No. 03-1395

In the Supreme Court of the United States

GEORGE J. TENET, INDIVIDUALLY, JOHN E. MCLAUGHLIN, ACTING DIRECTOR OF CENTRAL INTELLIGENCE AND ACTING DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether *Totten* v. *United States*, 92 U.S. 105 (1876), bars a district court from considering respondents' due process and tort claims that the Central Intelligence Agency (CIA) has wrongfully refused to keep its alleged promise to provide them with life-time financial assistance in exchange for their alleged espionage services to the CIA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 329 F.3d 1135. The June 7, 2000, opinion of the district court (Pet. App. 95a-116a) is reported at 99 F. Supp. 2d 1284. The January 22, 2001, opinion of the district court (Pet. App. 85a-94a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2003. A petition for rehearing was denied on January 7, 2004 (Pet. App. 65a-66a). The petition for a writ of certiorari was filed on April 6, 2004, and was granted on June 28, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. "In the world of espionage, there are two kinds of spies. They both risk exposure, arrest, and sometimes their lives in the clandestine search for information to forewarn the United States. They are called case officers and agents." Admiral Stansfield Turner, *Secrecy and Democracy: The CIA in Transition* 48 (1985). "The case officer is always a [Central Intelligence Agency (CIA)] person, usually an American, usually overseas. He is the contact between CIA Headquarters and the agents who do the actual spying. Agents generally are foreigners who are willing to spy for the United States." *Ibid.* "Some [agents] do so for money, some because they prefer our ideology to that of their own countries, some because they carry a grudge against their government, some for adventure, and some because of a personal friendship with the case officer who recruits them." *Ibid.* This case involves the latter category of spies.

It has long been established that such spies have no entitlement to sue to enforce their secret contracts. *Totten* v. *United States*, 92 U.S. 105 (1876). Indeed, it is understood that the government that procures their services may deny any relationship in the event the spying arrangement becomes exposed or suspected. See pp. 18-19, *infra*. Nevertheless, respondents, using the fictitious names John and Jane Doe, filed suit in the United States District Court for the Western District of Washington against the United States and the Director of Central Intelligence (DCI) in his individual and official capacity. The Second Amended Complaint alleges the following facts which, "for reasons of national security," the United States to date has neither confirmed nor denied. Pet. App. 2a. The CIA, through

its case officers, recruited respondents, husband and wife, to "conduct espionage for the United States" in a foreign country that was "then considered to be an enemy of the United States." *Id.* at 121a, 122a. Respondents agreed to spy for the CIA in exchange for a promise by the CIA to "arrange for travel to the United States and ensure financial and personal security for life." *Id.* at 122a. Respondents thereafter "carr[ied] out their end of the bargain" by performing "highly dangerous and valuable [espionage] assignments" abroad, and they ultimately defected to the United States and became United States citizens. *Id.* at 123a, 124a. John Doe subsequently obtained professional employment using a false name and resume. *Id.* at 124a. "As John Doe's salary increased over time, the [CIA's] living stipend decreased and eventually was discontinued." *Ibid.* A number of years later, John Doe lost his job due to a corporate merger and since has been unable to find employment. *Id.* at 125a.

The complaint also alleges that, if the CIA is "not compelled to resume assistance," respondents "will soon have no other choice than to leave the United States" and live in a foreign country where there is a risk that they will be recognized and punished as a result of their espionage services for the CIA. Pet. App. 126a-128a. The complaint also alleges that respondents have unsuccessfully contacted the CIA for assistance. *Id.* at 129a-136a. The complaint seeks an injunction ordering the CIA to pay monthly "financial support" to respondents pending further administrative review by the CIA of their claims; a declaratory judgment specifying the kind of administrative review that would be required; and an order of mandamus that would compel the CIA to "provide for [respondents']

basic needs" and to adopt regulations for administrative review of their claims. *Id.* at 138a-142a.

2. The government moved to dismiss the complaint because respondents' claims were barred by *Totten*, *supra*, which held that a suit against the United States could not be maintained to enforce the terms of an alleged agreement to perform espionage services. The Court in *Totten* concluded that "public policy forbids the maintenance of any suit in a court of justice, 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." 92 U.S. at 107.

The district court denied the government's motion in part, holding that *Totten* does not extend to plaintiffs' estoppel and constitutional claims. Pet. App. 104a-107a. The court granted the government's motion to dismiss respondents' equal protection claim, *id.* at 113a-114a, and the court also denied respondents' motion for a preliminary injunction. *Id.* at 115a.

The government then moved for summary judgment and renewed its motion to dismiss, attaching a declaration of William H. McNair, the Information Review Officer for the CIA's Directorate of Operations, which is the Agency's Clandestine Service that conducts foreign intelligence and counterintelligence activities. Pet. App. 143a-148a. In the affidavit, McNair explained that "any Agency response to the [complaint's] factual assertions * * *, whether to either confirm or deny the allegations contained therein, would be classified information and could not be filed in open court." *Id.* at 147a.

The district court denied summary judgment. Pet. App. 85a-94a. The district court then certified its orders for interlocutory appeal, and stayed further

proceedings pending disposition of the government's appeal. *Id.* at 79a-84a. The court of appeals granted the government's appeal and denied respondents' cross-petition to appeal pursuant to 28 U.S.C. 1292(b). Pet. App. 77a-78a.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-64a.

a. The court held that *Totten* does not bar judicial review of respondents' claims at the outset because their claims, in the court's view, "do not arise out of an implied or express contract." Pet. App. 18a. The court believed that *Totten* is not a "blanket prohibition on suits arising out of acts of espionage," but "is instead simply a holding concerning contract law." *Id.* at 21a. Thus, the court found that *Totten* holds only that, as a matter of contract law, a plaintiff could not recover on a claim for a secret contract for espionage services because bringing the action amounted to a breach of the contract that would necessarily preclude recovery. The court found that, "[f]or two reasons, the contractual holding of *Totten* is not applicable here." *Id.* at 22a. First, the court reasoned that respondents seek "to compel fair process and application of substantive law to their claims within the Central Intelligence Agency's . . . internal administrative process." *Ibid.* The court stated that "a fair internal process could presumably proceed in accordance with the secrecy implicit in an agreement to engage in espionage." *Ibid.*

Second, the court found that, "[h]ere, [respondents] have so far proceeded in a manner that has not breached the agreement" by "fil[ing] suit under fictitious names and reveal[ing] only minimal, nonidentifying details in their complaint." Pet. App. 22a. The court further reasoned that, "[w]ith court and government cooperation, it may be possible to continue the

suit in a manner that avoids public exposure of any secret information." *Id.* at 23a.

