argue Secretary Donley's invocation of the state secrets privilege but also for defendant's earlier litigation needs."). When the court sought "assurances from defendant that such use of sensitive information for tactical advantage will not recur," *id.* at 525, the government responded by "misrepresent[ing] the record," apparently hoping – in the court's estimation – to "rely on [the] problem of communication" caused by the need for secrecy to "misinterpret" the court's concerns, *id.* at 550-51. The court warned the government that its exploitation of the state-secrets power for tactical advantage "jeopardizes the [secret] information, gives [the government's] litigation team an unfair advantage," and "raise[s] serious implications under Rule 11." *Id.* at 551.

The parties disagreed about the effect of this first invocation of the privilege. The Contractors argued they could proceed on their superior-knowledge defense without the classified information the government had deemed secret, but the government argued this was not possible because the Contractors' "'superior knowledge' claims are inextricably intertwined with [protected] information." *Id.* at 586. The government added that it would be "a perversion to attempt to allow the judicial process to go forward" on superior-knowledge issues because the "informational poverty resulting

from invocation of the state secrets privilege . . . renders" those issues "nonjusticiable." *Id.* at 611.

Based on non-privileged evidence, the trial court ruled that the Contractors had "made an impressive showing that they can present a *prima facie* case [as to their superior-knowledge defense] under the existing discovery restrictions imposed by" the government, and therefore could continue discovery unless the government invoked the state-secrets privilege as to the entirety of the Contractors' superior-knowledge defense. *Id.* at 623, 625. In response, the government filed a declaration by Secretary of the Air Force Merrill McPeak. It stated that "continued inquiry into what is known as plaintiffs' 'superior knowledge' claims would necessarily require examination and use of information that cannot be disclosed in this litigation." *Id.* at 633. Secretary McPeak averred that "[l]itigation of plaintiffs' 'superior knowledge' claims would present a continuing threat of disclosure of information for which the military and state secrets privilege has been asserted, and would present a need for disclosure of additional information over which I would assert the privilege." *Id.*

The trial court then barred all discovery regarding superior-knowledge issues. *Id.* at 640-41. The court said it was clear that the Contractors "could establish a *prima facie* case" on the defense, and that "th[e] privileged information known to this court does not clearly establish that [the

government] could refute that showing." Pet. App. 441a. The court found, however, that it simply could not "resolve the merits" of the superior-knowledge dispute without "compromis[ing] military secrets." *Id.* The court also again expressed concerns about discovery abuses by the government. *See id.* at 432a-33a (discussing government violation of protective order concerning "access to certain classified information"); *id.* at 433a n.1 ("[d]uring the deposition of a government witness, [government] counsel deliberately elicited classified, compartmented information to further the government's case on the merits," a serious "security violation" that required "extraordinary corrective action" and "threatened the integrity of the litigation"); *id.* at 439a (discussing government's "security lapses").

As to the consequences of excluding superior knowledge from the case, the government argued that it should be allowed to pursue its default claim without litigation of the Contractors' "affirmative defense." JA 723-27. The court responded that although the "Government may choose not to cooperate [with discovery] because of legitimate concerns for national secrets, [it] must show the court why the cost of such a decision should be borne by plaintiffs" and "why we should not deem admitted" the Contractors' superior-knowledge allegations. *Id.* at 769.

Faced with losing its default claim, the government shifted position. Although it still maintained that no "portion of the 'superior

knowledge' claim . . . [was] truly separable from information subject to the state secrets privilege," upon "further reflection and consultation with senior Government officials" the government proposed a "framework for exploring whether further litigation of plaintiffs' 'superior knowledge' claims [was] possible." *Id.* at 773-75. Limited superior-knowledge discovery then resumed. *Id.* at 787-90.

3. The Trial Court Rejects Default on Other Grounds and Orders Reimbursement of the Contractors' Performance Costs.

Subsequently, the court ruled that the contract "was not terminated because of contractor default" but rather "because the Office of the Secretary of Defense withdrew support and funding from the A-12" for political reasons. *Id.* at 791. Having concluded that the default termination was pretextual and unjustified, the court again suspended superior-knowledge discovery, reasoning that it "may never become necessary" to litigate the defense. *Id.* at 795. After further trial proceedings, the court converted the default termination into a termination for convenience. Pet. App. 382a.

The superior-knowledge issue arose again, however, when the court held quantum proceedings to determine what, if anything, the Contractors were owed by the government in the termination-for-convenience context, where reimbursement of a contractor's incurred costs is standard. The Contractors had a claim for lost profits on work already performed based on the premise that the government breached its duty to share superior

knowledge; the government had a "loss ratio" argument for reducing reimbursement of incurred costs based on the premise that the government did not breach any duty and the Contractors would have lost money on the contract. Pet. App. 344a. Because both parties' arguments implicated information over which the government had already asserted the state-secrets privilege, the court decided to "spread[] the consequences of a difficult and dangerous problem." *Id.* at 381a. The court permitted the Contractors to recover their incurred costs (up to a contractual cap) with no adjustment of the contract price to reflect profit or loss. *Id.* at 380a-81a. Otherwise, the court concluded, it would necessarily be acting on "an incomplete record on which rulings . . . would be a sham." *Id.* at 379a-80a.

In so ruling, the court noted that "[u]nauthorized disclosures and questionable use of classification procedures by the Government have added to a general unease about litigating plaintiffs' equitable adjustment claims [based on the Government's superior knowledge] further." *Id.* at 376a. The court explained its concern that the government could strategically time its state-secrets-based objections to exploring certain topics to gain the maximum benefit. *Id.* at 369a-70a. It also reiterated its view that the government had made "misrepresentations" regarding its litigation use of secret information that it had withheld from the Contractors. *See, e.g.*, *id.* at 357a-58a & nn.9-10 (discussing why and how the government's "litigation team was given information so sensitive that the Air Force Secretary declared its disclosure for purposes of this litigation to be a

threat to national security," how the information was used, and what the government disclosed).

The court awarded the Contractors reimbursement of their actual costs (up to a contractual cap), in the amount of $1.2 billion plus interest. *Id.* at 342a; JA 884-85.

4. The Federal Circuit Reverses on the Default Issue.

On appeal, the government argued that it should have been permitted to press its loss ratio theory to avoid reimbursement of the Contractors' performance costs. At the same time, it argued that the Contractors' "superior knowledge and reasonable profits claims were properly removed from litigation because they jeopardized state secrets." Pet. App. 271a; *see also* JA 1234.

The Federal Circuit reversed on liability, holding that the termination was sufficiently "predicated on contract-related issues" that default could not be set aside solely on pretext grounds. Pet. App. 251a. It then remanded for an assessment of whether the default termination was actually justified on the facts. *Id.* Given the remand, the Federal Circuit vacated the trial court's rulings on superior-knowledge issues. It stated that due to the "passage of time and . . . possible intervening developments," it was in "no position to judge whether the risk of disclosure of state secrets [would] preclude adjudication" on remand, and the trial court was "free to reconsider this" in "the manner most fair and just to the parties." *Id.* at 271a.

5. The Privilege Is Invoked Again, and the Trial Court Upholds the Default While Barring the Superior-Knowledge Defense.

Hoping to find a way to litigate the whole case on remand, the trial court directed the parties to proceed with discovery on both the government's default claim and the Contractors' defense. JA 953-56.

The government then formally invoked the state-secrets privilege again. In an unclassified declaration of Secretary of the Air Force F. Whitten Peters (a classified, *ex parte* version was also filed), the government invoked the privilege over the "same matters that [had been] the subject of" earlier declarations. *Id.* at 975. Secretary Peters stated he had reviewed the 1993 declarations of Secretaries Donley and McPeak and determined that, even taking all possible precautions, there remained a "substantial risk that national security would be threatened" by disclosure of information concerning stealth aircraft. *Id.* at 975-76, 980.

