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In the Service of Secrets: The U.S. Supreme Court Revisits Totten, 39 J. Marshall L. Rev. 475 (2006)

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IN THE SERVICE OF SECRETS: THE U.S. SUPREME COURT REVISITS *TOTTEN*

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I. FINANCIAL REMUNERATION FOR CLANDESTINE SPY ACTIVITIES

Recently, the United States Supreme Court ruled that U.S. espionage agents could not bring a civil action against the United States seeking financial remuneration for their clandestine activities.[1] Although this notion has been around since the days immediately following the Civil War, contemporaries of a Union spy thought the U.S. government would reconsider its 130 year history of keeping its clandestine activities out of the courtroom. Ultimately, the Court rendered a succinct opinion dismissing most of the arguments set forth by both sides and relying heavily on its decision from six score and ten years ago.

A. The Case of the Civil War Spy

In July 1861, during the opening months of the Civil War, President Abraham Lincoln entered into a service contract with William Lloyd.[2] Specifically, Lloyd was to determine the number of Confederate troops at different points throughout the South, obtain plans for forts and fortifications, and obtain any other information beneficial to the North.[3] President Lincoln offered

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1. Tenet v. Doe, 544 U.S. 1 (2005).
2. Totten Adm'r v. United States, 92 U.S. 105 (1876).
3. *Id.*

Lloyd $200 per month for his services, and Lloyd accepted.[4] It was understood, either implicitly or explicitly, that the collection of information was a clandestine exercise, as was the communication of the information to the President.[5] Once the War and his service behind Southern lines ended, Lloyd sought compensation for his actions which previously had been limited to his expenses.[6]

After Mr. Lloyd's demise, his estate, led by his heir, Encoh Totten, brought an action in the U.S. Court of Claims.[7] The Court dismissed the case, ruling that the President of the United States could not contractually bind the country for secret services.[8] On appeal, the Supreme Court affirmed the opinion but dismissed the Court of Claims' reasoning, noting that the President, as Commander-in-Chief, is "undoubtedly authorized" to employ secret agents and enter into contracts to compensate such agents which are thereby binding upon the government.[9] The Court focused on the nature of the contract for which the parties "must have understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter."[10] To act otherwise, by, for example, enabling a secret agent to expose such a contract, would be detrimental to the public and would, in fact, be itself a breach of the contract.[11] The Court tried to preclude any similar future actions, opining that public policy forbids the maintenance of such contractual actions, as they, by their very nature, inevitably would lead to the disclosure of confidential matters.[12]

The *Totten* decision eventually was expanded to all contracts "with the government when, at the time of its creation, the contract was secret or covert."[13] In *Guong v. United States*, a Vietnamese saboteur contracted his services with the CIA as part of OPLAN 34A.[14] In 1964, Guong was captured and held prisoner until his escape in 1980.[15] The United States had stopped

4. *Id.* at 106.
5. *Id.*
6. *Id.*
7. The Court's name was later changed to the United States Claims Court and subsequently renamed United States Court of Federal Claims. *See* The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (1992).
8. *Totten Adm'r*, 92 U.S. at 106.
9. *Id.*
10. *Id.*
11. *Id.* at 106-07.
12. *Id.* at 107.
13. Guong v. U.S., 860 F.2d 1063, 1065 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989).
14. Maj. Kelly P. Wheaton, *Spycraft and Government Contracts: A Defense of* Totten v. United States, 1997 ARMY LAW. 9, 12 ((1997)). OPLAN 34A was designed to establish long-term informant networks, and conduct intelligence gathering and sabotage in North Vietnam.
15. *Guong*, 860 F.2d at 1064.

compensation to Guong's wife by March 1965.[16] Once in the United States, Guong sued the government for $449,201.45, which he claimed was due for his services.[17] The Court of Claims and the Court of Appeals for the Federal Circuit dismissed the action on *Totten* grounds.[18] The Court of Claims held that "[s]ince the alleged contract required the performance of covert military operations, we hold that it is a contract for 'secret services' which may not be judicially enforced."[19] Guong's tripartite argument to the Court of Appeals was that he engaged in sabotage, not espionage; disclosure of the contract would no longer compromise government secrets; and accounts of his operations already had been published.[20] The Court of Appeals relied on *Totten*, opining that the very existence of the contract cannot be disclosed.[21] The Court also noted that, as *Totten* was decided ten years after the Civil War ended, any secrets obtained by Lloyd no longer were secret.[22] With respect to publication, the Court noted that such disclosure is a matter for First Amendment cases and does not amend the *Totten* precedent.[23]

B. The Case of the Cold War Spy

The *Totten* line of reasoning has not stopped further lawsuits on similar grounds. The most recent ruling was precipitated by a lawsuit filed by a husband and wife who were diplomats from an unnamed Eastern European country which had been an enemy of the United States. Despite their pleas to immigrate into the United States, agents of the Central Intelligence Agency (CIA) convinced them to remain at their posts and engage in espionage on behalf of the United States. Once the couple completed their clandestine activities, they were designated by the CIA as "PL-110" aliens.[24] Although this provision enables an alien's immigration, confirmation of U.S. citizenship, and the establishment of a false background, it neither mandates nor stipulates any financial guarantees.

