No. 03-1395

In the Supreme Court of the United States

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Totten* v. *United States*, 92 U.S. 105 (1875), 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 (App. 1a-64a) is reported at 329 F.3d 1135.[1] The June 7, 2000, opinion of the district court (App. 95a-116a) is reported at 99 F. Supp. 2d 1284. The January 22, 2001, opinion of the district court (App. 85a-94a) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 29, 2003. A petition for rehearing was denied on January 7,

[1] "App." refers to the separately bound appendix to the petition for a writ of certiorari.

2004 (App. 65a-66a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In *Totten* v. *United States*, 92 U.S. 105 (1875), this Court 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 found 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." *Id.* at 107. The Ninth Circuit in this case held that *Totten* did not bar respondents from bringing an action in federal district court seeking relief for an alleged failure of the Central Intelligence Agency (CIA or Agency) to compensate them for espionage activities they purportedly conducted overseas on behalf of the CIA.

1. Respondents, using the fictitious names Jane and John 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 the United States has neither confirmed nor denied "for reasons of national security." App. 2a. The CIA 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 performed "highly dangerous

and valuable [espionage] assignments" abroad and 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 by individuals who are aware that there exist sanctions against them for death or imprisonment as a result of their espionage services for the CIA. 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 this Court's decision in *Totten*, *supra*, and because 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 denied the motion in part, holding that *Totten* does not extend to plaintiffs' tort and constitutional claims. App. 104a-107a. The district court also held that the Tucker Act does not apply to respondents' claims because they were framed in what the district court viewed as non-contract theories of a potential entitlement to benefits under statute, regulation, or estoppel. *Id.* at 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. App. 143a-148a. The district court denied summary judgment. *Id.* at 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 petition for interlocutory appeal and denied respondents' cross-petition pursuant to 28 U.S.C. 1292(b). App. 77a- 78a.

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

a. The majority held that the district court properly held that respondents' suit did not fall within the exclusive jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a)(1). The court found that "[t]he primary claim of [respondents] * * * is for an injunction requiring the CIA to conduct in-

ternal hearings on their claims that comport with due process," App. 9a, and that respondents' due process claims allegedly arose from a liberty interest that was not dependent on the existence of any contract, *id.* at 11a-12a. The court also concluded 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 majority similarly held the district court did not err in refusing to dismiss respondents' estoppel claim. *Id.* at 15a-17a. The court emphasized, however, that "this litigation is in a very early stage and full-fledged discovery has not yet begun," and that the CIA could accordingly file a renewed motion for summary judgment. *Id.* at 12a n.5.

The majority also held that *Totten* does not bar judicial review of respondents' claims at the outset because their claims, in the majority's view, "do not arise out of an implied or express contract." App. 18a. The majority 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 majority 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 admini-

strative 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.* (internal quotation marks omitted).

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, non-identifying details in their complaint." 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 majority 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). App. 25a. The majority 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 noncompliance with those formalities "is reason enough to affirm the district court's refusal to dismiss the case." *Ibid.*

The majority finally proceeded to "provide some guidance concerning the handling of [respondents'] claims should the state secrets privilege be invoked" by the CIA on remand. App. 31a. The majority 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 majority 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.

b. Judge Tallman dissented. App. 39a-64a. He explained that "*Totten* holds that claims brought by secret agents against the government are nonjusticiable," and only this Court, not the court of appeals, may "decide whether *Totten* continues to bar judicial review of actions arising from espionage services performed for the United States by secret agents." *Id.* at 39a (citation omitted).

