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

REPLY BRIEF FOR PETITIONER GENERAL DYNAMICS CORPORATION

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INTRODUCTION

The courts below upheld the government's default claim even though the state-secrets privilege barred the Contractors from litigating a *prima facie* valid defense. That result is fundamentally unfair, and the *Reynolds* rule forbids it. The government has long espoused that rule, and has often benefited from it. But here the government strives to evade it, both by contending that the Contractors are actually the moving parties as to the issue of default, and by insisting that the rule can never operate to disadvantage the government.

This Court should reject those arguments. First, as to the default claim, the government clearly is the moving party. It is asserting that the Contractors breached the contract and seeking to impose a drastic forfeiture. And it has the burden to prove that claim *de novo*, without reliance on the contracting officer's decision, which has no remaining legal force. The unique statutory procedure that forces the Contractors to appear as nominal "plaintiffs" does not alter those realities. Nor does the fact that the Contractors asserted in their complaint a separate claim for reimbursement of performance costs – a claim that would not even be ripe for litigation until after the government lost on its default claim.

Second, when the government is the moving party, it should not be granted special immunity from the operation of the *Reynolds* rule. Indeed, adherence to that rule is especially vital where the government can advance its own litigation interests

through invocation of the powerful state-secrets privilege.

The ruling below that the Contractors defaulted implicates the courts in the imposition of onerous penalties even though there is no way to know whether that outcome is justified on the merits. That ruling violates due process and undermines the integrity of the judicial system. It must be reversed.

ARGUMENT

I. The Government Is The Moving Party On Its Claim of Default.

The government alleged in the trial court that the Contractors breached the A-12 contract because they were not reasonably likely to meet their future obligations in a timely fashion. The government bore the burden of proof on that claim. *See Lisbon Contractors v. United States*, 828 F.2d 759, 764-65 (Fed. Cir. 1987). And although the government did not seek a court order directly imposing monetary or other penalties, it did seek a ruling that it had proved default – a determination the government *needed* before it could seek to impose sanctions on the Contractors using its asserted powers of offset and its control over future contract awards. The government received what it sought: a ruling that "the Government was justified in terminating the contract for default," Pet. App. 155a; *see also, e.g.*, *id.* at 28a, 174a, and a "judgment . . . in favor of" the government. JA1293; *see also* JA1262; *compare* Gov't Br. 29. The government got this relief even though the Contractors asserted a *prima facie* valid defense to the default claim that they were not

permitted to litigate. And in direct reliance on the Federal Circuit's affirmance of the judgment, the government demanded immediate payment of nearly $3 billion dollars. Dec. 29, 2009 Ltr. ("The recent appellate court action has affirmed and rendered final the trial court's judgment in the Government's favor. Accordingly, the Contractors' repayment . . . is due . . . ."). There is thus no doubt that the government was the moving party on its default claim.

A. The Government Was The Moving Party On Default Both When Its Contracting Officer Declared The Contractors In Default And When The Government Tried To Prove That Claim In Court.

The government was the moving party at the inception of the dispute over contract performance, and has retained that status at every subsequent stage.

1. Under the Contract Disputes Act ("CDA"), a government allegation of default is a government "claim." 41 U.S.C. § 605(a) (discussing "claims by the government against a contractor relating to a contract"). Any such claim is first addressed by the contracting officer, *see id.* – a highly partial decision-maker who represents the government's interests. Here, the contracting officer decided that the Contractors were in default and that the government was entitled to terminate the contract on that basis. As the trial court found, he also decided that the government was entitled to a specific amount of money as a result: more than $1 billion in

"unliquidated progress payments," plus interest. JA353-54.

The government suggests that payment of this amount would not be a forfeiture. But contrary to the government's assertion, the "unliquidated" payments were not for work that was never performed, Gov't Br. 37-38 – and certainly not, as the government insinuates, Gov't Br. 19, for work that was scheduled to be done sometime after the termination date. Rather, they were reimbursement for work that the Contractors actually carried out prior to termination, at the government's direction. JA111-15; *see also* Pet. App. 57a & n.12. Moreover, the payments did not even cover the Contractors' pre-termination costs of performance, which exceeded the total amount the government paid by over $1 billion. Accordingly, it is clear that the government was the moving party seeking to impose an enormous forfeiture on the Contractors. GD Br. 44 (collecting cases).[1]

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[1] As for the "liquidated" progress payments, which the government suggests were a windfall, *e.g.*, Gov't Br. 50, those were final contract payments relating to design and engineering work that the government formally accepted. The government clearly is responsible for those costs. 48 C.F.R. § 52.249-9(f). Although the government did not "receive a single aircraft," Gov't Br. 22, 50, that is because the government terminated the contract *nearly a full year* before any aircraft was due, Pet. App. 71a. And as to non-monetary penalties, the government's assertion that they are not at issue, Gov't Br. 38, is misleading. If this Court upholds the default termination, the government remains free to impose them. *See, e.g.*, 48 C.F.R. §§ 9.103 to 9.105-1, 42.1500 to 1501.

