1   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - - - - - - - - - - - - - x

3   GENERAL DYNAMICS CORPORATION,   :

4   Petitioners   :   No. 09-1298

5   v.   :

6   UNITED STATES   :

7   - - - - - - - - - - - - - - - - - x

8   and

9   - - - - - - - - - - - - - - - - - x

10   THE BOEING COMPANY, SUCCESSOR TO :

11   MCDONNELL DOUGLAS CORPORATION,   :

12   Petitioners   :   No. 09-1302

13   v.   :   `

14   UNITED STATES   :

15   - - - - - - - - - - - - - - - - - x

16   Washington, D.C.

17   Tuesday, January 18, 2011

18

19   The above-entitled matter came on for oral

20   argument before the Supreme Court of the United States

21   at 10:03 a.m.

22   APPEARANCES:

23   CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of

24   Petitioners.

25   NEAL KUMAR KATYAL, ESQ., Acting Solicitor General,

1   Department of Justice, Washington, D.C.; on behalf of

2   Respondent.

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1   P R O C E E D I N G S

2   (10:03 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first this morning in Case 09-1298, General Dynamics v.

5   United States, and the consolidated case, 09-1302, the

6   Boeing Company v. United States.

7   Mr. Phillips.

8   ORAL ARGUMENT OF CARTER G. PHILLIPS

9   ON BEHALF OF THE PETITIONERS

10   MR. PHILLIPS: Thank you, Mr. Chief Justice,

11   and may it please the Court:

12   The proposition that Petitioners are here

13   challenging is the one adopted or embraced by the

14   Federal Circuit that says that the United States

15   Government can declare that certain of its government

16   contracting partners have operated in default and, under

17   those circumstances, can reach into the government

18   contractor's pocket, withdraw at the time $1.35 billion

19   of moneys that were spent by the United States, but for

20   services that were rendered, without question, pursuant

21   to the contract, pursuant to the instructions of the

22   United States Government, and that when the contractor

23   seeks to defend against the claim that it has engaged in

24   some kind of default conduct, that the government can

25   assert the state-secrets privilege and, in so doing,

 1   deprive the contractor of the ability effectively to

 2   respond to the government's conclusion.

 3   Under those circumstances, it seems to me

 4   that the statement in this Court's decision in United

 5   States v. Reynolds, which is that the government is

 6   certainly free to assert the state-secrets privilege,

 7   but when it does so, it has to assume certain

 8   responsibilities that come from it, at least in the

 9   circumstances where the United States is the moving

10   party.

11   JUSTICE GINSBURG: Mr. Phillips, when the

12   contractors -- when they failed to deliver the first

13   aircraft at the time specified by the contract, their

14   reason was that its costs would far outrun the contract

15   price, and so it sought to reformulate the contract.

16   At that time -- correct me if I'm wrong, but

17   I think at that time the contractors said nothing at all

18   about superior knowledge and the government's obligation

19   to share information that it hadn't shared.

20   MR. PHILLIPS: There was nothing specific

21   with respect to that, Justice Ginsburg. The first time

22   the contractors identified the superior knowledge

23   problem arose, obviously, when the government took the

24   extraordinary step of issuing a cure notice, because up

25   until that point, obviously, the parties are attempting

1   to negotiate and work to a final resolution of this

2   project, as you would hope any contracting entities

3   would, to bring the contract to a happy resolution,

4   so --

5   JUSTICE GINSBURG: But you would expect them

6   to say, if they -- if that was the impediment to going

7   forward on this contract, to at least mention it. And

8   to --

9   MR. PHILLIPS: Well, yes, I think you have

10   to put it in context, Justice Ginsburg, because during

11   this period of time, obviously, there were consistent

12   efforts and requests being made to get access to both

13   the B-2 and the A-117 stealth technologies, and there

14   were discussions that went back and forth, and the

15   district court -- or the Court of Federal Claims

16   specifically held -- eventually, the information was

17   forthcoming, but it was, candidly, too little and too

18   late in order to effectively allow the contract to

19   proceed as -- as planned.

20   So I think -- I mean, I agree, you know, in

21   a perfect world, maybe you would have identified this.

22   But in this situation, the parties are simply trying to

23   come to some kind of a resolution that allows both sides

24   to be satisfied by the final --

25   JUSTICE SOTOMAYOR: Mr. Phillips --

1   MR. PHILLIPS: -- disposition.

2   JUSTICE SOTOMAYOR: -- why wasn't the need

3   to share that technology a part of this contract or a

4   condition to the contract? I've gone through the

5   contract -- or, not all of it; enough of it. I haven't

6   found anywhere in the contract that it requires the U.S.

7   to share information with you. Does that have anything

8   to do with what due process would require? Meaning --

9   MR. PHILLIPS: No, I think -- I think,

10   Justice --

11   JUSTICE SOTOMAYOR: I --

12   MR. PHILLIPS: I'm sorry.

13   JUSTICE SOTOMAYOR: I'm going to pose a

14   hypothetical. Let's assume the contract required the

15   sharing of state secrets, and the government then

16   invokes its privilege. Is that a different case than

17   this one in terms of due process? Wouldn't the --

18   wouldn't the former situation, where it's been made a

19   condition of the contract, require a different treatment

20   than this situation where the government's just saying,

21   if you want to raise a defense that's not part of the

22   contract, then you do what every other litigant with a

23   privilege does -- who a privilege has been invoked

24   against; you proceed with whatever evidence you have.

25   MR. PHILLIPS: Well, you have to --

1   JUSTICE SOTOMAYOR: That's usually what

2   happens with other privileges.

3   MR. PHILLIPS: Right. And we would have

4   been perfectly content to proceed with the evidence we

5   had. But the ultimate decision by the Court of Federal

6   Claims was that it was impossible to ultimately be in a

7   position to resolve it.

8   But I want to answer your more fundamental

9   question, Your Honor, as to the -- you know, the basic

10 point is, is that the background principle of law, the

11 superior knowledge defense, is the understanding of the

12 parties when they enter into an agreement. I mean, that

13 would have been true just as much in the Helene Curtis

14 case and the other cases where the Federal Circuit has

15 acknowledged the superior knowledge defense. That's

16 been around for a long time. It's a-- it's an

17 understood basis on which the parties enter into an

18 agreement. That's the first answer.

19   The second answer is that you're asking us

20 to put into a contract something about information that

21 we don't know anything about. We -- I mean, we have

22 some sense about the B-2 and the A-117, but we don't

23 know anything about the other programs that are

24 identified here.

25   JUSTICE SOTOMAYOR: Wait a minute. Where's

1 the obligation of the government to tell you build it

2 this way using the technology we already have? I

3 thought your claim was that you were promised this

4 information, and you structured the contract based on

5 that promise.

6 　　　　　　MR. PHILLIPS: Well, our claim -- we have

7 separate -- we have a series of distinct claims.

8 　　　　　　Our first claim is that we never would have

9 entered into the contract in the first place if the

10 government had provided us with information based on its

11 superior knowledge that the -- for instance, the weight

12 specifics that we were being asked to provide or to

13 supply were literally impossible to comply with based on

14 what the government already knew. If we had been just

15 told that much, just given a warning, we wouldn't be in

16 the situation where we are here --

17 　　　　　　JUSTICE SOTOMAYOR: There's a factual

18 dispute about that. I think somewhere I read that there

19 is a claim that they told you your weight estimates

20 weren't right.

21 　　　　　　MR. PHILLIPS: Well -- I mean, that may be a

22 factual dispute, but I'd be -- and I'd be happy to

23 litigate that issue if -- if we can get to that point

24 where we're in fact allowed to litigate any aspects of

25 our particular defense. But the bottom line here is --

1   and again to state the proposition as starkly as it --

2   as it is, because this is the way it comes to the Court

3   from the Federal Circuit: They're saying that the

4   government can assert a claim for $1.35 billion dollars

5   against us and tell us that we cannot defend against

6   that claim even though the reason why we were unable to

7   comply with the contract is because of the fact that the

8   government didn't provide us information either at the

9   outset or as we went along.