4. The court of appeals denied rehearing and rehearing en banc. App. 65a-66a. Judge Kleinfeld, joined by five other active judges, dissented from the denial of rehearing. *Id.* at 66a-76a. He reiterated that "[t]he panel opinion effectively overrules *Totten*." *Id.* at 67a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision to let this case proceed to "full fledged discovery" (App. 12a n.5) absent a successful and formal invocation of a state secrets privilege by the DCI is inconsistent with this Court's decision in *Totten*. Since the CIA was created in 1947, the CIA has successfully used *Totten* to obtain dismissal *at the outset* of complaints alleging secret contracts to perform espionage services. That practice has

continued after the articulation of the state secrets doctrine in *United States* v. *Reynolds*, *supra*, and indeed has continued up until the decision below. The court of appeals' unprecedented holding, therefore, undermines the regime for dealing with claims of alleged espionage agents that has functioned effectively for nearly 130 years since *Totten*. That result seriously threatens to compromise the United States' foreign relations with other nations and to impair the ability of the CIA to conduct clandestine intelligence operations and to protect national security information from public disclosure. This Court's review is accordingly warranted.[2]

I. THE COURT OF APPEALS ERRED IN REFUSING TO APPLY *TOTTEN* v. *UNITED STATES*

Totten, 92 U.S. at 106-107, holds that overriding considerations of public policy, informed by separation of

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[2] The United States does not seek review of the court of appeals' holding that, in the current posture of this case, the Tucker Act, 28 U.S.C. 1491(a)(1), does not require that respondents' constitutional claims be brought in the Court of Federal Claims. See App. 8a-17a. The United States does not take issue with that determination, but even if this Court took a different view, it would not preclude this Court from granting certiorari and reviewing the Totten issue. Certainly nothing in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), would preclude the Court from addressing the *Totten* issue without resolving the Tucker Act issue. See, *e.g.*, *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999). The Tucker Act issue is not jurisdictional in the Article III sense. See 5 U.S.C. 702. Moreover, the *Totten* doctrine necessarily must operate as a threshold basis for dismissing a suit. Indeed, in a case (and this may be such a case) where a plaintiff's standing depends on the existence of a secret contract or relationship with the CIA, the Court should dismiss the suit on *Totten* grounds without definitively resolving the question on which the plaintiff's standing depends. See p. 16, *infra*.

powers principles, forbid a suit against the United States that involves the disclosure of a secret agreement for espionage services. Respondents' suit seeks to force the CIA either to provide respondents with life-time financial assistance in compliance with an alleged contract (a contract with the CIA to perform espionage services) or to provide respondents with internal administrative procedures that would govern their entitlement to life-time financial support. App. 138a-142a. *Totten* 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* Bars A Court From Considering Claims That The CIA Has Wrongfully Refused To Pay For Espionage Services

1. *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.*[3]

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. Adjudication of such disputes not only would prevent effective foreign relations, but also would interfere with the government's ability to contract for espionage services in the first place. "A secret service, with liability to publicity in this way, would be impossible." *Totten*, 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

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[3] The importance of secrecy was not a novel concept at the time President Lincoln contracted for espionage services. Since the earliest days of the Republic, secrecy has been recognized as vital to the successful gathering of intelligence. In a letter of July 26, 1777, issuing orders for an intelligence mission, George Washington wrote to 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.

The Writings of George Washington 478-479 (J. Fitzpatrick ed. 1933); see *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

as confidential, and respecting which it will not allow the confidence to be violated." *Ibid.*

Totten establishes that suits to obtain judicial relief for the CIA's allegedly wrongful failure to compensate spies are "non-justiciable," because such suits cannot proceed without acknowledgment of an espionage relationship. App. 39a (Tallman, J., dissenting); accord *id.* at 67a (Kleinfeld, J., dissenting) ("Under *Totten*, those who spy for us cannot bring lawsuits to enforce our intelligence agencies' promises, because that would require exposure of matters that must be kept secret in the interest of effective foreign policy.").

2. *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. See generally *Baker* v. *Carr*, 369 U.S. 186, 211-217 (1962). "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." App. 41a (Tallman, J., dissenting). A suit that would compel the United States to disclose the existence and the details of an espionage relationship would be an inappropriate intrusion into the Executive Branch's authority over foreign affairs and national security. Moreover, the extent of any remedy for an alleged spy is a matter uniquely for the Executive Branch. As this Court noted in *Totten*, such individuals "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.