The court then reaffirmed its earlier ruling that superior-knowledge issues had to be entirely removed from the case as they could not be litigated "safely." *Id.* at 985. The court explained that its determination was based on the classified version of Secretary Peters' declaration and the "warnings described therein" as well as the warnings contained in the earlier declarations, which the court found from "recent briefings" (to which the Contractors were not privy) still applied. *Id.*

The court invited the parties to address the effect of this ruling. *Id.* at 986. Reversing its earlier position, the government argued that the superior-knowledge issues could, after all, be tried safely using the limited discovery that had already taken place. *Id.* at 1013. If the court concluded that the superior-knowledge issues could not be tried safely, the government maintained that the Contractors' defense should simply be removed and the government permitted to press its default claim. *Id.* at 1051-53. And if it could not sustain its termination for default, the government argued that the "logical extension" of the court's state-secrets rulings "would simply be that both parties would walk away." *Id.* at 1216-17.

The court stood by its conclusion that "issues involving superior knowledge cannot be litigated safely." *Id.* at 1233-34. Indeed, the court noted that the government had previously represented to the Federal Circuit that the superior-knowledge issues were properly removed from the case because "they jeopardized state secrets." *Id.* at 1234.

The case thus went to trial on the propriety of the default with the Contractors' superior-knowledge defense removed from the case. The trial court ultimately ruled that the government had met its burden of proving default. Pet. App. 212a. The court relied solely on a finding that the Contractors would

not have been able to meet the "first flight" milestone date in the revised contract schedule. *Id.*[1]

6. The Federal Circuit Vacates But Allows the Government to Pursue Default While Using the Privilege to Bar the Contractors' Defense.

The Contractors appealed, arguing that the trial court misapplied the applicable default termination standards and denied the Contractors due process by allowing the government to pursue its default claim while barring the superior-knowledge defense. Pet. App. 182a, 207a. Reversing position yet again, the government contended that "[t]he trial court correctly addressed the defense of superior-knowledge." JA 1274; *see also id.* at 1273 (describing the trial court's "unchallenged holding"). The government also asserted that "the removal of the state secrets from the case" did not hamper the government's efforts to meet its burden to establish default. *Id.* at 1285-86. In the government's view, it was of no moment that the government's invocation of the privilege deprived the Contractors of a potentially dispositive defense. *Id.* at 1284-87, 1290-91.

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[1] In addition, the court again explained that it could not definitively determine which party would have prevailed on the superior-knowledge defense. Pet. App. 245a ("We can never know enough to make a finding of fact on this issue."); *see also id.* at 246a. The court also adverted to a classified Appendix kept under seal at the Pentagon. *Id.* at 246a; *see also id.* at 345a & n.2.

The Federal Circuit vacated the trial court's liability ruling, directing the court to determine on remand whether the contracting officer could have had a reasonable belief that there was no reasonable likelihood of timely completion of the entire contract – not just the first contract milestone. Pet. App. 186a-87a. However, the Circuit affirmed the trial court's excision of the superior-knowledge defense from the case. *Id.* at 202a-10a. The court recognized that there is a "judicial aversion to default termination" because it is a "drastic sanction," acknowledged that the Contractors' superior-knowledge argument was a "defense" to that sanction, and agreed with the trial court that the defense could not be safely adjudicated. *Id.* at 190a, 202a, 207a, 209a. The court nevertheless concluded that the "Contractors [we]re not at jeopardy from an attack on them by the government," but rather were "the plaintiffs in this purely civil matter," *id.* at 208a, and therefore had to suffer the consequences when "a properly invoked claim of State Secrets privilege undercut[]" their "opportunity to prove [their] case," *id.* at 210a; *see also id.* at 208a-09a ("[T]he Fifth Amendment does not require that they be able to present all defenses, including a defense that would threaten national security.").

7. The Trial Court Rules Again for the Government and Is Upheld.

On remand, the trial court again addressed the merits of the default claim. The court concluded that there was no end date for contractual performance against which the Contractors' alleged "failure to

make progress" could be measured, *id.* at 122a, 127a, and acknowledged that default termination "is a forfeiture that is disfavored in the law," *id.* at 114a. Nevertheless, the court held the government had met its burden of proof by pointing to "reasons in retrospect why plaintiffs were not making the progress that some officials hoped and perhaps expected." *Id.* at 176a.

The Federal Circuit affirmed, undertaking a newly concocted "ad hoc, factual inquiry" into the "totality of the circumstances." *Id.* at 20a-21a. The decision did not comment further on the state-secrets issue.[2]

Following the Federal Circuit's decision, the government sent a letter to the Contractors demanding payment of $1,352,459,644 plus statutory interest from 1991. As of the date of the filing of this brief, the total government demand is $2,870,196,207.

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[2] Although the Circuit had affirmed the removal of the superior-knowledge defense four years earlier, then-Chief Judge Michel – who had seen the case through three appeals and multiple mandamus petitions – expressed puzzlement at oral argument that the government failed to share the information needed by the Contractors: "[I]t looks to me as if had the Air Force [stealth] technology been handed over at the start of this contract to the two companies, . . . they would have met the dates, and the Navy would have got the plane it needed and wanted." Oral Arg. 1:12:44-1:13:02 (Fed. Cir. No. 2007-5111, Dec. 3, 2008), *available at* http://oralarguments.cafc.uscourts.gov/mp3/2007-5111Pt1.mp3.

SUMMARY OF ARGUMENT

The courts below adjudicated the government's default claim on the merits, even as the government's assertion of the state-secrets privilege prevented the Contractors from litigating their primary defense of superior knowledge. The Contractors made a persuasive showing (amounting to what the trial judge repeatedly found to be a *prima facie* case) that any schedule delay was a direct result of the government's failure to supply information about stealth technology before contract award and during contract performance. That defense, if proved, would have negated the government's claim of default. But although the trial court held that the defense was too intertwined with state secrets to be tried, it proceeded to adjudicate the default claim, entering judgment in the government's favor. That result was fundamentally unjust and a violation of due process.

1. In *United States v. Reynolds*, 345 U.S. 1 (1953), this Court recognized the importance of the state-secrets privilege as a means of protecting national security, and it instructed the lower courts to give great deference to the government when it formally invokes the privilege. At the same time, the Court recognized that it would be "unconscionable" to allow the government as the "moving party" to prosecute while using the state-secrets privilege to deprive the other party of a defense. *Id.* at 12. Since that time, the lower courts have applied a consistent approach in civil cases. Where the state-secrets privilege prevents a party from obtaining some

evidence potentially relevant to a defense, but does not effectively bar assertion of that defense, it operates like other evidentiary privileges, and the court proceeds to adjudicate the merits. Sometimes, however, the privilege does prevent a party from mounting a defense, either because the evidence withheld is so extensive and so central that the defense is effectively lost or because – as here – it is not possible to litigate an issue at all without risking national security. When a defense is barred, the rule is that the court may *not* proceed to adjudicate the claim. Instead, judgment must be entered for the party whose defense has been taken away.

That rule serves several critical purposes. First, it protects the basic fairness and integrity of the judicial process. If a court were to adjudicate the merits and impose liability on the non-moving party, even though a potentially dispositive defense could not be considered, it would have no way of knowing whether the outcome was legally and factually justified. Awarding affirmative relief under such circumstances would deny due process to the losing party. Moreover, it would risk the court's own legitimacy. When the just outcome is unknowable, a court must refrain from exercising its power in the claimant's favor, not take affirmative action that might very well be wrong.

