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 OF PETITIONER THE BOEING COMPANY

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QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment permits the Government to maintain a claim while simultaneously asserting the state secrets privilege to bar presentation of a prima facie valid defense to that claim.

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

As of December 31, 2009, two companies disclose, in filings with the U.S. Securities and Exchange Commission, beneficial ownership of 10 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.

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The opinions of the Federal Circuit (Pet. App. 1a-34a, 178a-211a, 250a-79a) are reported at 567 F.3d 1340, 323 F.3d 1006, and 182 F.3d 1319, respectively.[1] The pertinent opinions of the Court of Federal Claims and its predecessor, the Claims Court (Pet. App. 35a-177a, 212a-49a, 280a-342a, 343a-81a, 382a-429a, 430a-43a; Joint Appendix ("JA") 349-72) are reported at 76 Fed. Cl. 385, 50 Fed. Cl. 311, 40 Fed. Cl. 529, 37 Fed. Cl. 270, 35 Fed. Cl. 358, 29 Fed. Cl. 791, and 25 Cl. Ct. 342, respectively. Additional relevant orders of the trial court (JA 388-94, 478-49, 504, 524-25, 550-51, 576-77, 622-25, 640-41, 768-69, 787-90, 793-95, 983-86, and 1233-35) are unpublished.

JURISDICTION

The Federal Circuit entered judgment on June 2, 2009, and denied the timely petitions for rehearing and rehearing en banc on November 24, 2009. Pet. App. 444a-45a. On January 22 and 28, 2010, and March 11 and 12, 2010, the Chief Justice extended the deadline for filing petitions for writ of certiorari in Nos. 09-1298 and 09-1302, first to March 24, 2010, and then to April 23, 2010, and the petitions were filed on that date. The petitions for writ of certiorari

[1] Unless otherwise specified, all references to the Pet. App. are to the appendix to the petition for certiorari filed in No. 09-1298.

were granted and consolidated on September 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Evidence 501, adopted by statute, *see* Pub. L. No. 93-595, § 1, 88 Stat. 1933 (1975), provides in pertinent part that "the privilege of a . . . government . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT

A. Factual Background

1. In 1988, the Navy and Petitioners The Boeing Company (then McDonnell Douglas Corporation) and General Dynamics Corporation (the "Contractors") entered into a fixed-price research-and-development contract with the Contractors to develop the "A-12 Avenger," a state-of-the-art, carrier-based, stealth aircraft. Pet. App. 40a. The contract required "two major defense contractors with impeccable credentials and long histories of government service to

undertake a complex and highly sensitive research and development project involving stealth technology." *Id.* at 248a. The Contractors first had to develop a design for the aircraft acceptable to the Navy, and then to manufacture and test eight prototype aircraft of increasing complexity, with the eighth aircraft fully functional. Pet. App. 40a. In May 1990, the Navy exercised an option to purchase six production aircraft ("Lot I"), which were to be delivered between June 1991 and May 1992. *Id*. at 40a-41a.

At the time of the contract, "the Air Force already had conducted flight tests for the B-2 Bomber and the F-117A Fighter," both of which employed stealth technology, and "[t]he A-12 was designed to apply similar technology." *Id*. at 353a. The trial court found that the Contractors "were anxious to access B-2 and F-117A program information during contract performance, and they had reason to expect that they would be granted such access." *Id*. at 353a-54a. Indeed, the court found that "[t]he Government contemplated sharing information with the contractors." *Id*. at 354a n.6. For example, the court noted, "the Navy and the Air Force were directed to form a joint committee" so that the Navy's A-12 program could "take advantage of previous technologies developed by the USAF and minimize life cycle costs." *Id*. (quotation marks omitted).

In testimony credited by the trial court, Secretary of the Navy John Lehman emphasized the importance of sharing the Air Force's stealth technology with the A-12 program:

> "[T]here was an unquestioned assumption when we started the [A-12] program that [the Navy] would have full and unimpeded access to all of the B-2 technology. . . . [S]ince the airplane was to be a miniature B-2, which would face all of the same unstable flight control issues, all of the same wind tunnel expenses, all of the same issues of dealing with engine inlets and outlets, that an enormous amount of money could be saved in wind tunnel time and development process by simply using the Air Force Northrop data."

Id. (quoting Lehman Dep. at 104-05 (July 26, 1995)).

For these reasons, the court found, 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.

2. The Contractors commenced performance in January 1988. From the beginning, the Contractors' progress was hampered because "[t]he United States Air Force chose not to share its highly sensitive stealth information sufficiently to avoid technical difficulties and delay," contrary to the mutual expectations and understanding of the Contractors and the Navy. *Id.* at 52a; *see also id*. at n.9 ("The contractors wanted and needed highly sensitive technical information for the A-12, and the Navy wanted them to

have it."). The original schedule required delivery of the first of the eight test aircraft in June 1990, but because the Contractors had been forced essentially to reinvent stealth technology from scratch, it was clear early on that the Contractors would not be able to meet that initial deadline. *Id.* at 37a. The parties discussed, but did not agree upon, a revised schedule; the Contractors "did not want to become contractually bound to a new schedule because of the uncertainties of controlling weight without having the benefit of shared technical information from the Air Force." *Id.* at 70a. In August 1990, the Navy unilaterally issued a contract modification, called P00046, which set a new schedule for delivering the eight test planes but did not establish a schedule for subsequent stages of contract performance (including delivery of the Lot I production aircraft). *Id*. at 4a-5a.

The Contractors continued to perform through the fall of 1990, at a cost to them of $120-150 million per month. *Id.* at 6a. During this period, the parties resolved all outstanding design issues, and the trial court found that "the Navy agreed that technical concerns had been addressed and resolved to its satisfaction. The Navy accepted plaintiffs' design for the A-12 in November 1990." *Id.* at 57a.

During this same period, even as the Contractors and the Navy reached agreement on the design and the Contractors continued to spend $120-150 million per month of their own money, the Department of Defense conducted a review of the A-12 program as part of a larger retrenchment in defense spending

sparked by the end of the Cold War. *See generally id.* at 387a-400a. On January 7, 1991, "[a] $553 million progress payment was due to the contractors." *Id*. at 399a. Over the Navy's objections, Secretary of Defense Cheney decided in early 1991 to withdraw support for the A-12 program, and on Sunday afternoon, January 6, 1991, the Defense Department informed the Navy's contracting officer that it "would not authorize the expenditure or obligation of any more funds to the program." *Id.* at 398a. Accordingly, the next day, the Navy's contracting officer terminated the contract for default rather than make the payment that was due, even though he strongly supported continuing the A-12 program. *See generally id.* at 399a-403a; *cf*. *id.* at 248a ("For reasons that do not appear in the record of this case in their entirety, the Government abruptly terminated the contractors for default.").

The Navy asserted that the Contractors were in default for "fail[ing] to . . . [p]rosecute the work so as to endanger performance of th[e] contract." 48 C.F.R. ("FAR") § 52.249-9(a)(1)(ii) [JA 223-24]; *see also* FAR § 52.249-8(a)(1)(ii) [JA 217-18]. Specifically, the Navy based the default termination on its projection that the Contractors would not meet the P00046 schedule for the delivery of the eight test planes and would not meet the *original* schedule for delivering the Lot 1 production planes (even though that schedule had been displaced by the P00046 modification,

see Pet. App. 14a).[2] Shortly after the termination for default, the Navy demanded that the Contractors return approximately $1.35 billion in progress payments plus interest.

B. Legal Background: Pertinent Principles of Government Contract Law

In order to place into context the issue on which this Court granted review, it is important to understand certain background principles governing the termination of government contracts, all of which were acknowledged by the courts below and are not in dispute here.