10   JUSTICE BREYER: The two questions I'd have

11   is, first of all -- Justice Sotomayor, sorry; I did not

12   -- I did have her question, because what that suggests

13   is, in this case, it's not unfair to hold your client in

14   this case. And you just read the two circuit court

15   opinions here, and you think this is a defense coming

16   out of long in the past that doesn't have much substance

17   to it. That was her question, I think, as I understood

18   it.

19   MR. PHILLIPS: Can I answer --

20   JUSTICE BREYER: In other words, it's not

21   unfair. But let me give you the other question because,

22   sometime in your argument, I'd like you to get to that.

23   And that is, if we accept as a principle of law what was

24   said in Reynolds, a criminal case or whatever, and apply

25   it to government contracting, where sophisticated

1   contractors are perfectly capable of negotiating their

2   own contract, we are not just throwing a monkey wrench

3   into the gears of government contracting; we're throwing

4   the whole monkey. That's my second question.

5   MR. PHILLIPS: Well, I don't --

6   JUSTICE BREYER: One, that this isn't a case

7   that calls for it; and, two, the threat to government

8   contracting by changing from Reynolds to here is

9   overwhelming. Now, I'd like your views on both of

10   those.

11   MR. PHILLIPS: Right. Well, it seems to me

12   clearly that this is the precise situation where

13   Reynolds is saying if you cannot bring forward a

14   legitimate defense -- I mean, part of the problem is we

15   don't know precisely what information we didn't have and

16   were never entitled to. So it's very difficult to say

17   how strong is our defense under these circumstances.

18   What we do know is that the Court of Federal

19   Claims judge looked very carefully at this and said that

20   we had made an impressive showing without regard to any

21   of the confidential or privileged information of a prima

22   facie defense in these circumstances. So our position

23   is we had a very valid defense. This is not pretextual.

24   We're not throwing this in simply as a mechanism to

25   force the government to assert its state secrets. It's

1   a fairly contrived approach to litigation and, frankly,

2   not something that I could imagine any circumstance in

3   which we would do that.

4   Two, I don't see how this throws a monkey

5   wrench into this process whatsoever, much less throws

6   out the monkey, because -- because the basic

7   understanding here is that the government is not

8   entitled to force its contractor down along this course.

9   If the government has information available to it, then

10   it has to make that information -- has to be forthcoming

11   with the information with the contractor, either at the

12   outset, which would have been the best of all

13   circumstances here, or as matters go along.

14   JUSTICE ALITO: Well, the Petitioners as a

15   formal matter were the moving party; isn't that right?

16   MR. PHILLIPS: Well, not -- I mean, "moving

17   party" I think is -- is not a self-defined concept,

18   Justice Alito. The Petitioners are the plaintiffs.

19   JUSTICE ALITO: They were the plaintiffs.

20   And the review scheme that you outlined was known to

21   them beforehand. So why do we need to look beyond that?

22   MR. PHILLIPS: Well, because the review

23   scheme also says that the very -- in 1986, in the

24   Assurance case, the Federal Circuit said -- which was

25   before this contract was entered into, the Federal

1 Circuit said the filing -- the mere filing of a

2 complaint immediately vacates the contracting officer's

3 rule.

4   So our understanding at the time we entered

5 into this agreement is that if there were a problem with

6 the way the contracting officer operated, we would be

7 allowed to file a claim and immediately take the

8 contracting officer's rule off the table. Under those

9 circumstances, it seems to me all we're asking for is to

10 go back to the status quo ante in that situation, which

11 means there's no contracting officer decision, there's

12 no basis on which the government can make a claim for

13 1.35 billion, now $3 billion.

14   JUSTICE GINSBURG: Can you explain that --

15 you've referred to it several times now. I thought that

16 that was not a progress payment based on completed work.

17 The government says that that money was advanced; you

18 had not complied with what was necessary to comply with

19 to get that 1.35 million. They distinguished the $1.35

20 million that you legitimately received as a progress

21 payment, but this next, they say, you have not fulfilled

22 what you needed to do to get that.

23   MR. PHILLIPS: Well, what had not happened

24 is that the final -- there had not been a final sign-off

25 by the contracting officer approving it and thereby

1   reducing it to a liquidated claim. But that's a vastly

2   different statement than to say -- and, indeed, we have

3   an argument that, at least with respect to half of that,

4   that it had already effectively been approved through a

5   mechanism independent of the contracting officer.

6   But the bottom line here is these were

7   services rendered, actually rendered. This was not some

8   kind of a prepayment for services to be rendered in the

9   future. That's not the nature of this contract. These

10   were -- this was for work we had done, for which we had

11   submitted specific claims, and for which the contracting

12   officer had pending before him at the time. And so, you

13   know, what the government says is that -- is that it was

14   a payment and they didn't ultimately get the airplanes

15   that were the ultimate desire of the contract under

16   these circumstances, and that's obviously true because

17   they terminated the contract a year before the airplanes

18   were due to be provided to them.

19   JUSTICE GINSBURG: But you are here seeking

20   to -- to emerge as a total winner, that is to get from

21   this contract what you would have gotten if it had been

22   successfully completed, including any profit --

23   MR. PHILLIPS: No. No, Justice Ginsburg,

24   that's not true. All we are asking for is -- are the

25   remedies that are fully available if you were to convert

1 this from a termination for default into a termination

2 for convenience. And under those circumstances, what --

3 you know, that -- the government has a wonderful

4 mechanism there. It protects it against the kinds of

5 lost profits damages that might otherwise be available

6 in a situation where you have a more traditional breach

7 of contract.

8   So all we're -- all we're asking for is the

9 actual amount of money that we expended, that the --

10 frankly, the Court of Federal Claims explicitly found,

11 and at this stage it's unchallenged, although presumably

12 it might be litigable at some point, but that these were

13 all reasonable, allowable, and fairly allocable costs to

14 these -- to this particular contract.

15   JUSTICE ALITO: Well, why shouldn't we view

16 this as if it were a dispute between two private

17 contracting parties? And if we did that, perhaps one

18 party would be the moving party with respect to some of

19 the claims and the other party would be the moving party

20 with respect to the remaining claims.

21   MR. PHILLIPS: Justice Alito, I think that

22 is precisely how you ought to look at it, and -- and

23 we'd be very comfortable with that, because it's quite

24 clear to me that, except in the hyper-technical way

25 that -- that you articulate because of -- because of the

1   way the Contracts Disputes Act plays out, that the

2   government is unquestionably the moving party, the party

3   seeking affirmative relief to be able to take 1.35

4   billion --

5   JUSTICE GINSBURG: I would -- I think it's

6   questionable, Mr. Phillips, for this reason: You say

7   that it's an implied term of this contract that the

8   government has a duty to share certain information, and

9   you are seeking to enforce that implied term of the

10   contract. So it seems to me, as to that alleged duty,

11   you are the moving party. You're saying: Court, please

12   enforce this implied term of the contract.

13   MR. PHILLIPS: Well, not -- I mean, you

14   could -- that's one way to articulate it. I think the

15   other way to articulate it, which -- which is much more

16   consistent with the reality of what's going on here, is

17   that the government is making a claim for $1.35 billion

18   for which -- on the basis that we did not act in a

19   timely fashion. And that's the only basis that exists

20   in this litigation anymore, is just the time of the

21   actions that we took.

22   And our answer to that claim is to say: No,

23   we -- we are not at fault for the delays because you did

24   not provide us the information or you did not spare us

25   the burden of having to go down this path in the first

1   instance.

2   JUSTICE SCALIA: Yes, but then you go on to

3   say: Moreover, give us -- give us the payment for the

4   additional money beyond the 1.35 that you've already

5   given us --

6   MR. PHILLIPS: But --

7   JUSTICE SCALIA: -- plus this additional

8   money that we've expended.

9   MR. PHILLIPS: Right. But that just goes to

10   Justice Alito's question about is there some way to

11   evaluate those claims separately, and the answer is,

12   yes, they should be evaluated separately. And --

13   JUSTICE SCALIA: Well, why shouldn't we? I

14   mean, it -- it seems to me if -- if, indeed, you say the

15   government has come up with a defense that makes it

16   impossible to decide who's in the right here --

17   MR. PHILLIPS: Right.

18   JUSTICE SCALIA: -- why don't we just -- you

19   know, I think the usual course taken by courts would be

20   to leave the parties where they are. The matter can't

21   be litigated. That would mean you would keep your $1.35

22   billion, but you wouldn't be entitled to sue for the

23   additional amount. If -- if you were that worried, you

24   should have -- you -- you should have had more frequent

25   progress payments or something.

