Second-Guessing the Spymasters
with a Judicial Role in Espionage Deals


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SECOND-GUESSING THE SPYMASTERS WITH A JUDICIAL ROLE IN ESPIONAGE DEALS

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I. THE PATTERN OF AN ESPIONAGE DEAL

There are heaps of spy novels and piles of memoirs and histories about espionage, but very few discussions of how American law applies to secret deals for secret services. This article adds that interesting third strand.

In one spy novel, the climax to John Le Carre’s Smiley’s People, occurs when spymaster George Smiley, from British “Circus,” convinces his nemesis Karla, from Moscow “Centre,” to cross a bridge in Berlin to defect to the West. To the intelligence professionals, this is the ultimate recruitment, an espionage deal between senior officers of two elite intelligence services. The crossing also represents Smiley’s victory in a broader spy war between Western democracy and authoritarian Communism. This crossing is not only the climax to one book, but the end of three books grouped as the “Karla Trilogy.” Having peeled back the layers to discover Karla’s personal spy network within and on the fringe of Moscow Centre, Smiley uses a secure channel, one of Karla’s private messengers, to convey the offer to defect. This offer, as Le Carre observes, is a simple variation of the carrot and the stick. The stick was exposing to Moscow authorities Karla’s private spy ring, all of his illegal and unauthorized activities to protect his daughter, Alexandra, an exposure that most likely would have led to his “liquidation” and her exile. The carrot came next.

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2 See e.g., works by Eric Ambler, Tom Clancy, Len Deighton, Ian Fleming, Alan Furst, Graham Greene, Rudyard Kipling, Somerset Maugham, and most notably John LeCarre.


4 Those who might question the propriety of referring to fictional spy characters in a law review article should take note of Justice Breyer’s recent reference to the character George Smiley during the oral arguments of Tenet v. Doe. See Oral Argument, Tenet v. Doe p. 25 (Jan. 11, 2005).
Smiley offered Karla the same carrot he had offered him more than twenty years before, in Delhi: save your skin, come to us, tell us what you know, and we will make a home for you. . . Smiley would have promised Karla immunity from prosecution for complicity in the murder of Vladimir. . . Without question, Smiley also threw in general guarantees about Alexandra’s future in the West—treatment, maintenance, and, if necessary, citizenship.\(^5\)

Those with first-hand knowledge of the espionage business, while admiring Le Carre’s mastery in portraying settings and characters, may object to slight inaccuracies in his plot. First, Smiley did not consider leaving Karla as an “agent in place.” Once someone has been “turned to the other side,” especially a senior official in a rival intelligence service, he is most useful as a continuing source of intelligence and a continuing means of disinformation. A well managed agent, as we learned with British turncoat, Kim Philby, can go years without being detected by the counter-intelligence branch of his own service.\(^6\) By contrast, a defector has limited value. The rival intelligence service quickly learns of the defection, for instance, as soon as Karla does not show up for work. The service then takes immediate measures to limit the damage, figuratively changing the locks on all doors to which the defector had the keys.

Second, Smiley did not seek approval from headquarters for the package he presented to Karla. The lawyers are nowhere to be seen, and Karla is not asked to sign an acknowledgment or a waiver. Instead, it is a gentleman’s agreement, by conduct, between Smiley and Karla, with the Russian returning a lighter that he “borrowed” from the Englishman at their last meeting, many years prior in an Indian prison cell when Smiley, once before, had attempted to bring Karla onto the Western side.\(^7\)

Fiction, of course, is often tidier than reality. Sometimes a spymaster lies to his agent about their deal. Sometimes a defector is imprisoned while the relevant intelligence service confirms that he is not a double-agent.\(^8\) Sometimes an agent, once he has become a citizen of his adopted country, once he has safely and comfortably settled into a suburban home with heated garage and heated toilet seats, “remembers” that the spymasters promised him much more than has been already delivered. And from time to time, the spymasters and their agents have honest disagreements.

\(^5\) **JOHN LE CARRE, SMILEY’S PEOPLE** 427 (1979).

\(^6\) Philby, perhaps as disinformation, later claimed from the safety of Moscow that he had been a Soviet case officer upon entering the British secret service. **KIM PHILBY, MY SILENT WAR: THE AUTOBIOGRAPHY OF A SPY** (Modern Library Paperback ed. 2002).

\(^7\) **SMILEY’S PEOPLE** at 438.

\(^8\) For instance, the CIA kept KGB defector Yuri Nosenko in solitary confinement for years in large part because the CIA chief of counter-intelligence, James Angleton, was convinced that Nosenko was a double-agent whose purpose was to cover up the KGB’s role in the Kennedy assassination. See e.g., **RONALD KESSLER, INSIDE THE CIA** 81 (1992).
The purpose of this article is to analyze what role, if any, American courts should play in resolving financial disputes between spymasters and their secret agents. While espionage may be an esoteric area for the law, some disputes about espionage contracts have made their way into the courts. Some cases have been summarily dismissed in the lower courts while others have made it farther along the process. And just recently, the Supreme Court in the *Tenet v. Doe* case decided to be heard again on this topic.

Without pressing the Le Carre metaphor too far, I present this article as a short sequel to the Karla Trilogy, as the possibility of Karla’s revenge. Indeed, at the end of *Smiley’s People*, the British spymaster, for some reason that Le Carre does not make explicit, is not satisfied. When one of Smiley’s colleagues tells him that he has won, he responds, “Yes. Yes, well I suppose I did.” Perhaps Smiley, a person who had looked deep into human depravity, knew that something sinister lurked out there for the rest of us. Perhaps Smiley was saddened to see that his misguided American cousins might take things so far that they would put spymasters before public commissions, that they might allow agents to air their grievances in public courts, that they might take activities which were always intended to be “below the line” and put them on public display. If some day, moving from one jurisdiction to another, Karla could serve Smiley with a complaint in an action filed in U.S. district court, requiring him to answer interrogatories and to undergo depositions, then Karla’s defection was a false one.

In Part II of this article, I suggest a framework for analyzing espionage disputes under American law. To do so, I explore the trade-off between individual liberty and group security and assess the need for judicial deference to the executive branch, common themes in national security studies. While I believe that espionage contracts are by themselves worthy of such analysis, my separation of powers framework could be used to review other areas of national security law. In Part III, in a historical survey of cases, I assess some arguments for and against judicial enforcement of espionage contracts, leading up to the *Tenet v. Doe* decision. In Part IV, I determine how an espionage dispute would be treated under three different strands or keys in

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9 The greatest number of disputes probably exists between spymasters and their agents, between “case officers” and “assets” to use the Central Intelligence Agency’s terminology. The CIA, however, is not systematic in keeping records of their disputes. The typical resolution of such a dispute would be the case officer “terminating” the asset, that is, cutting off any relationship, paid or unpaid. This termination may not even be reported from the overseas CIA location back to headquarters. Most of these assets are foreign citizens, who, unlike defectors resettled into the United States, do not have easy access to American courts.

10 The CIA did not provide me with a precise figure (ever since the CIA was created in 1947) and has not authorized me to reveal a precise figure that I obtained through independent research. The cases with published opinions, however, do number more than a handful.


12 Le Carre’s friend, Alec Guinness, is excellent in acting out Smiley’s ambivalence in a screen version of the novel, adapted by Le Carre himself. *Smiley’s People* (BBC television 1982).
national security law. This part leads to the analysis of the Supreme Court’s recent decision in *Tenet v. Doe*. In Part V, in conclusion, I suggest some opportunities which the Supreme Court and Congress have missed for bridging gaps and harmonizing the law in this area.

II. THE NATIONAL SECURITY PARADIGM

Starting on a clean slate, disputes over espionage deals could be dealt with at the basic level of contract. We could focus on familiar concepts such as offer, acceptance, consideration, and sort out agency law beyond sovereign immunity, that is, whether the U.S. governmental agency had the authority to enter the contract and whether the spymaster was an authorized representative of that agency. At this simple level, the espionage deal does not take on special significance different from deals between private contractors and the government.

The espionage deal takes on special significance when it is related to our Constitution and to statutes on intelligence activities. Although the Constitution does not contain an explicit intelligence function, the constitutional support for intelligence activities, including collection and covert action, is buttressed by provisions that are specific about foreign policy and military functions. The President heads the Executive Branch, is vested with executive power, and serves as Commander in Chief. Intelligence or the gathering of information about foreign states and foreign trends is a vital component of the President’s “sole organ” role to conduct our foreign policy, resting in part on the President’s specific Article II powers to make treaties and to appoint ambassadors. Yet it is more of a stretch, perhaps a contradiction in terms, to connect public diplomacy to an authority for covert action. Regardless, both intelligence collection and covert action share support from specified military powers. Intelligence is vital to our ability to defend the nation and to wage war with success. Just so, it falls within the President’s power to serve as Commander in Chief.