1. When the Government believes that its contracting partner has committed a serious breach of its obligations, the Government can terminate the contract for default. *See, e.g.*, FAR §§ 52.249-9(a)(1) [JA 223-24], 52.249-8(a)(1) [JA 217-18]. To do so, the Government must assert a formal claim against the contractor. As the Acting Solicitor General has acknowledged, *see* Br. for the United States in Opp'n in Nos. 09-1298 and 09-1302 ("Opp.") at 13-14, default

[2] The Government also asserted that the Contractors were in default for failing to meet the original contract design requirements, but the trial court found that the Navy had accepted a modified design in November 1990, Pet. App. 57a, and the Government did not appeal that ruling. Accordingly, as the case comes to this Court, the sole ground upon which the default termination rests is the Contractors' failure to make progress toward timely completion of contract performance.

termination is "a government claim," *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988), for it is an "assertion" by the Government "seeking, as a matter of right, . . . relief arising under or relating to the contract," FAR § 52.233-1(c) (defining "claim"); *see also* FAR § 2.101(a) (same).

According to the Contract Disputes Act's unique procedures governing the termination of government contracts, the Government must first submit its default termination claim to its own contracting officer, who will, if he determines that default termination is appropriate, issue an administrative decision terminating the contract for default. 41 U.S.C. § 605(a) ("All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer."); *Malone*, 849 F.2d at 1443 ("A default termination falls precisely within the contours of" § 605(a).); FAR § 33.211. The contracting officer's decision stands as a "final and conclusive" adjudication of the Government's claim, unless the contractor timely appeals that decision to the appropriate agency board of contract appeals or brings a suit challenging that decision in the Court of Federal Claims. 41 U.S.C. §§ 605(b), 609(a)(1); *see also Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 (Fed. Cir. 1990).

If the contractor mounts such a challenge to the default termination, the Government bears the burden of proof. *See, e.g.*, *Lisbon Contractors, Inc. v.*

United States, 828 F.2d 759, 763-65 (Fed. Cir. 1987). The Federal Circuit has explained:

> The default termination order is deemed by the [agency boards of contract appeals] to be a decision by the contracting officer on a government "claim" against the contractor which, being adverse, the contractor may appeal to the board under the [Contract Disputes Act]. . . . [Accordingly,] the imposition of the burden of proof of default . . . falls naturally on the government inasmuch as the government is only being made to bear the burden of proof on its own "claim" of default.

Id. at 764.[3] The courts below acknowledged and applied these rules, and they are not at issue in this Court. *See* Pet. App. 196a (holding that the Government has the burden of proof); *id.* at 269a-70a (same). Functionally, then, the contractor is the defendant-appellant, not the plaintiff.

2. The courts have long considered default termination to be "a drastic sanction" exacting a "severe penalty," *J.D. Hedrin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969), that qualifies as a "species of forfeiture" imposed by the

[3] *Lisbon* also held that the same rules apply regardless of whether the contractor appeals the contracting officer's decision to the appropriate board of contract appeals or seeks review in the Court of Federal Claims, explaining that otherwise, "the government would receive an advantage simply by reason of the choice of forum, a result which finds no support in the statute or Court of Claims precedent." 828 F.2d at 764-65.

Government. *Decker & Co. v. West*, 76 F.3d 1573, 1580 (Fed. Cir. 1996); *see also DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969) (same); *Schlesinger v. United States*, 390 F.2d 702, 709 (Ct. Cl. 1968) (noting the "drastic consequence" of default termination).[4] If the Government's default termination claim is sustained, the contractor is potentially subject to a number of severe penalties. Most significantly, upon termination for default, the contractor must forfeit payment for all of the costs it has incurred in performing work that had not yet been accepted by the Government. *See* FAR § 49.402-2(a). Not only is the Government relieved from any liability for the contractor's unreimbursed costs incurred performing work that was not yet accepted at the time of termination, it may even seek repayment of unliquidated "progress payments," that is, advance payments to the contractor for such work. *Id*. In addition, a default termination may have severe collateral consequences for the contractor, including suspension or debarment from public contracting, *see* FAR § 9.406-2(b)(1), and loss of future government contract competitions, *see*

[4] Indeed, both the trial court and the court of appeals below recognized that default termination "is a forfeiture that is disfavored in the law and to be construed narrowly by the courts." Pet. App. 114a (quoting *DeVito*, 413 F.2d at 1153); *see also id.* at 190a (noting "judicial aversion to default terminations"); *id.* at 248a (describing the default termination in this case as a "grievous sanction"); *id.* at 229a n.11 ("Termination for default is a very serious sanction that rarely is applied by the Government.").

Bannum, Inc. v. United States, 91 Fed. Cl. 160, 171 (2009).

The default termination sought by the Government in this case would impose severe financial penalties on the Contractors. The trial court found that the Contractors had incurred over $1.2 billion in unreimbursed costs in performing their obligations under the contract. Pet. App. 342a. In addition, as previously noted, shortly after the Navy terminated the contract, the contracting officer demanded that the Contractors return over $1.35 billion in progress payments for work the Navy claimed had not been accepted. *Id.* at 8a. On the same day, the Government and the Contractors entered a Deferment Agreement in which the Government "agreed to take no action 'to enforce collection of the amount demanded' pending action by the court." JA 366. Interest has therefore accrued on these amounts since June 1991, bringing the total forfeiture sought by the Government in this case to more than $5 billion.

3. In cases in which there has been no serious breach by the private contractor, the law provides the Government with an option for terminating its contracts at will. As the Acting Solicitor General has explained, *see* Opp. at 5 n.3, the Government has long enjoyed "[t]he right to terminate a contract when there has been no fault or breach by the non-governmental party . . . for the 'convenience' of the government." *Maxima Corp. v. United States*, 847 F.2d 1549, 1552 (Fed. Cir. 1988). This right, which is uniquely held by the Government, safeguards the

Government's resources by permitting the Government at any time to walk away from its contractual obligations without liability for breaching the contract. When the Government terminates a contract for convenience, the contractor ordinarily is entitled only to payment of "[1] costs incurred, [2] profit on work done and [3] the costs of preparing the termination settlement proposal." *Id*. Unlike a private party who walks away from a contract, however, the Government is not obligated to pay the anticipated profits on work that remains to be done when it terminates the contract for its convenience. *Id*.; *see also* FAR § 52.249-2(f) [JA 207-09].

The parties agree that if the Contractors prevail here and the default termination of the A-12 contract is not sustained, "the court may treat the termination as one for the convenience of the government," with the result that the Government walks away without liability for breach, as described above. Opp. at 5 n.3 (citing *Maxima Corp.*, 847 F.2d at 1553); *see* FAR §§ 49.401(b), 52.249-9(g) [JA 226]. As explained below, however, a termination for convenience in this case will put the Government in an even more favorable position than the generous result this option ordinarily affords it. Specifically, the Government's invocation of the state secrets privilege has barred the Contractors from pressing a claim for their profit on the work that was completed before termination (i.e., the second category of payment ordinarily made to a contractor following a termination for the convenience of the Government). *See infra* at 16-20.

C. Litigation History

1. As required by the Contract Disputes Act, *see* 41 U.S.C. § 605(a), the Government's default termination claim was initially resolved by the contracting officer. *See* JA 353-70 (holding that the contracting officer's default termination notice, the demand for the return of the $1.35 billion in progress payments, and the Deferment Agreement constituted a final decision on the Government's default termination claim). In accordance with the statute, *see* 41 U.S.C. § 609(a)(1), the Contractors sought review of the contracting officer's decision by filing this suit. While the Contractors thus were the nominal plaintiffs in the trial court in this case, their status simply reflects the unusual, Government-friendly procedural framework established by the Contract Disputes Act for resolving default termination claims. As discussed above, the statute allows the Government to enter an administrative judgment in its own favor on its default termination claim that will bind the contractor and entitle the Government to impose the above-described sanctions against it unless it appeals to the appropriate agency board of contract appeals or brings an action challenging the administrative determination in the Court of Federal Claims. *See* 41 U.S.C. §§ 605(b), 609(a)(1).