The second basis for the rule comes into play when the moving party is the government itself, as in this case. Since the government is the sole party able to invoke the state-secrets privilege, and often does so with only minimal judicial oversight, the

privilege gives the government as litigant the ability to tilt the playing field in its favor. That reality, and the attendant risk of manipulation, may be unavoidable in cases where the government is defending against a claim. But when the government is the moving party with an affirmative claim, the risk becomes intolerable – and courts can and must take steps to assure that they do not become vehicles for imposition of liability on parties who are prevented from defending themselves because the government has said that their defense would risk national security. Courts do this not by second-guessing the government's assertion of the privilege, but by attempting to find ways to accommodate national security concerns while litigating the whole case and then, if that is impossible, by ruling in favor of the party that has been deprived of its ability to mount a defense. A private party should not be held liable or penalized, and the government permitted to reap a potential windfall, because of the need to protect state secrets for the benefit of the Nation as a whole.

2. In entering and affirming judgment for the government on its default claim, the courts below disregarded the principle that judgment must be entered in favor of a party that has been prevented from mounting its defense as a result of the state-secrets privilege. The Federal Circuit ruled for the government on the ground that this is a civil case and, as a formal matter, the Contractors are the "plaintiffs" in the caption. But a host of cases have recognized that civil parties may not be held liable after they have been deprived of a defense.

Moreover, the Contractors were "plaintiffs" here only in the most formalistic sense. A contractor, having received a default determination from a contracting officer, files suit in order to (1) trigger the government's burden of proving its default case and (2) allow the contractor to present defenses. In such a case, the government is in every meaningful sense the "moving party" on the default issue. *Reynolds*, 345 U.S. at 12. By using that term in *Reynolds*, the Court indicated that what matters in this area is substance, not empty formalisms.

The reality that the government is the moving party in a default case is driven home by the sanctions that may be imposed if there is a final determination that a contractor defaulted. The financial consequence may be a massive forfeiture of monies already paid for work actually performed. In addition, the contractor may be debarred from obtaining future contracts or may be handicapped in future bidding. Such potential consequences leave no room for doubt that the contractor is in the position of a defendant fending off the claim of the government as moving party. Indeed, those consequences are the reason why government contracts guarantee contractors the right to defend against a default in court, with the government bearing the burden of proof – a right that was effectively taken away here.

Entry of judgment for the government was also particularly inequitable here for two reasons. First, the record showed that the government abused its position by using privileged information to

strengthen its case even as it refused to produce such information to the Contractors. That kind of misuse of the privilege is foreclosed by the rule denying affirmative relief to the government against parties who are prevented by the privilege from mounting a defense.

Second, the superior-knowledge defense that the Contractors could not litigate was found by the trial court to be substantial and potentially dispositive. Legally, it is well established that the government owes its contractor assistance if it has knowledge superior to that of the contractor about the subject matter of a contract. Factually, the Contractors were able to submit sufficient evidence to make a *prima facie* showing on their superior-knowledge defense, even though they never received much of the evidence they sought in discovery. That showing established a strong basis for believing that the government caused the Contractors to fall behind because it forced them to reinvent complex stealth technology.

3. As a remedy, this Court should direct that judgment be entered for the Contractors on the default claim. In addition, the judgment of the trial court entered early in the case, when the termination had been converted to one for the government's convenience, should be reinstated. That judgment ensured that the default termination did not impose an unfair penalty on the Contractors because it reimbursed them for the costs they incurred prior to termination in performing the contract for the government's benefit. It also appropriately barred

both the government and the Contractors from arguing that the amount of actual costs should be adjusted (to reflect projected profit or projected loss), since both sides' arguments were intertwined with the superior-knowledge issue.

ARGUMENT

I. When the Government Is the Moving Party and Its Assertion of the State-Secrets Privilege Prevents the Defending Party from Presenting a Defense, the Court Must Enter Judgment for the Defending Party.

It was fundamentally unjust for the courts below to rule for the government on its default claim after the government's invocation of the state-secrets privilege prevented the Contractors from presenting their primary defense. In *United States v. Reynolds*, 345 U.S. 1 (1953), this Court recognized that it would be "unconscionable" for the government to prosecute a defendant after using the privilege to exclude evidence relevant to the defense. *Id.* at 12. That rule has been consistently followed in civil cases in which the invocation of the state-secrets privilege has had the effect of barring a party from asserting a potentially dispositive defense.

For several reasons, the rule is an essential corollary of the grant to the government of the unilateral power to assert the state-secrets privilege. National security does sometimes require limitations on the information the government may be forced to divulge, or restrictions on the issues that may be litigated. And because there is no alternative, the judicial system accepts that the government will

sometimes prevail as a defendant as a result of asserting the state-secrets privilege. But basic concerns about due process, judicial legitimacy, and the danger of unfair manipulation make it unacceptable to allow the government to use the privilege not just as a shield but also as a sword – to seek relief against a private party that has been prevented from defending itself by an assertion of the privilege. In that situation, the adversary process has ceased to function, and the government may not pursue its affirmative claim.

1. *Reynolds* was a civil suit in which private parties sued the United States, alleging that negligence caused the crash of a military airplane carrying civilians. The plaintiffs sought a classified report about the government's investigation of the crash, but the government objected that disclosure of the report would harm national security.

This Court held that "the privilege against revealing military secrets" was "well established." 345 U.S. at 6-7; *see also id.* at 7-8 n.18 (citing I Robertson's Reports 186 (Marshall, C.J.)). The Court upheld the assertion of the privilege as to the classified report, noting that such an assertion should often be accepted without any "examination of the evidence, even by the judge alone, in chambers." *Id.* at 10. But the Court nevertheless permitted the tort claim to proceed, since the privilege shielded only one particular document, and the plaintiffs

might have been able to prevail using other evidence. *See id.* at 11.[3]

The Court explained, however, that different rules apply where the government is pursuing its own claim. Thus, it would be "unconscionable" for the government – which "has the duty to see that justice is done" – to continue a criminal prosecution while "depriv[ing] the accused of anything which might be material to his defense." *Id.* at 12 (citing *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (L. Hand, J.)). The Court noted that this principle was inapplicable in the case before it, because the government was the defendant in a tort suit and could not in any way be considered "the moving party." *Id.* ("Such rationale has no application in a civil forum *where the Government is not the moving party, but is a defendant* only on terms to which it has consented" (emphasis added)). But where the government *is* the moving party, the Court suggested, a claim must yield if the state-secrets privilege makes an adversary adjudication

[3] The Court had previously addressed a related question in *Totten v. United States*, 92 U.S. 105 (1875), a suit to enforce an alleged secret contract between the government and a private citizen. The Court held that the entire suit was barred, explaining that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Id.* at 107.

impossible by preventing consideration of a potentially valid defense. *See id.*[4]

2. That result is required – in civil cases as well as criminal ones – by principles of justice that are fundamental to the operation of the courts. It is basic to our system of ordered liberty that a party is entitled to "an adequate opportunity to defend against the imposition of liability." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000); *see also, e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (requiring "an opportunity to present every available defense" (internal quotation marks omitted)); *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932); *Saunders v. Shaw*, 244 U.S. 317, 319-20 (1917). That right has long been recognized to be among "those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature." *Morgan v. United States*, 304 U.S. 1, 19 (1938); *cf. Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (citing "fundamental requirements of fairness" in criminal case involving the consequences of the government's assertion of its privilege to withhold an informant's identity).