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16. *Id.*
17. *Id.*
18. *Id.* at 1065-67.
19. *Id.* at 1065-66.
20. *Id.*
21. *Id.* at 1065.
22. *Id.*
23. *See id.* at 1065-66 (citing Snepp v. United States, 444 U.S. 507 (1980) (per curiam)).
24. PL-110 refers to 50 U.S.C. § 403h which admits aliens and members of their families into the U.S. notwithstanding their immigration status. This determination is made by the CIA Director, the Attorney General, and the Immigration Director contingent upon the finding that admission "is in the interest of national security or essential to the furtherance of the national intelligence mission." *Id.*

Once in the United States, the CIA assisted John Doe in securing employment in the financial and banking industry and apportioned a supplemental monetary stipend commensurate with his salary. Consequently, as his salary increased, the stipend decreased. In 1997, several years after the CIA stipend ceased, John Doe was laid off because of a corporate merger. Due to CIA-imposed restrictions regarding the type of employment John Doe could seek, the Does' contacted the CIA in an effort to seek a resumption of financial assistance. The CIA declined their request which left the Does with two equally unappealing choices: return to their former country under the threat of retribution, or remain in the U.S. with limited opportunities for employment. In the timeless American tradition, available to even our newest citizens, the Does decided to bring a civil action. The couple, captioned as John and Jane Doe, argued in their complaint that they were promised travel arrangements, and financial and personal security for their lives, in return for their activities.

Believing the CIA should resume payment of the monetary stipend which they previously received for their acts of espionage, the Does brought suit in the U.S. District Court for the Western District of Washington seeking injunctive and mandamus relief. In an effort to circumvent the apparent jurisdictional bar to suits arising out of secret contracts between the government and its spies established by the Supreme Court in the *Totten* decision, the Does did not argue that the CIA was obligated under traditional contract theory to assist the Does in sustaining their surreptitious characters and reinstating their monetary stipend. Instead, the Does colored their claims creatively, arguing that the ultimate denial of their appeal to reinstate their benefits amounted to a violation of their constitutional due process rights.

The CIA responded by filing a motion to dismiss the Does' claims, challenging the jurisdiction of the District Court based on the Supreme Court's decision in *Totten*.[25] The CIA argued, unsuccessfully, that the Does' constitutional claims were the result of a "dispute over an alleged contract for secret services."[26] In rejecting the CIA's contention, the District Court concluded that the jurisdictional issue did not hinge on whether an enforceable contract existed but whether the actions of the CIA violated the Does' constitutional due process rights.[27] The District Court stated that "colorable constitutional claim[s]" were not automatically precluded from review by *Totten*.[28]

In defending its decision to deny the CIA's motion to dismiss, the District Court concluded that the Does' due process claims

25. Doe v. Tenet, 99 F. Supp. 2d 1284, 1289 (W.D.WA 2000).
26. *Id.* at 1289.
27. *Id.*
28. *Id.* at 1290.

were independent of the contractual issue which the CIA argued was the crux of the Does' suit.[29] The District Court concluded that it could retain jurisdiction over the constitutional claims raised by the Does and also gave short shift to the implications this suit would have on national security interests.[30] The District Court held that most aspects of the Does' case would not infringe on issues of national security and claimed that the trial court was capable of relying on established court procedures to protect any possible classified information from being revealed.[31] Instead, the District Court focused on the whether the Does had raised triable procedural and substantive due process claims.[32]

The CIA immediately appealed the District Court's conclusion that it retained jurisdiction over the Does' claims to the United States Ninth Circuit Court of Appeals. In determining whether the District Court properly asserted jurisdiction over the constitutional issues raised by the Does, the Ninth Circuit began its opinion by focusing on whether the Tucker Act[33] served as a jurisdictional bar to the Does' claims, rather than an analysis of the *Totten* decision.[34] While the Ninth Circuit concluded that a portion of the claims brought by the Does were barred by the Tucker Act because of the contractual nature of their claims, the court upheld the lower court's conclusion that it retained jurisdiction over those claims which did not stem from the Does' contractual relationship with the CIA. In fact, the Ninth Circuit found "no error" in the District Court's determination that the Does had a liberty interest in preserving their fictitious identities and monetary stipend which the CIA could not dismiss without amounting to a violation of the Does' constitutional due process right.[35]