The constitutional support for intelligence activities is complemented and supplemented by statute. In particular, the National Security Act of 1947 recognizes that intelligence activities are needed to conduct the nation’s foreign policy, authorizes the Director of Central Intelligence, acting on behalf of the President, to collect human intelligence and to perform other intelligence activities, and charges the DCI to “protect intelligence sources and methods from unauthorized disclosure.” As a result, the espionage deal can be shifted to a higher level of debate and into a special constitutional category called national security law.

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13 U.S. CONST. art II. § 1, cl. 1, § 2, cl. 1.
15 See U.S. CONST. art II, cl. 2. “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors. . . .” Id.
A. The Liberty–Security Trade-off

The openness to our society, a virtue in itself, makes us an easier target than closed societies to our enemies. This is an axiom for public debate on terrorism and for treating a national security matter such as espionage disputes. Obviously the government’s task in providing security would be easier if it were unfettered by the Constitution. Further, the task of security would be easier if the government could relegate some individuals such as foreign citizens to a nether category without full access to the courts. But unlike the scene from the movie *Casablanca*, our government is not completely free to round up the usual suspects.

Most observers accept that a trade-off exists between individual liberties and the government’s ability to provide security from invasion and terrorist attacks. Indeed, an understanding about the tension between individual liberty and group security goes back as far as the time of the

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17 A term like “national security law” tends to be thrown around without a clear meaning. More law school professors teach courses under this label, and the American Bar Association and the American Association of Law Schools have standing committees and sections that include “national security” in their titles. Our field, unlike tax law, is not easily segregated from the rest of the curriculum. National security draws on constitutional law, public international law, and criminal procedure. National security law is broader than military law and the rules of war. In studying the rules and the process concerning threats to our entire nation’s well being, we discuss the war-making powers under our Constitution, but most of us go beyond the Department of Defense’s primary role in waging war to cover many other institutions—the law enforcement community, the intelligence agencies, and, more recently, the Department of Homeland Security—that help protect us from enemy states, terrorists, and other threats. In addition, others focus on international organizations such as the United Nations and international agreements such as the Geneva Conventions that attempt to regulate armed conflict. And some, in a replay of Cold War themes, still address arms control and disarmament. Even so, there seems to be no charter or consensus concerning national security law. National security may thus be another concept where the best we do is to say we know it when we see it.

18 Some commentators have argued that not only are terrorists undeserving of treatment in U.S. criminal courts they are undeserving of the benefits of international conventions. See, e.g., John C. Yoo & James C. Ho, “The Statute of Terrorists”, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 207 (arguing that al Qaeda and Taliban members are not entitled to legal protections, such as prisoner of war status, that are accorded legal belligerents under the Third Geneva Convention of 1949).
Founders, many of whom had direct experiences with war and emergency conditions.\textsuperscript{19} One purpose of the constitutional system they created, especially the Bill of Rights, was to put up some obstacles in the path of those who, in the name of group security, would present quick-fixes at the expense of some individual liberties or of the liberty of some individuals.\textsuperscript{20} This is the high theory to the tension between an espionage plaintiff’s interest in having his day in court and the group’s need in having the Executive Branch carry out an effective intelligence function.

The trade-off between liberty and security is still a constant for many who participate in the debate on national security.\textsuperscript{21} But this trade-off, at least in the abstract, may not exist with all our individual protections. To be specific, some constitutional provisions may have an implicit power to break the Gordian knot, providing more individual liberty and more group security at the same time. For example, the Second Amendment, concerning the right to bear arms, may provide double benefits. Having arms in the hands of private citizens might be useful in repelling an invasion or in fighting a guerilla war against an occupier. The benefits to arming our private citizens are obviously limited, however. For example, arms and ammunition in the

\textsuperscript{19} \textit{Ex Parte Milligan}, 71 U.S. 2, 125 (1866).

Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew – the history of the world told them – the nation they were founding, be its existence short or long, would be involved in war . . . \textit{Id}.

\textsuperscript{20} \textit{Id}. “[U]nlimited power, wherever lodged at such time, was especially hazardous to freemen. For this, and other equally weighty reasons, [the founding fathers] secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. \textit{Id. See also} Furman v. State of Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972) (“The Founding Fathers thus wisely sought to have the best of both worlds, the undeniable benefits of both democratic self-government and individual rights protected against possible excesses of that form of government.”)

\textsuperscript{21} See \textit{Michael Ignatieff, The Lesser Evil: Political Ethics in an Age of Terror} (2004). Ignatieff is skillful in charting a middle course between civil libertarians who judge some actions wrong no matter the results and “consequentialists” who judge only by results. “This third position—which gives this book its title—maintains that necessity may require us to take actions in defense of democracy which will stray from democracy’s own foundational commitments to dignity. While we cannot avoid this, the best way to minimize harms is to maintain a clear distinction in our minds between what necessity can justify and what the morality of dignity can justify, and never to allow the justifications of necessity—risk, threat, imminent danger—to dissolve the morally problematic character of necessary measures.” \textit{Id} at 8.
hands of passengers would not have defused the bomb in checked baggage on Pan Am Flight 103 over Lockerbie, Scotland.\textsuperscript{22}

The First Amendment could also cut both ways. On the one hand, individual liberties at times can undercut group security; for example, terrorists may conduct their activities under the cover of freedom of religion and the freedom of assembly. On the other hand, an active citizenry and a vigilant press can contribute to group security. The quality of our decisions from the military, the law enforcement community, and the intelligence community improves as a result of questions and alternative views from outside the government, whether from academia, human rights organizations, independent commissions, or grass-roots movements. This is a more than theoretical possibility; it is a principle of our society.\textsuperscript{23}

As one outside view, Philip Heymann espouses new ways of looking at liberty and security, although his project does not delve into the details behind espionage disputes. In broad and pragmatic terms, he criticizes the Bush Administration for couching its policies as a “war on terrorism.”\textsuperscript{24} Heymann’s framework, in theory, does not preclude the possibility that some steps may actually promote democratic liberties, but his analysis focuses more on trade-offs between counter-terrorism and “democratic” liberties from such measures as ethnic profiling, using informants to penetrate religious and political groups, and maintaining databases which could be used to restrict or deny the access that some individuals may have to sensitive spaces and activities (e.g., defense facilities).\textsuperscript{25} Although Professor Heymann does not specifically address my suspicion of an across the board trade-off between liberty and security, his analysis is consistent with this suspicion to the extent he asks us to be innovative in our counter-terrorism. Against the Bush administration’s current, Professor Heymann stresses that an essential part of combating terrorism is building alliances with other countries.\textsuperscript{26}

\textsuperscript{22} Unarmed passengers, of course, seem to have prevented one of the hijacked planes on September 11\textsuperscript{th} from being struck into a target.

\textsuperscript{23} Indeed the uneasiness that some observers feel about investigating Islamic charities as a source of terrorist financing or about conducting undercover activities in mosques may stem from an assumption, articulated or not, that the costs to individual liberty (of the innocents drawn into an overly large net) are greater than the benefits to group security. \textit{See} David Cole, \textit{The New McCarthyism: Repeating History in the War on Terrorism}, 38 HARV. C.R.-C.L. L. REV. 1, 8-13 (2003); David Cole, \textit{Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis}, 101 MICH. L. REV. 2565, n. 45 (2003).

\textsuperscript{24} \textit{PHILIP B. HEYMANN, TERRORISM, FREEDOM, & SECURITY: WINNING WITHOUT WAR} 19 (BCSIA Studies in International Security ed., 2003)

\textsuperscript{25} \textit{Id.} at 91-113.

\textsuperscript{26} \textit{Id.} at 118. From this view, the detention of U.K. citizens in Guantanamo could be viewed as particularly counter-productive. The U.K. has been a strong ally in U.S. military actions in Afghanistan and Iraq and has been a very cooperative “liaison partner” on intelligence actions.
cooperation depends on the perception or the reality that the U.S. continues to protect individual rights, our pursuit of liberty and security becomes consistent. As a further example, if U.S. prosecutors precluded the death penalty on some cases, notably the prosecution against Zacarias Moussaoui, it might be much easier for foreign governments opposed to the death penalty to provide us with leads and evidence.

The 9/11 Commission, going further, argues that liberty and security in combating terrorism and in conducting intelligence activities are not part of a zero-sum formula but complement each other:

We must find ways of reconciling security with liberty, since the success of one helps protect the other. The choice between security and liberty is a false choice, as nothing is more likely to endanger America’s liberties than the success of a terrorist attack at home.