From the outset, the Contractors asserted that the delays experienced in the A-12 program were attributable to the Government's failure to timely share its "superior knowledge" – specifically, the critical "stealth" technology data the Air Force had

developed in connection with the B-2 and F-117A programs. "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 also* Pet. App. 270a ("[t]his doctrine of superior knowledge is well established in law"); *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991); *Helene Curtis Indus., Inc. v. United States*, 312 F.2d 774, 777-79 (Ct. Cl. 1963). The Contractors thus contended that the Government's failure to share its superior knowledge not only precluded the default termination, but also required, once the default termination was converted to a termination for convenience, an equitable adjustment to the contract price that would allow recovery of a reasonable profit on the work completed.[5] The Contractors' superior knowledge contentions were thus two-fold, constituting both a defense to the Government's default termination claim and also an affirmative claim for additional recovery from the Government

[5] As discussed above, a contractor is ordinarily entitled to recover both its costs and a reasonable profit on the work completed when a default termination is converted into a termination for convenience. In this case, however, Congress had not fully funded the contract before termination, and the trial court concluded that the Contractors' overall recovery was limited to the amount obligated by Congress absent an equitable adjustment. *See* Pet. App. 349a-50a; *id.* at 282a-84a.

beyond costs if the default termination were converted into a termination for convenience.

From very early in the litigation, the Government strictly limited discovery of information relating to the B-2 and F-117A programs. *See* JA 383-87. And although the Government claimed that the Contractors had access to these and *other* highly classified programs that involved stealth technology, it refused to allow any discovery at all related to these other programs. *See* JA 516, 520-23; JA 631-38; JA 974, 979-80.

In 1993, the Government moved to dismiss the Contractors' superior knowledge defense to the default termination and their claim for an equitable adjustment of the contract price, arguing that the state secrets doctrine barred litigation of these issues. In support of its assertion of the state secrets privilege, the Government invoked a declaration previously submitted by then-Secretary of the Air Force Donald Rice in support of the discovery limitations it had imposed earlier, and later supplemented it with additional declarations from General Merrill A. McPeak (at the time serving as Acting Secretary of the Air Force) and Acting Secretary of the Air Force Michael B. Donley. *See* Pet. App. 358a, 373a-75a. These declarations emphasized the "'*extremely grave damage to the national security*'" that could be reasonably expected to flow from unauthorized disclosure of "'the stealth technology from classified, special access programs, such as the B-2 or F-117A.'"

Pet. App. 375a (quoting Rice Declaration) (emphasis added by the court).

Nevertheless, the trial court found that the Contractors had "made an impressive showing that they can present a prima facie case under the existing discovery restrictions imposed by defendant [allowing access to the B-2 and F-117A information subject to strict limitations]. The unavailability of certain information does not require dismissal because plaintiffs have shown that they can proceed with the information available." JA 623; *see also* Pet. App. 441a ("We ruled that plaintiffs could establish a *prima facie* case, and that privileged information known to this court does not clearly establish that defendant could refute that showing."). Based on that showing, the trial court permitted limited discovery under stringent security procedures, but ultimately terminated the discovery after a number of security problems arose. *See id.* at 357a-61a.[6]

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[6] It is important to note that the trial court repeatedly found that the security problems were not caused by the Contractors, but rather arose at least in part from the improper actions of Government litigation counsel. Indeed, at one point the court entered sanctions against the United States (though the court later removed them after the Assistant Attorney General represented that he would take corrective action). *See, e.g.*, Pet. App. 357a-58a & nn.9-10; *id.* at 376a (citing "[u]nauthorized disclosures and questionable use of classification procedures by the Government"); *id.* at 433a n.1; JA 623 n.1 (responsibility for "improper disclosures of sensitive information . . . cannot be placed on plaintiffs").

2. In 1996, the trial court held that the default termination could not be sustained because it had been pretextual, and the contracting officer had not exercised reasoned discretion in invoking this draconian remedy. Accordingly, the trial court converted the termination for default into a termination for the convenience of the government. *See id.* at 382a-429a. As noted above, when a contract is terminated for the convenience of the government, the contractor is ordinarily entitled to payment of "[1] costs incurred, [2] profit on work done and [3] the costs of preparing the termination settlement proposal." *Maxima Corp.*, 847 F.2d at 1552. The Court of Federal Claims awarded the Contractors $1.2 billion in unreimbursed costs, *see* Pet. App. 280a-342a, but refused to award profit on the work the Contractors had done because the state secrets doctrine prohibited the Contractors from proceeding with their affirmative superior knowledge claim for an equitable adjustment of the contract price. *Id.* at 353a-81a.

As the trial court explained, the Contractors argued that "once they have proven their superior knowledge-based claim, corresponding equitable adjustments would increase the price of the A-12 contract enough to avoid the imposition of a loss ratio and entitle them to profits." Pet. App. 353a.[7]

[7] If the Government can prove that "the contractor would have sustained a loss on the entire contract" when it terminates a contract for convenience, a contractor cannot recover the profits on the work completed to which it would otherwise be

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In response, the Government argued (i) "[t]he present state of superior knowledge discovery does not verify plaintiffs' allegations," and (ii) "[e]ven if it did, further inquiry into various [other] 'black' programs would undermine plaintiffs' argument." Pet. App. 353a. In particular, the Government argued that the Contractors' alleged "participation in other highly classified Air Force programs" – information as to which the Government had asserted the state secrets privilege and thus barred discovery – provided them with "information and experience that negate a credible superior knowledge claim." Pet. App. 355a.[8]

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entitled, and even its recovery of its out-of-pocket costs may be limited. Pet. App. 347a; *see also* FAR § 49.109-7(a). The amount of the loss on the entire contract proved by the Government is applied pro rata to the unreimbursed costs through a loss ratio. *See* Pet. App. 347a-48a.

[8] Because the Contractors do not have access to the privileged information or the Government's *ex parte* submissions to the trial court, their understanding of the privileged information and the Government's arguments is based on what appears in the trial court's opinions. As discussed in the text, it appears from the trial court's description that the information as to which the Government asserted the state secrets privilege relates to highly classified programs, other than the B-2 and F-117A programs to which the Contractors were ultimately granted access (though not in time to avoid the costs and delays that resulted from the Government's failure to share this information in a timely manner). *See* Pet. App. 354a. But the Government's apparent claim that the Contractors had access to these other programs and, through this access, could have obtained substantially the same technology that they sought from the B-2 and F-117A programs is implausible on its face. Even if it were true that some personnel employed by the Contractors had timely access

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The Court of Federal Claims rejected the first argument, again finding (as it had in 1993, *see* JA 623) that the Contractors had the "ability to present a *prima facie* case based on A-12 program information alone." Pet. App. 373a; *see also id.* at 367a ("Plaintiffs have maintained that they could prove superior knowledge within the confines of the programs to which they have been given access. That may be true. We do not doubt plaintiffs' ability to present a persuasive case based on this information alone."); *id.* at 441a ("We ruled that plaintiffs could establish a *prima facie* case, and that privileged information known to this court does not clearly establish that defendant could refute that showing."). But the court found that the Government's second argument – that the Contractors' "participation in other highly classified Air Force programs" provided them with "information and experience that negate a credible superior knowledge claim," *id.* at 355a – could not be safely litigated without endangering state secrets concerning both the B-2 and F-117A programs and the other "black" programs to which the Contractors allegedly had access. *Id.* at 367a-81a.

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to these programs, in light of the highly classified and compartmented nature of the programs, there is simply no way that any technology from those programs could have been lawfully transferred to the A-12 program without the Government's express consent. It is difficult to take seriously any suggestion that such consent might have been forthcoming at the same time that direct access to the B-2 and F-117A programs was being denied.

The court reasoned that each side would have to seek "evidence of plaintiffs' exposure to relevant information through involvement with non-A-12 programs." *Id.* at 369a. Inevitably, according to the trial court, "[t]he Executive necessarily would block the parties' probing at some point, and such an invocation of the military and state secrets privilege would cease discovery or testimony. The timing of the privilege would determine who among the litigants would be damaged." *Id.* at 369a-70a. Compounding the court's concern, "[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.

In these circumstances, the court concluded, "[w]e cannot know fully the effects that privileged information omitted from evidence would have for the parties in this case. . . . [W]e are satisfied that trying this case would lead to an incomplete record on which rulings by the trial court and consideration by the Federal Circuit on appeal, would be a sham." *Id.* at 379a-80a. Accordingly, the court held that the Contractors could not seek profits and the Government could not seek to reduce the Contractors' recovery of costs by application of a loss ratio. *Id.* at 380a-81a.

