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No. 09-1298

IN THE
Supreme Court of the United States

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

**REPLY BRIEF ON PETITION FOR
WRIT OF CERTIORARI**

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INTRODUCTION

In 1988, the Navy entered into a multi-billion-dollar contract with General Dynamics and Boeing to develop and produce the A-12 Avenger, promising to give them access to the government's classified stealth technology. The Navy failed to deliver on that promise. But it recognized that this failure made the contractors' already-challenging task far more difficult – so it changed the original weight specification, disestablished the original schedule, and accepted the contractors' aircraft design.

In 1990, the Secretary of Defense canceled the A-12 program for political reasons, and the Navy had to terminate the contract against its will. The Navy chose to say the termination was based on a default, rather than acknowledging it was for the government's convenience. In upholding this choice, the Federal Circuit improperly deprived the contractors of the argument that the government's failure to deliver stealth technology was responsible for their performance problems, ignored the contracting officer's opposition to the termination, and changed the governing legal standard from one panel decision to another.

Arguing against review, the government says the contractors cannot complain about the state-secrets ruling because they are "plaintiffs." But that is a mere formality. The government was the "moving party" here, carrying the burden of justifying the default. As a result, based on decisions of this Court and other circuits, it was unconscionable for the government to eliminate the contractors' primary

defense while continuing to prosecute the default claim.

The government also argues the Federal Circuit was correct in upholding the default termination based on reasoning flatly inconsistent with the views of the contracting officer at the time. But the rule that the contracting officer must exercise discretion to choose a default termination, and that subsequent review must be limited to the factual bases on which the officer relied, is well established and based on statutory and regulatory requirements as well as principles of fairness reflected in administrative law. Those requirements are particularly important where the government is both decisionmaker and party to a dispute, seeking to effect a forfeiture and inflict other serious penalties.

Finally, the government is simply wrong to deny the circuit split over whether one panel can overrule a prior panel decision in the same case. The 2009 panel expressly recognized that it was changing the law, explaining that the 2003 panel decision was “clearly erroneous” or “manifest[ly] [un]just[]” – by which it apparently meant that the government would have to compensate the contractors for completed work. Pet. App. 27a n.4. Moreover, the government is incorrect that other circuits allow panels to overrule prior panel opinions.

The Federal Circuit’s rulings have grave consequences for the contractors, including a government demand for \$3 billion. They also have grave implications for all government contractors, for the government’s ability to obtain goods and services that are crucial to the Nation’s defense, and for the

stability and consistency of the law in a circuit whose docket affects a substantial part of the Nation's economy. This is a case of enormous significance, and this Court's guidance is therefore necessary.

ARGUMENT

1. The government does not dispute the principle, recognized by this Court in *Reynolds* and by the Fourth, Sixth, and D.C. Circuits, that when the government is the "moving party" it may not continue to pursue its case after invoking the state-secrets privilege to deprive the other party of a valid defense. *United States v. Reynolds*, 345 U.S. 1, 12 (1953). The government also does not deny that the default termination was a "government claim," Opp. 14, or that the contractors could have defeated that claim had the state-secrets privilege not barred them from relying on the government's failure to share its stealth technology.¹ The government's sole contention is that because it was formally denominated "defendant" in this case, despite carrying the burden of justifying the default termination, it was entitled to impose a massive forfeiture on the contractors by asserting the virtually unreviewable state-secrets privilege.

But the applicability of the *Reynolds* principle cannot turn on formalistic labels. *Reynolds* speaks of the "moving party," not the "plaintiff." *Reynolds*, 345 U.S. at 12. *Reynolds* was thus concerned not with nominal party designations but with whether the

¹ Given these facts, the contractors plainly do not advocate for a manipulable "[a]utomatic" rule that the government loses its claim once the state-secrets privilege is invoked, regardless of the validity and significance of the affected defense. Opp. 18.

government was pursuing a claim against another party, seeking to use the machinery of justice to enforce or uphold a sanction.