The court of appeals also concluded that *Totten*'s holding that public policy forbids a suit that would inevitably reveal information the law regards as secret "has flowered into the state secrets doctrine" as articulated in *United States* v. *Reynolds*, 345 U.S. 1 (1953). Pet. App. 25a. The court then held that "*Totten* permits dismissal of cases in which it is asserted that the very subject matter is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets doctrine." *Id.* at 27a; *id.* at 29a ("*Totten* is applicable to the case before us only as applied through the prism of current state secrets doctrine."). The court observed that the CIA "has not complied here with the formalities essential to invocation of the state secrets privilege," *i.e.*, a formal claim of privilege by the DCI after personal review of the matter. *Id.* at 31a. The court held that CIA's non-compliance with those formalities "is reason enough to affirm the district court's refusal to dismiss this case." *Ibid.*

The court of appeals finally proceeded to "provide some guidance concerning the handling of [respondents'] claims should the state secrets privilege be invoked" by the CIA on remand. Pet. App. 31a. The court instructed the district court to "make every effort to ascertain whether the claims in question can be adjudicated while protecting the national security interests asserted." *Id.* at 33a. The court observed that "the district court might conclude that the Agency has not provided *any* basis for concluding that national security

would be jeopardized by the revelation of the existence of a relationship with [respondents]." *Id.* at 36a.[1]

b. Judge Tallman dissented. Pet. App. 39a-64a. He explained that "*Totten* holds that claims brought by secret agents against the government are non-justiciable," and that, "[f]ar from modifying *Totten*, the Court's opinion in *Reynolds* reaffirms *Totten's* jurisdictional bar." *Id.* at 39a, 40a.

4. The court of appeals denied rehearing and rehearing en banc. Pet. App. 65a-66a. Judge Kleinfeld, joined by five other active judges, dissented from the denial of rehearing. *Id.* at 66a-76a. He explained that "[t]he panel's contention that the purposes of *Totten* can be served by the CIA asserting the state-secrets privilege, which would then permit in camera inspection of papers by the district court and so forth, leaves out the most important purpose of all: to keep the whole engagement utterly and entirely secret." *Id.* at 71a.

SUMMARY OF ARGUMENT

Nearly 130 years ago, *Totten* v. *United States*, 92 U.S. 105, 106-107 (1876), held that a former spy could not sue the United States for breach of a contract for espionage services performed on behalf of the

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[1] The government also argued below that the filing of the claims in district court was precluded by the Tucker Act, 28 U.S.C. 1491(a)(1), which provides for exclusive jurisdiction in the Court of Federal Claims for claims in excess of $10,000 "founded * * * upon any express or implied contract with the United States." The district court rejected that contention, Pet. App. 107a, and the court of appeals held that summary judgment was not proper on the issue whether respondents' due process claims arose from a statute or the CIA's regulations, because "further proceedings, including discovery," may provide support for a due process interest that exists independent of a contract. *Id.* at 15a. The United States has not sought review of that holding. See Pet. 8 n.2.

President. The fundamental underpinning of that decision is the principle that such a suit inevitably would lead to the disclosure of the existence of the agreement, contrary to both the inherently secret nature of the agreement and the Nation's overriding interests in effective national security and foreign relations. *Totten* also reflects the principle that judicial adjudication of claims by alleged former spies who are dissatisfied with the terms of an espionage relationship would severely intrude on the constitutional role of the Executive Branch to conduct espionage activities and to safeguard information whose disclosure would harm the Nation's interests. Those paramount considerations give rise to *Totten*'s categorical and jurisdictional bar to suits alleging that the CIA has wrongfully failed to compensate a spy for his espionage activities or otherwise violated the terms of an espionage agreement.

Respondents' suit should have been dismissed under the rule of *Totten*. The suit alleges the existence of an espionage relationship and alleges that the CIA failed to keep its promises to respondents. Although respondents' suit is framed in estoppel and constitutional terms, all of respondents' claims are premised on the existence of an espionage agreement—an agreement that necessarily included an implicit term that the agreement was not judicially enforceable because it would forever remain secret. The suit conflicts with the secret nature of the agreement, because the CIA cannot answer any of respondents' allegations without confirming or denying the existence of an espionage relationship and revealing information that should remain secret.

The Ninth Circuit critically erred in holding that *Totten*'s categorical bar has been superseded by the state secrets privilege articulated in *United States* v.

Reynolds, 345 U.S. 1 (1953). This Court in *Reynolds* confirmed that *Totten* continues to pose a jurisdictional bar "where the very subject matter of the action [is] a contract to perform espionage." *Id.* at 11 n.26. And since *Reynolds*, the Court has viewed *Totten* as imposing a jurisdictional bar that "forbids the maintenance of any suit" to recover on claims that would inevitably lead to the disclosure of classified information. *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981) (quoting *Totten*, 92 U.S. at 107). *Reynolds* also makes abundantly clear that in such cases the issue of a state secrets privilege is not to be litigated. Rather, "*[t]he action [i]s dismissed on the pleadings without ever reaching the question of evidence.*" 345 U.S. at 11 n.26. (emphasis added). There is accordingly no basis for requiring the DCI in every case to demonstrate that disclosure of the existence of an espionage agreement risks harm to our national security and foreign relations.

ARGUMENT

TOTTEN V. *UNITED STATES* CATEGORICALLY BARS RESPONDENTS' SUIT

Respondents' suit seeks to force the CIA to provide them with life-time financial assistance in accordance with an alleged espionage relationship with the CIA and to provide them with internal administrative procedures that would govern their entitlement to such assistance. Pet. App. 138a-142a. The Court's decision in *Totten* v. *United States*, 92 U.S. 105 (1876), categorically bars this suit because respondents' claims cannot proceed without disclosing facts that would damage national security: whether respondents actually had an espionage relationship with the CIA and, if so, the details of that relationship.

A. *Totten* Holds A Court Cannot Consider Claims That The United States Has Wrongfully Refused To Pay For Espionage Services

Totten involved an action brought by the administrator of the estate of William A. Lloyd to recover compensation for espionage services behind Confederate lines that President Lincoln contracted for in 1861 during the Civil War. 92 U.S. at 105. The Court expressed its "objection" to the suit as inconsistent with the secret nature of the contract:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter.

Id. at 106. The court concluded that the secret "condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties." *Ibid.*

The Court further stated that the alleged failure to compensate a spy consistent with prior promises was not susceptible to judicial resolution. Such litigation presupposes a fact that would be confidential if true and therefore is not a proper subject of litigation: namely, the fact of the prior promise and the details of the secret relationship. Adjudication of such disputes not only would prevent effective foreign relations, but also would interfere with the government's ability to con-

tract for espionage services in the first place. "A secret service, with liability to publicity in this way, would be impossible." 92 U.S. at 107. The Court thus articulated the "general principle[] that public policy forbids the maintenance of any suit in a court of justice, 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." *Ibid.*

B. *Totten*'s Categorical Rule Is Compelled By The Government's Paramount Interest In Conducting Espionage Activities In Secret

1. *Espionage Activities Are Essential To National Security*

The foreign intelligence and espionage operations of the United States are designed to acquire secrets of foreign countries in order to protect the life and liberty of United States' citizens. "Intelligence is information. Specifically, it is information about an adversary that is useful in dealing with him." George J.A. O'Toole, *Honorable Treachery: A History of U.S. Intelligence, Espionage, and Covert Action from the American Revolution to the CIA* 1 (1991) (O'Toole). Thus, "the two main functions of traditional intelligence" are "[a]ssessing an enemy or potential enemy's military capacity" and "the discovery of an enemy's intentions." Thomas Powers, *The Man Who Kept The Secrets: Richard Helms & the CIA* at vi (1979) (Powers).