The modest goal of this article, as laid out best in Part V, is to think beyond a zero-sum outcome in the judicial treatment of espionage disputes. The 9/11 Commission’s perspective, of course, is from the broadest level of strategy, rather than the instrumental level which most concerns Professor Heymann. Therefore, if we discuss the interaction between liberty and security at different levels of generality, the Commission can be correct in saying that it is a win-win situation and other commentators can be correct in saying that it is zero-sum. For me, although I cannot avoid some inherent trade-offs between liberty and security for analyzing espionage disputes, I have sketched how this conventional wisdom might be partially rebutted or completely turned around in my context and in other national security studies. New models and new data are needed to take our studies from impressionism into science.

B. Separation of Powers

To speak of judicial deference to the Executive Branch’s handling of an espionage relationship is to identify, under different words, the separation of powers at the core of the American constitutional system. In United States v. Moussaoui, for example, the Fourth Circuit was explicit about separation of powers on a national security case other than an espionage dispute, laying out what it described as “governing principles.” The Moussaoui Court, in a standard

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technique, refers to the Founders for historical legitimacy. Moving forward, the Court refers to recent Supreme Court precedent to define liberty:

And, the Supreme Court “consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” *Mistretta v. United States*, 458 U.S. 361, 380 (1989).

All this is true, but it is not specific enough to decide when liberty should lose to security, when the individual loses to the group interest in not having full access to the courts on an espionage dispute. Along with the value of individual liberty, our founders understood the vital importance of security to a new nation that was still confronted with numerous external and internal threats, whether from pirates, European powers, or internal rebellions. The founders preferred the term “safety” over “security” to express this understanding:

Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first. The safety of the people doubtless has relation to a great variety of circumstances and considerations, and consequently afford great latitude to those who wish to define it precisely and comprehensively.

All too prescient, our founders understood that citizens in frightening times would be tempted to trade liberty for security:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war—the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

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30 *Id.*
31 *Id.* at 468 *quoting Federalist No. 47.*
33 *The Federalist No. 8*, at 31 (Alexander Hamilton) (Terrence Ball ed., 2003).
Other parts of the Federalist papers, however, provide support for liberty. Speaking of the Constitution in general and the Senate in particular, the Founders noted:

What bitter anguish would not the people of Athens have often escaped, if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day, and statutes on the next.34

Back and forth, whether in the text of the Constitution, in the writings of the Founders, or in the interpretations of the highest court, the separation of powers doctrine incorporates, but does not always resolve the dichotomy between liberty and security. To the extent our Constitution is not explicit on how to resolve contradictions among different values such as liberty and security, that is, on the conditions under which one goal takes precedence over another, we are left the noble and necessary task of resolving these ambiguities through some reasonable method. That is the general test for national security law. That is also the specific test for espionage disputes, balancing a plaintiff’s right to have his day in court against the government’s need to protect the CIA’s sources and methods. However our question is posed, liberty versus security, however the debate is framed, judicial activism versus judicial restraint, the heart of the matter is finding an appropriate balance for these values.

C. Instruments for Measuring Judicial Deference

The reasons for some judicial deference to the Executive Branch on intelligence activities—the “why” of deference, not the “how much”—can easily be summarized. First, courts do not have the technical vocabulary and skills to understand fully all aspects of gathering foreign intelligence and conducting covert operations. Second, the slow and deliberate aspect to judicial resolution would undermine intelligence that often must be timely to be effective. Third, the courts are not directly accountable for successes and failures of intelligence activities. Fourth, courts do not have enough perspective on the large mosaic of information to understand how one activity fits into a broader pattern of activities, how one piece of information, seemingly innocuous, could be harmful to the national security when a hostile intelligence service adds that piece to whatever else they know about us. Fifth, courts are not as effective as the Executive Branch in protecting secrets from unauthorized disclosure.35

Each of these reasons can be partially countered or reversed. As to technical skill, the critic can show other areas (e.g. Daubert hearings concerning expert witnesses) where the courts get up to

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35 This last reason, goes to “physical” security, not a greater tendency of the judicial branch to “leak” information to the public.
As to the speed of decision making, the critic can point to existing models for expedited review in the national security field. As to accountability, the critic can show that a court’s lack of a vested interest in a particular intelligence activity is, in fact, an advantage for objectivity. As to the narrowness of perspective, the critic can argue that it is the Executive Branch’s duty to broaden the judiciary’s perspective, and that special courts can be created to hear espionage disputes. Finally, as to security, the critic can note the availability of court security officers, of closed and sealed proceedings, and of the existing model for dealing with classified information in criminal cases. At the end of this dialectic, however long, detailed and inspiring, I doubt, however, that a serious argument can be made for absolutely no judicial deference to the Executive’s conduct of intelligence activities. The serious question is not whether courts should defer. No, the serious questions are when and how much. To assist in answering these questions, we benefit from a reasonable method of measuring judicial deference.

In this article on espionage disputes, I suggest two methods of measuring judicial deference. The first is historical. Here, we compare how a similar set of facts is treated during different times in U.S. history. Defining the date of a reported decision is straightforward, but making sure that

36 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-96 (1995). The factors are whether the theory or technique has been reliably tested; whether the theory was subjected to peer review and publication; the techniques “known or potential rate of error”; existence of standards and controls for the test, and whether the test or technique has become “generally accepted.”


39 My analysis of espionage disputes is placed in the national security category. Where the scholarly literature on emergency powers seems useful to my measurements of judicial deference, I have drawn from it. Where this literature seems part of a separate debate, broader and more theoretical, I have kept an agnostic distance. Therefore, I do not take a position on whether the “accommodation” or the “strict enforcement” view is the proper role of the Constitution during an emergency; see Eric Posner & Adrian Vermeule, Accommodating Emergencies, 56 STANFORD L.R. 605 (2004), see Jules Lobel, Emergency Power and the Decline of Liberalism, 98 YALE L.J. 1385 (1989); nor do I take a position on whether an “emergency” constitution (as a supplement to the current Constitution) should be adopted to meet the terrorist threat after September 11; see Bruce Ackerman, The Emergency Constitution, 113 YALE L.J. 1029 (2004) and Laurence H. Tribe & Patrick O. Gudridge, The Anti-Emergency Constitution, 113 YALE L.J. 1801 (2004).
apples are being compared to apples may be more subtle.⁴⁰ Even so, the dispute about an espionage deal, treated as a national security matter, presents a relatively simple fact pattern that is susceptible to historical comparison.

The second method is to compare an espionage dispute against the tone or the key of leading cases in national security law. Here, without insisting that the fact patterns of the two cases being compared be similar, we can try to place one case on a spectrum between opposite poles of judicial deference, one representing the highest deference to Executive action and the other representing the least deference. By its design, this method can be used to analyze many other types of national security cases.

III. THE ESPIONAGE DEAL IN HISTORICAL CONTEXT

Espionage is not usually claimed as the oldest profession, but it has roots in ancient history and has a reasonable claim as the second oldest profession.⁴¹ So it is safe to assume that for as long as there have been espionage deals, there have been disputes among the participants to those deals. Before we survey those cases, we should agree on key terms.

A. Defining Espionage Terms

Much like the legal profession or the medical profession, the intelligence business uses its own lexicon. For outsiders to speak in an educated way with the intelligence professionals and for courts to consider whether they should involve themselves in espionage disputes, the basic terms

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⁴⁰ I am careful not to fall into what I describe as a Cartesian trap. While I believe there is a use to questioning one’s definitions, sometimes this questioning does not contribute to proving the obvious. Some externals should be taken for granted. Knowing this, Plato and Aristotle, unlike Descartes, did not engage in the folly of trying to prove their own existence. I do recognize the difficulties of defining all the cases that fall within the category of espionage disputes, of setting the outer boundaries to this category. Even without a precise definition, all the cases which I have selected, based on their facts, fall within the core of this category. As a modern philosopher explains: “We know heaps of things without being able to define the terms in which we express our knowledge. Formal definitions are only one way of elucidating terms; a set of examples may in a given case be more useful didactically than a formal definition.” P.T. GEACH, LOGIC MATTERS 34 (1972). I thank Professor Russell Panier for guiding me to this source.

⁴¹ A former Director of Central Intelligence traces the roots of espionage back to a chapter entitled “Employment of Secret Agents” in Sun Tzu’s Art of War, to Joshua sending two men on a scouting mission to Jericho, and to Herodotus’ account of Greek spies being sent into Persia before the “great invasion” of 480 B.C. ALLEN DULLES, THE CRAFT OF INTELLIGENCE (1963) at 13-14. Dulles also recounts the dramatic espionage battles between the British and the Americans during the American Revolutionary War. Id. At 29-37. For a more comprehensive view of this period of espionage, see THE EARLY YEARS OF AMERICAN ESPIONAGE.
must be mastered. The alternative, without this mastery, is discord, dissonance, the breakdown of meaning.