Here, there is no question that the government is the “moving party.” It issued a default termination decision that would become *final and enforceable* unless General Dynamics filed an action in court within one year. *See* 41 U.S.C. § 605(b). Once the action was filed, it was the government’s burden to justify the default. Therefore, while it is true that General Dynamics filed the first pleading, that was a formality, mandated by statute, which triggered the government’s obligation to prove its case. Pet. 16-17.

Although the government argues that this case is “far removed from a criminal prosecution,” Opp. 14, courts have repeatedly recognized that default is akin to criminal punishment: it is a “drastic sanction,” *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431 (1969), and a “species of forfeiture,” *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969), that is the “harshest punishment” the government can visit on a contractor, *Int’l Verbatim Reporters, Inc. v. United States*, 9 Cl. Ct. 710, 716-17 (1986). A defaulted contractor faces not only monetary losses but also substantial disadvantages in seeking future contracts, including potential “debar[ment].” *Malone v. United States*, 849 F.2d 1441, 1145 (Fed. Cir. 1988); *see* FAR 9.406-2(b)(1). In such a situation, the protections of *Reynolds*, and the due process clause, apply just as strongly as if individual liberty were at stake. *Cf. BMW v. Gore*, 517 U.S. 559, 585 (1996)

(“that [a party] is a large corporation . . . does not diminish its entitlement” to due process).

It is of no moment that the contractors had to support their affirmative defense of superior knowledge. Opp. 14-15. A defendant *always* bears the burden of proving an affirmative defense – yet the government acknowledges that a claim cannot go forward if a “defendant” is deprived of such a defense by the state-secrets privilege. Indeed, the government has often availed itself of this very rule in civil cases. Pet. 19-21. The governing principle is that the “moving party” in the litigation may not benefit from the invocation of the privilege – and that party here was the government, which retained the ultimate responsibility to justify the default termination. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987) (“ultimate burden of proof” on the issue of default remains with the government and never shifts “back and forth”). Put differently, if the parties had presented no evidence after the filing of the pleadings, the contractors would have prevailed.²

For all of these reasons, this case is entirely unlike a run-of-the-mill civil action against the government, Opp. 14, or a breach-of-contract action

² The government’s repeated references to the contractors’ superior-knowledge “claim” are therefore inaccurate. Opp. 6, 8-9, 12-19. When (at an early stage) the trial court rejected the government’s default claim and converted the termination to one for convenience, the superior-knowledge issue was relevant as one factor in the contractors’ quantum of recovery – the scenario to which a number of the government’s record citations refer. Opp. 7, 17-18. The only relevant “claim” in the case now, however, is the government’s claim for default.

against a private defendant who has terminated a contract, Opp. 15. Such analogies ignore basic government-contracts law. In neither of the government's examples does the defendant hold an administrative judgment against the plaintiff – one that is “final and conclusive” unless the plaintiff brings it to court. 41 U.S.C. § 605(b). Neither of these examples involves a defendant who, once the action is filed, has the duty to move the case forward. Finally, in neither example has the defendant imposed a sanction with serious and ongoing consequences, including non-monetary ones. The “drastic sanction” of a default termination is nothing like a mere refusal to pay money, or a decision simply to terminate a contract. That is precisely why the law unambiguously characterizes *any* attempt to impose a default termination as a government claim, no matter who files the initial pleading. *Lisbon*, 828 F.2d at 764.³

Indeed, the fact that the government now demands \$3 billion from the contractors – money

³ For these same reasons, the government's hypothesized government-contracts suit, in which the contractor sues for withheld progress payments but the government never terminates for default, is entirely irrelevant. Opp. 15 n.5. That hypothetical is premised on the *absence* of the very sanction that always – whether or not the government seeks to recover money – amounts to an attack and a punishment. Similarly irrelevant is the government's comparison of this case to one in which an “evidentiary privilege[]” limits access to material. Opp. 16. The contractors here were not deprived of discrete evidence – they were barred from asserting a defense that they could have proved without resort to any privileged material, based merely on the government's unreviewable assertion that the defense would implicate “secret” topics.