The government's ability to carry out such operations is essential to national security and is an inherent attribute of national sovereignty. "Intelligence services do not exist in a vacuum. A nation with neither an army nor enemies does not have much need for spies, but once it has both, an intelligence service is bound to

follow." Powers vi. "Secret intelligence is as old as warfare and diplomacy. * * * Both foreign policy in peacetime and command decision in wartime are driven by intelligence, much of which has necessarily been obtained by covert means." O'Toole 1; accord *id.* at 4 ("[S]ecret intelligence * * * has * * * been an instrument of American foreign policy since the birth of the Republic."). As this Court observed over twenty years ago:

> Every major nation in the world has an intelligence service. Whatever fairly may be said about some of its past activities, the CIA (or its predecessor the Office of Strategic Services) is an agency thought by every President since Franklin D. Roosevelt to be essential to the security of the United States and—in a sense—the free world. It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence.

Snepp v. *United States*, 444 U.S. 507, 512 n.7 (1980) (per curiam).

The importance of successful foreign intelligence has only increased over time. The Nation faces on-going threats not only from foreign sovereign adversaries, but also from terrorists who plan attacks both here and abroad against United States interests and citizens. Vital to the government's success in penetrating terrorist cells and gathering intelligence about an enemy's capabilities and intentions is the use of human intelligence sources. See, *e.g.*, National Comm'n on Terrorist Attacks upon the U.S., *The 9/11 Commission Report* 415 (2004) ("Rebuilding the analytic and human intelligence collection capabilities of the CIA should be a full-

time effort."); S. Rep No. 301, 108th Cong., 2d Sess. 24-26, 34, 269-271, 355, 391 (2004) (discussing need for human intelligence in dealing with Iraq); accord John Keegan, *Intelligence in War: Knowledge of the Enemy from Napoleon to Al-Qaeda* 316-319 (2003) (Keegan).

2. *Espionage Relationships Are Necessarily Secret*

a. The Nation's history reflects the paramount importance of secrecy in all aspects of foreign intelligence operations, including the very fact of the relationship's existence. Since the earliest days of the Republic, secrecy has been recognized as crucial to the successful gathering of intelligence. In a letter written on July 26, 1777, issuing orders for an intelligence mission, General Washington instructed Colonel Elias Dayton:

> The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it, they are generally defeated, however well planned and promising a favourable issue.

8 *The Writings of George Washington from the Original Manuscript Sources* 478-479 (John C. Fitzpatrick ed., 1933) (Fitzpatrick) (bracketed material omitted); see *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting the "[s]ecrecy in respect of information gathered" by the President's confidential sources of information). Two years later, General Washington admonished Benjamin Tallmadge, his Chief of Intelligence, that the "name and business" of one of his spies "should be kept profoundly secret, otherwise we not only lose the benefits desired from it, but may

subject him to some unhappy fate." 15 Fitzpatrick 326, 327 (1936).

The Continental Congress too "was quick to grasp the need for foreign intelligence during the Revolutionary War," and on November 29, 1775, "it created the Committee of Secret Correspondence, the distant ancestor of today's CIA, 'for the sole purpose of Corresponding with our friends in Great Britain, Ireland and other parts of the world.'" Christopher Andrew, *For the President's Eyes Only: Secret Intelligence and the American Presidency from Washington to Bush* 7 (1995) (Andrew). Similarly, at the conclusion of the Revolutionary War, protecting sensitive intelligence sources was an immediate institutional priority for the new American nation, still threatened by foreign powers. The Continental Congress classified the identities of intelligence sources and operations to protect them from harmful disclosure. Edward F. Sayle, *The Historical Underpinning of the U.S. Intelligence Community*, 1 Int'l J. of Intell. & Counterintell. 5 (1986); Central Intelligence Agency, *Intelligence in the War of Independence* 26-27 (1976). The Federalist Papers also recognize that successful intelligence gathering depends on the ability to shield information about such activity from public disclosure. The Federalist No. 64, at 392 (John Jay) (Clinton Rossiter ed., 1961) ("[T]here doubtless are many [sources] * * * who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly.").

"American secret foreign intelligence activities received official sanction on July 1, 1790, when Congress appropriated funds to pay 'persons to serve the United States in foreign parts.'" O'Toole 95. "Thus was born the president's Contingent Fund for Foreign Inter-

course, known informally as the Secret Service fund, which not only provided the wherewithal for foreign covert operations, but also represented Congress's tacit recognition that some of the business of the executive branch must be done in secret." *Ibid.*; accord Andrew 11 (observing that the Secret Service Fund was acknowledged by the Senate as "for spies"). "Congress required the President to certify what sum he had spent, but allowed him to conceal both the purposes and recipients of payments from the fund." *Ibid.*; see also *President James K. Polk's Message to the House of Representatives*, 6 A Comp. of the Messages and Papers of the Presidents 2281, 2285 (Apr. 20, 1846) ("The experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures the very object of which would be defeated by publicity. * * * In no nation is the application of such sums ever made public."). The Central Intelligence Agency Act of 1949 continues to vest the CIA with broad authority to conduct espionage activities through *secret* compensation. 50 U.S.C. 403j(a) and (b).

b. The United States's ability to conduct successful foreign intelligence activities in support of its national security, counterterrorist, and foreign policy objectives depends on maintaining the secrecy of its espionage activities. At "the heart of all intelligence operations" is the CIA's sources and methods of intelligence, particularly those relating to spies. *CIA* v. *Sims*, 471 U.S. 159, 167 (1985). "Obviously, such sources and methods must be protected by a cloak of secrecy if they are to continue to supply needed intelligence." O'Toole 1; accord Keegan 5. Secrecy means "secret from inception to eternity." Powers 102 (attributing statement to sen-

ior CIA official Lyman Kirkpatrick). Thus, "even after the intelligence itself has long since ceased to be of anything but historical interest, governments tend to hold secret the means used to acquire it." O'Toole 1. President Eisenhower thus expressed the essence of intelligence as a secret endeavor, in a May 11, 1960, press conference after the Soviet Union shot down an American U-2 spy plane:

> [I]ntelligence-gathering activities * * * have a special and secret character. * * * They are secret because they must circumvent measures designed by other countries to protect secrecy of military preparations. * * * These activities have their own rules and methods of concealment which seek to mislead and obscure * * * . It is a distasteful but vital necessity.

The President's News Conference of May 11, 1960, Pub. Papers 403-404 (1960-1961).

Clandestine intelligence operations accordingly demand special protection to ensure that intelligence sources are not compromised, that diplomatic policies are not embarrassing to the United States, and that the CIA can maintain the ability to use its secret tradecraft methods to carry out espionage activities. Inadequate protection of such information would render the CIA "virtually impotent." *CIA* v. *Sims*, 471 U.S. at 170; see *id.* at 175 ("[F]orced disclosure of the identities of [the CIA's] intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission.").

Specifically, secrecy in all aspects of the CIA's espionage activities is necessary in order to protect the lives of the spies as well as the CIA employees who recruit them. "The continued availability of [intelligence]

sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the[ir] personal safety." *Snepp*, 444 U.S. at 512. "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *CIA* v. *Sims*, 471 U.S. at 175. Similarly, disclosure of the CIA's sources and methods would, at a minimum, "endanger[] * * * the security of CIA operational assets—funding arrangements, the location of safehouses, proprietary companies, techniques of cover, and so on." Powers 102. Such disclosure would also endanger "something much more important: that public invisibility without which an intelligence agency cannot inspire confidence in those who trust it with their lives, their fortunes, and their sacred honor; and without which it cannot conduct the sort of operations no nation can undertake openly." *Ibid.* This Court accordingly has recognized that the CIA "has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *CIA* v. *Sims*, 471 U.S. at 175 (quoting *Snepp* v. *United States*, 444 U.S. at 509 n.3); accord *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988).