2. The government retained its moving-party status when the matter moved to the Court of Federal Claims. A contracting officer's unilateral decision about a government claim of default becomes final and enforceable if a contractor does not exercise its right to have the government's claim decided instead by the Court of Federal Claims (or the Board of Contract Appeals). 41 U.S.C. § 605(b). But once a contractor indicates that it wants the government's claim to be adjudicated by a neutral arbiter, the officer's decision has no further effect. *See, e.g.*, *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987) (holding that the "established rule" is that the filing of the suit "vacate[s]" the contracting officer's decision). The government must then proceed *de novo* to prove material breach. 41 U.S.C. §§ 605(a), 609(a) (providing that government can make a "claim[]" against a contractor at the contracting-officer stage, that "a contractor may bring an action directly *on the claim* in the United States Court of Federal Claims," and that court review is "de novo" and the contracting officer's findings "shall not be binding" (emphasis added)); *see also* 28 U.S.C. § 1491 (court has jurisdiction over "any [CDA] claim by *or against*, or dispute with, a contractor . . . , including a dispute concerning termination . . . ." (emphasis added)).

In this case, then, the government remained in the position of breach-of-contract claimant in the trial court. Under the statute, the suit is "on the [government's] claim" of default, not on the contracting officer's decision as to that claim. 41 U.S.C. §§ 605(a), 609(a). The government was

required to start anew, and the court had to decide whether the government had carried its burden. And the government was seeking affirmative relief from the court – a declaration that the government had proved default, without which the government could not seek the return of progress payments or impose other default penalties.[2]

B. The Government's Contrary Arguments Are Unavailing.

Given this statutory scheme, the Court should reject the government's strained arguments that the Contractors were somehow the moving parties on the default issue.

1. It is of no moment that the Contractors appeared as "plaintiffs" in the case caption. Gov't Br. 27. Application of the *Reynolds* rule cannot turn on that formalism.[3] Under the CDA, the Contractors' suit simply triggers the government's obligation to prove its default claim, and the case proceeds much like any breach-of-contract suit. *Lisbon*, 828 F.2d at 764-65; *see also, e.g.*, *Ameron Int'l Corp. v. Ins. Co. of Pa.*, 118 Cal. Rptr. 95, 105 (Cal. 2010) ("Although the

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[2] The government may be able to hold claimed money while a case is pending (although it did not do so here), but that is simply an interim remedy, which can be unwound when the court ultimately rules. *See, e.g.*, *Seaboard Surety Co. v. United States*, 67 F. Supp. 969, 971 (Ct. Cl. 1946).

[3] Because the government can never appear as a plaintiff in the Court of Federal Claims, Gov't Br. 28, if that factor were controlling the government would never bear any burdens associated with an invocation of the state-secrets privilege in government-contract disputes. Such a rule would be grossly inequitable and likely to foster abuses. *See infra* pp. 19-20.

contractor thus initiates the . . . proceeding [under the CDA], the purpose of the proceeding is to resolve the claim against the contractor, who is therefore in the position of a defendant.").[4]

2. Despite the government's frequent references to the Contractors' superior-knowledge "claim," superior knowledge operated only as a *defense* to the government's claim of default. It is a reason why the government was not entitled to terminate the contract for delay, which was the sole basis on which the courts ultimately upheld the default termination. *See* GD Br. 44 (government descriptions of Contractors' "defense"); *infra* note 5 (discussing superior-knowledge argument in context of the Contractors' contingent claim for incurred costs).