3. On appeal, the Federal Circuit reversed the trial court's holding that the termination for default had been pretextual. *Id.* at 259a-70a. The court of

appeals remanded for determination of whether the Government could prove that the Contractors were in default. *Id.* at 269a-70a. As a result of that ruling, the court held that the issues surrounding the Contractors' superior knowledge claim were "not ripe for our decision." *Id.* at 271a.

The court of appeals further observed that "[b]ecause of the passage of time and of possible intervening developments, we are in no position to judge whether the risk of disclosure of state secrets will preclude adjudication, on remand, of Contractors' superior knowledge claim, and the issues of loss adjustment and reasonable profit." *Id*. Accordingly, the court held that the trial court was "free to reconsider this issue on remand," and "express[ed] no view on the trial court's previous ruling on whether these three interrelated issues may be litigated." *Id.* at 271a-72a.

4. On remand in 2001, the trial court sustained the default termination based solely on its finding that the Contractors would not have met the December 1991 "first flight" milestone set by P00046. *Id.* at 218a-28a. The court rejected all other grounds for default termination the Government alleged – including that the Contractors could not meet weight and other design specifications, that the Contractors' financial condition threatened performance, and that the Contractors failed to give adequate assurances of performance. *Id.* at 230a-43a.

The court also refused to permit the Contractors to present their superior knowledge *defense*, reaffirming its 1996 ruling that superior knowledge issues "could not be tried because the resulting threat to national security would not permit it." *Id.* at 243a-44a.[9] During discovery, the Contractors "issued several interrogatories that prompted the United States to invoke again the military and state secrets doctrines." *Id.* at 244a. After reviewing a classified version of the declaration submitted by Secretary of the Air Force F. Whitten Peters, and in light of the earlier McPeak, Donley, and Rice Declarations, the Court of Federal Claims held that "we remain satisfied that superior knowledge issues in this case cannot be litigated safely." *Id*.

The court again acknowledged that "plaintiffs made a persuasive showing that they could prove their claim without the information." *Id.* at 245a. The court's determination that the Contractors had established a prima facie valid superior knowledge defense was never disturbed. The court also observed that the Government claimed that it could rebut the Contractors' superior knowledge defense with evidence concerning knowledge the

[9] As explained above, the Contractors' superior knowledge assertion arose in 1996 in the context of the Contractors' affirmative claim for profits as part of their termination for convenience recovery. At issue in the trial court's 2001 decision and the subsequent proceedings in this case, however, was the Contractors' attempt to assert the Government's superior knowledge as a defense to the Government's default termination claim.

Contractors allegedly derived from other black programs. But absent the privileged information, the court concluded: "We can never know enough to make a finding of fact on this issue. That is why we could not try claims or defenses that depend on information that has been removed from this case." *Id*. Moreover, the court explained that it could not "establish that the information that has been removed from this case would have benefitted either party. Without extensive discovery related to this information, which will not be permitted for years if ever, no one can know whether either party would have been helped or harmed by it." *Id*. Accordingly, the court held that the Contractors "may not use superior knowledge as a defense because we cannot know whether that argument has merit." *Id.* at 246a.

5. On appeal in 2003, the Federal Circuit vacated the judgment sustaining the default termination and remanded, holding that the trial court's finding that the Contractors would not have met P00046's first flight date in December 1991 "[wa]s insufficient to sustain a default termination in this case." *Id.* at 187a. Applying its well-established rule for evaluating default terminations for failure to make progress, the court of appeals instructed the trial court on remand to first "determine[ ] the performance required by the contract and the contract completion date, . . . [and] then decide . . . whether the government has met its burden of proving that the contracting officer had a reasonable belief that there was no reasonable likelihood that the

contractor could perform the entire contract effort within the time remaining for performance." *Id.* at 196a.

Turning to the superior knowledge defense, the Federal Circuit rejected the Contractors' argument that the Government could not, consistent with due process, both continue to assert its claim for default termination and also invoke the state secrets privilege to foreclose the Contractors' superior knowledge defense to that claim. *Id.* at 207a-10a. The court of appeals concluded that the rule established in *United States v. Reynolds*, 345 U.S. 1, 12 (1953), prohibiting the Government "to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense," does not extend to this civil claim by the Government seeking the "drastic sanction" of default termination. *See id.* at. 208a (asserting that the Contractors' argument "essentially conflate[s] rules governing criminal and civil proceedings, elevating this civil contract dispute into the constitutional territory of a criminal prosecution"). The court of appeals reasoned that the Contractors "are not at jeopardy from an attack on them by the government," *id.* at 208a, notwithstanding the $5 billion forfeiture the Government would seek. Asserting that the Contractors are "the plaintiffs in this purely civil matter, suing the sovereign on the limited terms to which it has consented," *id.* at 208a, the court held that "the Fifth Amendment does not require that [the Contractors] be able to present

all defenses, including a defense that would threaten national security." *Id.* at 208a-09a.

6. On remand, the Court of Federal Claims in 2007 found that "[t]he contract had no completion date at termination, seemingly leaving the court without a basis for finding a reasonable belief on the part of the contracting officer that the contractors would not complete the work on time." *Id.* at 164a. Nonetheless, the court upheld the default termination based on its finding that the contracting officer could reasonably conclude that the Contractors "were behind schedule at termination according to a self-contained series of milestones, *not in relation to the entire contract*," *id.* at 129a (emphasis added), as the court of appeals' 2003 decision in this case had required, *see id.* at 196a. Given the Federal Circuit's 2003 decision affirming the trial court's earlier holding that the Contractors were barred from presenting their superior knowledge defense, the trial court did not address that issue further. The court entered judgment for the Government sustaining its default termination claim.

7. The Federal Circuit affirmed in 2009. *Id.* at 1a-34a. Concluding that the analysis that its 2003 decision had mandated "cannot be strictly applied," *id.* at 29a; *but cf. id.* at 192a-93a, the court of appeals adopted and applied a new "ad hoc, factual inquiry." *Id.* at 20a-21a. The court's new test required that a default termination for failure to make progress toward timely completion be upheld, even absent a

contract completion date, if the Government shows that, in light of "all relevant circumstances," "the contracting officer was reasonably justified in feeling insecure about the contractors' rate of progress." *Id.* at 27a. The court held that the Government had satisfied this standard and sustained the Government's termination for default claim. *Id*.

The 2009 panel did not revisit the Federal Circuit's 2003 decision barring the Contractors from presenting their superior knowledge defense.

SUMMARY OF ARGUMENT

In this case, the Government asserted a default termination claim against the Contractors, seeking to impose a multi-billion-dollar sanction. The courts below prohibited the Contractors from presenting their prima facie valid superior knowledge defense to that claim because the Government maintained that the defense could be rebutted by the information protected by the state secrets privilege and because the trial court found that litigating the issue would create an undue risk that the state secrets would be disclosed. By allowing the default termination claim nevertheless to proceed in these circumstances, the courts below departed from this Court's precedent and violated fundamental principles of common law and due process.

Invoking *United States v. Reynolds*, 345 U.S. 1 (1953), the Federal Circuit ruled that the Contractors

were precluded from asserting their superior knowledge defense to the Government's default termination claim because, "when a properly invoked claim of State Secrets privilege undercuts a civil litigant's opportunity to prove its case, the interests favoring the protection of the state secret always prevail." Pet. App. 210a. But the Contractors do not dispute that genuine state secrets must always be protected, nor are they in a position to dispute the trial court's finding that genuine state secrets would in fact be threatened by litigation of their superior-knowledge defense; rather, Contractors respectfully submit that permitting the privilege to preclude their prima facie valid defense requires dismissal of the Government's default termination claim, as a matter of both the common law governing the state secrets privilege and due process. Neither the Due Process Clause nor basic principles of fairness permit the Government both to assert a claim and then to ensure its own victory by invoking the state secrets privilege to preclude its opponent from interposing such a defense.

In *Reynolds*, the plaintiffs sued the Government in tort and sought disclosure of a classified report withheld under the state secrets privilege. 345 U.S. at 3-5. Upholding the Government's assertion of privilege, the Court distinguished between a criminal defendant and a civil plaintiff asserting a claim for monetary relief against the Government: "[I]n the criminal field, . . . the Government can invoke its evidentiary privileges only at the price of letting the

defendant go free," for "it is unconscionable to allow [the Government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Id*. at 12. But this "rationale has no application," the Court held, "in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." *Id*.