3. The Secrecy Implicit In An Espionage Relationship Forecloses Judicial Resolution Of A Suit Seeking Redress For The CIA's Alleged Wrongful Refusal To Compensate A Spy

The practical necessity and overriding importance of maintaining secrecy in all matters respecting the recruitment, maintenance, and compensation of spies has led to the long-standing principle reflected in *Totten*

that contracts for espionage are inherently secret and are not a proper topic for public disclosure or any litigation. Inherent in all secret espionage relationships is the possibility that one party will deny any relationship with the other. Indeed, the classic understanding of espionage defines it as "an extraterritorial act of state for which the state was not responsible." Leslie S. Edmondson, *Espionage in Transnational Law*, 5 Vand. J. Transnat'l L. 434 (1972) (Edmondson). Consequently, governments traditionally have "disavowed knowledge of action by their espionage agents." Geoffrey B. Demarest, *Espionage in International Law*, 24 Denv. J. Int'l L. & Pol'y 321, 340 (1996) (Demarest); see Edmondson 445 ("Customary international rules governing the conduct of states in the aftermath of the discovery of espionage are few. * * * Protest and denial seem to remain the most accepted ritual."). Accordingly, "[a]lthough all States constantly or occasionally send spies abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognised position whatever according to International Law, since they are not official agents of states for the purpose of international relations." 1 Lassa F.L. Oppenheim, *International Law: A Treatise* § 455, at 862 (H. Lauterpecht ed., 8th ed. 1955) (Oppenheim).[2]

For those reasons, alleged spies lack legal protections and remedies for their espionage activities. "A spy cannot legally excuse himself by pleading that he only

[2] The status of a spy under international law is particularly anomalous because although the law of nations appears to at least tolerate the sending of spies, the domestic laws of almost every nation prohibit spying directed at that nation, and captured spies are subject to denial by the sending state and are treated most severely by the offended nation. Demarest 331, 338-339.

executed the orders of his Government, and the latter will never interfere, since it cannot officially confess to having commissioned a spy." Oppenheim 862. A captured spy is thus "without [the law] to the extent that he could claim few rules to protect him and no state to acknowledge and defend him." Maxwell Cohen, *Espionage and Immunity—Some Recent Problems and Developments*, 25 Brit. Y.B. Int'l L. 404 (1948); accord Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 Am. J. Int'l L. 53, 70 (1984) ("For acts of espionage, a 'true' spy * * * is himself responsible: he is out in the cold by himself and the sending state will most likely disavow any knowledge of him.").[3]

As the possibility of denial is inherent in and vital to the relationship, a party to an alleged *secret* agreement for espionage has no basis to demand an adjudication premised on the existence of that agreement or that they have been arbitrarily deprived of their day in court by a policy of government secrecy. That type of agreement necessarily forecloses the ability of an alleged spy to sue in court to enforce the agreement, because it is an inherent aspect of the secret relationship they entered into that the contracting government

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[3] This harsh reality was evident at the time this Court decided *Totten*. President Abraham Lincoln reflected on the isolating risks of espionage when, on May 28, 1863, he sent a Methodist minister who was serving in the Union Army into Confederate territory to make contact with members of the Southern Methodist Church. "Such a mission as he promises I think promises good, if it were free from difficulties, which I fear it can not be. First, he can not go with any government authority whatever. This is absolute and imperative. Secondly, if he goes without authority, he takes a great deal of personal risk—he may be condemned, and executed as a spy." Stephen F. Knott, *Secret and Sanctioned: Covert Operations and the American Presidency* 147 (1996).

can refuse to confirm or deny the relationship's existence and has the sole discretion to determine whether and what type of redress is appropriate. For instance, assuming respondents' allegations to be true and that their espionage activities had been detected by their government, then a Cold War enemy of the United States, the CIA properly could have refused to confirm or deny the existence of any relationship with respondents. The secrecy inherent in the relationship entitles the CIA, *a fortiori*, to refuse to confirm or deny the existence of the relationship in a suit by respondents alleging the CIA failed to provide them with adequate compensation. The suit is implicitly foreclosed by the very nature of the secret agreement.

That lack of legal protection is inherent in the relationship from the CIA's perspective as well. Given the utterly secret nature of the espionage agreement, the CIA likewise has no judicial means of seeking compensation or specific performance in the many instances where a spy fails to fulfill a promise to provide truthful information. See, *e.g.* Leo D. Carl, *The CIA Insider's Dictionary of US and Foreign Intelligence, Counterintelligence & Tradecraft* 205 (1996) ("fabricator: tradecraft jargon for an ostensible agent who furnishes notional information for financial gain."); S. Rep No. 301, *supra*, at 161 (describing fabricator who provided unreliable information regarding Iraqi government). The relationship is both entirely secret and entirely outside the law, and its terms are not specifically enforceable through legal means by either side. Rather, the very nature of the endeavor mandates that both parties are not at liberty to file a public grievance alleging that an espionage relationship existed between them. As *Totten* observed, "[b]oth *employer* and *agent*

must have understood that the lips of the other were to be for ever sealed." 92 U.S. at 106 (emphasis added).

Moreover, applying *Totten* to force individuals to "look for their compensation" from "the department employing them" (*Totten*, 92 U.S. at 107) does not strip human intelligence sources of all potential remedies. For instance, sources can attempt to negotiate the up-front payments of compensation, and they can raise their disputes with the CIA's Office of Inspector General. Finally, because human sources are essential to collecting intelligence, the CIA has an obvious incentive to preserve its reputation of being fair and of honoring commitments to its sources. Pet. App. 75a (Kleinfeld, J., dissenting).

C. Judicial Adjudication Of Suits Covered By *Totten* Would Interfere With The Constitutional Role Of The Executive Branch To Safeguard National Security

Totten also reflects the broader principle that certain matters touching upon foreign affairs and national security are not appropriate for judicial resolution because they are committed to the discretion of the Executive Branch. "Implicit in the Court's public policy holding [of *Totten*] is an understanding that fundamental principles of separation of powers prohibit judicial review of secret contracts entered into by the Executive Branch in its role as guardian of national security." Pet. App. 41a (Tallman, J., dissenting); see generally *Baker* v. *Carr*, 369 U.S. 186, 211-217 (1962). The President is "vested" with the "executive Power" as the head of the Executive Branch, and is also the "Commander in Chief of the Army and Navy of the United States." U.S. Const. Art. II, § 1, Cl. 1 and § 2, Cl. 1. Those constitutional grants of power include the executive power to

conduct espionage activities and to safeguard confidential information regarding those activities. Judicial adjudication of suits such as respondents' would interfere with the Executive Branch's authority not only to conduct foreign intelligence operations but also to determine that non-disclosure of its espionage relationships best serves the national security and foreign policy interests of the country.

