Chapter 13

LITIGATING STATE SECRETS IN GOVERNMENT CONTRACT PERFORMANCE DISPUTES

Joshua I. Schwartz

INTRODUCTION

On May 23, 2011, the Supreme Court of the United States handed down its decision in *General Dynamics Corp.* v. *United States* concerning what is known in United States law as "the state secrets privilege" (*General Dynamics*, 2011). The Court's unanimous opinion warrants the close attention of government procurement lawyers and practitioners, both in the United States, and throughout the international public procurement community.

General Dynamics vividly displays the tension that exists between two fundamental objectives of procurement public policy: The first is the need to establish and maintain independent and transparent procedures for determination of disputes arising out of the performance of government contracts (Schooner, 2002). The second is the need to maintain the security of important technical information the release of which would undermine national security.

The tension between these desiderata is one of the reasons that many public procurement regimes have exempted government defense procurement from the ambit of public procurement laws (Schwartz, 2004). However, because the United States has historically been a strong exception to that tendency, the efforts of its highest Court to reconcile these two desiderata are of particular interest for the study of procurement in comparative perspective (Schwartz, 2004). Moreover, with the globalization of government

procurement and the regulation thereof, the effort to reach an equitable balance between these two objectives is of increasing importance for advanced industrial societies globally. Witness, for instance, the end of the exemption of defense procurement from the reach of EU procurement regulation with the adoption of the EU Defense Directive (EU Defence Directive, 2009).

Seeking to accommodate these two opposing concerns, the U.S. Supreme Court held that when a valid claim is raised that litigation will expose secret information, neither the government nor the contractor can recover any damages. In such circumstances the court hearing the case is to leave the parties as they were at the moment the contract was terminated. This paper challenges the Court's belief that this establishes a fair general approach to this kind of problem. Rather, the Court's approach runs a significant risk of producing arbitrary results, and inequitable differences in the outcomes of functionally similar cases. This study further challenges the Court's assumption that knowledgeable parties will be able to effectively, fairly and efficiently "contract around" the default regime the case establishes. Indeed, were that assumption correct, this practice might exacerbate inequities between experienced and less experienced government contractors, and thus serve as an additional barrier to entry inhibiting competition to serve the government's needs in areas of sensitive technology. In addition, as this paper will show, the judgment of the Supreme Court of the United States in *General Dynamics* failed to achieve the Court's explicit aspiration to put an end to an extremely protracted and expensive litigation while doing so on terms the Court considered equitable.

Each of these conclusions suggests important lessons concerning the difficulty that generalist courts experience in mastering the complexities of public procurement processes. Especially difficult is the problem of creating a fair mechanism for genuinely independent determination of disputes arising out of contracts whose performance entails the extensive use of highly classified and important technical information. The United States' model and its experience offers some guidance regarding best practices that other nations should consider, including the value of a hybrid approach using specialized courts subject ultimately to review in a generalist supreme court.

The Importance and the Visibility of the Case

The Supreme Court's May 2011 decision received a substantial amount of press attention, at least in the United States, for diverse reasons practical, political and legal (Liptak, 2011a; Lithwick, 2011). The dispute in the case had become notorious, in part simply because the case had been in litigation for a remarkable amount of time—twenty years.[1] Moreover, it received special attention because of the enormous amount of money that depended on the resolution of a single government contracts dispute — roughly $2.5 billion. Without completion of a single prototype aircraft that met contractual specifications $3.88 billion had been spent under the contract. The lawyers' fees involved are also staggering: four years into this 20+ year course of litigation they were already a quarter of a billion dollars (Vartabedian, 1994) and they have continued to accrue at a similar pace ever since. Furthermore, the decision garnered extra attention because the Supreme Court dramatically essayed-- but ultimately failed--to achieve a Solomonic resolution that would at long last put an end to the protracted litigation on terms that roughly split the difference between the opposing positions of the government and its terminated contractor.

In addition to these considerations, the decision was eagerly awaited—both in the United States and in human rights law circles elsewhere—because of the significance of the state secrets privilege in cases arising out of the so-called "war on terror." In the wake of the terrorist attacks on the United States of September 11, 2001, the United States would repeatedly invoke the same state secrets privilege doctrine that came to the fore in *General Dynamics*, in defending civil litigation that sought damages for the aggressive tactics used by the United States on alleged enemy combatants in the "war on terror." That litigation included cases challenging the practices of "extraordinary rendition," and "enhanced interrogation," both of which implicated the United States, directly or indirectly, in practices alleged to constitute torture in violation of the norms of international law (Morrison, 2009; Schwinn, 2011).[2] Indeed, to the informed lay observer and to most lawyers in the United States, the label state secrets privilege evoked the "war on terror" cases, not a government contracts dispute about the termination of a high technology contract (Lithwick, 2011; Morrison, 2009). The legal and political conundrums raised by the effort to maintain legitimate state

secrets while maintaining the integrity and transparency of civil and criminal justice systems continue to be of pressing current interest -- as is witnessed by the ongoing controversy in the United Kingdom about a government-proposed extension of the use of "closed material procedures" in terrorism cases ("Spies, Lies and the Internet," 2012; Ambinder, 2012).

Another reason that *General Dynamics* got so much attention – in informed public law circles in the United States – is that the rationale and integrity of a key predecessor precedent, *United States* v. *Reynolds,*[3] a 1953 decision of the Supreme Court of the United States, had been dramatically impugned in the interim, by a striking piece of investigative journalism (Siegel, 2008). That investigative journalism and other retrospective examinations of the *Reynolds* case and its legacy gave reason for concern that the state secrets privilege was too often used in a fashion that cloaked governmental conduct that was embarrassing or illegal or both, without any credible judicial determination that important and legitimate secrecy interests of the United States were implicated (Siegel, 2008; Fisher, 2006).

The dubious provenance of the state secrets doctrine in the Supreme Court may explain explicit language in the Court's opinion about the nature of the secrets involved. Indeed, that language ties the Supreme Court's *General Dynamics* opinion in quite a different fashion to the "war on terror." The language included in Justice Scalia's opinion about the particular secrets at stake in the case almost certainly would not have been included but for the fact that, shortly before the release of the opinion, the United States had successfully caught and killed Osama Bin Laden. In the process of doing that, because one of the helicopters used by the United States crashed, because an eye witness reported the remarkable fact that he could not hear the helicopters approaching, and because photographs of the helicopter wreckage clearly revealed a previously unknown tail assembly design, one of the crown jewel state secrets of the United States–the existence of a stealth helicopter design that incorporated sound suppression technology--was divulged to the world.[4] And it was that event, which permitted Justice Scalia—who ordinarily is extraordinarily deferential to national security and official secrecy prerogatives asserted by the Executive Branch,[5] effectively to acknowledge in his opinion in *General Dynamics* the existence (in the late 1980s and early 1990s) of ultra-secret U. S. government stealth

technology programs the existence of which was not then publicly known. Once that secret came out in the course of killing Bin Laden, on May 2, 2011, Justice Scalia presumably felt free, just three weeks later, to specify the strong secrecy interests that were at stake in the A-12 litigation, rather than settle for the pro forma invocation of secrecy which appears to have sufficed in *Reynolds*. He stated:

> For instance, the fact that the Government had to continue asserting the [state secrets] privilege after granting [the contractors] 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. (*General Dynamics*, 2011, 131 S. Ct. at 1907).