The issue is not just fairness to a particular litigant. There is also the need to protect the

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[4] Notably, in its brief in *Reynolds*, the government argued that when it *is* the moving party and the state-secrets privilege prevents disclosure, "the Government is denied judicial assistance; but the public is left in no worse position than if it had never instituted the action." Br. of United States 17, *United States v. Reynolds*, 345 U.S. 1 (1953) (No. 21), *available at* 1952 WL 82378.

integrity and legitimacy of the judicial system. Neither the parties nor the public at large can have confidence in a judgment awarding affirmative relief in a case in which the state-secrets privilege has barred a defense that could change the result. As Justice Scalia once put it, if a party is "prevented from establishing a valid defense" and the court enters judgment, that "causes the courts of law not merely to let stand a wrong, but to become themselves the instruments of wrong." *Jaffee v. Redmond*, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting); *cf. Poe v. Ullman*, 367 U.S. 497, 505 (1961) (stating that "[t]he Court has found unfit for adjudication any cause that is not in any real sense adversary," since that is "a safeguard essential to the integrity of the judicial process" (internal quotation marks omitted)); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545-46, 548 (2001) (observing that blocking certain arguments "threatens severe impairment of the judicial function"). And that is no less true where the reason for the distortion in the process is the government's assertion of national security interests. *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963).

Moreover, where – as here – the moving party is the government, there is an additional justification for a rule against imposing liability on the party deprived of a defense by the invocation of the state-secrets privilege. *See Reynolds*, 345 U.S. at 12. Because a court's ability to inquire into the reasons for asserting the privilege is limited, *see id.* at 10-11, the temptations of strategic misuse of the privilege to obtain affirmative relief are high, and the courts

must guard against such misuse. *See, e.g.*, Beth George, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. Rev. 1691, 1707 (2009); Br. of United States 63-64, *United States v. Reynolds*, 345 U.S. 1 (1953) (No. 21), *available at* 1952 WL 82378 (arguing that the agency head deciding whether to assert the privilege will necessarily be cognizant of effects on the government's position and the public fisc); Scott Armstrong, *Do You Want to Know a Secret*, Wash. Post, Feb. 16, 1997, at C01 (quoting government attorney saying that the government can "always play the trump card – state secrets – and close down the game").

One form of government misuse is assertion of the privilege without justification to obtain a litigation advantage. For instance, when the accident report at issue in *Reynolds* was declassified and released decades later, it turned out to contain no information about secret equipment – although it did decry the government negligence that caused the plane crash. *See, e.g.*, Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131, 168 (2006); Barry Siegel, *Claim of Privilege* 210-11 (2008).[5] Another form of government misuse is

[5] The government has recently issued new guidelines for invoking the state-secrets privilege, but they do not lessen this concern, since there is no means of enforcing them. *See* Office of the Attorney General, *Policies and Procedures Governing Invocation of the State Secrets Privilege* at 4, Sept. 23, 2009, http://www.justice.gov/opa/documents/state-secret-privileges.pdf.

reliance on secret evidence – to which the other party never has access – to provide information, guide strategy, and otherwise advance the government's own affirmative case. The latter type of misconduct became a major concern of the trial court in this case, as the government developed its case using secret information while using a series of invocations of the privilege to withhold the information from the Contractors. *See supra* pp. 11, 13-16; *infra* pp. 53-54.

By contrast, there is little danger of strategic misuse of the privilege by private civil litigants seeking to defeat government claims by asking for disclosure of classified material. The government can often provide some but not all of the information requested. The court can determine whether the private party's discovery demands are overbroad or strategic, taking into account the information that the government is willing to share. Moreover, there are often ways to litigate issues while preserving some degree of confidentiality. *See, e.g.*, *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987); *see also infra* p. 51. Hence, only in exceptional cases will private parties be deprived of a potentially valid defense as a result of an assertion of the state-secrets privilege. When that occurs, however, the proper outcome is clear: judgment must be entered for the private party on whom the government is seeking to impose liability.

3. With the exception of the court below, the courts of appeals agree on that result, and have reached a consensus on how to determine whether a party has been "depriv[ed]" of a defense within the

meaning of *Reynolds*.[6] As with other privileges, invocation of the state-secrets privilege merely to remove *some* evidence from the case may have an impact on the truth-finding function of courts, but usually will not fundamentally impair the adjudicatory process. Thus, in many civil actions, invocation of the state-secrets privilege has the same effect as invocation of any other privilege: it merely removes some circumscribed subset of evidence from the case, which can thereafter continue to be adjudicated using ordinary procedures. *Mohamed v.*

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[6] Since *Reynolds*, this Court has held that courts may not entertain lawsuits seeking to enforce secret contracts relating to espionage work for the government, *Tenet v. Doe*, 544 U.S. 1 (2005), but has not otherwise addressed the effect of protecting state secrets in civil cases. In the criminal context, the Court held subsequent to *Reynolds* that dismissal of a criminal prosecution is required when the government invokes the state-secrets privilege to withhold evidence that is relevant and material to the defense. *See Jencks v. United States*, 353 U.S. 657, 670-72 (1957) ("[t]he burden is the Government's . . . to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets"); *cf. Roviaro*, 353 U.S. at 60-61. Congress then passed the Classified Information Procedures Act ("CIPA") to govern these issues in criminal cases. *See* 18 U.S.C.A. app. 3 § 4; *cf.* Mil. R. Evid. 505(e)(3). CIPA provides that where the government withholds on national security grounds information needed to ensure a fair trial, "the court shall dismiss the indictment or information." 18 U.S.C.A. app. 3 § 6(e); *see also, e.g.*, H.R. Rep. No. 96-831, pt. 2, at 3 (1980); *United States v. Fernandez*, 913 F.2d 148, 163-64 (4th Cir. 1990).

Jeppesen Dataplan, Inc., 614 F.3d 1070, 1082-83 (9th Cir. 2010) (en banc) (collecting cases).[7]

But the impact of the state-secrets privilege can be much more far-reaching, sometimes altogether preventing litigation of central issues. For example, as in this case, sometimes the relevant non-privileged evidence with regard to a given issue is so intertwined with state secrets that any litigation of the issue would present an intolerable risk. *See, e.g.*, *Fitzgerald v. Penthouse Int'l Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985) (explaining that "state secrets could be compromised" during exploration of non-secret evidence, since "the parties would have every incentive to probe dangerously close to the state secrets themselves"). In such cases, the state-secrets privilege no longer resembles other privileges. Rather, as Judge Phillips recognized in an oft-cited opinion, "the undisclosable scope of privilege lies so completely athwart the scope of proof relevant to resolution of the issues presented that litigation constrained by administration of the privilege simply could not afford the essential fairness of opportunity to both parties that is a fundamental assumption of the adversary system." *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 279 (4th Cir.) (Phillips, J., dissenting from panel opinion), *panel op. vacated on rehearing en banc*, 635 F.2d 281 (4th Cir. 1980). In

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[7] CIPA recognizes that where the privilege has a limited effect on a criminal defendant's defense the court may take action other than dismissal as "appropriate," such as finding against the United States on particular issues. *See id.* at 1082-83; *see also, e.g.*, H.R. Rep. 96-831, pt. 1, at 21.

this respect, the states secret privilege is "sui generis." *Id.* at 276.[8]

In these circumstances, a court must deny the affirmative relief sought by the moving party "not only when his claim but also when the defendant's defense is precluded by the privilege." *Id.* at 278. Thus, even if the moving party could establish the elements of its claim without using privileged material, a court cannot grant relief if the privilege altogether deprives the other party of its ability to prove a defense. Where the adversary process is so fundamentally impaired, imposing liability or a penalty on the defendant, or allowing the matter to go to trial without an opportunity for the defendant to put on its defense, would amount to a "mockery of justice." *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984) (Scalia, J.).