1. A suit that would permit an alleged spy to prove the existence and the details of an espionage relationship with the CIA would be an inappropriate intrusion into the Executive Branch's discretion to recruit, maintain, compensate, and terminate spies, all under a cloak of secrecy. Respondents' suit well illustrates the point. It seeks a permanent injunction ordering the CIA to provide respondents with a specific level of financial support, Pet. App. 138a, despite the fact that, for well over two centuries, the Executive Branch has compensated spies in utter secrecy. See, pp. 14-15, *supra*.

Respondent's suit also seeks judicial review of executive judgments that strike at the core of the President's constitutional and historical role of conducting espionage activities without public scrutiny. The complaint seeks a judicial adjudication of the propriety of the CIA's alleged promises to respondents in order to induce them to spy on behalf of the United States. Pet. App. 121a-125a. The complaint also seeks to have a district court determine that the CIA has "created a special relationship with [respondents]" such that the CIA is "obligated by law to provide for [respondents'] basic needs and protect [them] from deprivations of liberty." *Id.* at 135a. And the complaint seeks a judicial determination ordering, in elaborate detail, that the CIA adopt procedures and regulations to adjudicate "defector grievances." *Id.* at 138a-139a.

Those judgments, however, are constitutionally entrusted to the Executive Branch, and "are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); see also *Egan*, 484 U.S. at 530 ("[U]nless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); The Federalist No. 64, *supra*, at 393 (observing that the President "will be able to manage the business of intelligence in such manner as prudence may suggest"). Litigation of claims such as respondents' would embroil the judiciary in the conduct of clandestine human intelligence operations, including the extremely sensitive and secret relationship between the agent and the case officer, who is expert in recruiting human intelligence sources. That relationship—including the recruitment of the spy and the maintenance of the relationship—would be difficult if not impossible to maintain if it were subject to judicial oversight, even years later. Likewise, the decision as to what kinds of internal compensation procedures to promise and provide are matters of executive discretion involving considerations of the need for the information and the likelihood that such assurances would be material. They are not inquiries subject to judicially-manageable standards.

As this Court accordingly observed in *Totten*, the extent of any remedy for an alleged spy is a matter uniquely for the Executive Branch. Such individuals accordingly "must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that

fund may award." 92 U.S. at 107; see also Stephen F. Knott, *Secret and Sanctioned: Covert Operations and the American Presidency* 150 (1996) ("The Court's decision [in *Totten*] was a reflection of the prevailing sentiment within the American government over the need for conducting secret operations and for lodging the authority of them in the hands of the president.")

2. Suits that are premised on the existence of an espionage arrangement with the CIA also are incompatible with the protection of intelligence sources and methods that is constitutionally entrusted to the Executive Branch. The "constitutional investment of power in the President" necessarily includes the "authority to classify and control access to information bearing on national security." *Egan*, 484 U.S. at 527. That authority "exists quite apart from any explicit congressional grant." *Ibid.* In addition, Congress has specifically charged the DCI with protecting intelligence information from disclosure. See, *e.g.*, 50 U.S.C. 403-3(c)(7) (Supp. 2000 & Supp. I 2001) (DCI shall "protect intelligence sources and methods from unauthorized disclosure"); 50 U.S.C. 403-3(d)(1)-(5) (authorizing DCI to collect human intelligence and perform other intelligence functions and duties concerning the national security); *CIA* v. *Sims*, 471 U.S. at 168-169 (Congress entrusted the CIA with "very broad" and "sweeping power" to protect "all sources of intelligence information from disclosure").

The Executive Branch has long since determined that effective foreign policy and intelligence gathering operations mandate the non-disclosure of the existence of any espionage relationship, and *a fortiori*, the non-disclosure of any details of the CIA's tradecraft

methods of espionage. The reason was articulated in *Totten*:

> If * * * an action against the government could be maintained * * * , whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service [of the espionage relationship] in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public.

92 U.S. at 106-107. Any judicial order that would permit a plaintiff to prove the existence of an espionage relationship and its details (or that would require the United States to either confirm or deny those facts) is inconsistent with the authority and responsibility of the Executive Branch to protect national security information.

D. *Totten* Governs Respondent's Estoppel And Constitutional Claims

1. Because respondents' suit arises out of, and depends upon, a secret fact—respondents' alleged arrangement with the CIA to perform espionage services—*Totten* requires the dismissal of the complaint. As Judge Kleinfeld's dissenting opinion explained:

> [Respondents'] case is factually indistinguishable from *Totten*. Like William Lloyd, [respondents allegedly] were engaged to provide secret services to the United States behind enemy lines. Like Lloyd, they [allegedly] served to the great benefit of the United States in circumstances that could have gotten them killed. And like Lloyd, they allegedly got stiffed by the government providing less com-

> pensation than required by the contracts when the time came for the United States to pay up.

Pet. App. 69a. And like Lloyd, respondents are seeking a judicial order that would require an adjudication of whether respondents in fact had an espionage relationship, and if so, any extent to which that relationship imposes an obligation on the United States. Indeed, like Lloyd, respondents would not even have standing to sue unless such a relationship existed. Thus, like Lloyd's suit, respondents' suit is fundamentally at odds with the inherently secret and extralegal nature of the agreement, and would interfere with the government's ability to conduct espionage relationships while maintaining effective foreign relations. Like Lloyd, respondents have "no recognised position whatever according to International Law" or domestic law. Oppenheim 862. Respondents' alleged agreement with the CIA thus is no more judicially enforceable than Lloyd's alleged agreement with President Lincoln.

2. In refusing to dismiss the suit in this case, the court of appeals held that *Totten* does not require the dismissal of claims that did not seek enforcement of a *contract*. Pet. App. 21a-25a. The Court's holding and reasoning in *Totten*, however, extend beyond contractual claims and applies with the same force to other claims premised on an unenforceable and legally unrecognizable secret espionage relationship. The Court in *Totten* looked to the secret nature of the underlying relationship, emphasizing that "the employment and the service were to be equally concealed" and that "[t]he secrecy which such contracts impose precludes *any action* for their enforcement." *Totten*, 92 U.S. at 106, 107 (emphasis added); *id.* at 107 ("public policy forbids the maintenance of *any* suit in a court of justice")

(emphasis added). The Court that decided *Totten* certainly would not have entertained a tort suit for the tortious interference with an espionage contract, or any estoppel action that proceeded on the premise that a secret promise or contract, in fact, existed. Indeed, in light of the secret nature of espionage contracts, there is no meaningful difference between a contract action to enforce a secret contract and an estoppel action to enforce a secret promise.

Totten accordingly equally "extends to claims for tort or constitutional violations arising from the secret contractual relationship." Pet. App. 49a (Tallman, J., dissenting). "Whether it is called a plea for fairer process or a simple contract claim for damages, [respondents], like Totten's decedent, sue the government to obtain a remedy for its breach of an agreement to compensate them for intelligence services." *Id.* at 71a (Kleinfeld, J., dissenting). Thus, "the *Totten* doctrine applies to the facts of this case regardless of whether [respondents'] claim is based on a secret contract with the CIA or on other theories of relief that necessarily involve the disclosure of that secret relationship." *Id.* at 52a (Tallman, J., dissenting). The court of appeals' contrary reading of *Totten* would allow past or current spies (or individuals who imagine or falsely allege that they were spies) to circumvent *Totten* by artificially pleading contract claims as raising tort, estoppel, or constitutional claims.