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29. *Id.* at 1289-90:

> [R]egardless of whether plaintiffs had a contractual entitlement to benefits (which *Totten* might foreclose the Court from recognizing) or a right to benefits arising out of promissory estoppel, equitable estoppel, or a statutory or regulatory right, once the [CIA] represented to plaintiffs that a process existed through which they could "appeal" the denial of their monetary stipend, defendants assumed an obligation to provide procedural due process to [the Does'].

30. *Id.* at 1290.

31. *Id.* These court procedures include the CIA's ability to "request leave to submit materials in this matter under seal or *in camera*, or . . . assert the state secrets privilege. . . ." (citing United States v. Reynolds, 345 U.S. 1, 7-8 (1953))(emphasis in original)).

32. *Id.* at 1291-93.

33. 28 U.S.C. § 1491(a)(1)(2000).

34. Doe v. Tenet, 329 F.3d 1135, 1141 (9th Cir. 2003) (explaining that the Tucker Act "grants the Court of Federal Claims exclusive jurisdiction over any claim against the United States in excess of $10,000 that is 'founded . . . upon any express or implied contract with the United States' 28 U.S.C. § 1491(a)(1).

35. *Id.* at 1143.

Additionally, the Ninth Circuit supported the District Court's notion that by refusing to reinstate the Does' stipend or assist Mr. Doe in retaining new employment, the CIA left the Does with no alternative but to return to Eastern Europe and face the possibility of retribution for their acts of espionage. Consequently, regardless of whether the Does and the CIA ever entered into a secret contract, the Does retained a liberty interest in the stipend and fictitious identities created by the CIA which could not be repudiated without due process.[36]

In affirming the jurisdiction of the District Court to hear the Does' procedural due process claims, the Ninth Circuit once more relied on the limitations presented by the Tucker Act. Again, the Ninth Circuit limited the District Court's jurisdiction over the Does' procedural due process claims to only those claims that result from the secret contract between the Does and the CIA.[37] After considering the jurisdictional questions with regard to the Tucker Act, the Ninth Circuit considered to what extent the *Totten* decision infringed upon the Court's jurisdiction.

The Ninth Circuit could not have been more candid with its opinion regarding whether the *Totten* decision barred review of the Does' claims. The Ninth Circuit simply "d[id] not agree" that the *Totten* decision was applicable to the Does' case.[38] Instead, the Ninth Circuit concluded that the jurisdictional bar established in the *Totten* decision only applied to those claims which "arise out of implied or express contract[s]."[39] Moreover, the Ninth Circuit did not interpret the *Totten* decision as a jurisdictional bar but rather depicted *Totten* as the underpinning of the state secrets privilege, which precludes the exposure of information that would negatively impact national security.[40] Since the state secrets privilege would not serve as a jurisdictional bar to the Does' claims, the Ninth Circuit surmised that in order for the Does' claims to be justiciable, the courts must consider whether surrendering the Does' constitutional due process claims outweighed the possible disclosure of national security interests.[41]

Indispensable to the Ninth Circuit's decision was the presumption that the *Totten* decision was not a "blanket prohibition on suits arising out of acts of espionage, [but] is instead simply a holding concerning contract law."[42] This view

36. *Id.* "The district court held that the Does had raised a triable issue of fact with regard to this claim based on a liberty interest. . . ." "[W]e find no error in the district court's ruling denying summary judgment and permitting these claims to go forward." *Id.*

37. *Id.* at 1144.

38. *Id.* at 1145.

39. *Id.* at 1146.

40. *Id.*

41. *Id.*

42. *Id.* at 1147.

allowed the Ninth Circuit to conclude that *Totten* did not apply to the Does' case providing that their due process claims were independent of their alleged secret contract with the CIA. Once the Ninth Circuit concluded that the Does' claims raised justiciable due process claims, the Court turned its attention to the public policy arguments raised in *Totten* and relied upon by the CIA in the Does' case.[43]

In *Totten*, the Supreme Court relied heavily on a public policy argument to conclude that there was a jurisdictional bar to claims resulting from secret contacts such as the Does'. The Supreme Court held "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."[44] However, instead of applying the public policy line of reasoning as a jurisdictional bar, as the Supreme Court did in *Totten*, the Ninth Circuit in its analysis of the Does' case, continued to interpret the public policy line of reasoning articulated in *Totten* as the precursor to the state secrets doctrine.[45]

In an attempt to firmly ensconce its opinion that the Does' case was justiciable, the Ninth Circuit went on to "provide some guidance" for the lower court, should the CIA attempt to invoke the state secrets doctrine on remand.[46] The Ninth Circuit relied upon the Supreme Court's opinion in *United States v. Reynolds*,[47] to answer the question of whether the Does' case actually would place national security interests in jeopardy.