Relying on this discussion in *Reynolds*, the Federal Circuit held that the Contractors had "conflate[d] rules governing criminal and civil proceedings, elevating this civil contract dispute into the constitutional territory of a criminal prosecution." Pet. App. 208a. Concluding that "[t]he Contractors are not at jeopardy from an attack on them by the government," the court ruled that due process did not foreclose the Government from proceeding with its default termination claim, even as the Contractors were barred from presenting their prima facie valid superior knowledge defense. *Id*.

But the Federal Circuit misread *Reynolds*. *Reynolds* did not specifically resolve the situation here, where the Government *is* the "moving party" asserting a *civil* penalty claim against a private party. And contrary to the Federal Circuit's decision, the Contractors *are* at jeopardy – from a staggering multi-billion-dollar forfeiture. The concerns about fairness and integrity that underlay *Reynolds* do not depend upon the happenstance of the label affixed in the litigation to the party bringing the claim. *Reynolds*

notably spoke of the "moving party," not the "plaintiff." 345 U.S. at 12.

In fact, *Reynolds*' rationale concerning criminal defendants plainly applies here: just as it is unconscionable to allow the Government both to prosecute a criminal defendant and "invoke its governmental privileges" to prejudice the defense to the charge, *id.*, it is unconscionable to allow the Government to assert a civil claim against the Contractors that could subject them to a multi-billion-dollar sanction and also invoke the privilege to bar them from litigating a prima facie valid defense to that claim. The underlying risk to the judicial process in both cases is the same: if the Government can both assert a claim and invoke the privilege in a manner that substantially prejudices the defense to that claim, it can distort the court's fact-finding process to its advantage. In both contexts, due process and basic fairness require dismissal of the Government's claim.

Applying *Reynolds* in this way to this case is entirely consistent with other well-established precedent, in which this Court has unambiguously held that due process guarantees a civil defendant "an opportunity to present every available defense." *E.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quotation marks omitted); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). As this Court has explained, "[t]he purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making. That protection is of particular importance here, where the

Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55-56 (1993). The Federal Circuit's state secrets ruling thus violates due process and conflicts with this Court's clear teaching.

Except for the ruling below, the Circuit courts have consistently recognized that a civil claim may not proceed where invocation of the state secrets privilege precludes presentation of a valid defense to that claim, or where defending against that claim would run an unacceptable risk of compromising the state secrets. *See, e.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087-90 (9th Cir. 2010) (en banc); *El-Masri v. United States*, 479 F.3d 296, 306-07 (4th Cir. 2007); *Tenenbaum v. Simoni*, 372 F.3d 776, 777 (6th Cir. 2004); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1143 (5th Cir. 1992); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991); *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984) (Scalia, J.); *cf. Farnsworth Cannon v. Grimes*, 635 F.2d 268, 276 (4th Cir. 1980) (en banc) (per curiam). These decisions are rooted in the broader principle – which the Government has repeatedly and successfully invoked when it found itself, like the Contractors here, *defending* against an affirmative claim for relief – that when the need for safeguarding state secrets substantially prejudices a litigant's ability to defend, relief on the moving party's claim must be denied, for any other course threatens to compromise the integrity of the judicial

process. Only by withholding adjudication of the claim altogether can the court ensure that it does not, itself, become the instrument of an injustice by awarding relief where none was warranted. *See, e.g.*, *Molerio*, 749 F.2d at 825 (Scalia, J.) (it would have been "a mockery of justice for the court – knowing the erroneousness – to participate in that exercise"). This principle applies with special force where the Government is the party asserting the claim, for in that circumstance the Government holds the unique power both to wield the sword of its claim and to simultaneously deprive its opponent of the shield of its defense.

ARGUMENT

The state secrets privilege is a common-law evidentiary rule that shields military, intelligence, and diplomatic secrets from discovery when disclosure of those secrets would harm national security. *See United States v. Reynolds*, 345 U.S. 1, 6-7 (1953); *Molerio v. FBI*, 749 F.2d 815, 820-21 (1984) (Scalia, J.).[10] Although the privilege in this country appears to

[10] Apart from its common-law origins, the state secrets privilege also appears to serve a function of constitutional significance, for it allows the Executive Branch to protect information the secrecy of which is necessary to its Article II military and foreign-affairs responsibilities. *See United States v. Nixon*, 418 U.S. 683, 710-11 (1974); *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007).

have roots extending back at least to Aaron Burr's trial for treason, *see United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807); *Reynolds*, 345 U.S. at 9, the seminal modern decision recognizing and delineating the privilege is *Reynolds*.

As this Court explained in *Reynolds*, the state secrets privilege "belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *Id*. at 7. The privilege is absolute; once properly invoked, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* at 11.

When the Government asserts this privilege, a court must perform a three-part analysis. First, it must determine whether the procedural requirements for invoking the privilege have been satisfied. *See id*. at 7-8. Most important, "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id*. (footnotes omitted). Second, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." *Id*. at 8 (footnotes omitted). Finally, if the first two requirements are satisfied, the court must then determine how – and whether – the case should proceed in light of the successful invocation of the privilege. *See id*. at 11-12. While in some situations

the case can simply proceed without the privileged evidence, in other cases dismissal is required. *See id*.

Reynolds provides clear guidance regarding the first two parts of this analysis, and the Contractors do not dispute their proper application in this case. Rather, this case turns on the third part of the analysis – the consequences of the Government's successful invocation of the privilege. As demonstrated below, both due process and the common-law principles governing the state secrets privilege make clear that a civil claim may not proceed where the Government's invocation of the state secrets privilege substantially prejudices a litigant's ability to defend against that claim. But whatever the precise contours or outer limits of this principle, this Court should hold that, at a minimum, the Government may not assert a claim seeking serious sanctions against a private party and then ensure its own victory by invoking the state secrets privilege to prevent the private party from presenting a prima facie valid defense that could defeat the claim.

THE GOVERNMENT MAY NOT PROCEED WITH A CIVIL CLAIM WHEN THE STATE SECRETS PRIVILEGE BARS A PRIMA FACIE VALID DEFENSE TO THAT CLAIM.

A. This Court Has Held That the Government May Not Pursue a Claim Where Its Assertion of the State Secrets Privilege Substantially Prejudices the Defense.

In *Reynolds*, this Court embraced lower court decisions holding that "in the criminal field . . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free." 345 U.S. at 12. As the Court explained, the rationale of these cases "is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Id*. Thus, "[t]he burden is the Government's, not to be shifted to the trial judge, 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 and other confidential information in the Government's possession." *Jencks v. United States*, 353 U.S. 657, 672 (1957).[11]

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[11] Consistent with these decisions, the subsequently enacted Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 §§ 1-16, provides that, in the criminal context, "[i]f no adequate substitution can be found [for admissible classified information

(Continued on following page)

To be sure, the Court in *Reynolds* stated that this principle "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." 345 U.S. at 12 (emphasis added). But the Court's careful framing implicitly acknowledged that this principle *would* apply in a civil forum where the Government *is* the moving party. Indeed, in its brief in *Reynolds* the Government expressly distinguished that case from civil cases "in which discovery is sought against the United States *as plaintiff*." Br. for United States at 66, *United States v. Reynolds*, 345 U.S. 1 (1953) (emphasis added), *available at* 1952 WL 82378. As the Government explained:

> [W]here the Government is plaintiff, as in criminal cases where it is prosecutor, the choice of seeking the aid of the courts by pursuing the action or of refusing to produce is different from that where the Government is defendant. If the Government refuses to produce in the former class of cases, it is denied

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that the defendant expects to disclose or cause to be disclosed], the government must decide whether it will prohibit the disclosure of the classified information; if it does so, the district court must impose a sanction, which is presumptively dismissal of the indictment." *United States v. Moussaoui*, 365 F.3d 292, 312 (4th Cir. 2004) (citing 18 U.S.C. app. 3 § 6(e)). If "the court determines that the interests of justice would not be served by dismissal of the indictment," however, the CIPA provides that the court "shall order" other "appropriate" action, such as dismissing a count, finding against the United States on an issue, or excluding testimony. 18 U.S.C. app. 3 § 6(e)(2).