1   Why don't we just leave you where you are,

2   both you and the government, assuming we agree with you

3   on all the rest?

4   MR. PHILLIPS: Well, I mean, to be sure, we

5   would be much more comfortable in the world you just

6   articulated, Justice Scalia, than we are in the Federal

7   Circuit.

8   JUSTICE SCALIA: Yes, you would be 1.35

9   billion --

10   (Laughter.)

11   MR. PHILLIPS: With interest.

12   (Laughter.)

13   JUSTICE SCALIA: With interest. I forgot

14   the interest.

15   MR. PHILLIPS: That's starting to add up,

16   Your Honor.

17   (Laughter.)

18   MR. PHILLIPS: But -- and -- certainly we

19   think that's -- that is the minimum that we should be

20   entitled to, and maybe to some extent you could say

21   we're sort of being a little greedy. But the -- the

22   reality is that the standard rule is that if you take a

23   contract and you say you cannot make a determination

24   that the contractor has been guilty of default, then

25   that contract should be, in the -- kind of the basic

1   contract law and it's also in this -- in this agreement,

2   that you -- you convert it to a termination for

3   convenience.

4   And then the question simply is, what rights

5   flow from having declared this to be a termination for

6   convenience?

7   JUSTICE GINSBURG: You mentioned the 1.3 --

8   that you get to keep the 1.35 million, but there was

9   also another figure -- 1.2 million that you would get on

10   top of that.

11   MR. PHILLIPS: Right. And that -- that --

12   JUSTICE GINSBURG: So that certainly

13   wouldn't be leaving you where you were.

14   MR. PHILLIPS: Well, no. I mean, actually,

15   what -- what the $1.2 billion was, was the additional

16   amounts of money that were actually expended by the

17   contractors that were reasonable, allocable, and

18   allowable, by and according to the Court of Federal

19   Claims, on this agreement. So, there -- and it would be

20   the standard operating procedure. If you have a

21   termination for convenience, where the government says,

22   look, we've decided we just don't want to have this --

23   these -- we don't want these airplanes anymore, so let's

24   just call it off, which the government has the right to

25   do, then the question is, what are the reasonable costs

 1   that are, you know, sort of reallocated as a consequence

 2   of that? And the Court of Federal Claims --

 3   JUSTICE SCALIA: But the government didn't

 4   do that. I mean, you're making it up. The government

 5   didn't terminate for convenience. The government

 6   claimed you're in default. Why would -- why should we

 7   force that down the government's throat when we can no

 8   more say that the government's wrong than we can say

 9   that you're wrong?

10   MR. PHILLIPS: Well, it seems to me the -- I

11   mean, the question is was the default --

12   JUSTICE SCALIA: It seems to me you call the

13   game off.

14   MR. PHILLIPS: Well, and the question is, if

15   you call the game off, what -- what flows from that?

16   And it seems to me that it -- you can say we'll let the

17   government call it a default, I suppose, or you could

18   just as easily say -- and obviously the position we

19   would take is you say the government cannot call it a

20   default because, in order to get some kind of a

21   determination along those lines, somebody is going to

22   have to make a judgment that's not an honest assessment

23   of the -- of the -- of the facts of this case.

24   And so, if you say it's not a default

25   termination, then there's just a certain amount of --

1   certain consequences that flow from converting it, and

2   it automatically converts at that point to a termination

3   for convenience. And in a termination for convenience

4   situation, then you reallocate the costs in precisely

5   the way that the Court of Federal Claims has done this

6   at this point.

7   JUSTICE SCALIA: Yes, but --

8   JUSTICE KAGAN: Mr. Phillips --

9   JUSTICE SCALIA: -- the fallacy is we're

10   not -- assuming we agree with you on the rest, we're not

11   saying that it's not a default termination. We're

12   saying we don't know.

13   MR. PHILLIPS: Right. And the question

14   is --

15   JUSTICE SCALIA: We're saying we don't know.

16   We don't know what the state-secrets thing is. The

17   government is entitled to -- to make that determination,

18   so we don't know who's in the right here.

19   MR. PHILLIPS: Well, I -- I -- the

20   problem --

21   JUSTICE SCALIA: So why force the government

22   to -- to go to a termination for convenience?

23   MR. PHILLIPS: Right. Well, I would think

24   that the -- that the more appropriate way to proceed

25   under those circumstances, given that a default

1 termination carries with it a lot of collateral

2 consequences, it exposes you to subsequent problems in

3 the contracting context, it creates the possibility of

4 debarment in -- in future proceedings, that rather than

5 allow a finding that no one can comfortably conclude is

6 the right finding to stay in place and have those

7 collateral consequences flow from it, the more

8 appropriate way to proceed would be to say: Look, I

9 can't make a determination in this case that there

10 should be a termination for default.

11   And under those -- and so, therefore, the --

12 the -- under the contract, under the government

13 contracting principles generally, it automatically

14 converts over to a termination for convenience. And

15 once that happens, then you go down the road of -- of

16 evaluating those costs. And, again, the government's

17 got arguments about those costs, I'm sure, and we can --

18 and we can debate those out, although, you know, I would

19 commend the Court to the --

20   JUSTICE SOTOMAYOR: Mr. Phillips, give us a

21 way, a reasoned way, to reach the result Justice Scalia

22 is suggesting, because you are being greedy. You

23 admitted it. The termination --

24   MR. PHILLIPS: No, I -- I said --

25   JUSTICE SOTOMAYOR: The termination for --

1   MR. PHILLIPS: -- I could be characterized

2   that way.

3   JUSTICE SOTOMAYOR: A termination for

4   convenience carries its own automatic consequences that

5   appear unfair in light of the fact that the litigation

6   of the default termination has been invoked because

7   there is a risk to the United States. So, is there a

8   reasoned way to do it --

9   MR. PHILLIPS: Now, are you --

10   JUSTICE SOTOMAYOR: -- to not -- to not

11 impose that unfairness on the government? And if

12 there's not, then explain to me why it's unfair, given

13 that you're two sophisticated contracting parties, to

14 say you entered a contract knowing the government could

15 invoke state secrets, it has, and so you bear the risk

16 of that. I mean, you always knew the government could

17 do this.

18   MR. PHILLIPS: Right, but -- well, I don't

19 know whether you want me to answer the second part

20 first --

21   JUSTICE SOTOMAYOR: It goes back to my

22 original question, is --

23   MR. PHILLIPS: -- or go back to the original

24 question.

25   JUSTICE SOTOMAYOR: -- you could have

1   contracted around it.

2   MR. PHILLIPS: Sure, and so could the

3   government. I mean, the reality is that the background

4   principle here is United States v. Reynolds. And United

5   States v. Reynolds says that if somebody is the moving

6   party, that is the party seeking affirmative relief,

7   that's the party who's going to bear the burden to --

8   JUSTICE KAGAN: Mr. Phillips, could I ask

9   you whether that principle makes any sense in this

10   contracting situation, because both parties have argued

11   it as though the question of who is the moving party is

12   determinative of this case, but in a contract situation

13   the question of who's the moving party is very often

14   arbitrary or fortuitous.

15   If you think about it in a private setting,

16   you have one contract -- one contractor who fails to

17   perform or -- or provides some deficient product,

18   another who decides it's not going to pay, and the

19   question of who the plaintiff is, is often just a matter

20   of fortuity, who gets to the courthouse first --

21   MR. PHILLIPS: Right.

22   JUSTICE KAGAN: -- what the payment schedule

23   has been like, so whether somebody is demanding their

24   money back or simply refusing to pay it at all.

25   So, why in this contract situation is the

1   question of who's the plaintiff or who's the moving

2   party -- why does -- why does that make such a

3   difference?

