

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 --
Alderson Reporting Company

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
Alderson Reporting Company

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 --
Alderson Reporting Company

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
 Alderson Reporting Company

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
 Alderson Reporting Company

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
Alderson Reporting Company

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
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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
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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
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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
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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
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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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