The Intelligence Community involves parts and wholes of several United States agencies.42 Policymakers need accurate information (“intelligence”) to respond to events (e.g., an Iraqi invasion of Kuwait) and to predict trends (e.g., Saddam Hussein’s pursuit of weapons of mass destruction). The process of providing policymakers with this intelligence can be neatly divided into two separate tasks: collection and analysis. The collection of raw data is done through open sources (newspapers, books and broadcasts); through technical observation of signals and images, aided by satellites, drones, aircraft, and naval vessels; through listening devices and bugs on land-line telephones, cellular phones and emails; and through human sources. Rarely is this raw data shared directly with policymakers.

As the raw data is collected, it is made available to intelligence analysts who sift through it in search of a synthesis. The analysts package their conclusions in a variety of formats: oral briefings, regular daily reports (including the President’s Daily Brief and the Senior Executive Intelligence Brief), regular weekly publications, special intelligence memoranda, and the National Intelligence Estimates. Within the community, some agencies such as the National Security Agency are more devoted to the technical collection of data. Some agencies such as the State Department are essentially devoted to analysis. But the Central Intelligence Agency, to its pride, plays a pivotal role in both collection and analysis. Collection is done by the CIA’s Directorate of Operations and analysis is done by the Directorate of Intelligence.

The terms “spying” and “espionage” are sometimes used to denote the entire intelligence cycle from collection to analysis. For purposes of this article, however, “espionage” is limited to the clandestine collection of information from human sources (i.e., spies). Although the CIA considers itself preeminent in performing espionage on behalf of the U.S., it is not the only U.S. agency that does so. The intelligence arms of the various military services and the FBI also perform espionage. Yet, for clarity’s sake, this article adopts the CIA’s lexicon for performing espionage, a lexicon that can easily be translated to those at other U.S. agencies and to intelligence services in other countries.

The person within the Directorate of Operations, George Smiley’s counterpart, who spots, assesses, develops, recruits and handles spies is called a “case officer.” He or she is an employee with health and retirement benefits similar to those of “overt” employees of the CIA, such as the lawyers in the Office of General Counsel. The case officer, who goes through a rigorous course

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of training at a secret CIA location, usually works under an alias with official or non-official "cover," a claim often "backstopped" that he is employed by an entity other than the CIA. Hence, he is usually a "covert" employee who does not tell those without a need to know that he works for the CIA; some case officers even keep their true work secret from their spouses and their children. After all, it would be nearly impossible for a case officer to operate in a foreign country, or even be admitted by foreign immigration authorities, if he openly admits to being with the CIA. Foreign citizens would be more suspicious of him and foreign intelligence services would be more intense in their surveillance or "counter-intelligence."

The case officer rarely has direct access to the information our government would like to collect, say, the talking points for a summit which are being reviewed by the foreign country’s Ministry of Foreign Affairs. For this reason, it is vital to have a "penetration," a source or spy with inside access. A secretary in the Ministry, for instance, might have the necessary access to the talking points.

Trying to determine what motivates a spy to give in to a case officer or to volunteer to commit treason is to delve into the riddles of the human psychology. The motivation could be financial, ideological, spitefulness, thrill-seeking, or a combination of factors.43 The process of instructing

43 Although CIA psychiatrists and psychologists have done extensive research in this field, it has not developed a standard profile to predict who will become a traitor. The CIA, however, has been able, in hindsight, to glean a limited profile of traitors. The intelligence community uses the expression, "crossing the Rubicon" to describe the pivotal point of no return after which a person decides to spy against his country. This phrase is taken from ancient Roman history. ADRIAL HAVILL, THE SPY WHO STAYED OUT IN THE COLD 65 (2002). The acronym M.I.C.E. describes four common motivations for spying. They are Money, Ideology, Compromise, and Ego. Id. at 66-68. Five American turncoats, indicative of the modern era of espionage, are Robert Hanssen, Jonathan Pollard, Aldrich Ames, John Walker and Clayton Lonetree. Their motivations were complex and varied. On Hanssen, see e.g. MILT BEARDEN & JAMES RISEN, THE MAIN ENEMY 132 (2003) (Bearden and Risen contend that ideology did not motivate Hanssen’s decision because he was very religious and a staunch anti-Communist. Despite the money Hanssen received, he still lived a modest life. "Perhaps the only explanation was that Bob Hanssen had an addictive personality, and espionage somehow fed his cravings.") HAVILL, supra this note at 63-69, 103-04 (Havill places more importance on the role that money played in Hanssen’s betrayal. While Hanssen did not use the money to support a lavish lifestyle, he did use the funds to support his large family and to pay for his children’s private schooling. Ego may have been the “second-greatest” factor in Hanssen’s mind. Jerrold Post, who founded the CIA’s Center for the Analysis of Personality and Political Behavior, believes all spies are narcissistic, self-absorbed, and egocentric. Letters from Hanssen’s Russian handlers suggest that they understood this by stroking his ego “at every opportunity.” For Hanssen, who felt his talents and intellect went unrecognized by the FBI, his treason may have been the product of a bruised ego.) On Pollard, see e.g., WOLF BLITZER, TERRITORY OF LIES 37, 63-64, 92-93 (1989) (Jonathan Pollard’s religious and political ideology were the reasons he decided to spy for Israel. He strongly believed that the security of Israel was paramount and rationalized that his espionage
the recruited spy and of collecting what she has stolen, all without being spotted by the opposing intelligence service, is part of the case officer’s “tradecraft.” This tradecraft, notwithstanding LeCarre’s portrayals, is usually conducted by teams of case officers.

Despite the tendency of those outside the intelligence business to refer to case officers and sources interchangeably as “agent,” CIA case officers are careful to carve themselves out from this term. They only refer to the human sources whom they are recruiting or whom they have recruited as agents. It is the “running” of these agents that is the dramatic stuff of spy novels and spy movies. It is this stuff that creates the legends and the financial disputes in the reported cases.

**B. Totten Times**

Although the CIA was created in the 20th century, the ups and downs of American spying go back to the beginning of our history. In a 19th century case, the Supreme Court ruled that a suit against the U.S. Government could not be maintained to enforce the terms of an espionage deal. In this case, several years after the espionage services were performed, the administrator of William A. Lloyd’s estate sought to recover full compensation for Lloyd’s spying behind Confederate lines during the Civil War, namely, “ascertain[ing] the number of troops stationed at different points in the insurrectionary States, and procur[ing] plans of forts and fortifications. . .

The administrator alleged that this espionage deal was made in July of 1861 between Lloyd and President Lincoln. According to the administrator, the government had reimbursed Lloyd for his expenses but did not pay him the $200 a month which it had promised. In the CIA’s modern parlance, President Lincoln was the case officer for this deal and Lloyd was the agent or source. What is not mentioned is whether Lloyd used other persons, sub-agents or sub-sources, to help him gather the intelligence.

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44 CARL VAN DOREN, SECRET HISTORY OF THE AMERICAN REVOLUTION (1941).


46 *Id.* at 105.
Before Lincoln personally recruited him to be a spy, Lloyd had been a publisher of maps and guides for railroad and steamboat routes.\textsuperscript{47} For Lloyd’s business to succeed during the Civil War, he needed a pass to cross Union lines, a pass which President Lincoln provided as additional compensation for Lloyd’s espionage services.\textsuperscript{48} Twice detained by Confederate authorities who suspected him of spying, Lloyd actually had a written contract, signed by President Lincoln, which was kept hidden in a chambermaid’s dress for part of Lloyd’s tour of duty.\textsuperscript{49}

In one sense, Lloyd’s espionage deal with President Lincoln, while typical as to tradecraft, differs from the CIA’s espionage assignments. The CIA handles agents outside the United States. Whether Lloyd was operating outside or inside the concept of the United States, of course, was at the core of the dispute during the Civil War, but it is agreed that he operated on the American continent. The \textit{Totten} opinion, without specific reference to the Constitution, did not question President Lincoln’s authority to enter into the espionage deal with Lloyd. Instead, setting a sort of jurisdictional bar, the court objected to any legal action concerning the deal, stating that such an action violated the secrecy that was implicit to the deal.