> judicial assistance; but the public is left in no worse position than if it had never instituted the action.

Id. at 17 (footnote omitted). Further, while the threat to life, liberty, and property posed by a criminal prosecution may present the starkest context for application of the principles of due process and fundamental fairness reflected in *Reynolds*' and *Jencks*' analysis, those principles retain substantial force when the Government asserts a civil claim against a private party – especially where, as here, the Government seeks to impose significant punitive consequences in connection with that claim.

B. The Government May Not Pursue Its Default Termination Claim Because Its Invocation of the State Secrets Privilege Foreclosed a Prima Facie Valid Defense to That Claim.

In this case, the Government seeks to impose a civil sanction that could result in one of the largest forfeitures, if not *the* largest forfeiture, in government contracting history – upward of $5 billion. Beyond imposing a punitive monetary sanction, a default termination claim by the Government can also result in unfavorable treatment in, or even disqualification from, future government contract competitions. *See supra* at 10-11. The consequences of a default termination are thus so significant that courts uniformly have called it a "drastic sanction," a "species of forfeiture," that exacts a "severe penalty." *Supra* at 9-10 (citing cases). The courts below acknowledged the

"grievous" nature of such "forfeiture[s]," *supra* at 10 n.4 (citing opinions below), yet they nevertheless allowed the Government to pursue this sanction, even though the Government also invoked the state secrets privilege to prevent the Contractors from presenting and litigating what the trial court's undisturbed findings repeatedly recognized as a prima facie valid defense to the Government's claim. *See* JA 623; Pet. App. 245a, 367a, 373a, 437a, 441a.

In allowing the Government's claim to go forward, the Federal Circuit relied upon the distinction drawn by this Court in *Reynolds* between criminal prosecutions, on the one hand, and civil suits in which "the Government is not the moving party," on the other hand. *Id.* at 208a (quoting *Reynolds*, 345 U.S. at 12). According to the Federal Circuit:

> The Contractors are not at jeopardy from an attack on them by the government. Rather, they are the plaintiffs in this purely civil matter, suing the sovereign on the limited terms to which it has consented. Thus, the Fifth Amendment does not require that they be able to present all defenses, including a defense that would threaten national security. Complying with the high court's edict as we must, we therefore reject the Contractors' Fifth Amendment contention.

Id. at 208a-09a. As demonstrated below, this reasoning was wrong at every turn, for the Contractors *are* at jeopardy – of a multi-billion-dollar forfeiture – from a claim asserted against them *by the Government*.

Under these circumstances, the Fifth Amendment *does require* that they be able to present a prima facie valid defense that could defeat that claim.

1. The Government is the moving party in this case.

It is true, as the Federal Circuit observed, that the Contractors were the nominal plaintiffs in this case. As explained above, however, the caption's nominal structure is simply an artifact of the unusual, Government-friendly framework established by the Contract Disputes Act, *see* 41 U.S.C. § 605(a)-(b), which allows the Government unilaterally to enter an order in its own favor on its default termination claim. "The default termination order is deemed . . . to be a decision by the contracting officer on a government 'claim' against the contractor." *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987); *see also Malone v. United States,* 849 F.2d 1441, 1443 (Fed. Cir. 1988) (default termination is "a government claim"). The Government's unilateral order binds the contractor and allows the Government to impose sanctions against it, unless the contractor timely appeals that decision to the appropriate agency board of contract appeals or brings a suit challenging that decision in the Court of Federal Claims. *See supra* at 8.

This procedural framework thus shifts the burden of filing suit to the party defending against the Government's claim, but it does not change the fact

that the Government has asserted the underlying claim for relief under the contract, nor does it shift the burden of proof regarding the merits of the default termination, which remains with the Government at all times. *See Lisbon*, 828 F.2d at 764 ("the imposition of the burden of proof of default . . . falls naturally on the government inasmuch as the government is only being made to bear the burden of proof on its own 'claim' of default"); *supra* at 7-9. The Acting Solicitor General has conceded as much. *See* Opp. at 13-14.

The Federal Circuit was thus simply wrong in asserting that the Contractors in this case "are not at jeopardy from an attack on them by the government." Pet. App. 208a. The Government seeks to impose on the Contractors a "drastic sanction" that threatens them with a staggering financial penalty. The core principles of due process and fairness undergirding the Court's analysis in *Reynolds* and *Jencks* surely do not depend on a procedural technicality subject to ready statutory evasion, such as the label applied to each party in an action challenging a default termination. For good reason, then, *Reynolds*' analysis depended not on whether the Government is styled the "plaintiff," but rather on whether it is, in substance, the "moving party." 345 U.S. at 12.

2. Principles of due process and fundamental fairness protect parties defending against civil as well as criminal claims by the Government.

Nor may the decision below be sustained based on the distinction the Federal Circuit drew between criminal and civil proceedings in this context. *See, e.g.*, Pet. App. 208a (asserting that "Contractors essentially conflate rules governing criminal and civil proceedings, elevating this civil contract dispute into the constitutional territory of a criminal prosecution").

Although *Reynolds* discussed the effect of the state secrets privilege when it prevents the litigation of criminal defenses or of civil claims against the Government, it did not directly resolve the case in which the Government's invocation of the privilege substantially prejudices a litigant's ability to defend against a civil government claim. But this Court's analysis in *Reynolds* itself, the Court's due process precedents, a substantial and uniform body of precedent from the Federal Courts of Appeals, the proposed codification of the state secrets privilege, and the judicial treatment of other analogous evidentiary privileges all support a holding that a civil claim brought by the Government should not be allowed to proceed when the Government's invocation of the state secrets privilege would substantially prejudice a litigant's ability to defend against that claim. Simply put, if the Government's assertion of the state secrets privilege requires a litigant to lay down his shield,

basic principles of due process and fundamental fairness require the Government to lay down its sword.

a. When viewed in light of the factors identified by *Reynolds*, a government civil claim against a private party is much more closely analogous to a criminal prosecution than is a civil claim brought against the Government. Whether bringing a criminal prosecution or asserting a civil claim, the Government is clearly the "moving party," employing the truth-finding process and coercive machinery of the courts in attempting to impose a sanction or remedy against a private citizen. In either case, the Government's actions must be tempered by its "duty to see that justice is done," *Reynolds*, 345 U.S. at 12, and it is "unconscionable" for the Government to attempt to subject a private party to judicial coercion of any sort, while at the same time invoking an evidentiary privilege to prejudice substantially the private party's defense, *id*.

Further, when the Government is the moving party asserting a civil claim, it cannot be viewed simply as "a defendant only on terms to which it has consented." *Id*. Indeed, where the Government is a civil plaintiff, the question of sovereign immunity does not even arise. To be sure, the Government is the nominal defendant in this case, for it has enacted a statutory scheme that allows itself unilaterally to enter a judgment in its own favor against the Contractors. But principles of sovereign immunity surely could not shield that judgment from judicial scrutiny,

let alone the Government's attempts to enforce a forfeiture or other sanction against a private party based on that judgment, for it is well settled both that the Government may not rely on sovereign immunity to bar fair and full adjudication of a claim that it has asserted, *see Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) (State waives sovereign immunity by filing proof of claim in bankruptcy proceeding), and also that the Government may not evade judicial scrutiny by forcing otherwise cognizable actions into a forum where sovereign immunity purportedly applies, *see Lapides v. Board of Regents*, 535 U.S. 613, 619-24 (2002) ("the State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity"). *Cf. Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) (Congress may not "exercise . . . its control over jurisdiction . . . so . . . as to deprive any person of life, liberty, or property without due process of law"); *Reich v. Collins*, 513 U.S. 106, 109-10 (1994) (similar).

Finally, this Court's solicitude for criminal defendants in *Reynolds* and *Jencks* was plainly driven by the need to vindicate those defendants' fundamental due process right "to present a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967). But it is well settled that due process protects "civil litigants," as well as those who have been charged with crimes. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Specifically, this Court has long recognized that even in civil cases due process requires that there be "'an opportunity to present every available

defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)); *accord American Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932); *cf. Nelson v. Adams*, 529 U.S. 460, 466 (2000) (due process requires "an adequate opportunity to defend against the imposition of liability").

