GENERAL DYNAMICS CORPORATION, PETITIONER, v. UNITED STATES, THE BOEING COMPANY, SUCCESSOR TO McDONNELL DOUGLAS CORPORATION, PETITIONER v. UNITED STATES

SUPREME COURT OF THE UNITED STATES

131 S. Ct. 1900; 179 L. Ed. 2d 957; 2011 U.S. LEXIS 3830; 22 Fla. L. Weekly Fed. S 1016

January 18, 2011, Argued

May 23, 2011, Decided \* \* Together with No. 09-1302, Boeing Co., Successor to McDonnell Douglas Corp. v. United States, also on certiorari to the same court.

PROCEDURAL POSTURE: Petitioner contractors sued appellee, the United States of America, challenging the government's termination of a contract to build stealth aircraft. The U.S. Court of Federal Claims (CFC) awarded the contractors recovery. The U.S. Court of Appeals for the Federal Circuit reversed. On a second remand, the CFC again found in favor of the contractors. The appellate court affirmed, and certiorari was granted to review the state-secrets holding.

JUSTICE SCALIA delivered the opinion of the Court.

We consider what remedy is proper when, to protect state secrets, a court dismisses a Government contractor's prima facie valid affirmative defense to the Government's allegations of contractual breach.

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In *Totten* v. *United States*, 92 U.S. 105, 23 L. Ed. 605 (1876), the administrator of a self-styled Civil War spy's estate brought a breach-of-contract suit against the United States. He alleged that his testator had entered into a contract with President Lincoln to spy on the Confederacy in exchange for $200 a month. After the war ended, the United States reimbursed expenses but did not pay the monthly salary. We recognized that the estate had a potentially valid breach-of-contract claim but dismissed the suit. The contract was for "a secret service," and litigating the details of that service would risk exposing secret operations and other clandestine operatives "to the serious detriment of the public." *Id.,* at 106-107, 23 L. Ed. 605. "[P]ublic policy," we held, "forbids the maintenance of any suit . . . the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Id.,* at 107, 23 L. Ed. 605.

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We think a similar situation obtains here, and that the same consequence should follow. Where liability depends upon the validity of a plausible superior-knowledge defense, and when full litigation of that defense "would inevitably lead to the disclosure of" state secrets, *Totten*, *supra*, at 107, 23 L. Ed. 605, neither party can obtain judicial relief. As the CFC concluded, that is the situation here. Disclosure of state secrets occurred twice before the CFC terminated discovery. See 37 Fed. Cl., at 277-278. Every document request or question to a witness would risk further disclosure, since both sides have an incentive to probe up to the boundaries of state secrets. State secrets can also be indirectly disclosed. Each assertion of the privilege can provide another clue about the Government's covert programs or capabilities. See *Fitzgerald* v. *Penthouse International, Ltd.*, 776 F.2d 1236, 1243, and n. 10 (CA4 1985). For instance, the fact that the Government had to continue asserting the privilege after granting petitioners access to B-2 and F-117A program information suggests it had other, possibly covert stealth programs in the 1980's and early 1990's.

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We leave the parties where they are. As in *Totten*, see 92 U.S., at 106, 23 L. Ed. 605, our refusal to enforce this contract captures what the *ex ante* expectations of the parties were or reasonably ought to have been. Both parties "must have understood," *ibid.*, that state secrets would prevent courts from resolving many possible disputes under the A-12 agreement. The Government asked petitioners to develop an aircraft the design, materials, and manufacturing process for which would be closely guarded military secrets. . . . . The contract itself was a classified document at one point. . . . . Both parties -- the Government no less than petitioners -- must have assumed the risk that state secrets would prevent the adjudication of claims of inadequate performance.