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.\textsuperscript{50}

The court determined that secrecy is implied in secret agreements during “time of war” or “upon matters affecting our foreign relations.”\textsuperscript{51} Without such secrecy, the government might be embarrassed, the secret service compromised, or the agent endangered, injured or killed. In determining the need for secrecy, the court’s reference must have been to the time the espionage deal was arranged and conducted, for by the time Lloyd’s administrator brought the legal action, the Confederacy had disappeared, the espionage had been performed, and Lloyd was in his grave. As a sort of prelude to the National Security Act of 1947 and a series of Executive Orders on “classified” information, the court understands that intelligence activities cannot successfully be conducted without secrecy.\textsuperscript{52}

\textsuperscript{47}Christopher Andrew, \textit{For the President’s Eyes Only: Secret Intelligence and the American Presidency From Washington To Bush}, 16 (1995).
\textsuperscript{48}\textit{Id.} at 16-17.
\textsuperscript{49}\textit{Id.} at 17.
\textsuperscript{50}\textit{Totten} at 106.
\textsuperscript{51}\textit{Id.}
\textsuperscript{52}See, e.g., Executive Order No. 12958, amended on 25 March 2003, by Executive Order No. 13292, 6: Fed. Reg. 15315 (March 28, 2003). “This order prescribes a uniform system for
The need for secrecy in conducting intelligence operations was not novel to the 19th century. An understanding of this need goes back at least to the earliest days of the Republic when American and British case officers recruited agents and double-agents as a part of the broader battle of the American Revolutionary war. 53 From this perspective, for the agent to go to court with a dispute about the espionage would itself breach the deal, “and thus defeat a recovery.” 54 As the Supreme Court states:

> A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services 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. 55

In the final paragraph of its opinion, the Court grounds the ruling on a broad foundation of public policy:

> It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. 56

classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation’s progress depends on the free flow of information. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation’s security remains a priority.” Id.

53 In a letter of July 26, 1777, issuing the order 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).

54 *Totten* at 107.

55 *Id.*

56 *Id.*
Although the term “secret” is converted to “confidential,” this sentence with the emphasis on “any suit” will later be cited by those who claim that *Totten* establishes a jurisdictional bar to espionage lawsuits. Under the broader reading, *Totten* can then be linked to “non-justiciability” cases where, for other separation of powers reasons, the courts have decided not to intervene.\(^{57}\) In a move that should haunt the government’s position in responding to future espionage lawsuits, however, the government in *Totten* did not take the position of neither confirming nor denying that Lloyd was an espionage agent for President Lincoln. These facts are effectively acknowledged. Further, another sentence of the *Totten* opinion, muddying a prior sentence, provides ample support for those who will later argue that *Totten* stands for an evidentiary privilege rather than a jurisdictional bar:

> On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose.\(^{58}\)

So as early as the 19th century the question about an espionage suit is nicely framed. Should the dispute be subject to a jurisdictional bar? Is it a “threshold question” that may be resolved before reaching the jurisdictional question? Or an evidentiary privilege? The *Totten* court, while not necessarily framing its opinion in a trinity of jurisdiction, prudential standing, or evidentiary privilege, clearly ruled against treating the case as an evidentiary privilege.

A particular embarrassment to the government from confirming or revealing the details of an espionage relationship, as opposed to other categories of classified information, is that espionage is illegal and has no status under international law.\(^{59}\) Some military actions, by contrast,

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\(^{57}\) *See* generally, *Baker v. Carr*, 369 U.S. 186, 211-217 (1962) (Under the political question doctrine, federal courts will deny jurisdiction if the case presents any of six of the following factors: 1) A “textually demonstrable commitment” in the Constitution showing that the decision is better left to either the executive or legislative branch; 2) Lack of “judicially discoverable standards”; 3) An inappropriate policy choice for the court; 4) The decision would express a lack of respect to the other two branches; 5) A political decision has already been made; and 6) Potential for embarrassment).

\(^{58}\) *Totten* at 107.

\(^{59}\) *See*, e.g., 1 OPPEINHEIM’S INTERNATIONAL LAW § 455, at 862 (Lt. Lauter Pecht ed., 8th ed. 1955) (spies are “not official” agents of states for the purpose of international relations); Maxwell Cohen, *Espionage and Immunity-Some Recent Problems and Developments*, 25 BRIT. Y.B. INT’L L. 404 (1948) (putting aside the possibility of diplomatic immunity, a captured spy is “without [the law] to the extent that he could claim a few rules to protect him and not state to acknowledge or defend him”); Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT’L L. & POL’Y 321, 340 (governments traditionally disavow knowledge of their agent’s espionage actions); LESLIE S. Edmondson, *Espionage in Transnational Law*, VAND. J.
although classified, have an accepted status under international law. This distinction is not made in the *Totten* decision, but it does support the argument of a pure bar to espionage disputes rather than merely allowing the assertion of an evidentiary privilege. In simple terms, once the toothpaste is out of the tube about an illegal espionage activity it is nearly impossible to get it back in.

Years later, a former Director of Central Intelligence assessed the *Totten* case in practical terms, not delving into nuances of evidentiary privileges. “This is a warning to the agent that he had better get his money on the barrelhead at the time of the operation.” If only Gore Vidal, in deference to the DCI, had inserted a passage in his historical novel about Lincoln, detailed and ironic, for us to imagine the scene. Lloyd, chewing tobacco, comes before Lincoln, who rubs his temples in pain and disbelief. “Excuse me, sir, may I have the money for my espionage services up front?” And what was Lloyd’s recourse if Lincoln refused to give the money on the barrelhead?

*Totten*, to be sure, is not the only espionage dispute from the Civil War that made it to the Supreme Court. Since then, *Totten* has also been relied on in other espionage disputes and in contexts outside of espionage disputes. As an example outside of espionage disputes, the Supreme Court, over a hundred years after *Totten*, held that it was “beyond judicial scrutiny” whether or not the Navy has complied with [the National Environmental Policy Act] concerning the storage of nuclear weapons at a facility in Hawaii. The plaintiffs in this case had sought public release of an Environmental Impact Statement, but the Court, according to

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60 See, e.g., U.N. charter, art 51 for the right of self-defense.
62 GORE VIDAL, LINCOLN.
63 In De Arnaud v. United States, 151 U.S. 483 (1893), Charles de Arnaud claimed that he entered into an agreement in August of 1861 with Major General John C. Fremont, commander of the United States Army in Missouri, to observe Confederate troop strengths and movements. Before the Court affirmed that this suit was barred by the statute of limitations, it reviewed its holding in *Totten*: “But the [Totten] court was of opinion that the service stipulated for in 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.” Id. At 493. De Arnaud had not challenged the *Totten* doctrine, but, in a definitional twist, argued that he had served as a “military expert,” rather than as a spy, thus rendering *Totten* inapplicable. It seems unlikely that the Court would have fallen for this trick, but, as they stated, there were other defenses, namely the statute of limitations, that applied which “relieved [them] from considering whether the new-fangled term ‘military expert’ is only old ‘spy,’ ‘writ large.’” Id.
Freedom of Information Act standards, argued that the Government could neither admit nor deny the storage of nuclear weapons at the facility.  

C. Guong Against the Viet Cong

A twentieth century example of an espionage dispute is Guong v. U.S. Like Totten, the factual backdrop to this espionage deal is war, this time in Vietnam. The plaintiff, Vu Doc Guong, a Vietnamese citizen, alleged that the CIA had recruited him for covert military operations against North Vietnam. According to Guong, the deal was for the CIA to pay him to conduct sabotage; if he were imprisoned by enemy forces, the Americans would rescue him. If, for some reason, they could not rescue him, they would pay Guong’s wife while he was imprisoned. The deal did not work out as Guong expected, though. He was captured by North Vietnamese forces on a sabotage mission in March 1964. The Americans did not rescue him from his North Vietnamese captors, and, one year later, stopped paying his wife any monthly fee.

In 1980 Guong escaped from North Vietnamese captivity. In 1986 he filed an action against the United States, claiming over $400,000 in back pay, adjusted for interest and inflation, and $21 million in damages because United States had failed to rescue him from prison. Obviously, these are amounts far greater than were at issue in Totten.

As context to the Guong case, the CIA’s long and dirty role in Indochina has since become known. Some of the secrets to the Guong case, however, were the American case officer who recruited him, the tradecraft used in handling him, and the details of the covert operations in which Guong was involved.

At the government’s motion, the Claims Court (the lower court) relied on Totten to bar Guong’s suit. On appeal, Guong tried three tacks to distinguish Totten. First, he argued that his job “to

65 The government’s practice of neither confirming nor denying a fact is often referred to as “glomar.” Glomar was the name of an underwater vessel which was used in trying to recover a sunken Soviet submarine. The CIA’s decision, in response to a Freedom of Information request, to neither confirm nor deny that it had a file on the Glomar Explorer was accepted by the courts. Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

66 860 F.2d 1063 Fed. Cir. 1988. The factual summary in this section is all drawn from this case.