Instead of settling for a bland statement that the Court was satisfied, based on a review of the record of the case, that the invocation of the state secrets privilege was justified, the Court tacitly acknowledged the existence of what theretofore had been undisclosed U.S. stealth technology programs.

THE A-12 CONTRACT AND THE RESULTING LITIGATION: TWENTY ONE YEARS AND COUNTING . . .

The Contract, the Default and the Default Termination

Notwithstanding its formal caption, the case that became *General Dynamics* in the Supreme Court is almost universally known among practitioners of public procurement law in the United States as "the A-12 case." A-12 was the designation of the "Avenger II," which would have been -- had the contract been performed sucessfully to completion -- a carrier-based stealth aircraft, the United States' Navy's first (Schwartz, 2001, pp. 154-157).[6] Accordingly, the effort to perform the A-12 contract significantly pushed the envelope of existing capabilities and drew particularly heavily on the United States' most sensitive technical secrets. The A-12 case is also the most notorious piece of government contracts litigation in the history of the United States. Arising from a contract awarded in 1988, the case has been in litigation continuously since 1991, and the end is not yet in sight.

The A-12 contract was entered in 1988. As I have explained:

> The contract entered was a fixed-price contract with incentive features, providing for installment payments and requiring the [team of] contractors to produce a series of eight progressively more capable developmental models with the final one to serve as the basis for the production model. The contract price was well in excess of $4 billion. (Schwartz, 2001, p. 155).[7]

Because of the secrecy and complexity of the technology involved, it is particularly difficult for a non-expert (such as the author) to appreciate the technological reach that performance of the contract would have entailed. Nonetheless a sense of the difficulty of performance may easily be inferred from the Supreme's Court's phlegmatic explanation that

> The A-12 proved unexpectedly difficult to design and manufacture, and by December 1990, [the contractors] were almost two years behind schedule and spending $120 to $150 million each month to develop the A-12 (*General Dynamics*, 2011, 131 S. Ct. at 1903).

In less than three years the contract performance had fallen two years behind schedule.

The Navy reluctantly concluded that these performance shortcomings were intractable and far from temporary (Schwartz, 2001). Accordingly, in January 1991, in consultation with then-Secretary of Defense Dick Cheney, the United States Navy's responsible contracting officer terminated the A-12 contract for default because of the contractors' failure to meet contractual requirements.[8] The government sought repayment of $1.35 billion of the progress payments it had made to the contractors. This was the amount that had already been paid that was in excess of the sum earned for stages of work that had been accepted by the government; this was slightly more than half of the total of $2.68 billion that had been paid out to the contractors. The team of contractors sued, challenging the default termination, both resisting the government's attempted recoupment, and seeking damages for themselves of at least another $1.2 billion. Hence $2.5 billion, at least, is at stake in the litigation.

The Decisions of the Lower Courts in the A-12 Case

After many years of intervening litigation on a host of other issues, the lower U.S. federal courts ultimately determined that the team of contractors was properly held to be in default and the default termination was upheld. However, relying on established precedent of the United States Court of Appeals for the Federal Circuit (*still* never passed upon by the Supreme Court of the United States), the lower courts also determined that the United States had a duty not to mislead its contractors by withholding "superior knowledge," that it may have had of difficult-to-obtain information "vital" to successful contract performance. Contention ensued about the merits of this "superior knowledge" defense, raised by the contractors (*General Dynamics*, 2011, 131 S. Ct. at 1904, 1907, 1908).[9]

In the course of efforts to assess that superior knowledge defense, a dispute (that ultimately led to the Supreme Court's 2011 decision) developed concerning allowing the contractors' counsel access to certain specific highly classified information. Discovery proceedings at least twice resulted in inadvertent disclosure to counsel of "military secrets that neither side's litigation team was authorized to know" (*General Dynamics*, 2011, 131 S. Ct. at 1904). Ultimately, the responsible Department of Defense official, Acting Secretary of the Air Force, Merrill McPeak, filed a formal invocation of what is known as the state secrets privilege. By that document, the government asserted that any further discovery proceedings--even to explore the existence and extent of the government's alleged unshared "superior knowledge"--would "'pose unacceptable risks of disclosure of classified, special access information' . . . including the potential disclosure of covert Government programs" (*General Dynamics*, 2011, 131 S. Ct. at 1904 (quoting the McPeak declaration)).

The ensuing rounds of litigation centered on a debate as to the procedural consequences of the invocation of the state secrets privilege. The existence of that privilege had been recognized in previous Supreme Court cases without precisely delineating its boundaries or its key procedural ramifications.

The trial court, the United States Court of Federal Claims, terminated all further discovery into the question of the U.S. government's superior knowledge. That court ultimately concluded, moreover, that the invocation of the state secrets privilege barred the

application of the contractors' superior knowledge defense, but did not bar the assertion of the government's claim to recoup progress payments because of the contractors' default.[10] The United States Court of Appeals for the Federal Circuit affirmed in relevant respects.[11] That is the posture in which the issue reached the Supreme Court of the United States in 2011. The issue that the Supreme Court agreed to decide concerned only the procedural consequences of the government's invocation of the state secrets privilege. Specifically, the Court considered the contractors' argument that if they were barred from raising the "superior knowledge" defense and pursuing damages against the government, the government, in turn, could not pursue recoupment of unearned progress payments from the contractors.

The Supreme Court's *General Dynamics* Decision

In *General Dynamics* the Supreme Court reaffirmed its strong support for state secrets privilege: "We have recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets." Equally importantly, however, the Court generally agreed with the contractors about the consequences of the government's assertion of a state secrets privilege to bar the contractors' proffered superior knowledge defense. Specifically, the Court ruled that, assuming (without deciding) that the government was bound to share its superior knowledge in the circumstances of this case, the courts were obliged to "leave [all of] the parties where they stood when they knocked on the courthouse door" (*General Dynamics*, 2011, 131 S. Ct. at 1905, 1907).

Moreover, in the Court's view, this meant both that the government could not recover the unearned progress payments that had been made to the contractor that it had sought to recoup, and that the contractors could not recover any of the damages they sought to recover (*General Dynamics*, 2011, 131 S. Ct. at 1908-1909). The contract was analogized to an unenforceable agreement, in the face of which, the Court explained, a court must, under traditional common law doctrines, "'simply leave both parties as it finds them, even though this may result in one of them retaining a benefit that he has received as a result of the transaction'" (*General*

Dynamics, 2011, 131 S. Ct. at 1907, quoting 2 *Restatement of Contracts*, § 197, Comment a, p. 71 (1979)).

And what of the as yet untested assumption that the government was in fact obliged to share any superior knowledge with the contractors and that its failure to do so could therefore excuse the contractors default in performance? Under the Court's *General Dynamics* decision that issue will now be critical to the ultimate outcome of the A-12 contract dispute. Whether the government was obliged to share its alleged superior knowledge in the special and particular circumstances of this case remains the central issue open in proceedings on remand, as is explained below.