In *Reynolds*, the Supreme Court grappled with the extent of the government's ability to disregard discovery requests for evidence that could expose national security interests.[48] The plaintiffs in *Reynolds* were not spies, but widows of civilian observers who died when the plane they were flying crashed during the testing of electronic equipment.[49] The plaintiffs sued under the Federal Tort Claims Act, and following their discovery motion for the production of the official military accident investigation reports, the Government claimed that, under the state secrets privilege, it could refuse to produce the reports.[50]

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43. *Id.* at 1149.
44. *Totten*, 92 U.S. at 107.
45. *Id.* Doe v. Tenet, 329 F.3d at 1149-50. "This public policy principle has flowered into the state secrets doctrine of today."
46. *Tenet*, 329 F.3d at 1152.
47. 345 U.S. 1 (1952).
48. *Id.* at 3-4.
49. *Id.* at 2-3.
50. *Id.* at 2-5.

The Supreme Court concluded that in order to withhold evidence based upon the state secrets privilege, a "formal claim of privilege, lodged by the head of the department which has control over the matter" must first be filed.[51] Following the official claim of privilege by the government, a judicial evaluation must occur to ensure that "the circumstances are appropriate for the claim."[52] The Court found that in *Reynolds* the Government had properly invoked its privilege when the Secretary of the Air Force filed a formal claim of privilege.[53] While the Court recognized that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," the Court also stated that "we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case."[54] In the *Reynolds* opinion, the Court remanded the case, advising that sufficient evidence existed exclusive of the privileged accident report to prove the plaintiff's case.[55]

Following the Supreme Court's decision in *Reynolds*, the Ninth Circuit interpreted the state secrets privilege in the Does' case as an "absolute privilege" which "cannot be overcome by a showing of necessity."[56] However, irrespective of the "absolute" nature of the state secrets privilege, the Ninth Circuit concluded that the *Reynolds* opinion required a court to consider whether sufficient safeguards exist which a court could use to protect the discovery of information which may divulge national security secrets and thereby allow a suit to continue.[57] In the Ninth Circuit's opinion, should the trial court determine that sufficient safeguards exist to protect the disclosure of information that might negatively affect national security interests, the state secrets privilege would not prevent the case from continuing.[58]

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51. *Id.* at 7-8.
52. *Id.* at 8.
53. *Id.* at 6-7.
54. *Id.* at 9-10.
55. *Id.* at 11-12.
56. *Tenet*, 329 F.3d at 1152.
57. *Id.* "The standard practice when evaluating claims that the state secrets privilege applies is to conduct *in camera* and *ex parte* review of documents. In addition, unprivileged material can and must be separated from privileged material." *Id.* (citations omitted).
58. *Id.* at 1151.

> If we are to inflict upon individuals otherwise protected by our laws, particularly the United States Constitution, the harsh remedy of dismissal to protect the rest of us, we must do so only after the individual responsible for the national security interest at stake personally reviews the matter, and only after he or she concludes and certifies that there is indeed a national security basis for refusing to allow any form of court consideration of the facts necessary to adjudicate the dispute.

Consequently, the Ninth Circuit concluded that the Does' case could proceed, since sufficient safeguards could be implemented by the trial court to protect any national security interests that might be raised during the course of the case.

However, the critical distinction between the *Reynolds* decision and the Does' case, which the majority's opinion failed to take into consideration, was underscored by Circuit Judge Tallman's dissent. Judge Tallman emphasized that, "the state secrets privilege in *Reynolds* permits the government to withhold otherwise relevant discovery from a recognized cause of action (e.g., an FTCA case), while the *Totten* doctrine permits the dismissal of a lawsuit because it is non-justiciable before such evidentiary questions are ever reached."[59] Consequently, the majority opinion failed to view *Totten* as an obligatory jurisdictional bar, concluding 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."[60] As a result, the Ninth Circuit reasoned that *Totten* was only applicable to the Does' case vis-à-vis the state secrets doctrine, and in the Ninth Circuit's opinion, without the CIA properly invoking the state secrets doctrine, the district court retained jurisdiction over the Does' case.[61] Determined to protect *Totten* and its progeny, the CIA filed for certiorari with the U.S. Supreme Court.