The protection of intelligence sources and methods is constitutionally entrusted to the Executive Branch under Article II of the Constitution. 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, § 2, Cl. 1. That "constitutional investment of power in the President" necessarily includes the "authority to classify and control access to information bearing on national security." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). The President's authority to control access to classified information "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)(6) (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. 159, 168-169 (1985) (Congress entrusted the CIA with "very broad" and "sweeping power" to protect "all sources of intelligence information from disclosure").

Applying *Totten* to force individuals to "look for their compensation" from "the department employing them" does not strip human intelligence sources of potential remedies. For instance, sources 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. App. 75a (Kleinfeld, J., dissenting).

B. Respondents' Claims Are Governed By *Totten*

1. Because respondents' suit arises out of, and depends upon, a classified fact—respondents' alleged agreement 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 service to the United States behind enemy lines. Like Lloyd, they 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 compensation than required by the contracts when the time came for the United States to pay up.

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. Thus, like Lloyd's suit, respondents' suit would interfere with the government's ability to protect classified information and to conduct espionage relationships while maintaining effective foreign relations.

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. App. 21a-25a. The Court's holding and reasoning in *Totten*, however, extend beyond contractual claims. The Court 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 pre-

cludes *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 other action that proceeded on the premise that a secret promise or contract, in fact, existed.

Totten equally "extends to claims for tort or constitutional violations arising from the secret contractual relationship." 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 majority's contrary reading of *Totten* would allow past or current spies (or individuals who imagine or allege that they were spies) to circumvent *Totten* by artificially pleading contract claims as raising tort or constitutional claims.[4]

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[4] The majority erred in relying (App. 33a-35a) on *Webster* v. *Doe*, 486 U.S. 592, 604-605 (1988), which held that a discharged covert CIA employee could assert constitutional challenges to his dismissal from the Agency. 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) can be revealed or litigated without necessarily exposing classified information. The CIA also, of course, can assert the state secrets privilege with respect to any classified information relevant to the lawsuit. By contrast, beyond

All of respondents' claims, at bottom, are inexorably linked to, and premised on, the alleged existence of a secret agreement to perform espionage services, and "the judicial branch cannot right such a wrong without disclosure of the engagement's existence, which, as *Totten* said, must remain forever secret." App. 75a (Kleinfeld, J., dissenting). For instance, "[a]s with a claim sounding strictly in contract, [respondents'] claim based on theories of estoppel would require [respondents] 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.'" *Id.* at 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. "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." App. 53a (Tallman, J., dissenting). In sum, absent an alleged secret relationship between respondents and the CIA, the latter owes no actionable duty to the former.

The panel was manifestly wrong in asserting that a suit to compel the Agency to provide respondents with

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the general unclassified fact that covert CIA employees use human sources for intelligence, there is generally no aspect of any espionage relationship that can be revealed or litigated, including confirmation or denial of any relationship, that does not involve exposure of classified information. See App. 59a (Tallman, J., dissenting). In all cases, the facts that underlie an espionage relationship are classified such that a lawsuit cannot proceed under any circumstance. See pp. 24-26, *infra*.

a "fair internal process" could comport with the secrecy implicit in respondents' alleged relationship with the CIA. 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.* Absent such a relationship, they would not even have standing to seek a fair process. Indeed, the majority 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." App. 35a; accord *id.* at 37a (requiring district court to engage in "evidentiary inquiry * * * 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").

In short, respondents' suit in its entirety conflicts 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. Here, respondents seek not only an injunction for financial support or to "provide for [their] basic needs," App. 138a, but also seek a judicial determination of what procedures the CIA must have to adjudicate "defector grievances," *id.* at 139a.[5]

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[5] Indeed, because anyone agreeing to provide espionage would know that such a contract would not be judicially enforceable, they may seek certain assurances about the extent to which the Agency will provide a fair process to review any dispute. But that aspect

2. The court of appeals concluded that the *Totten* doctrine has effectively been subsumed under the state secrets doctrine under *United States* v. *Reynolds*, 345 U.S. 1 (1953). App. 25a-29a. This Court's decision in *Reynolds* itself, however, refutes that notion. 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 to some degree in resolving claims otherwise susceptible of 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. Contrary to the Ninth Circuit's reading, that passage makes eminently clear that *Totten*'s rule of dismissal does not require formal invocation of the state secrets privilege.

