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

REPLY BRIEF FOR THE PETITIONERS

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The Ninth Circuit has held that *Totten* v. *United States*, 92 U.S. 105 (1875), has been subsumed within the state secrets privilege recognized in *United States* v. *Reynolds*, 345 U.S. 1 (1953), and accordingly does not require dismissal, at the outset, of suits by spies alleging that the United States has wrongfully refused to fulfill its promises. That holding is unprecedented; it effectively overrules an important decision of the Court; and it seriously interferes with the CIA's ability to conduct espionage operations and protect national security information. The decision thus warrants this Court's review.

In opposing certiorari, respondents embrace the Ninth Circuit's ruling that *Totten* is no longer good law in light of *Reynolds*, and that the case must proceed with the United States retaining the ability to advance national security interests only by asserting and litigating the state secrets privilege as to particular information. Br. in Opp. 12-20. Indeed, respondents apparently view *Reynolds* as overruling *Totten* even on its precise facts, such that spies today are entitled to proceed with a breach of contract claim, absent formal invocation of a state secrets privilege by the Director of Central Intelligence and independent determination by a court that the suit implicates classified information to such a degree that it cannot proceed. That view, however, merely confirms the importance of the issue and the need for review by this Court. Whether or not *Totten* has any continuing validity in light of *Reynolds* is a matter for this Court alone. Pet. 19; see, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

A. The Court's Review Is Warranted To Confirm That *Totten* Survives *Reynolds*

1. *The Ninth Circuit's abrogation of* Totten *is unprecedented and conflicts with the Federal Circuit's decision in* Guong

The Ninth Circuit held that *Totten* has been subsumed by *Reynolds* and that the United States must comply with the formalities of the state secrets privilege in a suit by an alleged spy seeking redress for the CIA's alleged failure to comply with its promises in an espionage agreement. Pet. App. 25a, 27a, 31a. Those rulings directly conflict with the holding in *Guong* v. *United States*, 860 F.2d 1063 (Fed. Cir. 1988), cert.

denied, 490 U.S. 1023 (1989), that *Totten* continues to pose a jurisdictional bar to suits by spies to enforce contracts for covert espionage services. *Guong* thus concluded that *Reynolds* "does not limit or modify the authority of *Totten* or its rationale," and that *Totten* required outright dismissal of a suit by a CIA saboteur because the suit could not proceed without acknowledgment of a covert relationship with the CIA. *Id.* at 1066.

In arguing that the two decisions are distinguishable, respondents contend that the court in *Guong* held that assertion and litigation of the state secrets privilege was unnecessary because the court found that the suit necessarily would have involved disclosure of classified information. Br. in Opp. 16. The *Guong* court's outright dismissal of the action, rather than requiring the formal invocation of a state secrets privilege, however, is the conflict that merits this Court's review. The Ninth Circuit clearly announced a conflicting legal rule that the government may not rely on *Totten* in suits by alleged spies, but must invoke and litigate the state secrets privilege in every case.

2. *Reynolds did not overrule Totten*

Respondents suggest that other courts of appeals have recognized the abrogation of *Totten*. Br. in Opp. 12, 15-18. The Ninth Circuit, however, stands alone in that respect. The decisions cited by respondents (*id.* at 12-13, 15-19) are all inapposite; none of them holds that *Reynolds* supercedes *Totten* in cases governed by *Totten* and indeed, none involves a suit by an alleged spy.[1]

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[1] *Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356, 1360 (Fed. Cir. 2001), was a suit by a company seeking to address a breach of promise *by* an alleged spy on behalf of the Agency, and the issue of whether *Totten* would apply in those circumstances

Respondents also cite decisions in which courts have invoked *Totten* to dismiss suits only after the state secrets privilege has been formally asserted.[2] None of those cases, however, involved the class of cases governed by *Totten*—a suit by an alleged spy—and none of the decisions presented the question of whether, in that class of cases, *Totten* has independent force after *Reynolds*.

Reynolds itself confirms that *Totten* continues to pose a jurisdictional bar "where the very subject matter of the action" is "a contract to perform espionage." 345 U.S. at 11 n.26. Moreover, this Court has continued to view *Totten* as a jurisdictional bar that "forbids the maintenance of any suit" to recover on certain claims. *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981)

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was not before the court of appeals since the United States already had validly asserted the state secrets privilege. *Air-Sea Forwarders, Inc.* v. *United States*, 166 F.3d 1170, 1171-1172 (Fed. Cir. 1999), held that a settlement agreement barred a suit by a CIA contractor—-an entity whose very relationship with the CIA was not secret. The court did not reach whether *Totten*—as opposed to the settlement agreement—barred the suit and accordingly did not consider whether the government was required to assert a state secrets privilege. *Clift* v. *United States*, 597 F.2d 826, 830 (2d Cir. 1979), held that the district court erred in invoking *Totten sua sponte* in a suit by a patentee that did not have any contract (much less a secret one) with the government. Finally, *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 271 (4th Cir. 1980), rejected a government official's argument that *Totten* required dismissal in a case brought by a government employee where the state secrets privilege had already been asserted before the case reached the court of appeals.

[2] *McDonnell Douglas Corp.* v. *United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003); *Kasza* v. *Browner*, 133 F.3d 1159, 1166, 1170 (9th Cir.), cert. denied, 525 U.S. 967 (1998); *Zuckerbraun* v. *General Dynamics*, 935 F.2d 544, 547-548 (2d Cir. 1991); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F2d 1236, 1241-1242 (4th Cir. 1985).