that the contractors received for work they performed prior to termination – highlights the absurdity of the government’s position that the contractors are the real moving parties here. Attempting to brush this aside, the government insists that the contractors are “highly sophisticated entities that can protect themselves against undue risk.” Opp. 19. But this issue is a concern for all government contractors, who are governed by intricate regulations and cannot contract around the risk that the government will continue to pursue a default claim even after using the state-secrets privilege to preempt a key defense. Nor can they turn themselves into defendants, since the government is *always* the nominal defendant in the Court of Federal Claims. All they can do is refuse to enter into contracts involving classified technology.

That prospect has dire implications for the Nation’s security. In light of these concerns, and the “unconscionable” result reached by the Federal Circuit, this Court’s review is urgently needed.

2. The Federal Circuit’s decision also warrants review because it establishes a new standard under which a default termination can be upheld (1) even though the contracting officer did not exercise discretion and (2) based on factual justifications the contracting officer never articulated. Pet. 23-31. The combined effect is that the government can prevail based on a *post hoc* rationalization of a politically motivated decision.

The government does not address whether the contracting officer must exercise discretion, and does not disagree that (as the trial court found) the officer

here was *ordered* to terminate the contract. Pet. App. 97a-98a. Instead, the government contends it is always entitled to prove “that a default termination is justified based on any grounds available, regardless of whether those grounds were known at the time of termination.” Opp. 28.

That is incorrect. While the court reviewing a default termination is not bound by a contracting officer’s factual *findings*, Opp. 28, it cannot accept factual *bases* for the default wholly different from those on which the contracting officer relied. If it could, there would be no reason for Congress to have specifically required the officer to assess the contractor’s performance and state reasons for a termination in writing. Pet. 24-25; 41 U.S.C. § 605(a). There also would be no reason for the separate requirement that the government provide a contractor with an opportunity to cure *before* terminating for failure to “prosecute the work.” FAR 52.249-9(a)(1)(ii), (a)(2). The government ignores these requirements – but they have supplied the rule in the Federal Circuit for decades, permitting a court to accept or reject the contracting officer’s reasons *de novo*, but forbidding consideration of new reasons invented for litigation.

The cases cited by the government are not to the contrary. As the Petition notes, each involves a situation in which the *post hoc* reason for termination could not have been cured if raised earlier, and was therefore not subject to the cure-notice requirement. Pet. 25-26 & n.6. No such exception applies here, or in any case in which termination rests on an alleged failure to make

progress rather than (for example) a statutory violation, *see Kelso v. Kirk Bros.*, 16 F.3d 1173 (Fed. Cir. 1994), or fraud, *see Joseph Morton Co. v. United States*, 757 F.2d 1273 (Fed. Cir. 1985). Accordingly, if the Federal Circuit's decision stands, the cure-notice requirement and the other statutory and regulatory protections discussed in the Petition will become meaningless formalities. Pet. App. 80a (trial court finding that cure notice "was an item on the checklist," but that "[f]or all practical purposes, the decision to terminate had been made"); *id.* 174a-75a & n.90 (trial court statement that this case established contracting officer's role as "de minimis").

The government's fallback argument is that the question presented is academic because "the rationale on which the officer terminated the contract" was not "different in kind" from the rationale the Federal Circuit used to uphold the termination. Opp. 30. That is simply not true. The contracting officer admitted (and the trial court found) that he and his Navy superiors believed the contractors would fully satisfy the Navy's requirements for the aircraft. *See, e.g.*, Pet. App. 96a n.35, 98a n.40. Consequently, "the reasons [the contracting officer gave] for termination . . . resulted from directions of [the Secretary of Defense's] legal department," *id.* 99a, and reflected no analysis *by anyone* of "the merits" of the "plaintiffs' performance," *id.* 100a.⁴ Indeed, the termination