The government tries to separate its default claim from the Contractors' superior-knowledge defense, asserting that it is entitled to relief because it proved the elements of its claim without resort to privileged information. *E.g.*, Gov't Br. 32-33. But a claim and a defense to that claim are inextricably intertwined. The government cannot be said to have established its claim unless it has also overcome any defenses that could defeat the claim. That is why *Reynolds* mandated an end to any prosecution in which a

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[4] This point is driven home by the fact that the Boards of Contract Appeals – the other neutral fora to which contractors can take a dispute, *see* 41 U.S.C. § 607(d) – sometimes order the government to submit the first pleading, once a contractor has invoked their jurisdiction. *See, e.g.*, *In re RO.VI.B.Srl*, A.S.B.C.A. No. 56,198, 09-1 BCA ¶ 34,068, at 168,456 ("[T]he Board asked the government to file the initial pleading since default termination is considered a government claim.").

meaningful defense is stripped away, *United States v. Reynolds*, 345 U.S. 1, 12 (1953), and why the same result must obtain in this case.

The Contractors do bear the burden of proof as to their affirmative defense. Gov't Br. 35. But so, of course, does a criminal defendant – and the government concedes that a prosecution cannot go forward where a defense is taken away in the criminal context. *Id.* at 40; *see also id.* at 33 (it is improper to "fractur[e] the various issues" relating to a single claim to determine moving-party status); GD Br. 37-39 (explaining the uniform rule, endorsed by the government, that precluding an affirmative defense requires judgment against the claimant). The key fact is that the government had the duty of prosecuting the default claim as a whole; if both parties had failed to submit any evidence to the trial court, the Contractors would have prevailed. The government was the moving party, seeking to change the status quo and impose a forfeiture.

3. It also does not matter that the government did not ask the court to award the money it seeks or to impose any other specific default sanction. Gov't Br. 29. The government's claimed authority to inflict these penalties through self-help depends on having succeeded on its default claim in court, since the Contractors exercised their right to have the default issue judicially determined.

Congress designed the CDA dispute-resolution process to guarantee contractors a neutral forum for assessment of default. GD Br. 46 & n.10; *see also* 41 U.S.C. § 609(a)(1) (preserving right to suit

"notwithstanding any contract provision, regulation, or rule of law to the contrary"). Any other regime would be a violation of due process, giving the government free rein to impose monetary and other penalties without giving contractors a full opportunity to defend themselves. Here, the contract expressly guarantees the Contractors the right to have disputes heard and decided according to the requirements of the CDA, which are in any event necessarily implied into the parties' agreement. 48 C.F.R. § 52.233-1; 11 Williston on Contracts § 30:19, at 203-04 (4th ed. 1999).

Because under the CDA the suit deprived the contracting officer's decision of any force, the government repeatedly asked the courts below to judicially establish default. *See, e.g.*, Gov't Mot. S.J. at 89 (Fed. Cl. Dec. 22, 2003) ("[W]e respectfully request that the Court sustain the default termination, enter judgment in favor of [the government], and grant . . . such other and further relief as this Court deems just."); JA1285 ("Our burden below was to establish our claim of default."). It follows that the government was a moving party calling on the courts' aid – and they erroneously responded by granting that aid even though they could not determine whether it was legally and factually justified.

4. The government tries to analogize this case to a run-of-the-mill judicial challenge to administrative action, Gov't Br. 29-30, 38, but that comparison is misplaced. In an APA case, review is on an administrative record and is limited to the agency's stated reasons; some process has already been

provided at the administrative level; and, for that reason, review is deferential, such that the agency action remains an established fact unless the challenger can displace it. Here, by contrast, the government was free to come up with any reason at all to justify default, even if the contracting officer never considered it, GD Br. 43 n.9; there was no process afforded by the contracting officer; and there was no judicial deference due to the contracting officer's decision. Indeed, the Contractors' suit was "an action directly *on the [government's] claim*" of default as it was presented to the contracting officer, not an action for review of the contracting officer's decision. 41 U.S.C. §§ 605(a), 609(a) (emphasis added).

Accordingly, regardless of the rule that applies to ordinary APA review, here the government was the moving party on its default claim, litigating for the right to extract relief from the Contractors. In so doing, it was seeking to change the status quo because, once the complaint was filed, the contracting officer's administrative determination effectively disappeared. The reasons that underlie the *Reynolds* rule are thus fully applicable here. Once the government's invocation of the state-secrets privilege barred a substantial defense, permitting the government to obtain affirmative relief allowed the government to manipulate the system and made the courts an instrument of injustice.