For all of these reasons, basic principles of fairness and due process should apply *whenever* the Government invokes the state secrets privilege to prevent a litigant from interposing a prima facie valid defense, especially when it is the Government itself that has asserted the underlying criminal or civil claim.

b. This result is fully consistent with the well-developed body of precedent from the Federal Courts of Appeals holding that a civil claim may not proceed where the Government's assertion of the state secrets privilege substantially prejudices a civil defendant's ability to defend against that claim.[12] These precedents support dismissal of the Government's default termination claim here.

i. As the Fifth Circuit has recognized, "[m]ost courts that have discussed the state secret

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[12] In these cases the Government invoked this principle to bar claims against itself, its officers and employees, and/or its contractors. The same principle should apply a fortiori when the Government presses a claim against a private litigant. *See infra* at 52-54.

privilege have adopted the position that, if the privileged information would establish a valid defense, then the court ought to dismiss the plaintiffs' case." *Bareford v. General Dynamics Corp*., 973 F.2d 1138, 1143 (5th Cir. 1992) (collecting cases). In the leading case of *Molerio*, for example, the D.C. Circuit held that a plaintiff alleging that the FBI had unlawfully refused to hire him could not pursue his claim when the FBI's invocation of the state secrets privilege barred it from defending its action by proving the "genuine reason for denial of employment." 749 F.2d at 825 (Scalia, J.). The court concluded that without the privileged information that would have allowed the FBI to defeat the claim, any further litigation of the case would have "involve[d] an attempt, however well intentioned, to convince the jury of a falsehood." *Id*. The court thus ruled that the case simply could not proceed: although there may have been "enough circumstantial evidence to permit a jury" to rule in favor of the claimant, it would have been "a mockery of justice for the court – knowing the erroneousness – to participate in that exercise." *Id*. *Molerio* thus establishes that "summary judgment against the plaintiff is proper if the district court decides that the privileged information, if available to the defendant, would establish a valid defense to the claim." *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) (citing *Molerio*, 749 F.2d at 825); *see also In re Sealed Case*, 494 F.3d 139, 153 (D.C. Cir. 2007) ("If the defendant proffers a valid defense that the district court verifies upon its review of state secrets evidence, then the case must be dismissed.").

Similarly, in *Tenenbaum v. Simoni* the Sixth Circuit affirmed the dismissal of a suit against the United States and various federal employees alleged to have "conducted a criminal espionage investigation of [the plaintiff] Tenenbaum solely because he is Jewish." 372 F.3d 776, 777 (6th Cir. 2004). The court concluded "that Defendants cannot defend their conduct with respect to Tenenbaum without revealing" information as to which the Government had asserted the state secrets privilege. *Id*. "Because the state secrets doctrine thus deprive[d] Defendants of a valid defense to the Tenenbaums' claims," the court affirmed the dismissal of the complaint. *Id*.

Other courts have repeatedly recognized essentially the same rule. *See, e.g.*, *Mohamed v. Jeppesen Dataplan, Inc*., 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc) ("[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.") (quotation marks omitted); *Zuckerbraun v. General Dynamics*, 935 F.2d 544, 547 (2d Cir. 1991) ("[I]t has been held that, if the court determines that the privilege so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion, then dismissal is also proper.").

ii. The courts of appeals have also recognized that a claim may not proceed if fully litigating a defense would pose an unacceptable risk of disclosing a state secret. As the Ninth Circuit recently explained:

> 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 information 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.

Mohamed, 614 F.3d at 1083 (emphasis added). Applying this principle, the en banc Ninth Circuit recently upheld the dismissal of claims brought by various individuals alleging that they had suffered injury as a result of an "extraordinary rendition program" allegedly operated by the Central Intelligence Agency with logistical support from the defendant, Jeppesen Dataplan, Inc. *See id*. at 1073-75. In affirming dismissal of plaintiffs' claims, the Ninth Circuit concluded "that even assuming plaintiffs could establish their entire case solely through nonprivileged evidence – unlikely as that may be – any effort by Jeppesen to defend would unjustifiably risk disclosure of state secrets." *Id*. at 1090 (emphasis omitted); *see also id*. at 1088 (concluding that "*any* plausible effort by Jeppesen to defend against [plaintiffs' claims] would create an unjustifiable risk of revealing state secrets, even if plaintiffs could make a prima facie case on one or more claims with nonprivileged evidence").

The Fourth Circuit has affirmed dismissal of similar claims brought against government officials

and others whom the plaintiff alleged had unlawfully detained and interrogated him. *See El-Masri v. United States*, 479 F.3d 296, 299-300 (4th Cir. 2007). As one of the alternative holdings supporting affirmance, the court concluded that even if the plaintiff "were somehow able to make out a prima facie case despite the unavailability of state secrets, the defendants could not properly defend themselves without using privileged evidence" since "[t]he main avenues of defense available in this matter . . . would require disclosure of information" as to which the Government had invoked the state secrets privilege. *Id*. at 309; *cf*. *Farnsworth Cannon v. Grimes*, 635 F.2d 268, 276 (4th Cir. 1980) (en banc) (per curiam).

c. All of these cases are rooted in the principle that a court cannot grant affirmative relief when, as a result of the overriding necessity of holding the state secret inviolate, it cannot confidently conclude that such relief is warranted. In such cases, "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 of both parties that is a fundamental assumption of the adversary system." *Id.* at 278 (Phillips, J., specially concurring in and dissenting from panel decision), *panel decision vacated on reh'g en banc*, 635 F.2d at 276.

In that circumstance – which the trial court found to be present in this case – "the right solution"

is to withhold adjudication of the claim. *Id*. at 279. Only by refusing to render judgment on the claim may the court assure itself that the blindness thrust upon it by the overriding necessity to protect the state secret has not led it to render a false or otherwise unjust judgment.

d. Proposed Federal Rule of Evidence 509, which would have codified the common-law state secrets privilege, likewise supports the principle that a government civil claim should be dismissed when the Government's assertion of the state secrets privilege substantially prejudices a private party's ability to defend. Although Congress ultimately rejected proposed Rule 509 and the twelve other originally proposed Federal Rules of Evidence relating to evidentiary privileges, they were "approved by the Judicial Conference of the United States and by this Court," *Jaffee v. Redmond,* 518 U.S. 1, 8 n.7 (1996), and the Court has found that they provide persuasive guidance. *See id*. at 14-15. As this Court recognized, Congress' rejection of the proposed Rules was motivated not by "disapprov[al]" of their substance but rather by "an affirmative intention not to freeze the law of privilege" in a code. *Id*. at 8-9 & n.7, 14-15 (quotation marks omitted); *Trammel v. United States*, 445 U.S. 40, 47 (1980).

Proposed Rule 509 would have codified the common-law state secrets privilege along the lines articulated in *Reynolds*. *See* Proposed Fed. R. Evid. 509(a)(1), (b), (c), 56 F.R.D. 183, 251-52 (1972); Advisory Committee's Notes to Proposed Rule 509(a)-(c),

id. at 252, 254. More pertinently, it also provided guidance for addressing the "[e]ffect of sustaining [a] claim" of state secrets privilege. Proposed Rule 509(e), *id*. at 252. Under proposed Rule 509, "[i]f [the state secrets] privilege [was] successfully claimed by the government in litigation to which it [was] *not* a party, the effect [was] simply to make the evidence unavailable, as though a witness had died or claimed the privilege against self-incrimination." Advisory Committee's Notes to Proposed Rule 509, *id*. at 254 (emphasis added). But if the government *was* a party to the proceeding and "it appear[ed] that another party [was] . . . deprived of material evidence" as a result of the Government's successful assertion of the privilege, proposed Rule 509 instructed the judge to "make any further orders which the interests of justice require[d], including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action." Proposed Rule 509(e), *id.* at 252.

e. Well-established principles relating to judicial treatment of other evidentiary privileges further support a rule that a claim may not proceed when the Government's invocation of the state secrets privilege substantially prejudices a party's ability to defend against that claim. Particularly helpful guidance comes from "judicial experience" with the "analogous privilege . . . against self-incrimination." *Reynolds*, 345 U.S. at 7-8.