⁴ The government quotes after-the-fact trial testimony, Opp. 29-30, but ignores the trial court's ultimate factual findings as well

memo, which the government cites as evidence of “reasoned judgment,” Opp. 30, was simply copied wholesale from another Navy program in a last-minute rush, Pet. App. 99a-101a, 411a. And the grounds for default in the cure notice are different from the “alternative theory,” Pet. App. 29a, on which the default termination was ultimately sustained.⁵

Under the Federal Circuit’s decision, the requirements of a valid cure notice, an informed exercise of discretion involving consideration of specific factors, and a statement of reasons have all been rendered meaningless and no longer impose any check on the government’s power to inflict harsh sanctions. That will have devastating and far-reaching effects.

3. This Court’s review is also needed to establish a uniform rule regarding when (if ever) one circuit panel may overrule a prior panel in the same case. The government struggles to show that the panel decisions here were consistent, Opp. 22-23 – but the 2009 panel expressly acknowledged that its “current analysis” was “different from the one [it] previously instructed the trial court to perform,” Pet. App. 27a n.4. It could hardly have done otherwise, since the 2003 panel required the government to prove that

as evidence of what the contracting officer actually said and did at termination.

⁵ The reasons given in the cure notice were failure to “meet specification requirements” and “fabricate parts sufficient to permit final assembly.” Opp. 3. The trial court found that both reasons were invalid, and the government never challenged those findings. Pet. App. 55a-56a; *id.* at 79a n.26.

the contractors were failing to progress toward a specific completion date, and the 2009 panel abandoned that requirement. No “intervening” factual developments explain this change in course, Opp. 24, because there were none. Both the 2003 and 2009 panels identified certain facts as relevant, Opp. 23-24, but each thought they were relevant to a different legal question.

The 2009 panel decision therefore gives rise to a clear conflict with other courts of appeals, which bar one panel from overruling another simply because the later panel thinks the earlier one erred. Pet. 33-34. The government tries to paper over the conflict, but primarily relies on cases that have nothing to do with the interaction of appellate panels. *See Arizona v. California*, 460 U.S. 605, 618-19 (1983) (addressing whether this Court is bound by its earlier rulings); *City Pub. Serv. Bd. v. General Elec. Co.*, 935 F.2d 78, 82 (5th Cir. 1991) (considering whether district court correctly barred a claim the court of appeals had held foreclosed); *EEOC v. United Ass’n of Journeymen & Apprentices*, 235 F.3d 244, 249-50 & n.1 (6th Cir. 2000) (addressing whether district court is bound by its earlier rulings); *Johnson v. Champion*, 288 F.3d 1215, 1226 (10th Cir. 2002) (same).⁶ It also cites several cases that actually articulate the rule advocated by Petitioner. *See Maxfield v. Cintas Corp.*, 487 F.3d 1132, 1135 (8th Cir. 2007) (“one

⁶ Equally inapposite are *Mendenhall v. NTSB*, 213 F.3d 464 (9th Cir. 2000), which was decided ten years *before* the Ninth Circuit case on which Petitioner relies, Pet. 34, and which dealt with a panel lacking statutory authority to act, and *Murphy v. FDIC*, 208 F.3d 959 (11th Cir. 2000), which considered whether a transferor court’s rulings bind a transferee court.

panel of this court has no authority to overrule an earlier decision of another panel”); *United States v. Thomas*, 572 F.3d 945, 948 (D.C. Cir. 2009); *cf. United States v. Wallace*, 573 F.3d 82, 89 (1st Cir. 2009) (refusing to overrule earlier panel decision).

In short, the conflict among the circuits is clear. The Federal Circuit’s ruling therefore does not, as the government suggests, create merely an “internal difficult[y].” Opp. 25. Rather, it means that litigants in the contractors’ position will lose in the Federal Circuit even though they would prevail elsewhere. It also undermines the stability of the law in a circuit where stability is exceedingly important. And it deprives the contractors of *billions* of dollars they would otherwise have received, even though neither the Federal Circuit nor the government has ever identified any actual error or injustice here. This Court should step in to ensure uniformity of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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