This rule applies in several different situations in which the state-secrets privilege effectively prevents a defendant from putting on a defense. In some cases involving less complex fact patterns, the information that a court reviews *in camera* to

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[8] Indeed, in its first state-secrets decision, this Court recognized that a claim for relief may not proceed if its subject matter involves a state secret. *Totten*, 92 U.S. at 106-07. The same result follows when the evidentiary privilege against disclosure of state secrets results in a fundamental impairment of the adversary process. *See Jeppesen*, 614 F.3d at 1083 ("In some instances, however, application of the privilege may require dismissal of the action. When this point is reached, the *Reynolds* privilege converges with the *Totten* bar"); *cf. Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 146-47 (1981).

determine the adequacy of the claim of privilege may also conclusively establish the defense to liability. *E.g.*, *id.* But even where a court cannot conclusively determine that the defense would succeed, it cannot rule for the claimant where the effect of the privilege is that the other party "cannot fairly present a good faith, colorable affirmative defense, or fairly rebut the plaintiff's prima facie case." *Farnsworth Cannon*, 635 F.2d at 280 (opinion of Phillips, J.). Likewise, courts have recognized that liability may not be imposed when the privilege *altogether prevents* litigation of the entire case or a key element of it, such as a complete defense to liability. *See*, *e.g.*, *id.* (liability may not be imposed where "the privilege so far obstructs normal proof in respect of the issues presented by the parties as to deprive the litigation process of its essential utility for fair resolution of those issues" or where "the danger of inadvertent compromise of the protected state secrets outweighs the public and private interests in attempting formally to resolve the dispute while honoring the privilege"); *Jeppesen*, 614 F.3d at 1083 ("even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because – privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses – litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets").

The courts of appeals have uniformly adhered to these principles, except in the decision under review. *See, e.g.*, *El-Masri v. United States*, 479 F.3d 296,

309-10 (4th Cir. 2007) (because "the defendants could not properly defend themselves without using privileged evidence," the claim could not go forward); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) ("We further conclude that Defendants cannot defend their conduct with respect to Tenenbaum without revealing the privileged information. Because the state secrets doctrine thus deprives Defendants of a valid defense to the Tenenbaums' claims, we find that the district court properly dismissed the claims."); *Kasza v. Browner,* 133 F.3d 1159, 1166 (9th Cir. 1998) ("[I]f the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant" (quoting *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992) (internal quotation marks omitted)).

Moreover, the government has consistently advocated that the United States, its employees, and its contractors may not be subjected to civil liability when they are sued by a plaintiff who can establish a *prima facie* case without privileged evidence, but a core defense cannot be litigated because of state secrets. The government has urged that "dismissal is required . . . if the [state-secrets] privilege claim . . . precludes the defendant" from asserting a defense, or "if the case is so suffused with privileged material that further proceedings would pose an undue risk of disclosing secret information." Br. of United States 13-14, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693) (en banc), *available at* 2009 WL 6635974; *see*

also, e.g., Br. of United States 35, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667), *available at* 2006 WL 2726281 ("If the unavailability of the information protected by the privilege precludes either the plaintiff or defendant from establishing their respective legal positions on the issues in the case, then the case must be dismissed."); Br. of United States 35-36, *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (No. 04-1495), *available at* 2005 WL 871009 (requesting dismissal where "the Agency would be unable to present a defense" because of information protected by the privilege); *supra* note 4.

Indeed, the government has argued in support of that rule *in this very case*. When at an early stage the trial court addressed the Contractors' termination-for-convenience recovery, the court ruled that the government's invocation of the state-secrets privilege barred it from asserting a "loss ratio" argument that the government said would have reduced the recovery to zero. The government protested that it "was . . . grossly unfair to award plaintiffs their total costs when the Government was *deprived of a defense* which would have adjusted the amount of those costs as required by the contract and the Federal Acquisition Regulation." JA 1058-59 (emphasis added) (citing *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984)); *see also id.* at 1025 n.2; *id.* at 746 n.7 (arguing for dismissal of claims on ground that "the Government is precluded from asserting its defenses . . . because those defenses . . . are inextricably intertwined with privileged matters").

II. The Contractors Are Entitled to Judgment in Their Favor on the Government's Claim of Default.

The application of the above-stated principles to this case is straightforward. The government's invocation of the state-secrets privilege altogether prevented the Contractors from presenting their superior-knowledge defense to liability, even though the trial court recognized the Contractors had shown a substantial basis for the defense on the merits. Under those circumstances, entering judgment for the government was a "mockery of justice." *Molerio*, 749 F.2d at 825. The Federal Circuit's contrary ruling rested on the fact that this is a civil case and the Contractors are the nominal plaintiffs. *See* Pet. App. 208a-10a. But there is no basis for limiting to criminal cases the rule that the government, as moving party, may not be awarded judgment if the privilege prevents the other party from offering a defense. Nor is there any doubt that the government is the moving party with regard to its default claim.

A. The Fact That This Is a Civil Case Does Not Justify Affirmative Relief for the Government.

The court of appeals found it significant that this is a "purely civil matter," suggesting that constitutional concerns raised when a criminal defendant is barred by the privilege from defending himself do not apply to a civil action. Pet. App. 208a-09a. But as the authorities cited in Part I demonstrate, such a distinction ignores decades of case law. It also makes no sense.

When the government is the moving party in a civil case, due process and judicial integrity bar the imposition of liability on a party deprived of a defense, just as in a criminal case. Moreover, as this case and *Reynolds* both illustrate, concerns about governmental manipulation of the privilege are no less salient in the civil context. It would be indefensible to adopt the Federal Circuit's apparent view that in civil cases there is no problem raised by awarding affirmative relief to the government after the losing party has been prevented by the government's invocation of the privilege from offering a defense.

B. The Government Was the Moving Party on Default.

Nothing in *Reynolds* or related cases supports the Federal Circuit's formalistic approach, under which the question of who is the "moving party" turns on the form of the case caption. Indeed, it is notable that *Reynolds* uses the term "moving party," rather than "plaintiff," in this context. 345 U.S. at 12.

1. The procedures chosen by the government for resolving default claims dramatically demonstrate why the Federal Circuit's simplistic approach is erroneous. It is hornbook government-contract law that a claim for default termination is a *government* claim, not a contractor claim. *See, e.g.*, *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988) ("a government decision to terminate a contractor for default is a government claim"); 41 U.S.C. § 605(a) (provision of Contract Disputes Act distinguishing between "claims by the government" and "claims by

the contractor"); 48 C.F.R. § 2.101(a) (defining "claim" as an "assertion" that "seek[s], as a matter of right, . . . relief arising under or relating to the contract"). The government conceded this key point in its brief opposing certiorari. *See* Cert. Opp. 14-15 (citing *Malone*).

Although a default termination is a government claim, the law requires the *contractor* to bring suit in order to mount a defense against that claim. Specifically, when the contracting officer issues a decision terminating a contractor for default, the government's claim is set in motion. If the contractor does not timely defend itself against that decision – which normally includes, as in this case, a demand by the government for money, *see* JA 339-41 – then "the merits of that decision cannot be judicially challenged." *Seaboard Lumber*, 903 F.2d at 1562. Thus, "once the decision of the contracting officer becomes final," it has "preclusive effect" and can be automatically converted into a judgment enforceable against the contractor without any further inquiry into the merits of the government's claim or opportunity for the contractor to present valid defenses. *Id.*; *see also id.* at 1562 n.4 (explaining that "[t]he government may obtain a judgment on the basis of [a decision that becomes final in this manner] in a state or federal court without litigating the merits," and citing cases); 41 U.S.C. § 605(b) ("The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized

by this chapter."); *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1380-81 (Fed. Cir. 2007).