Courts have uniformly recognized that a defendant in a civil action should not be disadvantaged by the plaintiff's assertion of the Fifth Amendment privilege against self-incrimination. *See, e.g.*, *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1088 (5th Cir. 1979). Consequently, in cases where "defendants would be substantially prejudiced" because "there [is] no effective substitute for" the withheld information and there is "no adequate alternative remedy" by which to prevent unfairness to the defendants, courts should dismiss the claim. *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518-19 (1st Cir. 1996); *cf. United States v. Rylander*, 460 U.S. 752, 758 (1983) ("We think the view of the Court of Appeals would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his. None of our cases support this view.").

For example, in *Serafino* the plaintiff claimed that Hasbro and its CEO had retaliatorily "terminated certain business arrangements" but, invoking his privilege against self-incrimination, refused to answer deposition questions "concerning improprieties surrounding" those arrangements. 82 F.3d at 516-17. The withheld information was "central to defendants' defense" because, "if in fact the [arrangements] were illegally obtained," then the defendants could establish a "nonretaliatory reason for the termination." *Id.* at 518-19. "Without the ability to investigate a matter

that goes to the heart of the damages sought," the First Circuit said, "defendants would be substantially prejudiced" because "there was no effective substitute for" the withheld information. *Id*. at 518-19. Seeing "no adequate alternative remedy," the court affirmed dismissal. *Id*. at 519.

Similarly, in *Lyons v. Johnson*, the Ninth Circuit affirmed dismissal of civil rights claims brought by a plaintiff who invoked her Fifth Amendment privilege and refused to respond to any form of discovery concerning her claims. 415 F.2d 540, 541 (9th Cir. 1969). The court elaborated: "If any prejudice is to come from [the assertion of the privilege], it must, as a matter of basic fairness in the purposes and concepts on which the right of litigation rests, be to the party asserting the claim and not to the one who has been subjected to its assertion." *Id*. at 542; *see also Wehling*, 608 F.2d at 1087-88 (concluding that "it would be unfair" to require defendant "to defend against a party who refuses to reveal the very information which might absolve defendant of all liability"); *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1205-06 (Fed. Cir. 1987) (concluding that "a party may not claim a fifth amendment privilege and *proceed* with his suit").

The courts have applied a similar rule when addressing the attorney-client privilege, concluding that "where [the plaintiff's] assertion of a privilege results in the withholding of information necessary to [a] defense to [the] claim . . . , the privilege must give way to [the defendant's] right to mount a defense."

Ideal Elec. Sec. Co. v. International Fid. Ins. Co. ("IFIC"), 129 F.3d 143, 151 (D.C. Cir. 1997). As the D.C. Circuit explained, "Where society has subordinated its interest in the search for truth in favor of allowing certain information to remain confidential, it need not allow that confidentiality to be used as a tool for manipulation of the truth-seeking process." *Id*. at 151 (quotation marks omitted); *see also Greater Newburyport Clamshell Alliance v. Public Serv. Co.*, 838 F.2d 13, 20-22 (1st Cir. 1988) ("In a civil damages action, . . . fairness requires that the privilege holder surrender the privilege to the extent that it will weaken, in a meaningful way, the defendant's ability to defend."); *Conkling v. Turner*, 883 F.2d 431, 434-35 (5th Cir. 1989) (attorney-client privilege waived to extent necessary for defendant to establish affirmative defense). Although the result in these cases was waiver of the privilege rather than dismissal of the claim, these cases nevertheless show that a civil litigant cannot simultaneously maintain both its claim and its privilege in these circumstances.[13]

f. The Government itself has not hesitated to assert the foregoing principles when they serve its interests. Indeed, the Government has repeatedly,

[13] Of course, once the Government has properly invoked the state secrets privilege, a court-ordered waiver of the privilege is not permitted, leaving dismissal of the claim as the only option. *See Molerio*, 749 F.2d at 821 ("When properly invoked to protect such interests, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure.") (quotation marks omitted).

aggressively, and (as the cases discussed above indicate) successfully argued that a private civil claim cannot proceed against the Government, its officials, or its contractors when the assertion of the state secrets privilege substantially prejudices the defense. *See, e.g.*, *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007); *Tenenbaum*, 372 F.3d at 777; *In re United States*, 872 F.2d at 477; *Molerio*, 749 F.2d at 819; *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 985-86 (N.D. Cal. 2006). Indeed, earlier *in this very case* the Government insisted that, if the court converted the termination for default to one for convenience, the Contractors' claim for an equitable adjustment and recovery of profits should nonetheless be denied because a potential government defense to that claim would depend upon privileged state secrets. Here is what the Government argued: "As a matter of law, 'if 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.'" JA 1025 n.2 (quoting *Bareford*, 973 F.2d at 1141).

There is no principled reason why the rules that the Government so eagerly embraces when they serve its interests should not also apply when the shoe is on the Government's other foot. Certainly nothing in the decisions of this Court or the Courts of Appeals suggests that their holdings turn on the identity of the claimant. Furthermore, civil defendants subjected to government claims are entitled to at least the same

safeguards of due process and fundamental fairness that the Government claims for itself. Indeed, the fundamental purpose of due process protections is to safeguard against overreaching by the Government. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55-56 (1993); *see also id*. at 56 ("It makes sense to scrutinize governmental action more closely when the State stands to benefit." (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.))).

* * *

In sum, a civil claim should be dismissed whenever application of the state secrets privilege substantially prejudices a litigant's ability to defend against the claim. Whatever the precise contours or outer limits of this rule, it plainly should apply in circumstances such as those presented here. In this case, as discussed above, the Government has asserted a punitive claim with severe potential consequences against the private Contractors.[14] The trial court

[14] Given the disparity between the private and government interests at stake, due process concerns have special force when the Government pursues a default termination claim against a private contractor. *Cf. Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (balancing, *inter alia*, competing private and government

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found that the Contractors could present a prima facie valid superior knowledge defense based on the A-12 program information alone. *Supra* at 16-19, 22. But because the effect of the privileged evidence on the merits of that defense was "not readily apparent," Pet. App. 441a, and because litigating that defense would create an unacceptably high risk of disclosing the state secrets, *supra* at 15-20, 22-23; Pet. App. 246a, 376a, any ruling on the merits of the defense,

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interests in determining due process requirements). As detailed above, *supra* at 9-11, such a claim can subject a private contractor to severe sanctions, including massive financial penalties, suspension, debarment, and unfavorable treatment in future government contracting. There can be no doubt that due process requires careful scrutiny of government action that threatens the imposition of such serious penalties. *See, e.g., Jones v. Flowers*, 547 U.S. 220, 234, 239 (2006) (forfeiture); *James Daniel Good*, 510 U.S. at 55-56, 62 (same); *IMCO, Inc. v. United States*, 97 F.3d 1422, 1427 (Fed. Cir. 1996) (contractor debarment); *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981) (same). The harshness of these sanctions contrasts sharply with the relatively mild consequences to the Government if it is barred from simultaneously pressing a default termination claim and ensuring its own victory by asserting the state secrets privilege. The result would simply be conversion of the default termination into a termination for the Government's convenience – a unique, government-friendly remedy unavailable to private contractors that allows the Government to terminate a contract at any time for essentially any reason without liability for breach-of-contract damages. *See supra* at 11-12. This result is far less severe than "letting the defendant go free," a result that due process and basic fairness require when the state secrets privilege prejudices a criminal defendant's ability to mount a defense to the charge. *Reynolds*, 345 U.S. at 12.

the trial court found, "would be a sham," Pet. App. 380a; *see supra* at 20, 22-23. The trial court and the appellate court thus barred the Contractors from pressing their prima facie valid superior knowledge defense. *See supra* at 19-20, 22-25; Pet. App. 207a-10a.

But it follows inexorably that proceeding without that defense rendered adjudication of the Government's default termination claim also "a sham," for a fair judgment on the Government's claim could not be reached with confidence when the Government's assertion of the state secrets privilege so substantially prejudiced the Contractors' ability to defend. Under these circumstances, the Government's default termination claim should not have been allowed to proceed, and the Federal Circuit's decision permitting the claim thus violates due process and fundamental principles of fairness.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to convert the default termination to a termination for the convenience of the Government.

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