C. The Battle of the Briefs

Courts have consistently recognized the Executive Branch as the final arbiter when issues regarding the protection of national security secrets arise.[62] The President (as the top Executive Branch official and Commander-in-Chief) and his designees in the clandestine services are the ones with the expertise charged with protecting and controlling access to classified material.[63] In *Haig v. Agee*, the Court noted "the generally accepted view that foreign policy was the province and responsibility of the Executive."[64]

Id.

59. *Id.* at 1158. (Tallman, J., dissenting).

60. *Id.* at 1150 (emphasis omitted).

61. *Id.* at 1152."The [CIA] has not complied here with the formalities essential to invocation of the state secrets privilege. That is reason enough to affirm the district court's refusal to dismiss this case." *Id.*

62. *See generally*, Daniel L. Pines, *The Continuing Viability of the 1875 Supreme Court Case of* Totten v. United States, 53 ADMIN L. REV. 1273 (2001) (citing numerous instances in which the Executive branch dictates matters of national security).

63. Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988).

64. 453 U.S. 280, 293-94 (1981).

Other courts have highlighted that Article II duties are afforded the "utmost deference to Presidential responsibilities."[65]

In its brief to the U.S. Supreme Court, the CIA presented the issue of whether the federal court can consider a due process and tort claim involving an alleged promise for espionage services.[66] The CIA argued that if a former spy sued the government, the case inevitably would lead to the disclosure of the existence of a secret agreement and judicial adjudication would interfere severely with the Executive Branch's constitutional role of conducting espionage and safeguarding information.[67] Consequently, *Totten* provided a categorical and jurisdictional bar to such suits as a matter of national security and foreign affairs.[68]

The petitioners also averred that the Ninth Circuit was wrong when it held that the states secrets privilege set forth in *Reynolds* superceded *Totten*'s bar. Considering *Totten* held that such actions should be dismissed without ever reaching the question of evidence,[69] the Ninth Circuit opinion was wrong. The sources and methods of intelligence and espionage are essential in all intelligence operations and therefore must be kept secret if such operations are to continue.[70]

The petitioners also challenged the issue regarding due process violations. The bar to public exposure exists so long as national security secrets are involved. "[A]n action may be dismissed, even if constitutional claims are involved, when a plaintiff cannot establish his case without the use of such [state secret] information."[71] In its brief to the Supreme Court, the CIA also argued that an action in which a spy could "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 . . . ."[72] Consequently, it appears that where national security information is involved, courts will remain subservient to the mandates of the Executive Branch. The determination of who has access to such information remains the domain of those charged with protecting it.

The Does claimed in their appeal that they were seeking a "procedurally fair internal agency hearing for their claims for assistance and personal security," and a declarative concession by

65. U.S. v. Nixon, 418 U.S. 683, 710 (1974).

66. Brief for the Petitioners at 1, Tenet v. Doe, 544 U.S. 1 (2005)(No. 03-1395).

67. *Id.* at 8.

68. *Id.*

69. *Reynolds*, 345 U.S. at 11.

70. Brief for the Petitioners, *supra* note 66, at 15.

71. *Id.* at 42. *See, e.g.*, Darby v. U.S. Dep't of Def., 74 Fed. App'x. 813 (9th Cir. 2003).

72. Brief for the Petitioners, *supra* note 66, at 22.

the CIA that it must comply with substantive law on this issue.[73] The respondents relied on the Ninth Circuit distinction between *Totten* and *Reynolds* and concluded that the state secrets privilege applied, and rejected the Executive Branch's categorical bar. They argued that the judiciary has absolute authority to determine if a case can proceed without publicly exposing secrets. While acknowledging a role for the Executive, the court "cannot abdicate [its] responsibility to the Executive."[74] To do otherwise, the respondents argued, "would set a course toward the complete erosion of Reynolds [sic] and a perilous concentration of power in the Executive. Such a departure from established law is not justified by this case."[75]

Respondents tried to phrase this case as a matter of constitutional law, not enforcement of a contract. Constitutional rights guarantee citizens a hearing by an agency to review their claims for financial compensation (food and shelter), health care, personal security, and career placement.[76] For the Executive Branch to categorically bar this type of action would violate "the fundamental precept of the availability of the courts to enforce the rule of law and ensure procedural fairness when official conduct deprives citizens of liberty or property."[77] Similarly, it could contravene the principles of democracy for which the U.S. Supreme Court previously noted "[t]he doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power."[78] So, although the Executive Branch can invoke the state secrets privilege, the Judiciary is the only body able to determine if the case can proceed.[79] One case involved a CIA employee who was terminated after he informed a CIA Security Officer that he was a homosexual. The employee alleged his substantive constitutional rights, specifically due process and equal protection, were violated. The Supreme Court in *Webster v. Doe*, held that the "District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."[80]

73. Brief for the Respondents at 12, Tenet v. Doe, 544 U.S. 1 (2005)(No. 03-1395).
74. *Id.* at 14.
75. *Id.* at 15.
76. *Id.* at 16.
77. *Id.* at 18.
78. *Id.* at 21 (citing Myers v. United States, 272 U.S. 52, 293 (1926)).
79. *Id.* at 30.
80. 486 U.S. 592, 604 (1988).