The contractor can interpose its defenses against the government claim only by filing an action under the Contract Disputes Act. Once a contractor files suit, the contracting officer decision is effectively vacated. The court addresses the default issue *de novo* with the government carrying the burden of proof, and the contractor can defend itself against the government's charge. *See, e.g.*, *Lisbon*, 828 F.2d at 764-65 (noting "long-established government contract law" that "the government bears the burden of proof on the issue of the correctness of its actions in terminating a contractor for default," which never "shifts . . . back and forth," and that "the government is only being made to bear the burden of proof of its own 'claim' of default"); 41 U.S.C. §§ 605(a), 609(a)(3) (stating that findings of fact by the contracting officer "shall not be binding in any subsequent proceeding" and that the action "shall proceed de novo"); *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987) ("the contracting officer's award is not to be treated as if it were the unappealed determination of a lower tribunal"); Pet. App. 269a (the contracting officer "meant not to take away the right of Contractors to assert their defenses to termination for default, he instead only meant to assert the government's right to allege material breach").[9]

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[9] Indeed, one of the government's primary arguments has been that "unlike the court in an Administrative Procedure Act suit . . . the [court] in a [Contract Disputes Act] action does not

In short, there cannot be any doubt that the government was the moving party here. *See, e.g.*, *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1089 n.10 (5th Cir. 1979) (noting that when a party "'voluntarily' becomes a plaintiff only because there is no other means of protecting legal rights," the plaintiff-defendant distinction is only "superficially appealing"). Confirming this reality, the government in the courts below repeatedly acknowledged the Contractors' superior-knowledge argument as an "affirmative defense" to the government's own claim. *See, e.g.*, JA 723-25, 762, 923, 1052, 1274.

2. The government's status as the "moving party" is driven home by the harsh consequences the Contractors could suffer if default liability is imposed. Default termination is a "species of forfeiture." *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969). It has also been termed a "drastic sanction," *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969), and the "harshest punishment" the government can visit on a contractor, *Int'l Verbatim Reporters, Inc. v. United States*, 9 Cl. Ct. 710, 717 (1986); *see also H.N. Bailey & Assocs. v. United States*, 449 F.2d 387, 391 (Ct. Cl. 1971) (noting that a default termination is a "drastic sanction" and that the government must be "held . . .

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review an administrative record," so that the government is "entitled to establish that a default termination is justified based on any grounds available, regardless whether those grounds were known at the time of termination." Cert. Opp. 27-28; *see also* Pet. App. 29a (Federal Circuit's endorsement of this principle).

to strict accountability for its actions in enforcing this sanction" (internal quotation marks omitted)).

A default termination carries monetary consequences, *see, e.g.,* 48 C.F.R. §§ 49.402-2(a), -6(c), -7(a), which can be draconian – as in this case, in which the government seeks a staggering sum. It also carries a variety of serious prospective penalties. It can prevent a contractor from being awarded future contracts, by branding the contractor not "responsible." *Bannum, Inc. v. United States*, 91 Fed. Cl. 160, 171-72 (2009) (holding that agency was "legally required" to consider prior default termination in subsequent contract award); 48 C.F.R. § 9.103(a); *see also id.* §§ 9.104-1(c), 9.104-3(b), 9.105-1, 42.1501; John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 416-20 (3d ed. 1998). Moreover, it may result in debarment of a contractor from *any* dealings with the government. *See Malone*, 849 F.2d at 1445.

3. Given the procedural scheme the government has created, and the crushing penalties the Contractors may face if the government prevails on its claim of default, it would violate the principles of fundamental fairness and due process on which the *Reynolds* rule is based to treat the Contractors as the moving party for purposes of that rule. The Contractors entered into the A-12 contract in reliance on contractual provisions incorporating the statutory and regulatory dispute resolution procedures assuring them the opportunity to require the government to prove any default claim, subject to their defenses. *See* 48 C.F.R. § 52.233-1 (Disputes

clause of the contract, which refers to relevant provisions of the Contract Disputes Act).

The decision below, however, deprived the Contractors of the process to which they – and the government – agreed. It allowed the government to obtain judgment on its default claim free of the Contractors' main defense. Even worse, it was the government that controlled whether the Contractors were able to litigate their defense, a power that in this case the trial court found had been abused for the sake of obtaining a litigation advantage. *See supra* pp. 11, 13, 15-16. No one would doubt that it would violate due process simply to leave in place the contracting officer's default decision – with all of its extraordinary consequences – without giving the Contractors a fair ability to challenge it. But that is functionally equivalent to what happened here. In the face of a default termination that otherwise would have become final and enforceable, the Contractors' suit was the only means they had to put their superior-knowledge defense before a neutral arbiter. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617, 626 (1993) ("due process requires a neutral and detached judge in the first instance" (internal quotation marks omitted)).[10] That opportunity was taken away from them, through no fault of their own.

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[10] *See also, e.g.*, 41 U.S.C. § 601 revision note (explaining that the Contract Disputes Act was designed to "insure fair and equitable treatment to contractors and Government agencies"); 41 U.S.C. § 605 revision note (explaining that the contracting officer does not have to engage in any particular adjudicatory

Moreover, in the circumstances here, the government is best equipped to bear the consequences of the uncertainty created by its own assertion of the state-secrets privilege. This Court has long recognized that the United States should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) (internal quotation marks omitted). The state-secrets privilege protects the Nation, and where the government is the claimant, costs associated with the privilege should be borne by the people at large rather than by particular contractors subject to a demand for a massive forfeiture. As the government itself argued in its *Reynolds* brief, when a government claim is lost by virtue of the state-secrets privilege "the public is left in no worse position" than if the government had never brought its claim in the first place. 1952 WL 82378, at *17.

At the same time, a ruling by this Court that the Contractors are the moving parties for privilege purposes would infuse government contracts with damaging uncertainty. Government contractors are often trusted to deal with – indeed, to develop –

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process and can draw on "personal knowledge"); 48 C.F.R. § 33.214 (contrasting contracting officer with "neutral person"). *Compare United States v. Wunderlich*, 342 U.S. 98, 99-100 (1951) (holding, prior to enactment of the Contract Disputes Act or its predecessor, that government contractor contracted away the right to review of an adverse government decision).

secret technology.[11] Their efforts are critical to the national defense. *See, e.g.*, 50 app. U.S.C. § 2071 (discussing importance of contracts that promote "national defense"); U.S. GAO, GAO-10-317R, *DOD Assessments of Supplier-Base Availability for Future Defense Needs* 1 (2010) ("The Department of Defense . . . relies on thousands of suppliers to ensure that it has the weapons and supporting equipment needed to meet U.S. national security objectives."). They are governed by complex regulations that do not allow them to protect themselves by customizing contracts. Inevitably, a ruling endorsing use of the privilege to bar defenses to defaults would destroy confidence in government-contract disputes resolution and lead to a more costly and less efficient contracting process. Some contractors would undoubtedly refuse to do business with the government at all, while others would refuse to enter into risky research and development contracts like the one at issue here – exactly the kinds of contracts that the military uses to stay on the cutting edge. *See United States v. Winstar*, 518 U.S. 839, 913 (1996) (Breyer, J., concurring) (explaining the problems involved in hampering the government's ability "to obtain needed goods and

[11] For this reason, government contractors are hardly likely to try to gain a litigation advantage by placing secret information at risk, or by otherwise threatening to undermine national security. *Cf. Tenet*, 544 U.S. at 10-11. Contractors are well aware of the importance of preventing disclosure of sensitive national defense information, and face serious consequences if they abuse the government's trust. *See, e.g.*, 48 C.F.R. § 42.1501.

services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting"). Indeed, it was to guard against that evil that Congress enacted the statutes ensuring a full and fair process for addressing government default claims and airing contractor defenses. *See, e.g.*, S. Rep. No. 95-1118, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5238 (explaining that Contract Disputes Act is important because "[h]ow procurement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs," and "[t]he way potential contractors view the disputes resolving system influences how, whether, and at what prices they compete for Government contract business").[12] Allowing the government to proceed with its default claim here would undercut the very national security interests that the government seeks to protect when it invokes the state-secrets privilege.