Despite suggestions to the contrary prominent in the news coverage of both the oral argument and the decision in *General Dynamics* (Liptak, 2011a; Liptak, 2011b; Lithwick, 2011), it is inaccurate to claim that the Supreme Court has brought an end to this long-running lawsuit. The Solomonic "compromise" resolution in which each party keeps the money it has and owes none to the other –highlighted by the Court—is not necessarily the final resolution of this dispute. Rather, the arguments open to the government on remand, if successful, would destroy the basis for the contractors' superior knowledge defense. Moreover, the government may be able to do so without crossing the line into invocation of state secrets. Thus while the contractors have been denied their claims for damages on the merits, the government may yet recover its payments for unsuccessful work. Of course, it is also still possible that these government arguments will fail, or that the courts will find these remaining contentions cannot even be decided without infringing state secrets, or that the parties will, even at this late date, finally settle their dispute.[12]

ANALYSIS AND COMMENTARY

Common Law Remedies and Procedures Governing Litigation of Secret Information in Government Contracts Settings: *Totten, Tenet* and the Dubious Legacy of *Reynolds*

To understand the implications of *General Dynamics* for future government contracts state secrets cases as well as to appreciate its precedential significance for "war on terror"-related tort and constitutional litigation, it is important to trace the *General Dynamics*

Court's path through the competing and ambiguous precedents available to it. Significantly, the Court declined to view the application of the state secrets privilege to the case as controlled by *United States v. Reynolds,*[13] on which the government, the courts below and even the contractors had relied (*General Dynamics*, 2011, 131 S. Ct. at 1905-1906). Instead the Court relied on two precedents, *Totten*[14] and *Tenet*[15] involving contracts for the performance of espionage for the United States government.

Totten and *Tenet*

Totten and *Tenet* establish that a lawsuit may not be maintained to enforce a "covert espionage agreement[]" (*General Dynamics*, 2011, 131 S. Ct. at 1906). They further establish, the Court concluded, a remedial principle that when legitimate secrecy interests prevent litigation of a central issue in litigation, "we leave the parties . . . where we found them the day they filed suit" (*General Dynamics*, 2011, 131 S. Ct. at 1906). One might have thought that the A-12 government contract was easily distinguishable from those in *Totten* and *Tenet* for those cases arose out of contracts to perform espionage. Accordingly, the very existence of the contracts and the entirety of the performance was secret. By contrast, in the A-12 case, at least by the time a dispute arose, the existence of the contract was not a secret, though much of the technical information needed to perform it, and, likely, some of the terms of the contract, still were very much secret. Nonetheless, it was the principle derived from *Totten*, an espionage contract case, that the Court adapted to the cutting-edge technology contract situation in *General Dynamics*.

Even then, the Court had to resolve a sharp disagreement as to what it meant *to leave the parties where they were at the start of the litigation*. The government argued that this meant that its contract administration, including the determination that the contractor was in default, should stand. On this view, the government would be entitled to its recoupment of the unearned progress payments made; only the contractors' effort to secure additional compensation (on the theory that the default termination was wrongful) would be barred. The Court concluded, however, that maintaining the status quo at the time of the filing of the lawsuit meant to leave the parties where they stood "with regard to possession of funds and property" so that both the government's efforts at recoupment and the contractors' request

for damages for wrongful termination would be barred. (*General Dynamics*, 2011, 131 S. Ct. at 1908.)

Despite the considerable extension of precedent entailed in relying on *Totten* and *Tenet* in the A-12 case*,* the Court concluded that these were the most apposite precedents. It took this view because it perceived the central issue in *General Dynamics* to be the federal courts' "common law authority to fashion contractual remedies in Government-contracting disputes." *Reynolds*, on which the government had relied, by contrast, was in the Court's view, focused on evidentiary rules (and the related rules that govern production of documents in the process known as discovery.) (*General Dynamics*, 2011, 131 S. Ct. at 1906).[16]

Reynolds

In *Reynolds, the* Supreme Court had applied the state secrets privilege to bar, at the government's request, a request for government documents in a tort –injury-- lawsuit brought by the dependents of civilian contractor employees who had died in a crash of a B-29 bomber in 1946. As Barry Siegel has explained in his damning account of the *Reynolds* case, *Claim of Privilege,* on that ill-fated plane flight, the Air Force and the contractor's personnel were testing a prototype of an automated system for precise automated control of delivery, through manned aircraft, of bombs and missiles to predesignated targets (Siegel, 2008).

In their *Reynolds* lawsuit, the contractor employee dependents had sought disclosure and release to their lawyers of the Air Force's accident investigation report on the crash. The Court upheld, however, the government's invocation of the state secrets evidentiary privilege, which it labeled "well-established" (*Reynolds*, 1953, 345 U.S. at 7), so as to deny the plaintiffs' request to compel production of the accident investigation report.[17] Significantly, moreover, in *Reynolds*, the Court upheld the withholding of the accident investigation report without examining the report itself, acknowledging, however, that a court in this situation has discretion to decide whether to review for itself the evidence the government seeks to withhold (*Reynolds*, 1953, 345 U.S. at 9-11).

It was only Siegel's investigative reporting that made it clear to a general legal public that there had been a most tenuous basis for the invocation of the state secrets privilege in *Reynolds*. Siegel

presented a strong case that the Air Force had withheld its accident investigation report because it was embarrassing, demonstrating pervasive negligence in the maintenance and operation of the aircraft that crashed (Siegel, 2008). When the actual accident report on the B-29 crash was ultimately released in 1996, it strongly validated the suggestion of the *Reynolds* plaintiffs' counsel that the government's "violent objection to producing it naturally makes one suspicious that it may contains some conclusions very unfavorable to the Government's case" in the pending tort liability suit (Siegel, 2008).[18]

In *Reynolds* the Court initially articulated a qualified position as to the procedure to be followed when a claim of state secrets privilege is formally asserted by the responsible executive branch official:

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers (*Reynolds,* 1953, 345 U.S. at 9-10).

Ultimately, however, the *Reynolds* Court's 1953 decision broadly endorsed the government's bald assertion that national security-sensitive information was at stake, using language that clearly reflects the impact of the strong Cold War tensions then prevailing:

> In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past war has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests. On the record before the trial court it appeared that this accident occurred to a military plane which

> had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission (*Reynolds*, 1953, 345 U.S. at 10).

Based on this assessment of the grounds for invocation of the state secrets privilege, the Supreme Court concluded in *Reynolds* that, once the Secretary of the Air Force made the formal claim of privilege, asserting "a reasonable possibility that military secrets were involved," it was appropriate to deny the request to compel release of the accident investigation report*, without any court ever examining that report* (*Reynolds*, 1953, 345 U.S. at 11).[19]

Based on his exhaustive reporting and reconstruction of the sequence of events and the contents of the documents, Siegel was thus able to make a strong case that the Supreme Court in *Reynolds* had been deceived by misleading government representations into believing that national security information was contained in the accident investigation report, when all that was there was embarrassing evidence of Air Force negligence. Moreover, the Court had done so without examining the key accident investigation report when examination of the report apparently would have undermined the Court's assumption that military secrets were at stake (Siegel, 2008).