5. Although the government emphasizes *Reynolds*' reference to a suit "only on terms to which [the government] has consented," 345 U.S. at 12, *cited in* Gov't Br. 35-36, that language has no

significance for purposes of the government's default claim. The Court was not referring there to a case in which the government is only a nominal defendant and is pursuing its own claim. It was referring to the government's defense against a claim for affirmative relief brought by someone else (as in *Reynolds* itself). Only then might sovereign immunity be a relevant consideration. *See infra* pp. 18-19.

6. Finally, none of this analysis is changed by the fact that the Contractors also raised their own claim for recovery of unreimbursed costs incurred in performing the contract. *E.g.*, Gov't Br. 28-29. The Contractors' claim, which was the subject of a separate contracting officer decision from the default claim and arises only if the government's default claim is first rejected, *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 285, 287-91 (1997), in no way undercuts the point that the government cannot prevail as a moving party on default once its assertion of the state-secrets privilege has eliminated the Contractors' defense. Plainly, moving-party status must be assessed on a claim-by-claim basis. Whether or not the Contractors should be allowed to pursue their own claim once the default is overturned,[5] the government was the moving party

[5] After it initially rejected the government's default claim on the merits, the trial court awarded the Contractors their out-of-pocket costs – but not profit, as to which they would have been required to prevail on the superior-knowledge issue. The government contends that the court should have refused to award any costs, on the ground that the state-secrets privilege prevented full consideration of all issues relating to the Contractors' cost claim. Gov't Br. 54 n.21. The government's argument is wrong. The Contractors' claim is distinct in kind

as to *its* own claim – a conclusion that requires reversal of the Federal Circuit's decision.

II. Because The Government Is The Moving Party, It Should Not Have Been Permitted To Pursue The Default Termination Once The Privilege Barred A Substantial Defense.

A. There Is No Special Government Exception to the *Reynolds* Rule.

The government acknowledges the basic soundness of the rule that the moving party may not prevail on a claim if the state-secrets privilege wipes out a substantial defense. Gov't Br. 25-27. But it tries to justify a government-only exception that it intends to use to extract nearly three billion dollars from the Contractors. These arguments are based on two false premises. First, the government erects a strawman, claiming that the Contractors are seeking an "automatic" rule under which the government necessarily loses if it invokes the state-secrets privilege. Second, the government suggests that if the Contractors prevail it will somehow have been "punished" for asserting the privilege, arguing that the government should win regardless of the unfairness to the other party. But the Contractors are not saying that the government should always lose if it invokes the privilege – and neither should the government always avoid the burdens associated

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from the default claim – and the government's "loss ratio" argument, *see id.*, is itself a claim, not a precluded defense. 48 C.F.R. § 49.203(a). Of course, if the government were correct, the result would be that *all* claims are barred, such that neither party may recover anything from the other.

with such an invocation. Rather, the Court should rule that *no* moving party can proceed with a claim for relief if the privilege entirely prevents litigation of a significant defense. Under that rule, the default termination cannot be sustained.

1. The Contractors do not argue that they should prevail simply because the government invoked the state-secrets privilege while it was the moving party. *E.g.*, Gov't Br. 26, 39, 41. Such an outcome is appropriate only in "exceptional cases," GD Br. 33 – those in which the non-moving party raises a *substantial* defense and the court cannot fashion a procedural solution that will allow the defense to be considered while still protecting the Nation's secrets.

In most cases, the state-secrets privilege will not operate to strip a party of a defense. More typically, the privilege simply makes certain evidence unavailable, or the court can use various procedures to minimize the risk of dangerous disclosure – or even review the secret evidence itself and assess which side that evidence would favor. *E.g.*, *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984). In addition, in most cases, a party will not be able to come forward with sufficient non-secret evidence to establish that its defense is substantial, so as to assure the court that deprivation of the defense may work an injustice. For instance, in the three cases the government cites in which it invoked the state-secrets privilege as a moving party and was nevertheless permitted to proceed, the courts specifically determined that the secret evidence was so unlikely to be helpful to any defense that there was no danger of unfairness. Gov't Br. 42.