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[12] The Contract Disputes Act currently sets forth that process – providing, for example, that the contracting officer decision is entitled to no weight or deference in court. *See supra* pp. 8, 42-43. Its predecessor, the Wunderlich Act, was motivated by similar purposes. *See, e.g.*, H.R. Rep. No. 83-1380, at 4 (1954) (explaining that the absence of a fair dispute resolution system would "render the performance of Government work less attractive to the responsible industries" and would "attract more speculative elements whose bids will contain contingent allowances intended to protect them from unconscionable decisions of Government official[s]").

C. The Equities Support Reversal.

Imposing liability on the Contractors was particularly "unconscionable," 345 U.S. at 12, because of the trial court's findings that (1) the government engaged in unfair gamesmanship using the privilege, and (2) the Contractors would have been able to mount a "persuasive case" at trial on their superior-knowledge defense, even without privileged material, Pet. App. 367a.

1. As an initial matter, there is no dispute about the propriety of the trial court's decision to strip the Contractors of their superior-knowledge defense as a result of the state-secrets privilege. The court accepted the government's contentions that it could not attempt to counter the defense without use of secret information, and that at trial the Contractors' own non-privileged evidence would prove to be "inextricably intertwined" with state secrets that "could not be cordoned off in a safe manner," including the question whether certain secret programs even existed. Pet. App. 371a-73a; *see also, e.g.*, JA 586, 599-608, 629, 721-23, 742-51, 778-81. As the government put it in its papers opposing certiorari, "the courts below correctly found petitioners' superior-knowledge defense unamenable to adjudication." Cert. Opp. 17.[13]

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[13] In the trial court, the government vacillated on this issue, depending on how it perceived its interest at the time. *Compare* JA 628 *with id.* at 1013. But the government initially advocated, and ultimately accepted as a basis for its victory, exactly what the court did. *See id.* at 1233-34 ("The Executive Branch has warned us repeatedly that issues involving superior

The trial court arrived at that result only after years of trying every possible means available to proceed with litigation of the superior-knowledge defense without encroaching into protected territory. Among other precautions, the court limited the scope of discoverable information; used security officers and a Sensitive Compartmented Information Facility; and held certain proceedings in a sealed deposition room or courtroom. Pet. App. 246a, 345a & n.2, 356a-61a; 28 C.F.R. § 17.17; Security Procedures Established by the Chief Justice of The United States for the Protection of Classified Information, 18 U.S.C. app. 3 § 9 note; Pet. App. 431a-32a ("To the extent that procedures are available to protect national secrets in a judicial setting, those procedures are in place").

None of these efforts worked. *See, e.g.*, Pet. App. 381a ("Despite everyone's best efforts, the risk of compromising national secrets is too serious to proceed to trial."); *id.* at 369a-70a. Thus, while in many cases "creativity and care" can devise "procedures which [would] protect the privilege and yet allow the merits of the controversy to be decided," *Fitzgerald*, 776 F.2d at 1238 n.3, in this case it was not possible to wall off privileged material while continuing to litigate.

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knowledge cannot be litigated safely."); *id.* at 1273 ("the trial court correctly applied the law when it removed the issue of superior knowledge from the case and proceeded to litigate the Government's claim that the contractors were in default"); Cert. Opp. 17.

Nor was it possible for the trial court to review all of the complex secret evidence and make an *in camera* determination about the merits of the superior-knowledge defense, without input from the Contractors about privileged material they never saw. The government apparently did not share the entire universe of secret information with the court. *See* Pet. App. 441a (stating that "privileged information *known to this Court* does not clearly establish that defendant could refute" the Contractors' superior-knowledge showing (emphasis added)). Further, the court found that the Contractors' "superior knowledge claims are too complex to be resolved through a selective *ex parte*, *in camera* examination of evidence." *Id.* at 442a. Instead, "[t]he nature of the information involved likely would preclude the court from finding facts with the degree of certainty that justice requires." *Id.*; *see also id.* at 441a ("The information concealed by the state secrets privilege is such that its effect on the merits is not readily apparent.").

For these reasons, the trial court concluded that it was simply not possible to adjudicate the superior-knowledge defense. In the absence of "numerous layers of potentially dispositive facts," doing so would "lead to an incomplete record on which rulings . . . would be a sham" and an "affront to our system of justice." *Id.* at 379a-80a; *see also id.* at 367a (expressing concern that the government would be "unfairly prejudiced"); Cert. Opp. 17-18 (quoting the trial court's conclusion that "it is not proper to consider [the Contractors'] *prima facie* evidence

when [the government] might refute" that evidence "with greater access"); JA 1273, 1284-87.

2. But while the principle that motivated the trial court's decision not to adjudicate the defense was correct, the court applied the principle in precisely the "unconscionable" manner that *Reynolds* and its progeny forbid. The relevant question is not simply whether the superior-knowledge *defense* could be litigated. It is whether the government's default claim *as a whole*, of which the superior-knowledge defense was a critical aspect, could go forward once the Contractors were deprived of their ability to defend themselves. Under the authorities discussed above, the answer is plainly no. Rather, the only result consistent with fundamental fairness and due process is entry of judgment for the Contractors.

That result is particularly justified because the trial court found that the government was engaged in exactly the kinds of abuses that the *Reynolds* rule guards against. General Dynamics is not privy to the confidential submissions and briefings the government made to the trial court. But the court was able to determine that the government was using secret information for its own "tactical purposes" while refusing to turn the very same information over to the Contractors. JA 524; *see also, e.g.*, *id.* at 550-51 (noting that "sensitive information was used not only to argue Secretary Donley's invocation of the state secrets privilege, but also for defendant's earlier litigation needs," and warning the government that its "tactics raise[d]

serious implications under Rule 11"); Pet. App. 357a-58a nn.9&10 (explaining that the government used information withheld as privileged "in developing [its] defense to superior knowledge claims," and that the court "issued sanctions against the United States" for misrepresentations regarding privileged information); *id.* at 376a (noting "[u]nauthorized disclosures and questionable use of classification procedures by the Government").

The court also observed that the government possessed tremendous power to manipulate the outcome of litigation on the defense. By strategically "timing" its continuing objections to particular aspects of the superior-knowledge inquiry, so as to "cease discovery or testimony," the government could unilaterally "determine who among the litigants would be damaged." *Id.* at 370a; *see also id.* ("The Executive's job is to protect its secrets; it has no obligation to find the truth"); *id.* at 373a ("the Government's incentive would be to expand the inquiry" into privileged areas); JA 493-94. The government should not be permitted to exact a forfeiture based on such improper behavior.

3. Imposing default liability on the Contractors was also particularly inequitable because they were found to have made a strong showing on their defense, even without resort to privileged evidence. After reviewing declarations and other evidence submitted by the Contractors, the trial court repeatedly found that they "could establish a *prima facie* case" – based solely on non-privileged evidence – that the government failed to share its superior

knowledge of the technology involved in developing a stealth aircraft. Pet. App. 441a; *see, e.g.*, *id.* at 367a ("We do not doubt plaintiffs' ability to present a persuasive case based on this information alone."); JA 623 ("[P]laintiffs made an impressive showing that they can present a prima facie case under the existing discovery restrictions imposed by defendant."). In addition, the court found that the "privileged information known to this Court does not clearly establish that [the government] could refute" the Contractors' superior-knowledge defense. Pet. App. 441a.