In sum, the Does asked the Court to reject the Executive Branch's implication that the judiciary is "institutionally incapable" of dealing with national security cases.[81] The Constitution created three branches of government to protect an individual's constitutional due process rights. Moreover, *Totten* is a limited privilege case, not an authorization to deny subject matter jurisdiction by the Executive Branch.[82] The Ninth Circuit's holding preserves the CIA's ability to invoke a state secrets privilege after remand and, if in the interest of national security, the case will be dismissed. Since there had been no finding that state secrets would be disclosed, the respondent's argue that the case should proceed on remand to the District Court.

In their final brief, the CIA addressed the Does' arguments and highlighted the contradiction: in order to recover any compensation, the Does must establish they were espionage agents operating pursuant to their agreement with the CIA; but acknowledging the very existence of the agreement is prohibited.[83] Therefore, whether the respondents presented an estoppel argument or breach of contract claim, it must fail since "the first element of promissory estoppel is a clear and unambiguous promise[.]"[84] Since successful espionage activities mandate secrecy, the Does cannot seek a judicial order awarding compensation.[85]

The Does' due process claim equally fails because it would enable a court to order the "CIA to adopt and apply fair internal procedures for resolving compensation grievances by alleged former spies."[86] In order to do so, however, as the Ninth Circuit pointed out, the Does must establish, and the court must find as a matter of fact, that the Does spied for the United States.[87] This finding, and the exposure of the supporting facts, is barred by *Totten*.

The CIA summed up their position by noting that

> regardless of whether Totten [sic] is viewed as a substantive rule that suits based on secret espionage agreements are necessarily barred by the very nature of the undertaking, or as a "privilege" against litigating certain claims, or as a prophylactic rule that protects state secrets, it clearly operates as a jurisdictional bar to

81. Brief for the Respondents, *supra* note 73, at 44.

82. *Id.*

83. Reply Brief for the Petitioners at 1, Tenet v. Doe, 544 U.S. 1 (2005)(No. 03-1395).

84. *Id.* at 3. *See, e.g.*, Cyberchron Corp. v. Calldata Sys. Dev., Inc., 47 F.3d 39, 43 (2d Cir. 1995).

85. Reply Brief for *Petitioners*, *supra* note 83, at 4.

86. *Id.*

87. *Id.* at 5.

complaints 'where the very subject matter of the action [is] a contract to perform espionage.'[88]

D. The Supreme Court Speaks

Despite the length and breadth of the briefs, the U.S. Supreme Court rendered a succinct opinion prohibiting lawsuits against the government that involve covert espionage agreements. The Court also took the Ninth Circuit Court of Appeals to task noting their opinion was "quite wrong."[89] The Court assessed whether the CIA violated the Does' procedural and substantive due process rights by failing to submit their claims through a fair and internal process.[90]

Notwithstanding the review process used by the CIA, the Court held firm that the very nature of the suit required its dismissal. The Does, along with the Court of Appeals, reasoned that *Totten* established a contract rule which, while barring breach of espionage contract claims, did not bar claims based on due process or estoppel theories.[91] The Court relied on its previous discussion in *Totten*, holding that "[P]ublic policy forbids the maintenance of *any suit* in a court of justice. . ." which will lead to the disclosure of secrets.[92] The Court also noted that *Totten* stands for the proposition that "the secrecy which such contracts impose precludes *any action* for their enforcement."[93]

The Court picked apart the appellate court's reliance on *Reynolds*, which recognized "the privilege against revealing military secrets."[94] The Ninth Circuit suggested that *Totten* was limited to an evidentiary privilege.[95] The Supreme Court corrected the Ninth Circuit, reaffirming that *Totten* was indeed a categorical bar.[96] The Court referred to its *Reynolds* opinion which pointedly cited *Totten* as a case "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. . . ."[97] Accordingly it 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."[98]

Seeking to make its intentions even clearer, the Supreme Court also noted that *Reynolds* "cannot plausibly be read to have