This case is entirely different. The government does not meaningfully contest the trial court's determination that the Contractors had a *prima facie* valid superior-knowledge defense, which was barred only after years of struggle to find a way to allow its substantive resolution. To be sure, the government seeds its brief with factual assertions intended to suggest that the Contractors had all the information they needed, or that they disregarded government warnings. *E.g.*, Gov't Br. 1-3. But these assertions are misleading at best,[6] and certainly do not cast doubt on the trial court's repeated conclusions, based on its familiarity with the voluminous record, that the Contractors had a substantial superior-knowledge argument and might well have defeated the government's default claim if they had been permitted to put on their evidence. The trial court never retreated from those conclusions – it said that it could not definitively determine who would prevail

[6] For example, the government's claim that the Navy's sharing of a pre-award weight estimate constituted a "general warning," Gov't Br. 3, 52, ignores the facts. The government provided – without useful explanation – a design weight estimate that differed from the Contractors' final proposed weight by an inconsequential amount. Despite the government's superior knowledge from other programs and from Northrop's competing bid, the estimate gave the Contractors no indication that their approach would result in a much higher design weight and require extensive redesign work. Trial Transcript Vol. II at 613, Nov. 28, 1995; Gov't Ex. 5050 at 9; JA1083-85. The Contractors then spent months and many millions of dollars attempting to meet the weight "guarantee" – which the Navy ultimately waived, Pet. App. 239a, 388a – without benefit of vital information possessed by the government. Pet. App. 416a; *see also* JA648, 670-74; GD Br. 3-5; Pls.' Memo. at 3-9 (Fed. Cl. Feb. 1, 1994).

if the defense went to trial, Pet. App. 245a, *cited in* Gov't Br. 16 n.8, but its opinion about the strength of the Contractors' evidentiary showing remained unchanged, GD Br. 54-55.

Given the rarity of cases like this one, "graymail" is hardly a meaningful issue. Gov't Br. 26-27. Any real "graymail" concern arises with trumped-up claims *against* the government, not *defenses* to government claims. *See id.* But, in any event, under the regime developed by the courts of appeals, no party can realistically hope to prevail by manufacturing a defense that might implicate state secrets, because there is a high likelihood that the defense will be deemed insufficiently substantial (or that there will be some other obstacle to applying the *Reynolds* rule).[7]

2. Nor should the Court take seriously the argument that a ruling against the government would be tantamount to a "punish[ment] for asserting the privilege." *E.g.*, Gov't Br. 45-46. To begin with, the government concedes that the *Reynolds* rule applies in criminal cases, in which the government must choose whether it wants to insist on the privilege or proceed with a prosecution. Gov't Br. 39-40 (citing *Jencks*). There is no more "punishment" involved when the government is put to this choice in the civil context.

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[7] Given the limited reach of the *Reynolds* rule, it is not surprising that proposed Rule of Evidence 509 listed dismissal as only one possible option. *Proposed Rules*, 56 F.R.D. 183, 251-52 (1972); *see also* GD Br. 34 n.6 (discussing similar CIPA provision); *compare* Gov't Br. 46 n.15.

The Contractors are simply asking that the government be treated the same as any other litigant, bearing a burden as a result of a privilege assertion only where it is the moving party and only where a substantial defense has been prevented from being asserted. *Compare Salisbury v. United States*, 690 F.2d 966, 975 (D.C. Cir. 1982), *cited in* Gov't Br. 27, 46, 50. It is surprising that the government would suggest the viability of any exception to the operation of the *Reynolds* rule in those circumstances, since the government benefits from the rule much more often than it is burdened. Moreover, where the government as moving party does determine that the "collective public interest" in secrecy is "paramount," Gov't Br. 46, the potential loss of an *affirmative* civil claim will not create undue pressure to change that determination. GD Br. 30 n.4, 34 n.6. The government should not be permitted to force a particular private party to suffer a penalty on behalf of the collective – particularly here, where even the worst possible outcome for the government includes no penalties for its decision to end the contract. GD Br. 6-7.

3. The government argues that if it is subject to the *Reynolds* rule when it is a moving party it will not be able to carry out certain statutory mandates, which envision that the government will bring suit in the interests of national security. Gov't Br. 42-43. But the *very statutes* the government cites illustrate that Congress envisioned that the government would be subject to the *Reynolds* rule when it is the moving party in a civil action. For instance, 18 U.S.C. § 2339B, which contemplates a civil suit for an

injunction, bars the government from keeping classified material out of the record without providing a substitute (such as a stipulation) "sufficient to allow the defendant to prepare a defense." *Id.* § 2339B(f)(2); *see also* 18 U.S.C. § 3511 (requiring the district court to review classified information *in camera* if the government wishes to protect it from general disclosure). Thus, there is no danger that a ruling in favor of the Contractors will do anything to prevent the government from proceeding as Congress intended.