"*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." App. 44a (Tallman, J., dissenting). The *Totten* doctrine and *Reynolds* privilege are complementary, not mutually exclusive. 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

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of the alleged agreement is no more subject to judicial review than the terms of payment.

> 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 nonjusticiable before such evidentiary questions are ever reached.

Ibid.

This Court's post-*Reynolds* decision in *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981), also reaffirms *Totten*. In that case, the Court held that "whether or not the Navy has complied with [the National Environmental Policy Act, 42 U.S.C. 4332(2)(C)]" with respect to the storage of nuclear weapons at a Navy facility was "beyond judicial scrutiny." 454 U.S. at 146. 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, under *Totten*, the suit could not proceed. *Id.* at 146-147. Similarly, because any obligation of the CIA to respondents would be triggered by a classified fact, *i.e.*, the existence of an espionage relationship with the CIA, *Totten* categorically bars respondents' suit.

II. THIS COURT'S REVIEW IS WARRANTED TO REAFFIRM *TOTTEN*'S CONTINUING VALIDITY

Totten is of vital importance to the CIA's ability to carry out espionage activities and to protect classified information from unauthorized disclosure. The Ninth Circuit's holding that *Totten* does not bar suits such as respondents' warrants this Court's review.

A. This Court's Review Is Necessary To Correct The Ninth Circuit's Holding That *Reynolds* Superseded *Totten*

1. The majority held in this case 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." App. 25a, 27a; *id.* at 31a (holding that failure to formally invoke state secret privilege "is reason enough to affirm the district court's refusal to dismiss this case"). As Judge Kleinfeld, joined by five other judges, stated, "[t]he panel opinion effectively overrules *Totten*." *Id.* at 67a.

Only this Court, however, may overrule its precedent; a court of appeals cannot accomplish the same result through reliance on later decisions of this Court. *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997). This Court, of course, has never overruled *Totten* and has continued to recognize its force long after *Reynolds*. Thus, "[i]t is the prerogative of the Supreme Court, not [the Ninth Circuit], to decide whether *Totten* continues to bar judicial review of actions arising from espionage services performed for the United States by secret agents, or whether the *Totten* doctrine has somehow been supplanted by the modern state secrets evidentiary privilege articulated in *Reynolds*." App. 39a (Tallman, J., dissenting) (citations omitted); accord *id.* at 67a (Kleinfeld, J., dissenting). This Court's review is accordingly warranted to clarify that *Totten* bars suits that arise out of a secret agreement to perform espionage services for the CIA.

2. The panel's interpretation of *Totten* also conflicts with the decision of the Federal Circuit in *Guong* v. *United States*, 860 F.2d 1063 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989). In that case, the court of appeals dismissed under *Totten* a suit brought by an alleged covert saboteur for the CIA, and rejected the plaintiff's contention that the suit could proceed because the CIA could assert the state secrets privilege under *Reynolds*. *Id.* at 1064-1066. The court of appeals reasoned that *Reynolds* "does not limit or modify the authority of *Totten* or its rationale," and that the plaintiff's suit could not proceed without acknowledgment of a covert relationship with the CIA. *Id.* at 1066.

The panel's decision squarely conflicts with the *Guong* court's conclusion that *Totten* continues to have independent significance after this Court's decision in *Reynolds*. Moreover, in sharp contrast to *Guong*, the panel's decision specifically contemplates that respondents may adjudicate whether they in fact spied for the CIA. App. 35a, 37a. The conflict between the panel's decision and *Goung* over whether *Reynolds* supersedes *Totten* warrants this Court's review.

B. *Totten* Is Of Paramount Importance To The National Security And Foreign Relations Interests Of The United States

1. The issue of whether *Totten* has continuing validity is of critical importance to the United States's ability to conduct foreign intelligence activities in support of its national security, counterterrorist, and foreign policy objectives. 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. at 167. Clandestine intelligence operations demand special protection to ensure that intelli-

gence sources are not compromised and that diplomatic policies are not embarrassing to the United States. Inadequate protection of such information would render the CIA "virtually impotent." *Id.* 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."). 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. 507, 509 n.3 (1980) (per curiam)); see *Egan*, 484 U.S. at 527.