It is this background that suggests the Supreme Court was manipulated, or even deceived outright, in *Reynolds*, that supports the inference that the Supreme Court in *General Dynamics* felt especially pressed to establish the legitimacy of the government's assertion of the state secrets privilege. Moreover, this may well explain why Justice Scalia, writing for the Court, reached out to make an attention-getting assertion referencing the super-secret stealth technology development programs that became public only with the killing of Osama Bin Laden.

One more aspect of *Reynolds* must be considered to fully appreciate the Supreme Court's ruling in *General Dynamics* as to the effect on each of the parties of the government's invocation of the state secrets privilege. Recall that the lower federal courts had ruled in the A-12 case that the state secrets privilege barred the contractors' superior knowledge defense, but did not bar the government's claim to recover unearned progress payments that had

been paid to the contractors (see, above, page 7). The Supreme Court noted in *General Dynamics* (131 S. Ct. at 1906) that both the contractors (in their briefs) and the court of appeals (in its opinion) invoked the selfsame passage from *Reynolds* in support of their opposing positions on this issue. The passage from *Reynolds* in question is indeed so delphic as to be amenable to citation on both sides of this issue and, accordingly, bears closer examination.

In *Reynolds* (as described above at pages 12-13 and note 19) the Supreme Court had concluded that that the plaintiffs there had not shown sufficient necessity to require judicial examination of the government's accident report before ruling on the state secrets privilege invoked there. The Court then tacked on the following cryptic paragraph—which stands as the closing passage of its opinion:

> [Plaintiffs] have cited to us those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal justice cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented (*Reynolds*, 1953, 345 U.S. at 12; footnote omitted).

The plaintiffs' argument, rejected in *Reynolds,* was, in effect, that if the government were allowed to withhold the accident investigation report, it must forego the right to deny that it showed negligence as the cause of the contractor employees' deaths.

Invoking the language quoted above, the court of appeals in *General Dynamics* reasoned that *Reynolds* had already rejected the claim, made by the contractors in the A-12 case, that the state secrets privilege must operate as a two-edged sword, barring both the government and the private party from using the courts to alter the *status quo ante* (*McDonnell Douglas Corp.*, 2003, 323 F.3d at 1023). On the other hand, the A-12 contractors argued that they were not in the situation of the plaintiffs in *Reynolds*—purely claimants against the government, and, correlatively, that the government here (unlike *Reynolds*) was not in a purely defensive posture. Instead, the

contractors argued that in the A-12 litigation each party sought relief from the other. Accordingly, the contractors reasoned, the situation in the A-12 case *should* be analogized to the criminal prosecution in which both parties should be denied judicial relief (Brief for the Petitioner, *General Dynamics*, 2010, at 27-39).

In relying on *Totten* rather than *Reynolds*, the *General Dynamics* Court attempted, formally speaking, to sidestep this dispute about what it called the *Reynolds* dictum. The practical result of the Court's ruling, however, was the same as siding with the contractors on this issue. The difference in rationale, however, which could prove significant in future cases, is that the Court positioned its decision as the exercise of "common-law authority to fashion contractual remedies in Government-contracting disputes" (*General Dynamics*, 2011, 131 S. Ct. at 1906).

It thus was able to emphasize that the rule laid down was sufficiently fact-dependent as to allow "further refinement"–presumably to allow it to be distinguished—"where relevant factors significantly different from those before us here counsel a different outcome" (*General Dynamics*, 2011, 131 S. Ct. at 1909). In addition, as explained below (page 21) the Court explained that, as experienced "repeat players," many defense contractors would be able to contract around the default rule established by the case. The Supreme Court thus sought in *General Dynamics* to establish a default regime of remedies and procedures for the guidance of contractors and the government in future contracting, and for the guidance of courts entertaining future state secrets cases. At the same time the Court sought to reserve flexibility for the contracting parties to adjust this regime by advance agreement and to allow future courts to deal with the equities of future cases. Some potential limitations and pitfalls of this approach are addressed below.

The Court's "Equitable" Resolution in *General Dynamics* is No Resolution at All

Although the only issue that it had agreed to decide concerned the contractors' effort to bar the government's damage claim, an issue on which it had ruled for the contractors, the Supreme Court made clear that it saw this result as an equitable compromise resolution of the case viewed as a whole. Justice Scalia proclaimed

that "[n]either side will be entirely happy with the resolution we reach today" (*General Dynamics*, 2011, 131 S. Ct. at 1908).[20] He described the "impact of our ruling on these particular cases" as "produc[ing] rough, very rough, equity" (*General Dynamics*, 2011, 131 S. Ct. at 1909).

The triumphal claim of attaining closure sounded in the Court's opinion was noted even by contemporaneous observers at the time of the oral argument in the case (Lithwick, 2011; Liptak, 2011a). It certainly was recognized in press coverage of the Supreme Court's ultimate opinion issued on May 23, 2011 (Liptak, 2011b; Weisberger, 2011). Careful readers of the Court's opinion's penultimate substantive paragraph could see clearly, however, that this was not, in fact, the end of the litigation in this protracted dispute. The Court explained that all of its analysis had simply assumed without deciding the validity and applicability of the superior knowledge defense that the contractors had invoked. Although the government had never specifically challenged the general soundness of that doctrine—which had been established only in earlier decisions of the Federal Circuit—the government had, in the A-12 case, much earlier asserted two bases for contesting the application of the doctrine in the particular circumstances. Those arguments, which have never been decided by the lower courts, remain open to the government. Those arguments are

- First, that any such government duty to share its "superior knowledge" with a contractor does not extend to especially highly classified information of the kind involved in this case, and
- Second, that any such implied duty does not apply when the underlying contract specifically identifies information that must be shared and the information the contractor subsequently claims in litigation should have been shared goes beyond that so specified.

The Court acknowledged that those issues—as well as "whether they can safely be litigated without endangering state secrets"-- remain open for decision in the lower courts (*General Dynamics*, 2011, 131 S. Ct. at 1910).

Of course, it still may be determined that even these issues cannot be litigated. The A-12 litigation then, at long last, would truly be finished. But it is important to recognize that the two remaining

issues, taken in combination, appear to offer the government a potent argument with which to achieve its litigation objectives. In particular, because the Supreme Court has never actually endorsed the Federal Circuit's "superior knowledge" doctrine, it appears likely that the government could ultimately persuade that Court, if need be, that any such implied obligation of the government does not apply in the circumstances of this case. In particular, if the applicable contract specifically identifies information that must be shared, it seems highly implausible that an implied duty should require further disclosure, especially when the information in question is classified at the highest level.

The Law Going Forward: Conflicting Portents

General Dynamics will now be the leading authority concerning the applicability of the state secrets doctrine in procurement litigation. Specifically, it creates a framework for analysis of the remedies available and unavailable to both the government and to contractors when the state secrets privilege has been invoked. It also establishes at least a presumptive rule that bars relief to either party *in cases like the A-12 litigation*. However, this formulation clearly begs the important question of what it means to say that a case is like the A-12 litigation. That is one of the two essential problems explored in the remaining sections of this paper. That problem pertains both to government procurement cases and to the application of the state secrets privilege in cases arising out of the "war on terrorism."