4. The government suggests it is not a matter of great import to disregard the *Reynolds* rule in the civil context. Gov't Br. 40-41. But it is just as improper in a civil case as in a criminal one for a court to order affirmative relief when it cannot determine which side should prevail. Indeed, this Court's prior rulings make clear the serious due process concerns raised when invocation of the privilege prevents a civil party from offering a defense using non-secret information already in its possession. GD Br. 30 (collecting cases).[8]

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[8] In this way, the state-secrets privilege is different from other evidentiary privileges – it alone makes *entire issues* incapable of litigation, even if the relevant evidence is not itself privileged and is in the hands of the party that wants to present it. *Compare Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994) ("[O]ur holding is not meant to preclude disclosure of the knowledge the insureds possessed."), *cited in* Gov't Br. 43-46. The immigration cases cited by the government, Gov't Br. 41 n.13, do not establish that due process protections are inapplicable in that circumstance. Indeed, the primary case on which the government relies, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), rested on the

Notably, the government is not willing to subject *itself* to such a regime. It would bar operation of the *Reynolds* rule in the civil context only when the government is the moving party, while preserving its own right to invoke the rule when the privilege blocks a government defense in a civil case. Gov't Br. 40-41. But the government's arguments for the civil/criminal distinction do not support such a limited bar. If taken seriously, they would mean that the government as defendant could not obtain a judgment in its favor where it is deprived of a defense, and neither could a private defendant sued by a private plaintiff. Yet these are both situations in which the government has long successfully advocated for application of the *Reynolds* rule. GD Br. 38-39. In reality, the proposed civil/criminal distinction is just another way of arguing that the government should be specially immunized from suffering any burden as a result of the uniquely powerful privilege it controls.

5. Finally, sovereign immunity presents no barrier here. The government can suggest otherwise only by conflating its own claim for default and the Contractors' separate and contingent claim for a termination-for-convenience cost recovery. Gov't Br. 28, 35-36; *see supra* pp. 10-11. As to the government's affirmative request that the courts find the Contractors in default, sovereign immunity is irrelevant. *Cf. Lapides v. Bd. of Regents*, 535 U.S. 613, 619-20, 622 (2002) (immunity cannot be wielded as a sword). And even if waiver of sovereign

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holding that aliens who have not entered the United States have *no due process rights*. *Id.* at 212.

immunity were somehow made relevant by the unusual procedures though which the government's default claim comes to court, the applicable waiver is more than adequately broad. It covers all matters relating to a government contract, *see* 28 U.S.C. § 1491(a)(1)-(2), with no "limitations" or "conditions," *Soriano v. United States*, 352 U.S. 270, 276 (1957); *see United States v. Mitchell*, 463 U.S. 206, 215 (1983) (waiver of contract-dispute immunity is "perhaps the widest and most unequivocal waiver of federal immunity").

6. Since the government is entitled to no special shield, it should be subject to the same rule for which it has so frequently advocated when it is in the position of a defending party rather than a moving one. GD Br. 38-39. Indeed, the government's request for unique protections disregards the realities of litigation. The need for the rule is *more* acute where the government is the moving party, not less so, because the government has every incentive to ensure a favorable outcome for itself, *see Reynolds*, 345 U.S. at 12 – particularly where, as here, the potential reward for doing so is high. The government protests that it can be trusted and would never act in anything but the most upright fashion. Gov't Br. 47-49. But that cannot be squared with the government's candid acknowledgement that its officials are influenced by financial considerations. Gov't Br. 26, 47. Nor can it be reconciled with the government's record of misconduct in litigating this case after the privilege was invoked. GD Br. 32-33. The government barely addresses the trial court's

repeated expressions of concern about its conduct,[9] but the record well illustrates the risk that the government will act aggressively if its use of the privilege has no conceivable downside.

The "government always wins" rule also disregards the realities of government contracting. As the industry amicus brief makes clear, NDIA Br. 2, 11-17, announcement of such a rule by this Court would have a chilling effect on contractors contemplating complex or high-risk contracts, who would never know in advance whether their case will be the one in which a valid defense cannot be litigated. The government's proposed solution – that contractors should negotiate for contract terms protecting against that eventuality, Gov't Br. 51 – is no answer. Contractors have no bargaining power to vary mandatory contract terms such as the standard "Disputes" clause. *See, e.g.*, *United States v. Seckinger*, 397 U.S. 203, 212 (1970) ("there is a vast