4   MR. PHILLIPS: Well, I -- I think that

5   actually the Court in Reynolds, to the extent it would

6   have envisioned any of these circumstances decades ago,

7   used the language "moving party" rather than "plaintiff"

8   or "defendant" precisely for that reason, because I

9   think what the Court had in mind is the party who was

10   seeking affirmative relief. And --

11   JUSTICE GINSBURG: It was thinking of a

12   tort. It wasn't thinking of -- Reynolds is a tort

13   action.

14   MR. PHILLIPS: Oh, no. To be sure, that --

15   that's the specific context, although the Court's

16   language is broader than that. It just didn't talk

17   about itself as a defendant in a tort action.

18   JUSTICE KAGAN: But it can't possibly be the

19   case that the question is what the payment schedule is.

20   If I've paid you already and then I find your product

21   deficient, then I'm going to go to court and demand my

22   money back. If I find your product deficient before I

23   pay you, then you're going to go to court and say you

24   have to pay me.

25   So why should that difference make a

1 difference with respect to the constitutional question

2 before us?

3   MR. PHILLIPS: Well, because in the one

4 situation I have $1.35 billion in my pocket for services

5 that were unquestionably rendered and which, in our

6 judgment, you know, satisfied our portion of the

7 obligation under this contract.

8   JUSTICE KAGAN: Both party has a claim here.

9 One says you provided deficient performance; the other

10 says you were obligated to pay me. The question of who

11 has the claim and who has the affirmative defense -- it

12 can be structured in either way.

13   MR. PHILLIPS: I don't disagree with that,

14 Justice Kagan. I think the bottom line, though, is, you

15 know, what -- what -- what are -- what do principles of

16 fundamental fairness tell you to do in this case?

17   JUSTICE BREYER: That's exactly my problem,

18 because when I looked at Reynolds, Reynolds doesn't hold

19 anything in your favor. It holds the opposite way. It

20 says to you -- in a criminal case, we said it was

21 unconscionable for the government both to prosecute and

22 not to -- not to tell them a secret, okay? And it says

23 such a rationale has no application in a civil forum

24 where the government is not the moving party. It

25 doesn't say anything about where the government is the

1   moving party.

2   MR. PHILLIPS: Right, but --

3   JUSTICE BREYER: And Exhibit A that it is

4   not unconscionable here consists of the two opinions of

5   the Federal Circuit. I mean -- now, what do you want me

6   to read to get over that impression?

7   MR. PHILLIPS: Well, I mean, the very fact

8   that the court says and limits its ruling to where the

9   government is not the moving party -- I mean, if the

10   government really -- if the court --

11   JUSTICE BREYER: It didn't limit it. It

12   said the rationale is unconscionable. Now, I don't even

13   have to go that far. I can go to "fundamentally

14   unfair." All I want to know is what should I read to

15   get over my unfortunate impression, which I got out of

16   the two opinions that I did read, that there was nothing

17   unfair? Okay?

18   What do you want me to read to get over that

19   impression --

20   MR. PHILLIPS: Well --

21   JUSTICE BREYER: -- which I think you do

22   want me to read something.

23   MR. PHILLIPS: I think -- right. Well, no,

24   you should clearly read the Court of Federal Claims

25   opinion that gave rise to this in the first place, where

1   -- where the judge says we have made --

2   JUSTICE BREYER: Okay.

3   MR. PHILLIPS: -- an impressive prima facie

4   showing of a defense. And -- and the Federal Circuit's

5   view is: We don't care; we're not going to let you go

6   down that path, period.

7   And all we're saying is that in that

8   situation, where we've made that kind of showing, the

9   default rule should be the government cannot reach into

10   our pocket and --

11   JUSTICE SOTOMAYOR: Just before we get

12   there, that showing was based on the court's in camera

13   review of quite a bit of already confidential

14   information, correct?

15   MR. PHILLIPS: And the non-privileged

16   information that it had available to it.

17   JUSTICE SOTOMAYOR: And the non-privileged

18   information. So it made this judgment on the basis of a

19   great deal of information, and yet it couldn't conclude

20   that you were right as a matter of law, correct?

21   MR. PHILLIPS: Well, it recognized that it

22   terminated the discovery early. And, actually, it did

23   -- it terminated discovery very early, and -- and there

24   are whole programs that we know nothing about. We know

25   about the B-2 and the A-15. What we don't know are the

1   other programs, and there's nothing in this record on

2   any of that, Your Honor.

3   CHIEF JUSTICE ROBERTS: Thank you, Mr.

4   Phillips.

5   General.

6   ORAL ARGUMENT OF GENERAL NEAL KUMAR KATYAL

7   ON BEHALF OF THE RESPONDENT

8   GENERAL KATYAL: Thank you, Mr. Chief

9   Justice, and may it please the Court:

10   Two basic things decide this case. First,

11   the government is not affirmatively invoking the power

12   of the Federal court; only the plaintiffs are. It was

13   Mr. Phillips's clients who 20 years ago walked into the

14   Federal court and asked that court to set aside the

15   decision of the contracting officer and to award them

16   over a billion dollars in damages. The government, by

17   contrast, simply asked the court to dismiss the Federal

18   lawsuit.

19   And, second, Reynolds makes clear that the

20   state-secrets privilege will be used to bar a claim at

21   most only when the party that is relying on secret

22   information is trying to use the Federal court to alter

23   the legal status quo. And --

24   CHIEF JUSTICE ROBERTS: We have -- we've

25   gotten to this point in the dispute because you say

1   they're at fault; they say you're at fault. Under the

2   state-secrets doctrine, we can't resolve that question.

3   Why don't we call the whole thing off? Nobody's at

4   fault; that means it's terminated not for fault, but for

5   convenience, and that's it.

6   GENERAL KATYAL: Well, for several reasons.

7   One is that is the affirmative use of the Federal courts

8   to alter the legal status quo. I think the principle of

9   Reynolds is that --

10   CHIEF JUSTICE ROBERTS: Well, only because

11 you altered the legal status quo -- the legal status quo

12 is they're going along with their contract, and you

13 altered it by holding them in default.

14   GENERAL KATYAL: I disagree, Mr. Chief

15 Justice. I think that the contract itself specifies

16 that the contracting officer will decide whether or not

17 there's a default termination, and once there is that,

18 they owe -- once the contracting officer so decides,

19 then they owe the unliquidated payments that have --

20   CHIEF JUSTICE ROBERTS: Isn't that -- isn't

21 that the affirmative step with the contracting officer

22 saying there's a default?

23   GENERAL KATYAL: Well, it's certainly an

24 affirmative step under the terms of the contract, but it

25 is not an affirmative step of the Federal court. Our

1   central proposition --

2   CHIEF JUSTICE ROBERTS: It's an affirmative

3   step of the Federal Government. He works for you, and

4   he's the one changing the status quo.

5   GENERAL KATYAL: Undoubtedly the case, and

6   those are the terms under the contract to which they

7   agreed. Our central proposition is that in a world in

8   which the Federal court doesn't know, as Justice Scalia

9   said, who is right and who is wrong on a particular

10   claim, it should stay its hand entirely and get out of

11   the business altogether. It should follow the

12   Hippocratic principle of doing no harm.

13   JUSTICE ALITO: Am I correct to interpret

14   what you've just said to mean that you think this case

15   should be decided under the basic principle of Reynolds,

16   that the party that seeks the affirmative relief --

17   seeks affirmative relief from the court is the -- is the

18   party that bears the burden involving the invocation of

19   the state-secrets privilege? You're not asking us to

20   adopt a new test applicable in the contracts situation?

21   GENERAL KATYAL: Absolutely. I don't think

22   we need to go there. I do think that there are special

23   arguments available in this case because it is a

24   contract, as Justice Breyer said, with sophisticated

25   parties who ex ante will decide who bears the burden of

1   coming into court and -- and so on. But here I think

2   this is a simple principle that, in a world in which the

3   court doesn't know who is right and wrong in the

4   superior knowledge defense -- and that's the answer to

5   the question that Justice Sotomayor asked to Mr.

6   Phillips a moment ago about what did the Court of

7   Federal Claims ultimately decide. They didn't decide

8   there was a prima facie case. They said at page 245a of

9   the 2001 opinion: We can't know one way or the other.

10   And so --

11   JUSTICE SOTOMAYOR: Could I -- could I --

12   I'm interrupting Justice Alito because you answered his

13   question very quickly. It's your position that if we

14   determine you're the moving party, you lose?