The government's opposition to certiorari did not question the trial court's rulings that the government had a duty to share its knowledge with the Contractors, or the court's findings that the Contractors had established a *prima facie* valid defense. Indeed, it is well established that the government must disclose "superior knowledge" to a contractor that will otherwise pursue "a ruinous course of action." *Helene Curtis Indus., Inc. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963); *see also, e.g.*, *Am. Ship Bldg. Co. v. United States*, 654 F.2d 75, 79 (Ct. Cl. 1981); *Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364, 1371-72 (Ct. Cl. 1972) (explaining that "the Government has an affirmative duty to disclose [superior] knowledge" and "cannot remain silent with impunity"). The duty to disclose applies prior to the submission of a bid as well as during performance of the contract, and breach of the duty can function as a complete defense to default termination. *See, e.g.*, *Fla. Engineered Constr. Prods. Corp. v. United States*, 41 Fed. Cl.

534, 542 (1998); *In re Johnson Elecs., Inc.*, A.S.B.C.A. No. 9366, 65-1 BCA ¶ 4628, at 22,107 (holding that because of the government's breach of its superior-knowledge duty "the contracting officer's termination of the contract for default was not proper"); *In re Johnson & Son Erectors*, A.S.B.C.A. No. 24564, 81-1 BCA ¶ 15,082, at 74,602 (collecting cases). The duty applies to both classified and unclassified information, as the trial court correctly concluded – particularly where the contractor is already entrusted with development of highly classified materials relating to the same subject matter. *See, e.g.*, *J.A. Jones Constr. Co. v. United States*, 390 F.2d 886, 888, 893 n.14 (Ct. Cl. 1968) (stressing that government was "not free . . . to stand aside and let the bidder be overwhelmed without a warning," and reasoning that "[w]hile some aspects of the Air Forces' [sic] plans undoubtedly were classified, the evidence falls far short of proving that a general warning to plaintiff would have rent the security blanket").[14]

Here, the Contractors made a showing that the government knew the Contractors lacked access to

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[14] *See also, e.g.*, *Northrop Grumman Corp. v. United States*, 63 Fed. Cl. 12, 19 (2004) ("The defendant has not demonstrated any basis for this court to create or recognize a compartmented programs or classified information exception to the government's duty to disclose under the superior knowledge doctrine, nor has any court so held."); John Cibinic, Jr., Ralph C. Nash, Jr. & James F. Nagle, *Administration of Government Contracts* 262 (2006); J. William Eshelman & Suzanne Langford Sanford, *The Superior Knowledge Doctrine: An Update*, 22 Pub. Cont. L.J. 477, 485 (1993).

the confidential information possessed by the other bidder, which made a dramatically different bid at a much higher price and with important limitations. In addition, the Contractors' non-privileged evidence showed that the government promised both before and after bids were submitted that it would comply with its duty to share its superior knowledge during contract performance. But it ultimately dribbled out only small amounts of information, and then stopped sharing altogether – and the bits that it did transmit came too late to be useful. *See supra* pp. 3-5; *see also, e.g.*, JA 392, 689-92. The evidence further showed that the Contractors' schedule difficulties were the direct result of the government's failure to disclose. JA 691-92. All of this evidence was highly probative of the Contractors' defense: that the government breached its duty by allowing the Contractors to proceed on a "ruinous course," and by failing to warn them or to attempt to structure the contract to protect them from their lack of knowledge. *Helene Curtis*, 312 F.2d at 778; *see also Snyder-Lynch Motors, Inc. v. United States*, 292 F.2d 907, 910 (Ct. Cl. 1961) (finding breach of superior-knowledge duty where "the Government was remiss" in withholding "information regarding the . . . experience" on a different, similar contract).

The government's assertion of the privilege no doubt prevented the Contractors from obtaining additional evidence that would have bolstered their defense. In particular, the Contractors pressed for, but were unable to obtain, evidence regarding the knowledge the government derived from stealth programs other than the B-2 program – programs so

secret the government refused to confirm or deny their existence. JA 521-22; Pet. App. 370a-73a. But even without resort to state secrets, the Contractors submitted credible evidence sufficient to entitle them to present their defense to the trier-of-fact, had the government's invocation of the privilege not prevented that. *See* Pet. App. 441a-42a; JA 1234-35. Their showing was so persuasive that the trial court stated that they were likely to "establish" their superior-knowledge defense at trial. Pet. App. 369a.

That finding reinforces the conclusion that upholding the government's default claim, without consideration of the superior-knowledge defense, was a sham and a mockery of justice – one that, if allowed to stand, could end up costing the Contractors billions of dollars.

III. The Court Should Order Reinstatement of the Judgment Entered When the Trial Court Converted the Termination to One for the Government's Convenience.

For the reasons set forth above, the government cannot justly pursue its default claim, and this Court should rule that the Contractors are entitled to judgment in their favor on default. That will ensure that the government cannot penalize the Contractors on the basis of an alleged default that, through no fault of their own, they have been prevented from disproving.

But the Court should do more to bring this case to a just conclusion: it should remand with directions to reinstate the judgment entered by the Court of Federal Claims at an earlier stage of the case (before

being vacated in the first appeal) when the termination had been converted to a termination for convenience. *See supra* p. 16. Under the governing regulations and the terms of the contract, "[i]f, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government." 48 C.F.R. § 52.249-9(g). A termination for convenience enables the government to end a contract on a no-fault basis without exposure to contract breach damages, but prevents the government from saddling the contractor with unreimbursed costs of work already performed. *See id.* § 52.249-2(g)(2); *see also id.* § 49.201.

Here, after the trial court invalidated the default on the ground that it was pretextual, it applied the rules for terminations for convenience and held that the Contractors could recover their actual unreimbursed performance costs (up to a contractual cap). Pet. App. 341a-42a; *see, e.g.*, John Cibinic, Jr., Ralph C. Nash, Jr. & James F. Nagle, *Administration of Government Contracts* 1120 (2006). If the Contractors are not reimbursed for the amounts they spent performing the contract prior to termination, then the government will have succeeded in imposing an unjust sanction on them as a consequence of the termination decision – precisely the result that the *Reynolds* principle prohibits in this case. Were the rule otherwise, the government could simply time its termination and its contract payments for maximum advantage, as it did here, so

as to ensure that it paid as small an amount of a contractor's costs as possible. Reimbursement of incurred costs eliminates that possibility and fairly accounts for where both parties stood when their contract ended.

In allowing a termination-for-convenience recovery, the trial court addressed the effects of the elimination of the superior-knowledge issue from the case. It ruled that the burden of the parties' inability to address the issue should be split, with the Contractors being barred from showing that they would have earned profits if the government had shared its knowledge and the government being barred from showing that the Contractors would have lost money on the contract if (as the government argued) it had no duty to share its knowledge. *See supra* pp. 14-15. Reinstatement of that Solomonic ruling would resolve this case equitably and without further litigation.

The government may argue, as it has previously, that if the default is overturned, there should be no recovery by anyone – *i.e.*, that "plaintiffs' entire claim" for costs "cannot be decided" due to the effects of the state-secrets privilege. JA 1058. But that outcome would not serve the ends of justice because (1) it would leave the Contractors' actual out-of-pocket expenditures unreimbursed, and (2) if the superior-knowledge issue could have been litigated, the Contractors' recovery is at least as likely to have increased to reflect lost profits as to have decreased to reflect losses they never incurred. In all events, the Court should make clear that on remand there

can be no consideration of reinstating the default determination, as to which the Contractors have a substantial but non-justiciable defense.

CONCLUSION

The Court should reverse the Federal Circuit and rule that the Contractors are entitled to judgment on the default claim. It should also direct reinstatement of the final judgment the Court of Federal Claims entered when the termination had been converted to one for convenience.

Respectfully submitted,

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