The other significant problem addressed below is how the regime established by the Supreme Court will work, how it should work, and what shortcomings it may have. It will be argued here that Justice Scalia's confidence was misplaced when he suggested that *General Dynamics* established a default rule around which parties will be able to efficiently and equitably bargain.

A Significant Evolution of the Law of State Secrets

General Dynamics marks a significant development in the law, applying the state secrets privilege in a context that will be generically important for the law of government contracts. In a post-9/11, high technology, world, a substantial number of claims may arise out of contracts for goods and services, the performance of which entails

secret information. And the increasing reliance of the United States government on contractors for functions formerly carried out by military and diplomatic personnel only accentuates this trend (Dickinson, 2011; Freeman & Minow, 2009; Stanger, 2009; Verkuil, 2007). *General Dynamics* goes well beyond any prior decision of the Supreme Court of the United States in applying a broad state secrets privilege to government contracts cases. Of course, the facts of *Reynolds* involved government contractor personnel, but *Reynolds* was a torts case, not a contract dispute. It is thus particularly noteworthy that while *Reynolds rejected* the argument that the government's invocation of the state secrets privilege waived its right to deny its negligence, *General Dynamics embraced* the related notion that invoking this privilege may, generally at least, bar the government from securing affirmative relief from a contractor.

General Dynamics also goes well beyond *Totten* in applying the state secrets privilege. Application of the privilege to cases like the A-12 can be expected to be much more common and much more significant than application of the privilege to contracts for spying or other wholly clandestine services. Of course, the government could not have had a better test case to establish this extension of the privilege because of the level of confidentiality attached to the technology at issue in this case.

Nuanced Impact on Human Rights State Secrets Cases

For observers concerned with international human rights law, *General Dynamics* brings the proverbial package of good news and bad news. For the cases arising out of the United States' tactics in the campaign against terrorism, the bad news is, for the most part, straightforward and immediately apparent; appreciation of the good news requires a more nuanced consideration.

As for the bad news: First, *General Dynamics* places no explicit limits on the invocation of the state secrets privilege. Second, the decision extends the *Totten* state secrets privilege well beyond the necessarily specialized considerations affecting espionage contracts, to reach *–and to bar litigation of* -- any case in which "full litigation of [a] defense" -- or, presumably, of any claim—"'would inevitably lead to the disclosure of state secrets" (*General Dynamics*, 2011, 131 S. Ct. at 1907, quoting *Totten*, 1876, 92 U.S. at 107). Accordingly, the case gives those concerned about the government's use of the state

secrets privilege to defend tort suits arising out of the anti-terrorism campaign clear cause for concern. Third, grounding the privilege on *Totten* rather than *Reynolds* makes clear just how far-reaching the effects of the government's invocation of state secrets privilege may be. *General Dynamics* makes clear that the privilege is not merely a bar to discovery proceedings or to the introduction of evidence that a private party seeks. Finally, *General Dynamics* no more than *Reynolds* requires the courts to examine putatively secret material independently to evaluate the government's assertion that it contains secret material. After the devastating revelations highlighted in Siegel's work about the apparent abuse of the privilege in *Reynolds*, this can only be seen as discouraging.

The good news is substantial, however, as well. Discerning it requires framing *General Dynamics* appropriately.

Alan Morrison has written thoughtfully about the remedies problem that follows from the invocation of state secrets in the tort cases arising out of alleged abuses by the United States in the anti-terrorism context. He has proposed that where the government's only effective defense against such claims is an invocation of the state secrets privilege that bars determination of the merits of such a claim, it should "lose its right to contest its liability"; the case should be "transferred to the [United States] Court of Federal Claims" where the only issue would be "the proper amount of actual, but not punitive, damages." Morrison protests "the basic injustice of the position of the executive branch" of the U.S. government, which leaves even innocent victims of mistakes made in prosecuting the campaign against terror entirely without forum or relief. The lynchpin of his argument is that, in the cases that concern him: *"[t]he claims that are at issue involve individuals who have no prior formal connection with our government (as an employee or agent) and who are not U.S. citizens, although the states secrets defense applies to anyone unfortunate enough to be swept up by it."* (Morrison, 2009; emphasis added.)

The contrast between the anti-terror abuse cases as thus framed by Morrison and the situation in cases like *General Dynamics*, could not be more stark. Morrison's arguments cut the other way here. The A-12 contractors, while not quite in the situation of putative espionage agents as in *Totten* and *Tenet*, assuredly have a formal engagement with the United States government. They knowingly and

voluntarily entered into a sophisticated, long-term, contractual relationship with the United States entailing the application of what the contractors had every reason to know was the most secret of technologies. More specifically, the contractors had every reason to know, entering into their contract to build the A-12 aircraft for the United States Navy, that as the Supreme Court explained, "[t]he design, materials, and manufacturing processes two prior stealth aircraft operated by the Air Force—the B-2 and the F-117A—are some of the Government's most closely guarded secrets" (*General Dynamics*, 2011, 131 S. Ct. at 1904). Accordingly, there is much force to Robert Chesney's conclusion that *General Dynamics* simply does not illuminate the view the Supreme Court ultimately will take on "the far more controversial cases involving state secrets, such as those relating to torture or warrantless wiretapping" or, this author would add, the practice of "extraordinary rendition" of suspected terrorists to other countries for such torture (Chesney, 2011). At the same time, the contrast between the two kinds of cases highlights the equitable basis for the sweeping privilege in public procurement cases.

Notwithstanding all this, in the broad-brush approach taken by the U.S. Supreme Court in *General Dynamics*, it still is possible to discern room for a more balanced approach to the litigation of state secrets in future cases that have a strikingly different complexion. Indeed, *General Dynamics* need not be read to tie the United States firmly to a position at odds with an emerging international consensus among commentators. Such a consensus appears to support a less abjectly deferential attitude toward the invocation, by the executive, of state secrets doctrines in the litigation of cases arising out of alleged abuses in the "war on terror," an approach more evident in the United Kingdom than in the United States to date (Kavanaugh, 2011; Schwinn, 2011; Fabbrini, 2010; Ambinder, 2010).

First, as noted above, the *General Dynamics* Court went well out of its way to assure itself that the invocation of the state secrets privilege in the A-12 case really was supported by genuinely secret information. While the lower courts did not review this information, it is important to recognize that, because of the facts of the A-12 case, there simply never was any dispute but that the information involved was extraordinarily highly secret. So *General Dynamics* should be viewed, at worst, as neutral on whether courts should directly

examine allegedly classified information themselves. And it should be viewed as *endorsing* the view that courts hearing such cases must somehow assure themselves that the invocation of state secrets really is factually justified.