15   GENERAL KATYAL: Oh, no. I think --

16   JUSTICE SOTOMAYOR: Is that what your answer

17   to him --

18   GENERAL KATYAL: No, we --

19   JUSTICE SOTOMAYOR: -- which is that -- he

20   asked you whether we apply Reynolds; you didn't say

21   which part of Reynolds. Are you conceding that if we

22   apply Reynolds and we find you're the moving party, you

23   lose?

24   GENERAL KATYAL: Oh, absolutely not, Justice

25   Sotomayor. I don't think Reynolds says that if the

1   government is the moving party, it's an automatic loss.

2   I think that's a back-up argument that we have advanced

3   in our brief that I think there is no reason whatsoever

4   for the Court to give its view --

5   JUSTICE SCALIA: Let's talk about "moving

6   party." I -- I don't -- I don't know that "moving

7   party" means who comes into court first. I would -- I

8   would -- in the -- in the context of a contract dispute,

9   I would say the moving party is the party who is trying

10   to use principles of law to change the contract, and

11   that's the government here. The government -- the

12   government is blowing the whistle; it is the government

13   which is saying you are in default, and under the law,

14   since you're in default, we can walk away, and indeed we

15   can claim the money we've already paid you.

16   GENERAL KATYAL: Justice --

17   JUSTICE SCALIA: That seems to me the moving

18   party in the -- in the context of a contract.

19   GENERAL KATYAL: Justice Scalia, I think

20   it's important to add to your definition "using legal

21   principles in a Federal court," because that's I think

22   what Reynolds is talking about. There's not some

23   abstract moving --

24   JUSTICE SCALIA: Reynolds was talking about

25   that because that was the fact situation in Reynolds.

1   But I'm saying that the logic of the matter -- the logic

2   of the matter when applied to a contract situation such

3   as this ought to be the party who is blowing the

4   whistle, who is trying to use the law, the one -- the

5   one who is asserting that -- that the law requires this

6   result. And then we say, well, we can't tell whether

7   the law requires this result or not. That, it seems to

8   me, ought to be the moment of truth.

9   GENERAL KATYAL: I -- I don't think,

10   Justice, that's what either Reynolds is getting at or

11   what this Court's subsequent decisions about a state of

12   uncertainty in the law and what the role of the Federal

13   courts is getting at. I think, rather, what all of

14   these decisions say together is if you don't know one

15   way or another, you should return; you should wind the

16   clock back to the status quo ante before the lawsuit was

17   filed. And at that status quo ante, there was undoubted

18   a right of the government to have $1.35 billion.

19   Now, I understand some of you have

20   suggested, well, maybe we should just cut it even and

21   they get to keep the $1.35 billion and we get to keep --

22   and we don't have to pay the $1.2 billion. I suggest

23   there's no principled way to do that, which is what I

24   think Mr. Phillips's answer --

25   JUSTICE SCALIA: It wasn't the undoubted

1   right of the government before the lawsuit was filed.

2   It was the undoubted right of the lawsuit only if the

3   contracting officer was correct that there had been a

4   default. If he was wrong about that, it was not the

5   right of the government.

6   GENERAL KATYAL: Justice Scalia, let me read

7   to you the contract to which they agreed. It's at Joint

8   Appendix, page 120 to '21: "If the contract is

9   terminated under the default clause, the contractor

10   shall, on demand, repay to the government the amount of

11   unliquidated progress payments."

12   And then, what happened, as a result of that

13   demand letter that we sent right after the -- after the

14   termination for default, was they came to us, hat in

15   hand, and said: Please don't take this money from us

16   right now, our banks are going to complain, and so on.

17   And so we entered into a deferment agreement --

18   CHIEF JUSTICE ROBERTS: I thought --

19   GENERAL KATYAL: -- which is at page --

20   CHIEF JUSTICE ROBERTS: I'm sorry. Do you

21   want to give the cite?

22   GENERAL KATYAL: Joint Appendix page 342.

23   And it seems to me a very odd notion of due

24   process to say that somehow the fact that we agreed to

25   their deferment creates some entitlement for them to

1   keep the $1.35 billion.

2   JUSTICE KENNEDY: I have this -- this

3   question about due process: The components of the due

4   process analysis, it seems to me, are what is

5   reasonable, what's necessary in the case, what's

6   unconscionable. That it seems to me is just an

7   extrapolation of what Reynolds said, and I don't know

8   why we don't have that just as a law of -- of -- the

9   Federal common law of contracts. I don't know why we

10   need to elevate this to a due process analysis.

11   GENERAL KATYAL: I guess I would say two

12   things. One is, if you look --

13   JUSTICE KENNEDY: Assuming that we're -- we

14   apply Reynolds, which --

15   GENERAL KATYAL: Right. And I think if you

16   -- if you were to look to that background common law

17   contract principle, you would look not just to Reynolds

18   but to Tenet -- or excuse me, Totten, which I think

19   makes clear that, at the time they signed their

20   contract, they were on notice that highly classified

21   information that is the subject of -- of litigation is

22   something that generally can't be litigated in the

23   Federal court.

24   And then, if you wanted to think about due

25   process and the overlay of unconscionability or whatever

1   with respect to Federal contracts, you would ordinarily

2   assume that the contract itself from highly

3   sophisticated parties would work that out ahead of time.

4   And so if they were concerned about this situation

5   unfolding, they could have written into the contract

6   that they should get certain information and that if the

7   government invoked the state-secrets privilege, it would

8   automatically terminate the contract's default and

9   convert a default termination into a termination for

10 convenience.

11   JUSTICE KENNEDY: Well, that --

12   JUSTICE GINSBURG: So you're --

13   JUSTICE KENNEDY: That just restates the

14 question of what -- what do you do if you apply the

15 Reynolds principle to this case, and they would say,

16 well, you could have put it in your contract, too, and I

17 think that's almost a wash.

18   GENERAL KATYAL: Well, I don't think it

19 comes out as a wash, Justice Kennedy, because I think

20 the contract is undoubtedly clear that, in order to

21 challenge the -- the decision of the contracting officer

22 about a default termination, they have to come into

23 Federal court and invoke affirmatively, seek affirmative

24 judicial relief from the Federal court, to change the

25 world. We don't have to do that.

1   JUSTICE GINSBURG: Am I -- am I right that

2   this contract did specify certain information that the

3   government agreed to give the Petitioner?

4   GENERAL KATYAL: That is correct. Some of

5   that is at Joint Appendix 137 to 140.

6   JUSTICE GINSBURG: Mr. Phillips said the

7   reason they couldn't specify this information is they

8   didn't know what it was.

9   GENERAL KATYAL: Yes.

10   JUSTICE GINSBURG: They -- they didn't know

11   what -- it was secret information. They didn't know --

12   wouldn't even know what to ask for.

13   GENERAL KATYAL: I have to say, it is a very

14   odd thing to bid on a highly -- a multi-billion-dollar

15   contract on the assumption that they're going to get

16   some technology that they haven't even specified. I

17   mean, this -- we're bidding for their research and

18   development. They brought in Lockheed, who -- which had

19   built low-technology -- low-observability planes --

20   precisely for the reason that they said they'd have the

21   technology. At Joint Appendix page 1087, you see their

22   bid, their offer, and I don't think anyone held a gun to

23   their back to say: Enter into this.

24   JUSTICE SCALIA: No, but they -- they claim

25   that you knew that it was impossible to do what they

1   contracted with you to do at the weight of plane which

2   they promised to come across with. They say that you

3   knew that because of -- of other contracts that you had

4   had, and yet didn't -- didn't tell them about it.

5   GENERAL KATYAL: Justice Scalia, let me say

6   two things. First, the impossibility of --

7   JUSTICE SCALIA: I don't know whether that's

8   true or not, and we're never going to know it's true,

9   because you came in and blew the whistle and said:

10   State-secrets privilege.

11   GENERAL KATYAL: Two things. One is that

12   impossibility claim was separately litigated before the

13   Court of Federal Claims, along with 18 other claims of

14   theirs in defense to the 1.35 billion and this rest that

15   we've been talking about. They've had massive

16   opportunities to litigate almost all of their

17   challenges, with the one exception being the superior

18   knowledge aspect of this case, and much of that has

19   taken place in a highly classified environment. The

20   trial has taken place in --

21   JUSTICE SCALIA: Are you saying it was not

22   impossible to do it at that weight?