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. Additionally, the CIA's covert operations are designed to acquire secrets of foreign countries in order to protect the life and liberty of United States citizens.

That reality 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 litigation. Inherent in the process is the possibility that one party will deny any relationship with the other. See, *e.g.*, 1 *Oppenheim's International*

Law § 455, at 862. (H. Lauterpecht ed., 8th ed. 1955) ("Although 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. * * * A spy cannot legally excuse himself by pleading that he only executed the orders of his Government, and the latter will never interfere, since it cannot officially confess to having commissioned a spy."); Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 Am. J. Int'l L. 53, 70 (1984) ("For acts of espionage, a 'true' spy, acting in disguise or under false pretenses, is himself responsible: he is out in the cold by himself and the sending state will most likely disavow any knowledge of him."). As the possibility of denial is inherent in and vital to the relationship, a party to an alleged contract for espionage has no basis to demand an adjudication premised on the existence of the contract. Permitting such actions threatens our ability to conduct effective foreign relations. "Spying is among the 'matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties.'" *Id.* at 72a (quoting *Totten*, 92 U.S. at 106). *Totten* is therefore essential to CIA's ability to carry out espionage activities in secret.

2. 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 litigating 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 lawsuits by alleged spies at the earliest stage of litigation. The panel's unprecedented holding that such suits are not barred at the outset and may even proceed to judgment runs the real risk that such lawsuits would substantially increase. Indeed, 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.

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

1. 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 their relationship with the CIA. *Totten* protects against potentially devastating disclosures of national security information, discourages lawsuits from being filed in the first place, and prevents the judiciary from reviewing what is a quintessentially core Executive Branch function. Those benefits are in large measure lost if the CIA must undergo "full-fledged discovery" (App. 12a n.5) and 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.

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 (at 15-16), all of respondents' claims depend upon the existence of an espionage relationship whose very existence must "for ever" remain secret. *Totten*, 92 U.S. at 106. 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." 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 (Kleinfeld, J., dissenting). And knowing information about one spy—where he works, what cover he had, and the like—can reveal sensitive information about CIA's tradecraft with respect to other spies and covert 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. Significantly, "[e]ven 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." App. 72a. 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." *Ibid.* 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:

> [A]ny Agency response to the factual assertions made in any of [respondents'] pleadings, whether to either confirm or deny the allegations contained therein, would be classified information and could not be filed in open court. * * * [W]hen such allegations are either confirmed or denied by the Agency * * * they then bear the imprimatur of an official statement, at which point, * * * national security issues would be raised and the matters would become classified.[ ]
>
> * * * [T]he denial of a 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; see Exec. Order No. 12,958, § 1.2(4), 3 C.F.R. 333 (1996), as amended by Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (2003) (requiring classification of information the disclosure of which "reasonably could be expected to result in damage to the national security").

2. The panel fundamentally disagreed with the CIA's assessment that even responding to respondents' allegations was a national security risk. Thus, the panel 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 of whether a plaintiff was a spy for the CIA. Thus, the panel held that 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." App. 37a; accord *id.* at 35a. The panel also repeatedly suggested that suits that allege an espionage relationship with the CIA may not jeopardize national security. *Id.* at 35a-36a. The panel 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 panel 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." App. 35a, 36a. But "even if a fact * * * is the subject of widespread media and public speculation, its official acknowledg-

ment 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 *Abbots* v. *NRC*, 766 F.2d 604, 607-608 (D.C. Cir. 1985).

Another example is the panel'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." 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. "The *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*, 860 F.2d at 1065. As *Totten* itself stated: "Both 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). Because the Ninth Circuit's decision to remand this case for further proceedings conflicts with *Totten* and seriously undermines the CIA's ability to protect classified information and conduct espionage operations, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2004