Second, the Court's decision to ground its ruling in the role played by federal courts, under the common law, to establish law governing government contracts remedies, supports a flexible framework for the application of the doctrine in future cases—both contracts cases and others. As explained above at pages 14-15, the Court took pains to emphasize that its decision reserved authority to courts adjudicating future cases to strike a different remedial balance "where relevant factors significantly different from those before us here counsel a different outcome" (*General Dynamics*, 2011, 131 S. Ct. at 1909). Furthermore, although I question (pages 21-22) the workability of this suggestion, the very fact that the Court strongly suggested that parties might contract around the default rule that it had outlined for government contracts state secrets cases suggests the flexibility of the framework.

Ultimately, the essential importance of grounding the A-12 decision on the courts' authority to make common law is to underscore the remaining authority of future courts, including lower courts, to do justice, case by case, in future state secrets cases while still aggressively protecting genuinely sensitive secret information. That means, among other things, that there would be room even for seemingly radical but ingenious proposals such as Alan Morrison's, noted above (page 19), for dealing with the collision between legitimate secrecy needs and the equally compelling imperative to do justice for the innocent victims of collateral damage in the "war on terror."

Weaknesses in the *General Dynamics* Approach

Although there is much to be said for the Supreme Court's flexible framework, there are problems as well as advantages associated with that approach as applied to public procurement litigation. One concern with the Supreme Court's approach is whether the bilateral unenforceability norm it establishes when a state secrets privilege has been invoked properly will prove to be arbitrary with respect to the various cash flow regimes that might be in effect between the government and contractors. As it happened, in the A-12 case, the

contractors had received $1.35 billion in progress payments for work that was never accepted by the government because it never attained the relevant contractual specification. And the contractor asserted that it was owed at least $1.2 billion more for the cost of work performed before it was terminated. The fact that the Court's approach yielded a roughly even split between contractors and the government of the total cost of the contractors' non-compliant performance in this case was not entirely happenstance—for these were experienced defense contractors with good lawyers working on an envelope-stretching performance. But neither was it the working of an unseen hand bending the result toward a just outcome. Plainly there is a certain amount of good fortune in this result that will not necessarily be replicated in future cases.

Moreover, the Court may have made an erroneous assumption concerning the ability of repeat player contractors to "contract around" the default rule that the Court has established for procurement performance disputes in which a valid claim of state secrets privilege has been raised. Justice Scalia asserted that, with the baseline established by the decision, the government and its "repeat player" contractors –the "cutting-edge defense contractors of the sort likely to operate in the state secrets field" – will be able to negotiate "the timing and amount of progress payments to account for the possibility that state secrets may ultimately make the contract unenforceable" (*General Dynamics*, 2011, 131 S. Ct. at 1909).

What Justice Scalia may have overlooked is the extent to which the provisions and policies of the Federal Acquisition Regulation, as well as those of the underlying federal procurement statutes, constrain the parties to a federal government contract with regard to things like progress payments, inhibiting or prohibiting the kind of bargaining in the shadow of the newly clarified law that the Court suggested. Moreover, the Justice also overlooked the federal government's strong preference to do business on uniform terms. That, of course, is encouraged, and to some extent required, by the well-established transparency- and competition-values-based requirement that the contract awarded by the federal government of the United States be the one for which offers were solicited by that government (*Prestex*, 1963).

On the other hand, if Justice Scalia's suggestion were to prove viable, one might question how equitable it is thus to advantage

experienced contractors over new entrants to the field. As it is, the exceptionalist rules of federal government procurement law constitute a significant barrier to entry to the federal procurement market, reducing incrementally the competitiveness of that market (Kovacic, 1998; Schwartz, 1997; Schwartz, 1996).

These specifics aside, the author is indeed somewhat optimistic about the ability, over the long term, of the lower federal courts to manage wisely the discretion conferred on them by the Supreme Court's approach. That optimism remains to be empirically validated.

Specialized and Generalist Courts in Government Contracts Litigation

A final comment-worthy aspect of *General Dynamics* concerns the roles of specialized and of generalist courts in handling sensitive state secrets privilege claims and in dealing with the complex corpus of federal public procurement law, and, above all, the intersection of the two. These are functional concerns that may arise in any national system of public procurement.

The United States Court of Federal Claims has rendered well over a dozen published decisions (and countless others) in the A-12 case, and the United States Court of Appeals for the Federal Circuit has rendered nearly half a dozen. Each of these courts is a semi-specialized tribunal with expertise and jurisdiction that substantially transcends government contract cases; government procurement disputes—both bid protests and contract performance disputes make up a larger share of the Court of Federal Claims' jurisdiction and a smaller share of the Federal Circuit's jurisdiction. Commentators differ on how effectively that jurisdiction has been exercised (Schooner, 2003; Schooner & Kovacs, 2012; Schwartz, 2003). By contrast, the Supreme Court of the United States is truly a pure generalist forum, prone to the possibly erroneous assumptions about government procurement law identified here.

Viewed as a whole, however, this is a rational pyramidal arrangement, one that strikes a balance between the strengths and liabilities of specialized forums, and complementary virtues and vices of generalist courts (Schwartz, 2003). That said, it is likely that the law in this fraught intersection of law and policy could be articulated and administered more effectively, and more equitably. To achieve that result, the lower courts and the Supreme Court especially would have to become more appreciative, going forward, of the fact that, in

the flexible framework that *General Dynamics* establishes, the lower courts possess a degree of expertise in the complex corpus of government contracts law that the Supreme Court simply cannot match. Still, this hybrid system of semi-specialized tribunals married to a Supreme Court with discretionary generalist jurisdiction has much to commend it to other national procurement systems.

NOTES

1. Thus, inevitably, it provoked comparisons to the fictional litigation-without-end in the matter of *Jarndyce* v. *Jarndyce* portrayed in in Charles Dickens' *Bleak House* in satirizing the English legal system (Jones, 2009).
2. See, e.g. *El-Masri* v. *United States,* 479 F.3d 296 (4th Cir. 2007); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010).
3. 345 U.S. 1 (1953).
4. For an account with a photograph, see http://abcnews.go.com/ Blotter/top-secret-stealth-helicopter-program-revealed-osama-bin bin/ story?id=13530693#.T4tQje2KO20.
5. *See, e.g. Rasul v. Bush*, 542 U.S. 466, 498-500 (2004) (Scalia, J., dissenting.)
6. Over the protracted course of the litigation in the A-12 case, a significant consolidation occurred in the defense industry of the United States. That consolidation is reflected in the caption of the case. The caption of most of the decisions in the lower courts in the case is *McDonnell Douglas Corp*. v. *United States*. *See, e.g.* McDonnell Douglas Corp. v. United States, 567 F.3d 1340 (Fed. Cir. 2009). But the Boeing Corporation acquired McDonnell Douglas, which had been a competitor in the manufacture of aircraft, especially civilian airliners, in 1997. Boeing's petition for a writ of certiorari was docketed just after its co-contractor's, that of General Dynamics. The case in the Supreme Court of the United States accordingly bears the caption *General Dynamics* v. *United States*.
7. The author's 2001 article addressed a significant decision at a much earlier stage in the litigation, concerning whether the involvement of high executive officials in the decision to

terminate the contract somehow tainted the decision to terminate for default by the contractor, depriving the government of the right so to terminate. The termination, the contractors claimed, had to be treated, in light of this involvement, as a termination for convenience. The contractors have also claimed, in the course of the litigation, that the government's decision to solicit offers on a fixed-price basis was inappropriate given the technological degree of difficulty of the performance of the contract. The termination that occurred essentially recognized the error in the inception of the formation of the contract, they argued. Whether or not these arguments—ultimately rejected by the lower U.S. courts-- have any legal merit, it is apparent to many commentators that the U.S. Navy's decision to seek offers on this fixed-price basis was a reaction to mounting political concerns over a legacy of major cost-overruns on major weapon systems procurements and related concerns about the adequacy of budgetary resources for the new project.