67 For the perspective of a CIA case officer who served in Vietnam, see Frank Snepp, Decent Interval, 1977. That the CIA would abandon and then stiff Guong would come as no surprise to Snepp. “Because of the sensitivity of their jobs, the list of CIA locals who were evacuated, or left behind, remained hidden away in agency vaults in the period following the Communist victory. Yet several of my former colleagues, who were outraged at what had taken place, saw to it that some basic statistics were made available to me. According to these tabulations, only about 537 of the [CIA] station’s 1,900 ‘indigenous employees’ were finally evacuated.” Id. at 566.
blow up ships in North Vietnamese harbors” was not secret. (Totten only barred a secret service or secret agreement for secret services.) By this argument, Guong claimed the secret service or second prong of Totten had not been met. In light of the CIA’s broad division of operations into foreign intelligence and covert operations, Guong, in essence, tried to limit Totten to classic espionage.68 But the appeals court did not accept Guong’s distinction: “Hence, it cannot be doubted that Totten stands for the proposition that no action can be brought to enforce an alleged contract with the government when, at the time of its creation, the contract was secret or covert.”69 In so doing, the court may have gone farther than necessary; for it is difficult to defend the dismissal of a lawsuit where, although the original deal was secret, the government declassifies everything about the deal, particularly the names of the case officer and the agent, the tradecraft used, and the activities conducted. The judiciary, in short, should not protect something the Executive no longer views as secret. Yet, given the government’s reluctance to declassify many national security matters, this overbroad aspect to Guong is more a theoretical than a practical possibility.70

Second, Guong attacked Totten’s secrecy prong by claiming that his covert military operations had been acknowledged in books by former CIA and military officials. The court’s response to Guong’s first argument also precludes the second argument; the relevant perspective for assessing the need for secrecy is at the time of the deal, not later. Further, the court notes that there is a sharp difference between unofficial accounts, such as memoirs and histories, and official confirmations. Here, the court’s logic is sound. Other courts, although not necessarily citing Guong for this point, have followed its logic.71

Third, Guong proposes that the court protect the secrets by requiring the government, where necessary, to invoke the state secrets privilege so that the matter could be considered in camera.72 Guong implicitly assumes that he should be included in the in camera proceeding,

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68 “Covert actions” at CIA require Presidential approval through findings. THE 9/11 COMMISSION REPORT at 90. Overt military operations, by contrast, are done by the Department of Defense. Today, with many joint paramilitary operations between the CIA and the DOD in the “war on terror,” the line between overt and covert is not always clear. See also, Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 8, 1981).

69 Guong at 1064.


71 “[E]ven if a fact * * * is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security.” Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983); Military Audit Project v. Casey, 656 F.2d 724, 745 (D.C. Cir. 1981); accord Abbots v. NRC, 766 F.2d 604, 607-608 (D.C. Cir. 1985).

72 The Supreme Court, referring to Totten in a footnote, had established the state secrets doctrine in U.S. v. Reynolds, 345 U.S. 1 (1953). In Reynolds, three widows sued the U.S.
either because he already knows the secrets or because there are not many more secrets that are relevant beyond what he knows. In response, the Guong court referred to the post-Totten precedent at the Supreme Court and stated: “A close reading of Reynolds reveals that it does not limit or modify the authority of Totten or its rationale.” Instead, the “close reading” shows that Totten is sometimes a subset of state secrets cases where the government’s assertion of the evidentiary privilege causes or would cause the suit to be dismissed.

In some cases when the Reynolds evidentiary privilege is invoked, the parties can “litigate around” the secrets. These are secrets separate from espionage disputes. A part of the case is carved out from discovery and trial, but the civil process is otherwise allowed to proceed. In this regard, it is useful to recall that, beyond espionage relationships, there are many sources to classified information, from signals collection at the National Security Agency to the equipment used by our Special Forces. Implicit to the Guong court’s logic is that while parties to some civil actions can litigate around some secrets, almost by definition, they cannot litigate around the core of an espionage dispute. But even if this logic is accepted in substance, it does not follow that the “pure” Totten procedure of dismissal should always be kept separate from the state secrets privilege. As a matter of cogent jurisprudence, one should decide whether Totten is separate from state secrets on espionage disputes, whether Totten and state secrets overlap to some extent, or whether one doctrine is a subset of the other. That is at the core of the debate in this article. Could the trial court have dismissed the case solely because of allegations about an espionage deal in the complaint? Or should the court require more? The Guong court did not

Government under the Federal Tort Claims Act. Id. at 2-3. The widows asked for discovery relating to a crash of an Air Force plane. Id. at 3. The Supreme Court held that when the Secretary of the Air Force had filed a formal claim of privilege related to circumstances that reasonably involved military secrets, that was sufficient to cut off any further demand from the plaintiffs for production. Id. at 10-11. Totten cases and state secrets cases are similar in that both involve sensitive or classified information. But Totten cases and state secrets cases are different in a fundamental sense concerning the possible parties in the suit. In Totten cases, by definition, the United States is a defendant. On the other hand, there are many state secrets cases, such as a contractual dispute between two private parties, where the United States is not a party to the suit but intervenes to protect classified information either at the core or at the fringes of the suit.

73 Guong at 1066.

74 See, e.g., Monarch Assur. P.L.C. v. United States, 36 Fed. Cl. 324 (1996) aff’d in part 244 F.3d 1356 (C.A. Fed. 2001). In Monarch Assurance, the plaintiffs had loaned several million dollars to an individual who claimed to be a secret operative who acted on behalf of the CIA. When the individual did not repay the loan, the plaintiffs obtained a judgment in British court. When the plaintiffs were not made whole from this judgment, they brought suit against the United States in the Court of Claims. This case does not fall within the Totten paradigm because Monarch’s providing of the loan was not a secret service to the United States. The individual who received the loan had said he was associated with the CIA.
reach these fundamental questions, and, in its summary pace, did not even consider Guong's proposal for handling the secrets *in camera*
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At the end of the episode, Guong would have been more successful if he had complained in another forum. Indeed, some other individuals who alleged that the Executive Branch had breached the terms of secret agreements for secret services during the Vietnam War found relief, not from the judiciary, but from the legislature. In response to the claims of 280 “lost commandos” who, like Guong, alleged they performed paramilitary services for the U.S. during the Vietnam War, Congress provided compensation to all persons whom North Vietnam captured or incarcerated for their participation in what was known as the “OPLAN 34A” Program. This is one example when the legislature provided relief instead of the judiciary.

D. The *Webster* Exception

Whether or not the Supreme Court realized or intended, the *Webster* case put a camel’s nose deep into *Totten*’s tent. This case clearly contradicts the notion that the courts should not have a role in overseeing intelligence operations. “Doe” was an employee in the CIA’s Directorate of Operations, a “covert electronics technician” but not a case officer, who lost his security clearance because he was a homosexual. At that time, the CIA considered homosexuality, even by those who were not inclined to hide their homosexuality, to be a factor that contributed to a security threat or to a greater tendency to commit espionage. Without a security clearance, Doe could not maintain his employment at the CIA.

This CIA employee had proceeded by pseudonym, not because he was ashamed of his sexuality, but because he sought to protect the secrecy of his activities. The *Doe* majority, while dismissing any statutory grounds for Doe’s complaint, did rule that Doe could pursue Constitutional challenges to his dismissal from the CIA, for instance, for improper discrimination because of sexual orientation. The Court further noted that serious Constitutional issues would arise if Congress tried to “deny any judicial forum for a colorable constitutional claim.”

Because the briefs and the oral argument in *Webster* focused on the statutory authority of the Director of Central Intelligence under Section 102(c) of 50 U.S.C. 403(a), on whether this statute precluded judicial review of the Director’s “discharge decisions,” *Totten* did not receive full

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77 The Court would only accept an explicit preclusion of Constitutional claims, said to be lacking in the National Security Act of 1947. *Webster* at 603.

78 *Webster* at 603.
consideration. If *Totten* stands for the notion that secret agreements for secret services are beyond judicial review, then this doctrine should have been a basis for dismissing Doe’s claim. Doe’s employment with the CIA, not necessarily his “cover” connection to some other entity, was classified, and Doe’s actions for CIA were classified. Those facts fall within *Totten’s* framework.

The *Webster* court, however, without referring to *Totten* in the opinion, leaned toward a state secrets approach. To respond to the government’s argument that judicial review of constitutional claims would damage national security because of a “rummaging around” in CIA affairs, Justice Rehnquist cited *Reynolds* on behalf of the majority. As he states:

> 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.\(^{80}\)

Here, even when the CIA’s interests are defined as “extraordinary” they lose in the balance against the interest of giving a plaintiff his day in court.

Justice O’Connor, concurring in part and dissenting in part, disagrees with the majority’s suggestion that a constitutional problem would exist if Congress completely precluded Webster from bringing a colorable constitutional claim. “Whatever may be the exact scope of Congress’ power to close the lower federal courts to constitutional claim in other contexts, I have no doubt about its authority to do so here.”\(^{81}\) She views intelligence activities within a special constitutional status. To be specific, citing *Totten*, she links the DCI’s unfettered authority to discharge employees to his authority to control access to classified information. The DCI’s authority, in turn, is linked to the President’s exclusive power to serve “as the sole organ of the federal government in the field of international relations.”\(^{82}\) Unlike the majority, by deferring to Executive discretion on intelligence matters, she leans towards *Totten’s* “pure” dismissal of lawsuits that stem from secret agreements for secret services.