(quoting *Totten*, 92 U.S. at 107)). *Reynolds* also makes abundantly clear that in such cases the issue of a state secrets privilege is not to be litigated. Rather, "*[t]he action [i]s dismissed on the pleadings without ever reaching the question of evidence.*" *Ibid.* (emphasis added).

B. *Totten*'s Continuing Validity Is Of Paramount Importance To The CIA's Ability To Conduct Espionage Operations

Although this Court's decision in *Reynolds* remains important to the government and effectively serves its interests in the cases where a cause of action may proceed, *Totten* remains vitally important to the United States in the class of cases where recovery depends on a secret contract to provide espionage services. That type of contract necessarily forecloses the ability of an alleged spy to sue in court to enforce the contract, because it is an inherent aspect of the secret relationship that the contracting government can deny the relationship and has the sole discretion to determine whether and what type of redress is appropriate. The CIA thus has always conducted its espionage operations on the understanding that agreements for espionage services are inherently secret, and are not justiciable. Persons whose suits are entirely premised on having entered into such an agreement with the CIA should not be heard to complain that they have been arbitrarily deprived of their day in court by a policy of government secrecy. That result follows inevitably from the very nature of the secret agreement they claim to have with the CIA. Pet. 20-22.

Thus, the fundamental underpinning of *Totten* is that overriding considerations of public policy forbid a suit alleging that the United States refused to abide by a

secret promise to a spy; adjudication of the suit would conflict with the parties' implicit agreement to keep the matter entirely secret and would necessarily disclose whether a secret agreement existed and the details of that agreement. *Totten*, 92 U.S. at 106-107; Pet. 8-16. *Totten* has effectively served the national security and foreign relations interests of the United States by requiring dismissal at the outset of suits by alleged spies seeking to enforce promises by the CIA and other intelligence agencies. That regime protects against devastating disclosures of national security information (such as CIA's tradecraft methods and operations) by potential plaintiffs, discourages lawsuits seeking to force the agency to make "graymail" payments, and prevents the judiciary from being forced to review the details of uniquely sensitive arrangements. Pet. 23-24.

Those interests cannot be effectively served if the Director of Central Intelligence must assert and litigate on a case-by-case basis the state secrets privilege. Indeed, even confirmation or denial of the existence of a secret agreement as envisioned by the Ninth Circuit would defeat the most important purpose of *Totten*: to keep the entire matter utterly secret. Pet. 24-27. "A secret service, with liability to publicity in this way, would be impossible." *Totten*, 92 U.S. at 107.

C. The Court Of Appeals Erred In Refusing To Apply *Totten*

1. *Webster v. Doe does not support the Ninth Circuit's decision*

Respondents argue that permitting their constitutional claims to proceed on the merits is supported by the Court's holding in *Webster* v. *Doe*, 486 U.S. 592 (1988). See Br. in Opp. 19-22, 26. That is not correct. *Webster* held that Section 102(a) of the National Secu-

rity Act of 1947, 50 U.S.C. 403-4(h), did not preclude judicial review of a CIA employee's colorable constitutional challenges to his dismissal from the agency. 486 U.S. at 601-605. *Webster* did not involve an assertion that *Totten* required dismissal of the action, and indeed the majority opinion did not even cite *Totten*, much less suggest that *Totten* is no longer good law in light of *Reynolds*.

The circumstances of *Webster* also differ considerably from those of this case. *Webster* involved a suit by an *employee* of the CIA, albeit one engaged in covert operations, and did not involve an alleged spy who had entered into a covert agreement with the agency. In the former case, acknowledgment of the mere existence of an employment relationship with the CIA, along with other details of that relationship, generally may be revealed in a lawsuit without compromising national security. In the latter case, the CIA has determined that different considerations of national security and foreign relations are implicated if the CIA were to confirm or to deny the existence of a human intelligence source recruited by a CIA case officer. In that class of cases, there is generally no aspect of an espionage relationship that can be revealed, including confirmation or denial of the relationship's existence. Pet. 14-15 & n.4. That determination is owed substantial deference because the Executive Branch is uniquely situated and entrusted to determine whether disclosure of intelligence information would compromise national security. Pet. 12.

2. *Respondents' suit is governed by Totten because it cannot proceed without disclosing the existence of a secret relationship with the CIA*

Respondents also argue that their suit to compel the CIA to conduct an internal proceeding to consider their

claim for compensation would not necessarily involve the disclosure of secret information. Br. in Opp. 23-26. Respondents are seriously mistaken. Their suit arises out of, and their standing to prove it depends upon, a classified fact—respondents' alleged covert agreement with the CIA to perform espionage services. Pet. 13-16. As even the Ninth Circuit recognized, respondents' suit cannot proceed unless and until respondents prove that they in fact had a secret agreement to conduct espionage services for the CIA. Pet. App. 35a, 37a. Without such proof, respondents have no standing to sue, and no right to relief on any claim. Pet. 15-16.

Respondents thus fundamentally misconstrue the import of *Totten* by arguing that the government must invoke the state secrets privilege in order to demonstrate that respondents' suit would compromise national security. *Totten* has already held that the very existence of an espionage arrangement—the fact upon which all of respondents' claims are based—must "for ever" remain secret. 92 U.S. at 106; Pet. 24-25. The Ninth Circuit's rejection of the holding in *Totten* warrants this Court's review.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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