8. Although the termination was formally issued by the Navy's senior contracting official, he almost certainly acted after consulting with the Secretary of Defense, then Dick Cheney. In an earlier article, the author argued that, although the government's litigating position is that the termination decision was made by the senior contracting official, and the United States Court of Appeals for the Federal Circuit has endorsed that position, *McDonnell Douglas Corp. v. United States,* 182 F.3d 1319 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1097 (2000), it is literally inconceivable that the decision to terminate was made without conferring with, and without the approval of, the Secretary of Defense (Schwartz, 2001, pp. 170-180 & 221-223). This issue was not reached by the Supreme Court of the United States in its decision twelve years later in *General Dynamics* (*General Dynamics*, 2011, 131 S. Ct. at 1905 (describing the issues resolved earlier in the case as "not relevant here")). These matters are mentioned *here*, however, as they remain important in considering best practices in contract management.

   Dick Cheney served as Secretary of Defense to President George H.W. Bush, the 41st President of the United States, from 1989 - 1993, and subsequently was Vice President of the United States in the administration of President George W. Bush, the 43rd

President, from 2001 - 2009. The litigation over the default termination, defending the decision made on the watch of Secretary of Defense Dick Cheney, continued through the remainder of President George H.W. Bush's presidency, through the entire presidency of Bill Clinton, through the entire presidency of George W. Bush, and has continued as of the date of this writing through the Presidency of Barack Obama. The legal position of the United States with regard to that default termination and the invocation of the state-secrets privilege in that litigation has not changed between Republican and Democratic administrations.

9. The Supreme Court described this as a defense, casting the government as the claimant, because the government initially sought the repayment of the progress payments. At all events, the contractors' assertion of a superior knowledge "defense" to the government's claim would govern whether any default by the contractor was for that reason legally excused, and thus governed both the government's "claim" to recoup the progress payments, and the contractors' opposing claim to recover additional compensation.

10. *McDonnell Douglas Corp. v. United States,*36 Fed. Cl. 270, 280, 281-282, 284-285, (1996); *McDonnell Douglas Corp. v. United States*, 50 Fed. Cl. 311, 326 (2001).

11. *McDonnell Douglas Corp. v. United States,* 323 F.3d 1006, 1023-1024 (Fed. Cir. 2003); *see also McDonnell Douglas Corp. v. United States*, 567 F.3d 1340 (Fed. Cir. 2009) (subsequent appeal on other issues).

12. There are known to have been several, ultimately unsuccessful, but serious, efforts at alternative dispute resolution in this case.

13. *United States v. Reynolds,* 345 U.S. 1 (1953).

14. *Totten v. United States,* 92 U.S. 105 (1876).

15. *Tenet v. Doe*, 544 U.S. 1 (2005).

16. See note 17, below for an explanation of the relationship between discovery issues and the discovery process, and the law of evidence governing which materials would be admitted in evidence at a trial.

17. In general, under the Federal Rules of Civil Procedure, Rule 26(b)(1) documents that would otherwise have to be provided to an opposing party in "discovery" proceedings prior to a trial do not have to be produced if they could not be introduced into evidence because covered by an evidentiary privilege. Hence the Court's characterization of the issue in *Reynolds* as an evidentiary issue was technically correct, though it may well be somewhat misleading.

18. Ironically, or tellingly perhaps, the report was released (in January 1996) – apparently without any case-specific scrutiny for national security sensitive information — as part of a mass release of accident investigation reports on older accidents. Although it is certainly arguable, nonetheless, that there was some secret material in the report, it is indeed difficult to see today any compelling reason why the report could not have been produced in slightly redacted –edited–form.

    Siegel reported on the ultimately unsuccessful efforts to reopen the *Reynolds* case that were made in the last decade after the accident investigation report became public. Those efforts required counsel for the survivors of the original *Reynolds* plaintiffs to establish not only that the original invocation of state secrets was unjustified or overbroad, or that the judicial decisions in *Reynolds* were unjustified or erroneous, but that the government had perpetrated a egregious fraud on the courts in asserting the state secrets privilege. Ultimately the plaintiffs in that reopened case, daughters of the original plaintiffs in *Reynolds*, were unsuccessful in making the required showing. The United States Court of Appeals for the Third Circuit held that they had failed to show what that court considered "clear, unequivocal and convincing evidence" of "the most egregious misconduct" that perpetrated "an intentional fraud" that was "directed at the court itself" and that "in fact deceives the court." (Siegel, 2008, pp. 202-308; *Herring*, 2005, 424 F.3d at 386-387 & 391-392.)

19. The Court actually held that it was appropriate to deny the plaintiff's request for the document, without examining the report "on the showing of necessity for its compulsion that had then been made" –which the Court branded as "dubious." The Court suggested that the *Reynolds* plaintiffs and their counsel had had a good alternative, which was to examine the few surviving

members of the crew of the B-29 that crashed to secure their testimony. To be clear, this "showing of necessity" factor was relevant only to "how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate" as "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." (*Reynolds*, 1953, 345 U.S. at 5, 11.)

20. This is correct if one views the case in terms of the opposing objectives of the parties at the outset of the litigation: each sought damages from the other. It is not correct if one takes as a baseline the status of the case as it stood prior to the Supreme Court's decision. Note, as well, that while the contractors premised their argument at least on constitutional notions of due process, the Supreme Court does not embrace, or even discuss, that potential basis for the decision.

REFERENCES

"Spies, lies and the internet" (2012, April 7). *The Economist*: 66.

Ambinder, M. (2012). "State Secrets Privilege is Defeated…In Britain." *The Atlantic.* [Online]. Available at www.theatlantic.com/politics/archive/2010/state-secrets-privilege-is-defeated-in-britain/35704e. (Retrieved February 27, 2012).

"Brief for the Petitioner General Dynamics Corp." (2010). *General Dynamics Corp. v. United States*, ___U.S. ____, 131 S. Ct. 1900 (2011).

Chesney, R. (2011, May 23). "State Secrets and Today's Supreme Court Decision in General Dynamics v. United States." *Lawfare*. [Online]. Available at www.lawfareblog.com/2011/05/state-secrets-and-todays-supreme-court-decision-in-general-dynamics-corp-v-united-states. (Retrieved May 15, 2012).

Danisi, C. (2011). "State Secrets, Impunity and Human Rights Violations: Restriction of Evidence in the Abu Omar Case." *Essex Human Rights Law Review* 2011, 8 (1) [Online]. Available at http://projects.essex.ac.uk/ehrr/V8N1/Danisi.pdf. (Retrieved April 12, 2012).