88. *Id.* at 14 (citing *Reynolds*, 345 U.S. at 11).
89. Tenet v. Doe, 544 U.S. at 11-12.
90. *Id.* at 10-11.
91. *Id.* at 11-12.
92. *Id.* (citing *Totten*, 92 U.S. at 107 (emphasis added)).
93. *Id.* (citing *Totten*, 92 U.S. at 107 (emphasis added)).
94. *Reynolds*, 345 U.S. at 4-6.
95. *Doe*, 329 F.3d at 1158.
96. *Tenet*, 544 U.S. at 11-12.
97. *Id.* at 11-13 (citing *Reynolds*, 345 U.S. at 11).
98. *Id.* at 12 (citing *Reynolds*, 345 U.S. at 11) (emphasis added).

replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships."[99] The coup de grace was the Court's admonition of the Court of Appeals with its observation "that if the 'precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'"[100]

Thus, the Court made clear its decision to put this issue to rest. One may even surmise that the Court was extending a warning, of sorts, for those who may raise this issue again. The Court of Appeals' rebuke and succinct opinion belie the Court's overt displeasure in this case. Simply stated, the Court refused to let such a case see the proverbial light of day. "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.'"[101]

E. Are all Spies Alike?

As time has passed, particularly after September 11, 2001, human intelligence operations have become even more critical as the United States tries to penetrate terrorist groups, narcotics trafficking organizations, and rogue nations to gather intelligence about their criminal intentions.[102] A spy's traditional remedy in the first instance is to seek compensation from the agency utilizing their services. The *Totten* Court recognized this option opining that spies "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."[103]

Most, if not all, investigative, law enforcement, and intelligence agencies avail themselves of services by informants. At times referred to as "assets", "spies", or "confidential informants", they all provide original sensitive information about some threat to the United States. Although some collect intelligence out of a patriotic calling, most do it for reasons such as monetary rewards, reduction of criminal charges/sentences, or entry and citizenship into the United States.

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99. *Id.*

100. *Id.* (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)).

101. *Id.* at 1238 (citing CIA v. Sims, 471 U.S. 159, 175 (1985)).

102. Brief for the Petitioners, *supra* note 66, at 12 (citing FINAL REPORT OF THE NATIONAL COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, at 415 (2004)).

103. *Totten*, 92 U.S. at 107.

The Drug Enforcement Administration (DEA) is a federal law enforcement agency with a substantial intelligence gathering component that utilizes persons who gather information about people, organizations, locations (drug labs, cultivation fields, stash houses), and methods (money laundering, trafficking routes, concealment techniques). The purpose of the following excerpt[104] is to provide a comparison of the regulations and methods of compensating informants relied on by the DEA versus those at issue here used by the CIA.

II. DEA'S INFORMANT PROGRAM

Today's investigators, particularly those involved in drug trafficking, rely on confidential sources of information ("CS") to infiltrate criminal organizations to help build their cases. During their training as Basic Agent Trainees and throughout their careers, investigators are repeatedly instructed not to make promises to CSs. For example, pursuant to Section 6612.57(A)(1) of the DEA Agent's Manual, agents are specifically prohibited from promising informants rewards in any amount.[105] This rule is especially important when the issue is a reward for the information provided to the investigator. DEA Special Agents and Task Force Officers have utilized thousands of CSs who have been compensated justly for their efforts. In a limited number of cases, a CS objects to the amount of a reward she/he received and files a civil action against the DEA for a breach of contract seeking a reward of compensatory damages, arguing that she/he was "promised" and/or is "entitled" to a definitive dollar amount or a specific percentage of the assets seized. Notwithstanding their assertions, a CS is not *entitled* to any amount of a reward nor can she/he legally rely on any purported promises made by investigators.

The statutory authority for CS rewards from the Department of Justice is found in two distinct code sections. The first is 21 U.S.C. § 886, which authorizes the Attorney General to pay any person from funds appropriated to the Drug Enforcement Administration for information concerning a violation of the

104. Douglas A. Kash, *Rewarding Confidential Informants: Cashing In On Terrorism and Narcotics Trafficking*, 34 CASE W. RES. J. INT'L L. 231, 240-41 (2002).

105. *Id.* (citing the DEA AGENTS' MANUAL).

> Do not make any commitments to a CS regarding payment from [the Asset Forfeiture Fund]. CSs have no inherent "entitlement" to receive payment from the Asset Forfeiture Fund regardless of the extent of their cooperation. The final decision as to whether to pay a CS from the Asset Forfeiture Fund is at the discretion of the appropriate Headquarters officials . . . .

Id.

Controlled Substances Act[106] without regard to any reward the person may otherwise receive.