Respondents cannot recover under any theory of relief absent proof of their alleged agreement to perform espionage services for the CIA. For instance, respondents' "claim based on theories of estoppel would require [them] to actually demonstrate a relationship with the CIA," "the very existence" of which is "a secret that cannot be disclosed, since disclosure of this

fact would inevitably 'compromise or embarrass our government in its public duties.'" Pet. App. 52a (Tallman, J., dissenting) (quoting *Totten*, 92 U.S. at 106). The same is true of respondents' due process claims that are allegedly based on a statute or regulation. Absent an alleged secret relationship between respondents and the CIA, respondents would not even have standing to seek a fair process and the CIA would owe no actionable duty to respondents. "That is, [respondents] would have to show that a relationship or an agreement existed between themselves and the CIA that would entitle them to seek relief under these specific statues and regulations for the benefits they now claim." *Id.* at 53a (Tallman, J., dissenting).

The court of appeals was manifestly wrong in asserting that a suit to compel the Agency to provide respondents with a "fair internal process" could comport with the secrecy implicit in respondents' alleged relationship with the CIA. Pet. App. 22a. A judicial order of that sort would necessarily be premised upon a finding that respondents were in fact spies entitled to a "fair internal process." *Ibid.* Indeed, the court explicitly acknowledged that "to make out their procedural due process claim, [respondents] *will need to demonstrate * * * that they had a relationship with the CIA that could potentially establish an entitlement to continued assistance or payments*." *Id.* at 35a (emphasis added); accord *id.* at 37a (requiring district court to engage in an "evidentiary inquiry * * * * to determine *whether the alleged relationship with the CIA in fact existed*, and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest") (emphasis added). Under *Totten*, however, respondents could have had no legitimate expectation that their

alleged agreement with the CIA would give rise to legally enforceable rights.

In short, respondents' suit conflicts *in toto* with respondents' allegedly secret relationship with the United States and the public policy that suits by spies compromise national security and effective foreign relations. If anything, respondents' suit imposes even more of an intrusion on the Executive Branch's role in safeguarding national security than that imposed by William Lloyd's suit for compensation. As discussed, respondents seek not only a permanent injunction for financial support, but also a judicial determination of what internal procedures the CIA must have to adjudicate "defector grievances," Pet. App. 139a. Such matters are committed to the Executive Branch, see pp. 22-24, *supra*, and respondents' claims conflict with the secret nature of the agreement. Because any spy would know that such an espionage agreement would not be judicially enforceable, he may seek certain assurances about the extent to which the Agency will provide a fair process to review any dispute. But that aspect of the alleged agreement is no more subject to judicial review than the terms of payment.

E. *Reynolds* Does Not Supersede *Totten*

The Ninth Circuit concluded that the *Totten* doctrine has effectively been subsumed under the state secrets doctrine of *United States* v. *Reynolds*, 345 U.S. 1 (1953). The court of appeals thus held that *Totten* "has flowered into the state secrets doctrine of today," such that "*Totten* permits dismissal of cases in which it is asserted that the very subject matter is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets

doctrine." Pet. App. 25a, 27a. That ruling is unsound both in principle and in practice.

1. *The Ninth Circuit Erroneously Concluded That* Reynolds *Governs Suits Whose Subject Matter Involves An Agreement To Perform Espionage Services*

a. *Reynolds* was an action brought against the Air Force under the Federal Tort Claims Act, 28 U.S.C. 2674, in which the plaintiffs sought information relating to the crash of a military aircraft that had been engaged in testing secret electronic equipment. The Court held that the information was protected by "the privilege against revealing military secrets," *i.e.*, the state secrets privilege, which must be formally "lodged by the head of the department which has control over the matter, after actual consideration by that officer," and must be reviewed by the court to determine that "military secrets are at stake." 345 U.S. at 6, 8. 11. Nothing in that decision purports to overrule *Totten* or suggests that *Reynolds*, rather than *Totten*, governs suits by spies seeking redress for an alleged failure of the CIA to provide adequate compensation. The Ninth Circuit accordingly erred in deciding for itself that *Totten* had no continuing force by virtue of a later decision of this Court. See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

b. In any event, the Court's decision in *Reynolds* itself refutes the notion that *Totten*'s categorical bar on suits such as respondents' lacks independent force. The Court in *Reynolds* cited *Totten* expressly, and differentiated it from an ordinary dispute in which the evidentiary state secrets privilege is necessary to protect information that might be relevant in resolving claims

otherwise susceptible to judicial resolution. As this Court explained, *Totten*, by contrast, was a case "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed *on the pleadings without ever reaching the question of evidence*, since it was so obvious that the action should never prevail over the privilege." *Reynolds*, 345 U.S. at 11 n.26 (emphasis added). Contrary to the Ninth Circuit's reading, that passage makes eminently clear that *Totten* continues to set forth a *categorical* rule of dismissal for suits premised on a secret agreement and that formal invocation of the state secrets privilege is *not* required for suits covered by *Totten*.

Although this Court's decision in *Reynolds* remains important to the government and effectively serves its interests in the cases where there is a recognized cause of action, *Totten* remains essential in the distinct class of cases where recovery is incompatible with the very nature of the agreement that forms the basis for the plaintiff's claims for relief, *i.e.*, a clandestine agreement to provide espionage services. In that instance, a court can ascertain "on the pleadings" (*Reynolds*, 345 U.S. at 11 n.26) that the plaintiff's entitlement to any relief is premised on the existence of a secret agreement to perform espionage services. Thus, "*Reynolds* did not alter the long-standing rule announced in *Totten* barring judicial review where the very subject matter of the suit is a state secret." Pet. App. 44a (Tallman, J., dissenting). As Judge Tallman's dissent correctly explained:

> While *Totten* and *Reynolds* are closely related in that both protect a state secret from disclosure, the rules announced in those cases differ in subtle but

> important respects. Most importantly, the state secrets privilege in *Reynolds* permits the government to withhold otherwise relevant discovery from a recognized cause of action (*e.g.*, [a Federal Tort Claims Act] case), while the *Totten* doctrine permits the dismissal of a lawsuit because it is non-justiciable before such evidentiary questions are ever reached.

Id. at 45a.

This Court's post-*Reynolds* decision in *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981), also reaffirms the continuing validity of the categorical rule set forth in *Totten*. In that case, the Court held that "whether or not the Navy has complied with [the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C)]" with respect to the storage of nuclear weapons at a Navy facility was "beyond judicial scrutiny," a "similar situation" to the one at issue in *Totten*. 454 U.S. at 146, 147. The Navy's obligation under the Act, the Court explained, was triggered by a proposal to store nuclear weapons. Because any such proposal would itself be classified information, the Court held that the suit, like the one in *Totten*, could not proceed. *Id.* at 146-147. And the Court reached that judgment despite the absence of a formal invocation of a state secrets privilege by the Navy.