23   GENERAL KATYAL: I'm saying -- well, at the

24   initial weight, we thought it was impossible and warned

25   them as such, and that's -- those are the citations in

1   the government's brief. But -- so --

2   JUSTICE SCALIA: At the weight contracted

3   for?

4   GENERAL KATYAL: And then we -- at the

5   weight contracted for, we had warned them that it

6   wasn't, and then later we relaxed to that weight

7   specification. So I'm not sure that is really present

8   one way or the other.

9   But our central submission to you, Justice

10   Scalia, is: If you're not sure, as you were saying to

11   me -- you don't know who is right and who is wrong --

12   then the Federal court shouldn't be complicit in the

13   process of siding and picking winners and losers in that

14   circumstance --

15   CHIEF JUSTICE ROBERTS: Are you ever the --

16   JUSTICE KAGAN: General, what would

17   happen --

18   CHIEF JUSTICE ROBERTS: Are you ever the

19   moving party in the Court of Claims?

20   GENERAL KATYAL: Sure. I could imagine that

21   we could be on a counterclaim, for example.

22   CHIEF JUSTICE ROBERTS: Well, on a

23   counterclaim, but that obviously means somebody else is

24   the moving party. They've raised the claim.

25   GENERAL KATYAL: That's correct. The -- the

1   jurisdiction of the CFC --

2   CHIEF JUSTICE ROBERTS: If somebody wants to

3   get money -- if somebody wants to get money from the

4   Federal Government, they have to go to the Court of

5   Claims, right?

6   GENERAL KATYAL: That's correct.

7   JUSTICE BREYER: How do you --

8   CHIEF JUSTICE ROBERTS: So this is a pretty

9   convenient rule for you, right?

10   (Laughter.)

11   GENERAL KATYAL: Well, it's a convenient

12   rule, Mr. Chief Justice, that they agreed to when they

13   signed the contract. The CDA was on the books. They

14   knew the deal going in, which is if they wanted to

15   challenge the decision of the contracting officer, they

16   would have to come in.

17   Now, you could have structured it very

18   differently. You could have said we -- you know, that

19   there would have to be -- that -- that if there were a

20   termination for default, it would automatically change

21   into a termination for convenience --

22   JUSTICE ALITO: But you have the burden

23   of -- you had the burden of proof on the issue of

24   default. That was known, too, wasn't it?

25   GENERAL KATYAL: We have the burden of proof

 1   on default, but not on superior knowledge, the precise

 2   question here. In their rule, if you -- if you follow

 3   their rule, they're asking the court to proceed

 4   counterfactually and say that they are entitled to not

 5   just the 1.35, but the 1.2 billion on top of that, as if

 6   they had proved their superior knowledge claim. And --

 7   JUSTICE KAGAN: General, what would --

 8   JUSTICE GINSBURG: Do you agree that -- do

 9   you agree that there is nothing between -- I think

10   Justice Scalia was asking Mr. Phillips, why can't we

11   just say let's -- all bets are off, everybody go home

12   with what they have. But Mr. Phillips says there are

13   only these two things; there's either default

14   termination or termination for convenience, and nothing

15   in between.

16   Do you agree that that's the world that

17   we're dealing with, those two choices and nothing else?

18   GENERAL KATYAL: I do agree that that is --

19   that's the way the contract is written. It

20   distinguished between those two and distinguished

21   between liquidated payments -- as to which the

22   government has no right in the event of a default

23   termination, and we're not seeking that -- and

24   unliquidated payments, as to which the government has an

25   absolute right at the moment the contracting officer

1   decides there has been a default termination.

2   JUSTICE SCALIA: I don't care how the

3   contract's written. I mean, if we're going to -- if

4   we're going to say that there's been a broken play, that

5   we're not going to try to apply the contract because we

6   can't tell who's in the right and who's in the wrong,

7   it's totally irrelevant what the contract says. You

8   just leave the parties where they are.

9   GENERAL KATYAL: Justice Scalia, I am saying

10   leave the parties where they are under the terms of the

11   contract. And --

12   JUSTICE SCALIA: You're --

13   GENERAL KATYAL: Well, that -- Justice

14   Scalia, I don't think that the Federal court should be

15   in the business of micromanaging under the Due Process

16   Clause in a contractual situation with parties that can

17   protect themselves ex ante very easily. I mean, they

18   say --

19   JUSTICE KENNEDY: We can -- we can do it as

20   a member -- as a matter of the law of contracts. And

21   when we look at the law of contracts in Reynolds,

22   Reynolds talked about the moving party, and I'm not --

23   I'm not sure that that phrase either had or has really

24   definable content in our law. It seems to me it's just

25   a question of the burden of persuasion.

1   At one point, the contractor has to proceed.

2   He makes -- it makes a certain showing, and the

3   government has to go back and forth. And if at some

4   point, the person with the burden of persuasion invokes

5   the privilege, then we have to ask whether it's

6   fundamentally fair as a matter of the Federal law of

7   contracts.

8   GENERAL KATYAL: So even if you followed

9   that reasoning -- and I don't think you should, for a

10   reason I'll explain in a moment -- but they would still

11   lose, because they still bear the burden of proof and

12   persuasion on superior knowledge, the -- the excuse

13   that's at issue in this case.

14   Now, I don't think that would be the rule,

15   that that's an appropriate rule, Justice Kennedy,

16   because I think underlying Reynolds is this central

17   proposition that a court shouldn't be involved,

18   shouldn't be picking winning -- winners and losers

19   either way, when the state of knowledge is unknowable.

20   JUSTICE KAGAN: So just to make sure I

21   understand your argument, suppose that state secrets had

22   prevented you from being able to prove your default

23   claim, that you were unable to make that showing because

24   of state secrets. What would happen then?

25   GENERAL KATYAL: Unable to make the showing

1   in --

2   JUSTICE KAGAN: That the -- that the --

3   GENERAL KATYAL: -- in Federal court?

4   JUSTICE KAGAN: That's right, that the

5   secrets that you were -- that you wanted to protect were

6   actually the -- the key to your proving that there was a

7   default.

8   GENERAL KATYAL: Right.   Well, in that

9   circumstance, again, the -- I think the case would be

10   dismissed, because they would be coming in and seeking

11   affirmative judicial relief to void the contracting

12   officer's decision and to get whatever damages they want

13   and --

14   JUSTICE KAGAN: Let me make sure I

15   understand, because that really does sound like a tails

16   you win, heads you win, whatever.

17   (Laughter.)

18   JUSTICE KAGAN: You're saying that if the

19   state secrets prevented you from making your affirmative

20   case, you should win that one, too?

21   GENERAL KATYAL: I think -- I think that

22   that would be -- the general proposition is if the

23   Federal court can't know one way or another who's right

24   and who's wrong, it shouldn't grant affirmative relief

25   to a party, and that's --

1   JUSTICE SCALIA: To a moving party, and you

2   are never the moving party.

3   (Laughter.)

4   GENERAL KATYAL: Well, again, Justice

5   Scalia, that's the contract they've signed. They could

6   have signed a different contract with different results.

7   They say --

8   JUSTICE SOTOMAYOR: Counsel, you seem --

9   GENERAL KATYAL: -- we didn't have the

10   ability --

11   JUSTICE KENNEDY: Did the contract --

12   JUSTICE SOTOMAYOR: Counsel, you can't ever

13   give --

14   CHIEF JUSTICE ROBERTS: Justice Kennedy --

15   JUSTICE KENNEDY: Did the contract contain

16   the term "moving party"?

17   GENERAL KATYAL: The contract didn't say

18   "moving party," but it did say who had to come into

19   Federal court in order to challenge the decision of the

20   contracting officer. And that is a -- that -- that --

21   and it puts that burden on them.