In a recent reading of *Webster* by a CIA employee, “It was worth noting that the opinion in *Webster* never indicates whether the court considered the *Totten* doctrine in rendering its

\(^{79}\) The Government in its reply brief cited *Totten* for the proposition that “the terms and conditions of intelligence operations have historically not been subject to judicial oversight.” Reply Brief for the Petitioner, *Webster v. Doe* 1987 WL 881346 1, N.11 at 9 (U.S. 1987) Although Title VII does not cover discrimination based on sexual orientation, the Government did not exclusively argue that Title VII precluded any further review.

\(^{80}\) *Webster* at 604.

\(^{81}\) *Webster* at 605.

\(^{82}\) *Webster* at 606.
decision, or even whether either party ever raised the issue.”

Despite his factual errors, Mr. Pines must realize, as indicated by the apologetic tone to his article, that Webster can be used to launch a siege on the Totten tower. As parts of different paradigms, Webster and Totten cannot easily be reconciled in a consistent jurisprudence. Indeed Mr. Pines, in a begrudging way, admits another area where Totten could be applied in theory, but has not been in practice: the CIA’s classified agreements with outside corporate contractors.

For some services (e.g., catering in the cafeteria), the CIA “openly” contracts with outside companies such that the name of the contractor and a description of the services are publicly revealed. Because there is nothing secret to these contracts, they fall outside Totten’s scope. On other contracts, while the name of the contractor may be unclassified, a description of the services may be classified. In addition, the CIA has contracts where both the name of the contractor and the type of services are classified. It is these contracts that are most relevant to the Totten doctrine. It is therefore significant that the CIA’s practice is to rely on the state secrets privilege in dealing with lawsuits that stem from these contracts. In an attempt to explain why it makes sense not to apply Totten in either the Webster case or the dispute with a contractor, Mr. Pines states: “Employee and business disputes almost always concern U.S. persons or companies, as well as activities and actions committed on American soil, and therefore, such disputes may be asked to be resolved without compromising national security or U.S. foreign relations.” But the conclusion does not follow from the premise. The CIA does have classified activities with U.S. persons on U.S. soil. By definition, an unauthorized disclosure of such information would damage the national security. Perhaps aware of the weakness of this definition, Mr. Pines tries a different tack that brings in Webster. “In the context of employee disputes, and disputes with certain businesses, the Agency may decide to permit the case to proceed on the merits in order to maintain general employee morale, as well as to provide reassurance to companies with whom the Agency does business.” In other words, to Mr. Pines, it makes sense to allow the Agency broad latitude to stiff agents because they are

83 Daniel Pines, The Continuing Viability of the 1875 Supreme Court Case of Totten v. United States, Admin. Law Review, Fall 2001, N. 95. As to whether either party raised the Totten issue, this observation is belied by the government’s reply brief, supra. As to considering Totten, this observation is belied by Justice O’Connor’s concurrence.

84 Referring to McDonnell Douglas Corp. v. United States, 182 F.3d 1319 (Fed.Cir. 1999), Mr. Pines notes, “While aspects of the contract at issue in McDonnell were handled in such a way as to preserve the classified nature of certain technical information, there is no indication that either the fact that Congress had appropriated funds to develop the ‘stealth’ technology at issue or the fact that McDonnell Douglas was awarded the contract at issue was a secret.” Pines, N. 96.

85 Pines at 1295.

86 The expected damage determines the level of classification from confidential to secret to top secret. See Exec. Order No. 12,958 60 Fed. Reg. 19,825 (Apr. 20, 1995).

87 Pines at 1295.
foreign citizens but not to stiff the technicians and the case officers because they are U.S. citizens.

The Constitution, of course, does recognize that the government can treat citizens and some non-citizens differently in some cases.\(^{88}\) This difference in treatment is a tenet of the Bush Administration’s anti-terrorism tactics.\(^ {89}\) Therefore, the usual difference in citizenship between agents and case officers is a factor in the \textit{Totten} analysis, but it is not dispositive. Further, the CIA’s notion that quick dismissal of lawsuits with outside contractors would interfere with the CIA’s ability to conduct “repeat” business contradicts its other argument that, out of self-interest, it will treat agents fairly even if they lack judicial recourse. An implicit premise to the CIA’s notion is that there is a limited number of contractors that can provide the CIA with outside services while there is a nearly unlimited pool of potential agents to spy for the Agency. Again, the cloak of classified information prevents outside observers from testing the accuracy of these premises. In any event, if the CIA were to maintain a warranted reputation for fairness in all realms, agents and contractors alike, without judicial recourse, should be pleased to deal with the Agency.

Later, when Mr. Pines’ cohorts at the Justice Department asked the Supreme Court to overrule the Ninth Circuit decision that gutted the \textit{Totten} doctrine, as described in the next section, the Solicitor General’s office recognized the threat that \textit{Webster} posed to unfettered Executive discretion. Not adopting any of Mr. Pines’s justifications, the Solicitor General’s Office tried to distinguish \textit{Webster} from an espionage dispute by asserting that, contrary to \textit{Webster}’s situation, there is little unclassified space, if any, between the fact of an espionage relationship and the core of the activities that relate to that relationship, including confirming or denying any relationship. \textit{Webster} is kept separate from \textit{Totten} because, “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.”\(^{90}\) That is not the case, so it is said, with the espionage relationship. Then, in its brief for the Supreme Court, the Government beefed up its effort to distinguish \textit{Webster}. “This is not a case in which a congressional statute is being construed, however, but a case in which the complaint asserts a constitutional entitlement to payments and process under a secret espionage agreement.”\(^{91}\) Further, the Government correctly notes that the assertion of the state secrets privilege could eliminate constitutional claims. The difference between the \textit{Totten} doctrine and the state secrets approach, of course, is that under the former the case is automatically dismissed. Under state

\(^{88}\) For example, an overseas search by U.S. authorities of a non-U.S. citizen without significant connections to the U.S. does not implicate the Fourth Amendment. \textit{United States v. Verdugo-Urquidez}, 494 U.S. 259 (1990).


secrets, the head of an executive agency must exercise his discretion to assert the privilege and this assertion is subject to some judicial supervision.

Such subtle arguments may not be enough to maintain all bright-line distinctions on this national security topic, but they are the best that the Government has done to push Webster’s nose from getting into Totten’s tent on espionage disputes. For the Government to maintain the consistency of the Webster/Totten distinction, it may eventually argue that Totten prevents judicial review even if the discrimination against the agent is in an area where individuals have constitutional protections, even if the CIA mistreats an agent solely because of the agent’s sexual orientation or ethnicity. That is the toughest case for the distinction, a hypothetical case for another set of John Doe plaintiffs that has not yet reached the courts.

E. Another Set of Does

For a while, John and Jane Doe from Washington State were the most successful alleged former agents of the CIA to work around Totten.92 Using fictitious names, careful not to reveal secrets such as the names of their case officers, the Does alleged that the CIA proposed that they become spies of a foreign country “considered to be an enemy of the United States” during the Cold War.93 In their version, after being held in a CIA safe house, the Does agreed to remain in their diplomatic posts as agents in place in exchange for the CIA’s promise to arrange for their later travel to the United States and to ensure their financial and personal security for life.94 The CIA, after using the Does as sources of human intelligence, eventually did settle them into the United States where they became U.S. citizens.

But the Doe story did not have the happy ending of a popular spy novel. As John Doe’s salary from a new, non-spying job increased, the stipend that the CIA paid the Does decreased. Then, in a twist common to the American business cycle, John Doe lost his job after his position was eliminated in a corporate merger.95 Unemployed, he had difficulty finding a new job, in part, because of gaps in his resume which the CIA did not permit him to explain. As a result, the Does’ financial situation deteriorated, and they had to tap into their savings to pay for mounting medical expenses. In dire straits, they asserted that if the CIA were not compelled to fulfill its promise to “always be there” for them, they could be forced to return to their more economical home country where they would face the danger of being recognized as traitors. Accordingly, they sought an injunction for the CIA to pay them monthly financial support; a declaratory judgment specifying the administrative review the CIA must give them to comply with due process; and an order of mandamus for the CIA to meet their basic needs and to adopt fair administrative procedures.96

92 Doe v. Tenet, 329 F.3d 1135 (9th Cir. 2003).
93 Id. at 1138.
94 Id. at 1139.
95 Id.
96 Id. at 1140.
Before the Does filed suit, they claim that they initiated internal appeals at the CIA. First, the
Deputy Director of Operations, after review, supported the Agency’s decision not to provide the
Does any further assistance. Next, the Does appealed to the Helms Panel, named for a former
Director of Central Intelligence and composed of former government officials. In the end, the
Does did not receive what they wanted. Adding to their irritation, the Does did not receive full
information about the process for each appeal and were not allowed to appear before the appeals
boards. In short, the appeals were closed door and did not include the Does or their legal
counsel.