2. *Requiring The CIA To Assert The State Secrets Privilege With Respect To Specific Information Does Not Sufficiently Safeguard The CIA's Interests*

a. As discussed, the rule of *Totten* is compelled by the inherently secret nature of espionage agreements, and the decision prevents potentially devastating disclosures of national security information and the judi-

ciary from reviewing what is a quintessentially core Executive Branch function. On a practical level, *Totten* also serves the national security mission of the CIA and other intelligence agencies. Since its inception over a century ago, the *Totten* doctrine has deterred lawsuits by individuals who have real or perceived grievances against the United States arising out of an alleged relationship for the performance of espionage. *Totten* also has greatly preserved the CIA's resources and prevented efforts at "graymail," *i.e.* attempts by individuals to induce the Agency to settle a case (or prevent a case from being filed) out of a concern that any effort to litigate the suit would reveal sensitive or classified information useful to our adversaries or that would compromise the Agency's clandestine operations. *Totten* significantly reduces the effectiveness of graymail by eliminating any judicial forum for those who would allege the existence of a secret arrangement.

The court of appeals' unprecedented holding that such suits are not barred at the outset and may proceed at least to the invocation of the state secrets privilege and even proceed to judgment runs the real risk that such lawsuits would substantially increase. Indeed, every stage in the litigation involves some risk of disclosure of sensitive information and accordingly some opportunity for graymail. In particular, the expected enormous publicity that may be generated by the assertion of a state secrets privilege by the DCI in any given case could well force the CIA to settle the case, regardless of its merits.

The Ninth Circuit's holding that this case could proceed unless and until the DCI successfully asserts the state secrets privilege significantly reduces the benefits to the CIA from *Totten*'s categorical bar of suits by spies arising out of their relationship with the CIA.

Only a categorical rule absolutely eliminates a judicial forum for graymail. The benefits to the CIA are in large measure lost if the CIA must undergo "full-fledged discovery" (Pet. App. 12a n.5) or become embroiled in a case-by-case battle over the propriety of asserting a state secrets privilege with respect to individual documents or pieces of information. Such a regime would also place an enormous burden on the DCI, whose attention would be diverted from the CIA's other pressing business to reviewing potentially every pleading filed by an alleged spy with a grievance against the agency. Cf. *Cheney* v. *United States Dist. Ct.*, 124 S. Ct. 2576, 2589 (2004) (declining to hold that the Vice President must invoke executive privilege before the district court considers separation of powers objection to discovery requests and reasoning that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.").

The personal burden on the DCI envisioned by the Ninth Circuit also is wholly unnecessary in suits like this that necessarily involve classified information. Even in a suit in which a plaintiff has entirely fabricated an alleged secret espionage relationship, the DCI would need to invoke the privilege to prevent the disclosure of classified information. See, pp. 35-36, *infra*.

At a more fundamental level, however, the Ninth Circuit's holding seriously misconceives *Totten*'s protection of the classified fact of whether the United States has contracted for espionage services. As discussed (pp. 27-29, *supra*), all of respondents' claims ded-pend upon the existence of an extralegal espionage relationship whose very existence must "*for ever*"

remain secret. *Totten*, 92 U.S. at 106 (emphasis added). The possibility of a formal adjudication confirming the relationship is fundamentally inconsistent with the nature of the relationship and the bargain struck. The "most important purpose" served by the *Totten* rule is "to keep the whole engagement utterly and entirely secret." Pet. App. 71a (Kleinfeld, J., dissenting). "If a lawsuit is filed but some papers remain secret, that is not enough. An intelligent observer, knowing something of the events, can figure out from the barest indications in a lawsuit what it is all about." *Id.* at 72a. And knowing information about one spy—how he was recruited, the terms of the relationship, and representations made by case officers—can reveal sensitive information about the CIA's tradecraft methods with respect to other spies and similar clandestine operations.

Moreover, because the existence *vel non* of an espionage agreement is itself a classified fact, invocation of a state secrets privilege in every case by the DCI would be an entirely unnecessary exercise. *Reynolds*, 345 U.S. at 11 n.26. And any further judicial inquiry into whether or not the relationship in fact existed could lead to the disclosure of classified information. "Even asserting that there is a secret to protect * * * amounts to letting the cat out of the bag. It is such disclosure of the relationship's very existence that *Totten* sought to avoid." Pet. App. 72a (Kleinfeld, J., dissenting). *Totten* thus avoids the risk that even subtle differences in the manner of invoking the state secrets privilege in different cases will reveal matters of interest to a hostile power. That risk may seem unimportant in an individual case, because a court will not know the context in which it appears. This Court, however, has recognized that "[i]t is conceivable that the mere

explanation of why information must be withheld can convey valuable information to a foreign intelligence agency," which will have "both the capacity to gather and analyze any information that is in the public domain and the substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details." *CIA* v. *Sims*, 471 U.S. at 178-179; see *Gardels* v. *CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982); *Halkin* v. *Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978); *United States* v. *Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

The same is equally true "where there is no espionage relationship to protect," in which case any statement to that effect would "make all non-denials effectively confirmations." Pet. App. 72a (Kleinfeld, J., dissenting). With respect to this case, William H. McNair, the Information Review Officer within the CIA's directorate for foreign intelligence and counterintelligence activities, explained that any official acknowledgment of the truth or falsity of any of respondents' allegations would reveal information that could compromise national security:

> [T]he denial of [an espionage] relationship would itself reveal classified information. If the CIA were to deny a relationship every time one did not exist, then any time the Agency refused to confirm or deny a relationship, it would be tantamount to an admission that such a relationship does in fact exist. Such a procedure would obviously reveal the very information that the CIA seeks to protect (i.e. a current or past covert relationship) and would risk national security.

Id. at 147a n.1.

b. The Ninth Circuit fundamentally disagreed with the CIA's assessment that even responding to respondents' allegations was a national security risk. Thus, the court questioned the CIA's need at the outset to obtain dismissal of suits arising out of an espionage agreement and held that the CIA is compelled in every case to demonstrate harm to national security from official confirmation or denial of whether a plaintiff was a spy for the CIA. The court even held at one point that the district court was permitted to engage in an "evidentiary inquiry * * * to determine whether the alleged relationship with the CIA in fact existed and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest." Pet. App. 37a; accord *id.* at 35a. The court also repeatedly suggested that suits that allege an espionage relationship with the CIA may not jeopardize national security. *Id.* at 35a-36a. The court therefore invited the district court "to second-guess the DCI's determination of what information remains harmful to national security or [is] otherwise embarrassing to the federal government," *id.* at 54a (Tallman, J., dissenting). Judges are ill-suited, however, to make the "complex political, historical, and psychological judgments" that factor into the DCI's assessment of what revelations could damage national security. *CIA* v. *Sims*, 471 U.S. at 176.

For example, the court speculated that the CIA could acknowledge whether respondents were in fact spies without necessarily harming national security because "[i]t is widely known that * * * the CIA recruits foreign spies" and because allegations in the complaint "could be evidence that [respondents'] past relationship with the CIA is not now clandestine." Pet. App. 35a, 36a. But "even if a fact * * * is the subject of

widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security." *Afshar* v. *Department of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983); *Military Audit Project* v. *Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981); accord *Abbotts* v. *Nuclear Regulatory Comm'n*, 766 F.2d 604, 607-608 (D.C. Cir. 1985).