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[9] In an April 1993 decision, the Federal Circuit stated that the submissions before it did not establish that the government had used privileged information for "tactical purposes." JA568 n.5, *cited in* Gov't Br. 48 n.17. But that decision obviously did not address the trial court's many *subsequent* findings about government bad acts that preceded and followed that date. For example, the trial court later found that the government had improperly used privileged information to ask "highly inappropriate, leading follow-up questions designed to elicit responses that would benefit" the government – conduct that required "extraordinary corrective action" and led to sanctions on government attorneys. Pet. App. 357a-60a & nn.9-10, 433a n.1; JA550-51. The Circuit also did not address the government's frequent changes of position on whether the case could be litigated after invocation of the privilege, all designed to further its own interests. GD Br. 13-14, 16, 39, 50 n.13.

disparity in bargaining power and economic resources between . . . the United States and particular government contractors"); *Sandnes' Sons, Inc. v. United States*, 462 F.2d 1388, 1392 (Ct. Cl. 1972) ("Government contracts are contracts of adhesion"); *Do-Well Mach. Shop, Inc. v. United States*, 870 F.2d 637, 641 (Fed. Cir. 1989) (government has "superior bargaining power"); *Appeal of Penner*, G.S.B.C.A. No. 6820-R, 83-1 BCA ¶ 16,495, at 81,987 (clause in a government contract is "every bit as unilateral an enactment on the part of the Government" as a statute).[10]

B. The Government Can No Longer Rely On The Contracting Officer's Decision, And Judgment Should Be Entered For The Contractors On The Issue Of Default.

In addition to arguing that the *Reynolds* rule should not apply here, the government also seems to suggest that the proper outcome, if the rule applies, would be a dismissal leaving the contracting officer's default determination in place. Gov't Br. 32 n.9, 34. This Court should firmly reject any such notion.

The filing of the Contractors' suit meant that the government had to prove its default case from scratch. Because the *Reynolds* rule precludes the courts from holding that the government has carried its burden on that question, the government cannot

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[10] The suggestion that government might voluntarily agree to subject itself to the *Reynolds* rule, if taken seriously, undercuts the force of the government's arguments about why it needs to be able to impose defaults on contractors deprived of their defenses.

prevail. It cannot continue to claim the right to penalize the Contractors by insisting that the contracting officer's unilateral decision retains some vitality. That would not only deny the Contractors due process but also contravene the CDA and the parties' contract. *See supra* pp. 8-9.

For these reasons, application of the *Reynolds* rule cannot justify pretending that this lawsuit was never filed and that the contracting officer's decision therefore became enforceable by operation of law. Rather, the effect of the rule is that the contract remains terminated, but the government as moving party cannot claim to have established default and thus cannot seek to impose default sanctions.[11] Otherwise, the government would win even though it never proved its claim (a task that includes defeating any substantial defenses), and the courts would implicate themselves in the government's unfair imposition of a massive forfeiture.[12]

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[11] *See* 48 C.F.R. § 52.249-9(g). Whether the Contractors are entitled to a termination-for-convenience cost recovery, as the trial court found, or the parties should instead walk away with no one recovering anything, is a further question. *See supra* note 5.

[12] Petitioner does not agree that a remand is necessary to decide legal issues relating to the superior-knowledge defense. Gov't Br. 52-54. It is contrary to all existing precedent to suggest that a contractor who is to be trusted with developing highly sensitive technology should be deprived of information about that very technology, or even a warning about the infeasibility of proposed contract terms, based on an asserted need for secrecy. *See* GD Br. 56 & n.14 (citing *J.A. Jones Constr. Co. v. United States*, 390 F.2d 886 (Ct. Cl. 1968)); *see also United States v. Speed*, 75 U.S. 77, 84 (1868); *Bannum, Inc. v. United States*, 80 Fed. Cl. 239, 247 (2008). Moreover, the government

CONCLUSION

For the foregoing reasons, this Court should reverse the Federal Circuit's ruling upholding default.

Respectfully submitted,

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expressly promised to provide critical stealth information to the Contractors, and those promises were a premise of the Navy's decision to undertake the program and of the contracting relationship. GD Br. 3-5; *see also, e.g.*, May 26, 1993 Appendix at Tab 7; JA646-47, 658-59, 687. If the Court nevertheless decides to remand for consideration of these issues, it should ensure that the government's continued reliance on the contracting officer's decision is foreclosed, and that the Federal Circuit's task is clearly circumscribed.