Council of Europe Parliamentary Assembly Report (2011) (Rapporteur D. Marty) (herein "Marty 2011"). "Abuse of State Secrecy and

National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations." [Online]. Available at http://www.assembly.coe.int/CommitteeDocs/2011/State%20secrecy_MartyE.pdf. [Retrieved April 11, 2012].

Dickinson, L. (2011). *Outsourcing War & Peace*: *Preserving Public Values in a World of Privatized Foreign Affairs*. New Haven, CT, USA: Yale University Press.

Directive 2009/81/EC (2009) (herein "European Defence Directive (2009"). [Online]. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:216:0076:0136:en:PDF. [Retrieved April 4, 2012].

Fabbrini, F. (2010). "Understanding the Abu Omar Case: The State Secret Privilege in Comparative Perspective." Paper Presented at the International Association of Constitutional Law World Congress, December, Mexico City, 2010, Workshop No. 6: "The Rule of Law in an Age of Terrorism."

Fisher, L. (2006). *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case.* Lawrence, KA, USA: University of Kansas Press.

Freeman, J. and Minow, M., eds. (2009). *Government by Contract: Outsourcing and American Democracy*. Cambridge, MA, USA: Harvard University Press.

General Dynamics v. United States, ____ U. S. ___, 131 S. Ct. 1900 (2011) (herein "*General Dynamics,* 2011").

Herring v. United States, 424 F.3d 384 (3d Cir. 2005). cert. denied, 547 U.S. 1123 (2006) (herein "*Herring*, 2005").

Jones, A. "Boeing's Saga without End: 'American Version of *Jarndyce v. Jarndyce'." Wall Street Journal Law Blog* June 6, 2009. [Online]. Available at http://blogs.wsj.com/law/2009/06/06/a-closer-look-at-the-american-version-of-jarndyce-and-jarndyce. (Retrieved April 15, 2012).

Kavanaugh, A. (2011). "Constitutionalism, Counterterrorism and the Courts: Changes in the British Constitutional Landscape." *International Journal of Constitutional Law*, *9*(1): 172-199.

Kovacic, W. (1998). "The False Claims Act as a Deterrent to Participation in Government Procurement Markets." *Supreme*

Court Economic Review, *6*: 201-239. [Online]. Available at www.jstor.org/stable/1147106. [Retrieved May 14, 2012].

Liptak, A. (2011b, May 24). "State Secrets Block Resolution of Contractors Suit, Justices Say." *New York Times*: A19.

Liptak, A. (2011a, January 19). "In Knotty State Secrets Case Justices Ponder Telling Litigants to 'Go Away.'" *New York Times*: A15.

Lithwick, D. (2011, January 18). "Go, Leave, Get Outta Here." *Slate*. [Online]. Available at http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2011/01/go_leave_get_outta_here.html. [Retrieved April 14, 2012].

McDonnell Douglas Corp. v. United States, 323 F.3d 1006 (3d Cir.) (2003).

Morrison, A.B. (2009) "A State Secrets Solution." *National Law Journal.* [Online]. www.law.com/jsp/nlj/legaltimes/PubArticleFriendlyLT.jsp?id=1202435438238. [Retrieved May 15, 2012].

Prestex, Inc. v. United States, 162 Ct. Cl. 620, 320 F.2d 367 (1967).

United States v. Reynolds, 345 U.S. 1 (1953) (herein "*Reynolds*, 1953").

Schooner, S.L. (2002), "Desiderata: Objectives for a System of Government Contracts Law" [Online]. Available at http://ssrn.com/abstract=304620. (Retrieved April 11, 2012).

Schooner, S.L. (2003). "The Future: Scrutinizing the Empirical Case for the Court of Federal Claims." *George Washington Law Review,* 71: 714-772. [Online]. Available at www.pubklaw.com/papers/plltwp50.pdf. [Retrieved May 13, 2012].

Schooner, S.L. & Kovacs, P (2012, Forthcoming). "Affirmatively Inefficient Jurisprudence?: Confusing Contractors' Right to Raise Affirmative Defenses With Sovereign Immunity." *Federal Circuit Bar Journal*.

Schwartz, J.I. (1996). "Liability for Sovereign Acts: Exceptionalism and Congruence in Government Contracts Law." *The George Washington Law Review*, *64*: 633-702.

Schwartz, J.I. (1997). "Assembling *Winstar*: Triumph of the Ideal of Congruence in Government Contracts Law?" *Public Contract Law Journal*, 26: 481-565.

Schwartz, J.I. (2001). "Administrative Law Lessons Regarding the Role of Politically Appointed Officials in Default Terminations." *Public Contract Law Journal, 30*: 143-223.

Schwartz, J.I. (2003). "Public Contracts Specialization as a Rationale for the Court of Federal Claims." *George Washington Law Review, 71*: 863-878.

Schwartz, J.I. (2004), "The Centrality of Military Procurement: Explaining the Exceptionalist Character of the United States Federal Public Procurement Law." [Online]. Available at http://ssrn.com/abstract=607186. [Retrieved April 15, 2012].

Schwartz, J.I. (2007). "Regulation and Deregulation in Public Procurement Law Reform in the United States." In G. Piga and K.V. Thai (Eds.), *Advancing Public Procurement: Practics, Innovation and Knowledge-Sharing* (pp. 177-201). Boca Raton, FL: PrAcademics Press.

Schwinn, S.D. (2011, Spring). "State Secrets, Open Justice, and the Criss-Crossing Evolution of Privilege in the United States and the United Kingdom." *L'Observateur des Nations Unies, 29*: 171-188. [Online]. Available at http://ssrn.com/abstract=1910923. (Retrieved February 27, 2012).

Siegel, B. (2008). *Claim of Privilege: A Mysterious Plane Crash, a Landmark Supreme Court Case, and the Rise of State Secrets.* New York: Harper Collins.

Stanger, A. (2009). *One Nation under Contract: The Outsourcing of American Power and the Future of Foreign Policy*. New Haven, CT: Yale University Press.

Van Harten, G. (2009). "Weakness of Adjudication in the Face of Secret Evidence." *International Journal of Evidence and Proof*, 2009, *13* (1): 1-27.

Vartabedian, R. (1994). "Legal Costs of A-12 Lawsuit Skyrocketing." *Los Angeles Times*, October 6, 1994. [Online]. Available at http://articles.latimes.com/1994-10-06/business/fi-47270_1_ legal-expenses. (Retrieved April 22, 2012).

Verkuil, P. (2007). *Outsourcing Sovereignty: How Outsourcing of Government Functions Threatens Democracy and What We Can Do About It.* Cambridge, UK: Cambridge University Press.

Weisberger, M. (2011, May 23). "Supreme Court Overturns A-12 Ruling Against Contractors." *Defense News*. [Online]. Available at www.nytimes.com/2011/05/24/us/24secret.html?scp=1&sq=General+Dynamics+A-12&st=nyt.

Yukins, C.Y. (2009). "The European Defense Directive: An American Perspective." [Online]. Available at http://ssrn.com/abstract=1502858. (Retrieved April 4, 2012).