Another example is the court's mistaken perception that it is relevant that "[a] substantial time has passed since the agreement with [respondents] was formed, and we are no longer 'at war,' 'cold' or otherwise, with [respondents'] country of origin." Pet. App. 36a. The end of the Cold War, and the passage of time generally, do not detract from the CIA's need to protect all aspects of its tradecraft methods in spotting, developing, recruiting, rewarding, and terminating human intelligence sources. For instance, "[t]he *Totten* case was decided over ten years after the end of the Civil War, and whatever military secrets Totten might have uncovered during the war were certainly not current military secrets in 1875." *Guong* v. *United States*, 860 F.2d 1063, 1065 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989). The relationship is thus a matter "to be *for ever* sealed." *Totten*, 92 U.S. at 106 (emphasis added).

Finally, forcing the CIA to respond to respondents' complaint "through the prism of current state secrets doctrine" (Pet. App. 29a) does not at all address *Totten*'s recognition that judiciary is ill-suited to adjudicate certain core Executive Branch judgments concerning espionage activities. Respondents' suit, at bottom, is a dispute about how much financial assistance or how much internal process the CIA owes to its former spies. The Article III branch has never entangled itself in

such disputes, and the Ninth Circuit's decision would mark a clear break with that historical practice.

F. *Webster* v. *Doe* Does Not Support The Ninth Circuit's Decision

Respondents argue that permitting their constitutional claims to proceed on the merits is supported by the Court's holding in *Webster* v. *Doe*, 486 U.S. 592, 601-605 (1988), which held that Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c) (1988), did not preclude judicial review of a CIA employee's colorable constitutional challenges to his dismissal from the agency. See Br. in Opp. 19-22, 26. The court of appeals similarly reasoned that "*Webster* requires that the constitutional nature of [respondents'] cause of action weigh heavily in applying the *Reynolds* state secrets privilege standard." Pet. App. 35a. That contention is mistaken.

1. *Webster* did not involve an assertion that *Totten* required dismissal of the action, and indeed the majority opinion did not even cite *Totten*, much less suggest that *Totten* has been superseded by *Reynolds*. The circumstances of *Webster* also differ considerably from those of this case. *Webster* involved a suit by an *employee* of the CIA, albeit one who was engaged in clandestine activities, and did not involve an alleged espionage source who had entered into a covert agreement with the agency and its case officers. Although the Ninth Circuit viewed the two circumstances as involving distinctions of mere "nationality and location," Pet. App. 34a, the national security implications and the historical treatment of the two situations are meaningfully different. In the former case, acknowledgment of the mere existence of an employment relationship with the CIA, along with other details of that relationship, generally may be, and has been, revealed in a lawsuit

without compromising national security. Thus, as long as a covert CIA employee's name is not identified, certain aspects of his or her activities (*e.g.*, the case officer's GS pay rank) may not necessarily expose classified information. As the Court in *Webster* noted, the CIA has routinely entertained employment disputes under Title VII concerning the hiring and promotion policies of Agency employees. 486 U.S. at 604.

In the case of a non-employee espionage agent, the CIA has determined that different considerations of national security and foreign relations are implicated if the CIA were to confirm or to deny the existence of a human intelligence source recruited by a CIA case officer to steal the secrets of an enemy. In that class of cases, there is generally no aspect of an espionage relationship that can be revealed, including confirmation or denial of the relationship's existence. That conclusion is consistent with the traditional government practice of refusing to acknowledge an espionage relationship, see pp. 18-19, *supra*, and the conclusion is owed substantial deference because the Executive Branch is uniquely situated and entrusted to determine whether disclosure of intelligence information would compromise national security. See, pp. 21-22, 24-25, *supra*.

Moreover, as *Totten* holds, it is evident on the face of a complaint by an espionage agent seeking additional or different compensation than that awarded by the CIA that the agent's claim cannot proceed without disclosure of classified facts, *i.e.*, the relationship's existence and the details of that relationship. And there is no historical (much less routine) practice of litigation of claims by former spies that the CIA has provided them with insufficient compensation or that the CIA does not have fair procedures for dealing with financial claims by former spies. Indeed, unlike Title VII, which applies to

federal employees and guarantees them specific statutory rights, 42 U.S.C. 2000e-16(a), there has never been any recognized cause of action for former espionage agents who are dissatisfied with the CIA's recruitment, compensation, or termination.

2. Respondents' reliance on their due process allegations fails for more fundamental reasons as well. The Court construed the statute at issue in *Webster* in a way to avoid a "'serious constitutional question'" were Congress to "deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (quoting *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). This is not a case in which a congressional statute is being construed, however, but a case in which the complaint asserts a constitutional entitlement to payments and process under a secret espionage agreement. But the fundamental premise of that relationship is that neither side has a legally enforceable claim to hold the other side to the terms of the agreement. There is simply no legally cognizable or constitutionally-protected interest to safeguard.

In addition, even under the Ninth Circuit's ruling, respondents' claim can be defeated by the invocation of the state secrets privilege. As the Ninth Circuit acknowledged (and respondents have not disputed), if the head of the CIA were to assert that the existence *vel non* of an espionage relationship with respondents is a state secret, and the district court were to agree with that determination and further conclude that respondents' suit could not proceed without the disclosure of that secret, respondents' constitutional claims would be dismissed and respondents would be "left without redress even if everything they allege is true." Pet. App. 18a; accord *id.* at 14a-15a n.7.

The Due Process Clause does not entitle an alleged spy to insist on assertion of the state secrets privilege, as opposed to a *Totten* dismissal. To the contrary, under *Totten*, and as confirmed by *Reynolds*, no such formal invocation of the privilege is necessary, let alone constitutionally compelled. Rather, respondents' action should have been dismissed "on the pleadings without ever reaching the question of evidence," because "the very subject matter of the action, a contract to perform espionage, [is] a matter of state secret" and "it [is] so obvious that the action should never prevail over the privilege." *Reynolds*, 345 U.S. at 11 n.26. That result raises no serious constitutional question. Under the state secrets privilege, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake," *id.* at 11, and an action may be dismissed, even if constitutional claims are involved, when a plaintiff cannot establish his case without the use of such information.[4] Likewise, respondents' due process allegations do not alter the fact that their action, including any due process claim, is premised on a state secret—the existence of an espionage relationship—and *Totten*'s categorical rule accordingly bars judicial resolution of their claims.

* * * * *

The United States has always employed spies to serve its foreign relations and national security interests. Such arrangements are inherently secret and

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[4] *E.g.*, *Darby* v. *US Dep't of Def.*, 74 Fed. Appx. 813 (9th Cir. 2003); *Weston* v. *Lockheed Missiles & Space Co.*, 881 F.2d 814 (9th Cir. 1989); *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Halkin* v. *Helms*, 690 F.2d 977 (D.C. Cir. 1982); *Salisbury* v. *United States*, 690 F.2d 966 (D.C. Cir. 1982).

always have been treated as such throughout our history. This suit, which alleges that respondents are former spies who are entitled to an award of compensation from the CIA and a court order mandating the CIA to adopt fair procedures for dealing with them, could not be more inconsistent with the Nation's traditions in treating espionage activities as secret, entrusted to the Executive Branch, and beyond the realm of judicial resolution. The courts below accordingly should have applied *Totten* and dismissed respondents' suit.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with instructions to dismiss the complaint.

Respectfully submitted.

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