The second source is found at 28 U.S.C. § 524(c)(1), which provides that the Assets Forfeiture Fund (AFF) "shall be available to the Attorney General without fiscal year limitations for [specified] law enforcement purposes." By its very language, granting a reward is discretionary and the statute neither enumerates any specific requirements nor stipulates a certain sum. Consequently, section 524(c) does not mandate that a CS is *entitled* to monetary remuneration.[107] Within section 524(c) there are two subsections which provide for a reward.

Section 524(c)(1)(B) allows for the payment of rewards for information or assistance directly relating to violations of the criminal drug laws. Section 524(c)(1)(C) grants the Attorney General discretionary authority to pay a reward for information or assistance leading to a civil or criminal forfeiture. One court opined that:

> When an informant provides information or assistance under section 524(c)(1)(B), the Attorney General or her delegate has discretion to award any amount between $0.00 and $250,000.00. Similarly, when an informant provides information or assistance under section 524(c)(1)(C), the Attorney General or her delegate has discretion to award any amount between $0.00 and $250,000.00, or between zero and 25 percent of the amount realized from the property forfeited, whichever is less. Neither section 524(c)(1)(B) nor section 524(c)(1)(C) requires payment of any particular sum; instead, the statute leaves the amount of the award to the discretion of the Attorney general or her delegate.[108]

Similarly, the Court of Appeals for the Federal Circuit has determined that 28 U.S.C. § 524(c) authorizes the discretionary payment of rewards from the proceeds of forfeited property but does not mandate the payment of compensation from the government.[109]

The DEA has adopted internal regulations, set forth in the DEA Agents Manual, which detail the purely discretionary nature of the payment of rewards and the officials who are required to approve these rewards at the highest levels of the DEA. Where the payment of rewards is contingent on the quality of the information provided, it is not integral to an Agent's duties that he

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106. 21 U.S.C. § 886 *et seq* (2000).

107. Hoch v. United States, 33 Fed. Cl. 39, 45 (1995). *See also*, Henke v. United States, 43 Fed. Cl. 15, 28 (1999) (noting that decisions to make awards of $250,000 or more under 28 U.S.C. 524(c) are "wholly discretionary").

108. *Hoch*, 33 Fed. Cl. at 44-45 (internal citations omitted).

109. *Id.* at 45. *See also*, Perri v. United States, 35 Fed. Cl. 627, 630 (1996) (recognizing that there is no language in 524(a) that affirmatively mandates an award by the Attorney General).

be able to contract with informants at the beginning of the informant relationship, as former CS plaintiffs typically allege. Agents are specifically prohibited from making promises to a CS, and conduct which violates that prohibition cannot be said to be integral to the agents' duties.[110] Section 6612.57(A)(1) of the DEA Agents Manual provides that "[t]he final decision as to whether to pay a CS from the Asset Forfeiture Fund is at the discretion of the appropriate Headquarters officials and will depend upon" other priorities. Consequently, DEA Special Agents and deputized Task Force Officers are reminded continually that they are not to make any promises or firm commitments to a (potential) CS, thereby creating the impression that the CS is "entitled" to any remuneration.

CONCLUSION

All informants who conduct themselves in accordance with the terms of their agreements with the agency controlling them may be eligible for some proportionate compensation. The type and amount of this compensation is governed by the laws and guidelines which regulate that agency. As discussed *supra*, the compensation can be in the form of cash rewards, criminal adjudication, and even U.S. citizenship. Paramount in the relationship is the need for the informants to be made aware that there are no promises; indeed the agreements they sign are *not* contracts enforceable in a court of law. Such agreements only set forth the terms under which the informant will conduct him or herself and expectations the agency has in utilizing the informant. The compensation is made wholly at the discretion of the agency. For an informant to challenge these principles in an open court likely would expose national security secrets and similarly categorized sensitive information to the public domain. It is in this domain where terrorists, drug traffickers, and other nefarious persons lie in wait to collect pieces of information regarding espionage operations and methods, and then use such information against this nation.

Although we live in a free nation with a judiciary open to the public, freedom is not free; it exacts a heavy price. It is thanks to the courage, dedication, and sacrifice of generations of Americans who served in our armed forces, intelligence services, and law enforcement agencies that the price is, fortunately, not even higher. If the security of that freedom mandates a prohibition on a limited class of lawsuits filed by (former) informants seeking compensation in a court of law, then that is but a small price to

110. *See* Cruz-Pagan v. United States, 35 Fed. Cl. 59, 62 (1996) (displaying the DEA's internal policy refusing to grant contracting authority to field agents who are neither special agents nor Country Attaches).

pay compared to the murder of thousands of Americans by terrorists who have perverted the very freedoms we seek to protect and promote.