22   CHIEF JUSTICE ROBERTS: And now Justice

23   Sotomayor.

24   JUSTICE SOTOMAYOR: That's what I don't

25   understand. Yes, the default provision is decided by

1   the contracting officer, but by law you can't collect on

2   that judgment once they file a complaint. So you can't

3   do anything until you get the court to affirm your

4   default. You are asking for a legal declaration of

5   being right, that they defaulted. That's -- you're the

6   one seeking --

7   GENERAL KATYAL: Justice Sotomayor, this is

8   a very important question, and I think that that's the

9   impression left by their briefs and it's wrong. So the

10   filing of their claim -- their claim in the Court of

11   Federal Claims they say vacated the contracting

12   officer's decision. That's wrong under the statute;

13   605(b) in the -- in the Contracting Disputes Act says

14   that a clause can be put into the contract to continue

15   it in effect and require performance even if there's an

16   appeal to the Court of Federal Claims, and that

17   provision exists in this very contract. So --

18   JUSTICE SOTOMAYOR: I'm sorry. You're going

19   too fast for me, and I don't think I remember this in

20   your reply brief.

21   GENERAL KATYAL: Well, I think it is. It's

22   in a footnote of our reply brief, and it cites to

23   605(b). And our claim is that -- that that provision

24   requires -- right now we have an absolute entitlement to

25   the $1.35 billion. That is what the contract says.

1   That is what even the deferment agreement says that

2   we've entered into.

3   So we're not asking, Justice Sotomayor, for

4   any affirmative judicial relief at all. We don't need

5   -- we want the Court, as it does in state-secret cases

6   such as Tenet, to stay out entirely and say -- to deny

7   an audience to this case on the merits. And if you do

8   what Mr. Phillips says or if you do what Justice Scalia

9   suggested, the kind of compromise option, that is

10   affirmatively using the power of the Federal court,

11   granting him relief on a claim that he has not proven,

12   and that is something I see -- I see zero precedent

13   for --

14   JUSTICE SCALIA: It's granting nobody

15   relief. We're leaving you where you are. "Get out of

16   here," is what we're saying.

17   (Laughter.)

18   GENERAL KATYAL: Justice Scalia, we have

19   no --

20   JUSTICE SCALIA: We don't know what the

21   answer is, so go away; we leave you where you are.

22   (Laughter.)

23   GENERAL KATYAL: Justice -- Justice Scalia,

24   we have no problem with a go-away rule. And if you did

25   that and you returned to the status quo ante, we would

1   have that $1.35 billion. That is what the contract

2   says. That is what their own filing in September 16,

3   1991, said before the Court of Federal Claims, when they

4   called that $1.35 billion, quote, "money presently due

5   and owing."

6   JUSTICE SCALIA: That assumes that the

7   contracting officer's termination for default was valid.

8   And we don't know that it was valid, and we don't want

9   to have to inquire whether it was valid. So to say "go

10   away" means everybody keeps the money he has.

11   GENERAL KATYAL: Justice Scalia, that seems

12   to me -- that is affirmatively using the power of the

13   Court to set aside the contracting officer's decision,

14   which is what I think is forbidden by Reynolds. And it

15   would be an odd rule, because it's basically a

16   happenstance. If we had just simply insisted on our

17   $1.35 billion at the moment that it was owed to us in

18   February of 1991, we wouldn't even be having this

19   conversation right now. The only reason we're having it

20   is because we acceded to their own request to not take

21   the $1.35 billion right away.

22   CHIEF JUSTICE ROBERTS: How would you write

23   -- you keep saying these are sophisticated parties.

24   What would the contractual term look like that would

25   avoid this problem?

1   GENERAL KATYAL: Oh, I think it would be

2   very simple. You could say: In the event the

3   government invokes the state-secrets privilege, any

4   termination for default automatically becomes a

5   termination for convenience. That's one of many.

6   CHIEF JUSTICE ROBERTS: Do you think your

7   client would ever agree to something like that?

8   GENERAL KATYAL: Do I think the government

9   would?

10   CHIEF JUSTICE ROBERTS: Yes.

11   GENERAL KATYAL: Well, I think if they

12   don't, Mr. Chief Justice, that underscores the problem

13   with their argument, because they are saying: Read the

14   contract precisely this way, to eliminate terminations

15   for default and convert them all into terminations for

16   convenience when the state-secrets privilege is being

17   invoked. And I agree with you. I think that would be a

18   very unusual contract for the government to get into.

19   That is what they're demanding here, and that's

20   strictly --

21   CHIEF JUSTICE ROBERTS: So how do they write

22   the contract? If they -- your answer can't be the only

23   way they can write it is a way that you'd never accept.

24   So how -- how do you contract around this problem?

25   GENERAL KATYAL: Well -- well, I think there

1   are other ways. There's the possibility that they may

2   demand extra money in exchange for greater risk. There

3   may be that there may be some alternative dispute

4   resolution mechanisms available. I don't know, but I

5   would -- I would --

6   CHIEF JUSTICE ROBERTS: This wouldn't be a

7   problem in an alternative dispute resolution because

8   that's not a court?

9   GENERAL KATYAL: Well, it might depend on --

10   you might have it within the military, you know, the

11   equivalent of that -- in the Tenet v. Doe, you might

12   have panels like the Helms panel. I'm not sure what the

13   precise contractual arrangements would be. I do think

14   that the need for this Court to be involved is a lot

15   lower than, say, in the criminal context of Reynolds,

16   because the government here is a repeat player with

17   these contractors. They're not in the business, as our

18   deferment agreement, I think, underscores of trying to

19   willy-nilly advance the state-secrets privilege to

20   undermine and take their money away.

21   Indeed, I think since the 2003 Federal

22   Circuit decision, there have only been a couple of

23   instances, at most, in which -- that I'm aware of in

24   which the government has invoked the state-secrets

25   privilege in any sort of contracting action, and nothing

1   like this superior knowledge thing. And since 2009, the

2   government, all together in civil court, has invoked the

3   state-secrets privilege a whopping two times, to -- to

4   my knowledge.

5   JUSTICE BREYER: So it isn't -- it isn't a

6   big practical problem. All right. Let me ask then, I

7   was -- misimpression. Would you go back to Justice

8   Kennedy's question for a minute? I'm -- I -- I don't

9   quite see -- if you would discuss it a little bit -- how

10   you do this as a matter of constitutional law, because

11   the Due Process Clause is tied to fundamental

12   unfairness, and I think the answer has to be in this

13   kind of circumstance, secret block or not, it depends.

14   It depends on many things.

15   So, would you write this as a matter of

16   constitutional law? Would it -- shouldn't it be written

17   as a matter of Federal common law of contracts?

18   Shouldn't it be written as an exposition of the superior

19   knowledge doctrine, which seems totally open to it?

20   And -- or shouldn't it be written as a matter of

21   discovery law, which is what the district judge who

22   ended up thinking -- the Court of Claims judge says,

23   gee, I don't really know.

24   I mean, that's how I read it. How would you

25   -- would you speak about this for a minute?

1   GENERAL KATYAL: Sure. Justice Breyer, I

2   think that due process is an ill-fitting concept in this

3   contractual dispute for a couple of reasons. Not just

4   can the sophisticated parties agree ahead of time to

5   other things, but also the whole notion of due process

6   in contracts is odd, because the government has waived

7   its sovereign immunity only since 1855. They don't have

8   any freestanding right to come in ab initio and claim

9   fundamental fairness on contracts. I think that is

10   implicit in the Constitution itself, that they don't

11   have that right.

12   And so, the question becomes, is there some

13   extra protection the courts should give here akin to the

14   one in Reynolds about criminal defendants in the

15   government using state-secrets information? And I think

16   the answer to that is "no," because parties can work

17   that out themselves ex ante.

18   And so, my answer to you is -- I think it

19   was option B -- to use the contract as the -- and

20   contractual interpretation as the basic rule for a

21   decision here. The contract itself specified -- and it

22   was done under the shadow of Reynolds and under the

23   shadow of -- of Totten that specified that they would

24   have to be the moving party. They would have to come in

25   and challenge the decision of the contracting officer --

1   JUSTICE KENNEDY: Well, in a whole law of

2   contracts, you could say, oh, the contracting parties

3   could have put this down, anticipatory breach, we don't

4   need to have rules on that, that the parties could have

5   negotiated that. That's not the way the contract law

6   works.

7   GENERAL KATYAL: Well, I do think that with

8   respect to this, in this -- you know,

9   thousands-and-thousands-of-page contract, I think that

10   this specific set of issues could have been worked out

11   in advance and, I do think, was worked out in advance.

12   They knew, going in, that they bore the burden of

13   walking into court, paying their attorneys, and

14   everything else, to challenge the decision of the

15   contracting officer. And they also knew at that moment

16   the government had an undoubted right to the

17   unliquidated progress payments.

18   The contract they signed distinguished

19   between liquidated progress payments, as to which the

20   government has no right, and unliquidated payments, as

21   to which default termination automatically gave that to

22   the government. And the argument they're advancing here

23   is, well, let's collapse those two; let's keep the $1.35

24   billion, because the government hasn't given it to us

25   yet.

1   JUSTICE SCALIA: Why is that unliquidated?

2   I didn't get the distinction between -- why is the 1.35

3   unliquidated?

4   GENERAL KATYAL: Because the contract

5   specified two payment streams. One is the work that

6   they had reviewed and understood and said -- the

7   government had said this is good work, we're going to

8   pay you for it; and other work which are claims that

9   they have made but they haven't actually been approved

10 by the government. And I think Mr. Phillips -- I don't

11 think that there's any sort of evidence that -- or

12 certainly nothing that the courts below found that says

13 that the -- that they had a right to the

14 unliquidated progress payments.

15   JUSTICE SCALIA: What's the other? What's

16 the -- what's the other 1.25 billion --

17   GENERAL KATYAL: The 1.2 --

18   JUSTICE SCALIA: -- that he's also asking

19 for?

20   GENERAL KATYAL: The 1.2 billion that he's

21 seeking on top of --

22   JUSTICE SCALIA: Right.

23   GENERAL KATYAL: -- keeping 1.35 billion, as

24 I understand it, is costs -- is extra costs incurred

25 under the contract above and beyond the $4.8 billion

1   that was in the initial contract.

2   JUSTICE SOTOMAYOR: General, do you have the

3   citation to that footnote you referred to in the -- the

4   605(b)? I can find it later, but --

5   GENERAL KATYAL: It's page 32, and I'd also

6   refer the Court to the court of appeals appendix page

7   19567, which is the page of the contract itself that

8   incorporates the provision. The provision is

9   FAR 52.233-1(h), and it says that -- it mandates

10   performance and compliance with the contract even when

11   there -- in the contracting officer's decision, even

12   when a decision is under appeal.

13   So it is not the case whatsoever that their

14   filing of this claim somehow vacated the contracting

15   officer's decision. The only way that will happen is if

16   this Federal Court reverses the Federal Circuit --

17   JUSTICE SOTOMAYOR: So your view is that --

18   GENERAL KATYAL: -- and grants them

19   affirmative --

20   JUSTICE SOTOMAYOR: -- that the complaint

21   did not stay their obligation to pay you; that provision

22   required them to pay you --

23   GENERAL KATYAL: That's correct.

24   JUSTICE SOTOMAYOR: -- the -- the

25   unliquidated sums?

 1   GENERAL KATYAL: That's right. At that

 2   moment they had to pay. They knew that, and they in

 3   fact sent a bank letter and so on -- this is Joint

 4   Appendix 329 -- saying please don't do that. And then

 5   we entered into a deferment agreement, but we have an

 6   absolute right to that money right now regardless of

 7   what -- we don't need an affirmative decision from this

 8   Court in order to get that money. We're asking the

 9   Court to simply stay its hand and follow the Hippocratic

10   principle of doing no harm in a world in which the --

11   the Court can't decide who's right and who's wrong.

12   JUSTICE GINSBURG: If that -- if you're

13   right about that, the government's absolute right, could

14   you withhold it from other contracts of these

15   contractors?

16   GENERAL KATYAL: That's absolutely right.

17   The -- the Federal rules and the Contract Disputes Act

18   provide us an offset so that we could -- we don't have

19   to actually seek the 1.35 billion from their coffers, as

20   he colorfully called it, "reaching into"; we can just

21   offset it against future contracts, and the Federal

22   courts would be out of the business altogether about

23   that 1.35 billion.

24   CHIEF JUSTICE ROBERTS: So you get the extra

25   money without having to go to court because then they'd

1   have to go to court and challenge your offset?

2   GENERAL KATYAL: And, again, Mr. Chief

3   Justice, that's the contract to which they signed.

4   Thank you.

5   CHIEF JUSTICE ROBERTS: Thank you, General.

6   Mr. Phillips, you have 3 minutes remaining.

7   REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

8   ON BEHALF OF THE PETITIONERS

9   MR. PHILLIPS: Thank you, Mr. Chief Justice.

10   Justice Kennedy, I think the answer to your

11   question is that this case can properly be decided on

12   Federal common law principles, and indeed I would ask

13   the Court to apply those same -- those contract

14   principles in this context to -- it's just on the Joint

15   Appendix on page 209.

16   General Katyal focuses on what happens when

17   the contracting officer takes some action. What he

18   leaves out is the following sentence: The contractor

19   shall have the right of appeal under the disputes clause

20   from any determination by the contracting officer.

21   And while the General spends an awful lot of

22   time talking about what do you do in the Article III

23   context, the Contracting Disputes Act specifically

24   allows to us go to a board of contract appeals, which is

25   not an Article III institution. And I guarantee you

1   that the government would be making exactly the same

2   argument if we had taken that particular route.

3   It seems to me the case ought not to be

4   decided on the basis of this kind of a technical

5   assessment. The case ought to be decided on the basis

6   of sort of where the rights are and what's the

7   fundamental change and who's making the shift in one

8   direction or the other.

9   And if you do that -- and Justice Ginsburg,

10   you specifically asked the question, am I asking for all

11   or nothing? No. I think there's no question you can

12   come up with a principled basis to adopt precisely the

13   principle that Justice Scalia pointed out, which is to

14   say we will stay our hand, we'll -- we will not uphold

15   the -- the contracting officer's decision, and therefore

16   we're not going to say there's a default --

17   JUSTICE GINSBURG: But you say --

18   MR. PHILLIPS: -- but we're not going to go

19   the extra mile and say it's a termination for

20   convenience. The Court can certainly do that.

21   JUSTICE GINSBURG: So you are saying there

22   is another way? There's a middle way?

23   MR. PHILLIPS: There is a middle way.

24   There's no question about it. All I was saying in

25   response to Justice Scalia's question was, you know --

1   JUSTICE SOTOMAYOR: On what principle of

2   law?

3   MR. PHILLIPS: On the principle of law that

4   if you don't have a contract for default, then there's

5   no basis for -- and we're not going to do any more than

6   that; we can't decide who's right and who's wrong, and

7   therefore we're not going to enforce the contracting

8   officer's decision, or we're not going to do anything

9   more than this. We're going to leave the status quo

10   ante, which means before the contracting officer

11   declared that there was a default under these

12   circumstances.

13   JUSTICE SCALIA: It's the "go away"

14   principle of our jurisprudence, right?

15   (Laughter.)

16   MR. PHILLIPS: I actually get that a lot,

17   Justice Scalia.

18   JUSTICE KAGAN: Mr. Phillips, I understood

19   your papers as making only a constitutional claim.

20   MR. PHILLIPS: No. I don't read that,

21   Justice Kagan. I mean, we -- we certainly have a due

22   process argument in there, but embedded in there as well

23   is -- are a number of references to Federal common law

24   principles as a -- as a -- obviously nonconstitutional

25   basis on which to rule in our favor.

1   And I -- I mean, I think the Court ought to

2   be informed in -- in making its determination about how

3   to interpret the contracting arrangement by the question

4   of whether this is fundamentally unfair and

5   unconscionable, obviously, but you would probably do

6   that as a matter of Federal common law principles in

7   trying to decide on the -- on contracting principles or

8   not.

9   At the end of the day, Your Honors, this has

10 been fundamentally unfair, and we would ask for the

11 Court to reverse.

12   CHIEF JUSTICE ROBERTS: Thank you, Mr.

13 Phillips, General.

14   The case is submitted.

15   (Whereupon, at 11:02 a.m., the case in the

16 above-entitled matter was submitted.)

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