The Ninth Circuit, in permitting the Does to proceed with their suit, made great use of Webster,
holding that Totten was not a “blanket prohibition on suits arising out of acts of espionage,” but
“is instead simply a holding concerning contract law.” In the Ninth Circuit’s view, the Does
did not breach the secrecy that was so important to the Totten case. First, the fair internal
process which the Does demanded “could presumably proceed in accordance with the secrecy
implicit in an agreement to engage in espionage.” Second, the Does revealed only minimal,
non-identifying details in their complaint. Third, in a reference to Reynolds and its state
secrets progeny, the Ninth Circuit noted that since Totten, the courts “have developed means of
accommodating asserted national security interests in judicial proceedings . . .”

Although the Ninth Circuit tried to limit Totten to a contractual holding, it did recognize the
espionage dispute as a national security matter where the judiciary owes the executive some
deference. The Ninth Circuit, however, spun a traditional argument on its head, arguing that
judicial activism, not deference, will also contribute to national security.

That counterweight role has been reserved for the judiciary. We must fulfill it
with precision and care, lest we encourage both executive overreaching and a
corrosive appearance of inequitable treatment of those who have undertaken great

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97 Id.
98 Id. at 1147.
99 Id.
100 Id. at 1148.
101 Id.
102 “When the government asserts that the interests of individuals otherwise subject to
legal redress must give way to national security interests for the larger public good, the result can
end in a balance tipped toward the greater good, with resulting unfairness to the individual
litigants as the acknowledged corollary.” Id. at 1146, citing Bareford v. Gen. Dynamics Corp.,
973 F.2d 1138, 1144 (5th Cir. 1992); Fitzgerald v. Penthouse Int’l Ltd., 776 F.2d 1236, 1238
risks to help our nation, an appearance that could itself have long-run national security implications.\textsuperscript{103}

Taking on the question that the \textit{Guong} court dodged, the Ninth Circuit stated that \textit{Totten} should be applied “through the prism of current state secrets doctrine.”\textsuperscript{104} Because the state secrets privilege can only be asserted by the head of an agency (the Director of Central Intelligence at CIA) the state secrets approach, so says the Ninth Circuit, would garner more respect from the public, would lead to a more thoughtful reaction in the agency, and would minimize the chances that the relief will be denied by the spite, inattention, or incompetence of a low level bureaucrat.

Yet, even if the Executive were to assert the state secrets privilege, the Ninth Circuit would remain active. This court is not a rubber stamp on the DCI’s signature. “Such deference, however, does not entirely obviate the CIA’s need to make a minimally coherent explanation to the court concerning why simply admitting to a relationship with the Does could conceivably jeopardize national security.”\textsuperscript{105} The Ninth Circuit’s skepticism of the CIA’s cult of intelligence is palpable. This is a court, less swayed by the CIA’s mystique, then by an unstated list of CIA bumblings and excesses from the Bay of Pigs, to the illegal opening of American mail during the Red scare, to secret drug experiments on American citizens, to assisting illegal White House efforts to arm the Contras, and finally to failures to warn about the Soviet invasion of Afghanistan, the nuclear tests in India and Pakistan, and the attack on September 11\textsuperscript{th}, 2001. Not only was the court skeptical of the CIA’s abilities, it second-guessed CIA determinations of what constituted classified information.

There is much that bothered the CIA about the \textit{Doe} opinion, the disrespect most of all. Specifically, the CIA has argued that the state secrets approach is inherently flawed for preventing the revelation of who has been an espionage agent. Even if the plaintiffs file in a pseudonym, as the Does did, and even if they use general language to describe where they performed espionage, as the Does did, a hostile intelligence service can track the progress of cases to determine who is truly an agent and who is an imposter or a kook. By this argument, the longer a case stays on the docket until a resolution, either by settlement or verdict, the more likely it is that that case involves a true spy. Although this argument has a surface appeal, the danger of disclosure could easily be resolved. As a matter of policy, whenever a lawsuit is filed which involves a dispute about an espionage deal, the CIA could file a standard declaration of the state secrets privilege, informing the court why it was necessary to neither confirm nor deny the allegations on the public record and asking that the court instruct the clerk’s office to record nothing more than the date the lawsuit was filed, in a sort of off the balance sheet accounting.

But even with the procedural fine-tuning that I suggest, the state secrets approach is not as tidy as the Ninth Circuit would believe. The most difficult scenario for the state secrets approach is

\textsuperscript{103} \textit{Id.} at 1146.

\textsuperscript{104} \textit{Id.} at 1151.

\textsuperscript{105} \textit{Id.} at 1154.
when, after an *in camera* hearing, the court realizes that the secret agent truly performed a service for the CIA, but the CIA and the secret agent have an honest difference about the terms of the deal.

How these cases can be litigated through depositions and public trials without putting an abundant amount of classified information on the public record has not been sufficiently explored. Conceivably the agent could always be referred to as Mr. A and his region of operation as Region B. The agent could enter, appear in, and leave the courtroom in disguise. And the special treatment of the court docket could be implemented. Such measures may seem farfetched, but the CIA has indeed implemented some combination of these measures in selected CIPA cases.106 Again, the CIA prefers not to do so on espionage disputes. But preferring not to is not the equivalent of something being impossible.

A balance must be found between the individual and the group on espionage disputes. In track with the Ninth Circuit, one commentator is very explicit on why *Totten* must be undone. “In wielding *Totten*’s broad sword, courts and the government have yielded inequitable and unjust results against otherwise valid claimants in the name of ‘national security.’”107 Instead of dismissing complaints under *Totten*, Mr. Flynn proposes *in camera* adversarial proceedings, a FOIA type of “heightened” review, special masters, and special tribunals.108 So far the Supreme Court has not adopted these measures for handling espionage disputes; I will consider them more fully in the “hybrid” approach I propose at the end of this article.

**F. Underlying Policy Issues.**

Having reviewed the leading cases, our discussion of espionage disputes is broadened by returning to the simple question of why the CIA prefers *Totten* to the state secrets approach.109 Under *Totten*, one side of the ledger has a fixed negative, namely a potentially aggrieved person who is denied full access to the courts. On the other side of the ledger is a variable and unspecified negative, the extra burdens and risks to the CIA of using state secrets. If the state secrets approach does not compromise intelligence operations, all other things being equal, the benefit will be to the aggrieved person whose case goes farther under state secrets. But no matter what branch we select for resolving espionage disputes, these will always be murky issues.

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108 *Id.* at 808-13.
109 While the CIA is the preeminent spymaster overseas, as noted in Part III, it is not the only agency that handles secret agents. Therefore, the vitality of the *Totten* doctrine has some importance to the entire intelligence community.
The CIA, in its inter-agency recommendations to the Justice Department, has made several arguments to support the *Totten* doctrine. These arguments, stripped of their surface appeal, boil down to a default mode where the CIA does not want anyone to challenge its self-proclaimed mastery in conducting intelligence operations. In short, the little secret is that CIA could live with some judicial oversight of espionage deals but, as long as the cases go its way, prefers to operate without the judiciary looking over its shoulder.

First, judicial review is said to be detrimental to the case officer’s handling of secret agents. The CIA, in making this argument, points to the complexity of the “intelligence cycle” from spotting to rewarding human sources. One aspect of CIA tradecraft, not stated to secret agents themselves, is for the case officer to maintain control over them. After all, the case officer is directing the agent to break laws by stealing and selling a country’s treasured secrets. A case officer would not maintain a relationship with an agent who is too inclined to negotiate or to re-negotiate the deal because this inclination would be proof that the agent cannot be properly controlled. In CIA jargon, the agent would be “terminated.” On closer inspection, it can easily be seen that this argument still begs the question of how to treat disputes about espionage deals. It is quite possible that an agent who is properly controlled while he serves the case officer could, after his services have been completed, after he is resettled into the United States, honestly and truly claim that he had been promised more. Not all agents are liars, and not all case officers tell the truth. In other words, the need for a case officer to control the secret agent, even if accepted and protected, does not necessarily lead to the unfettered right to stiff the agent without consequences.

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110 I helped prepare many of these recommendations and the petition for writ of certiorari in *Doe v. Tenet* where, in the government’s view, the only question presented was “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.” For a public statement of some of these recommendations see Daniel L. Pines, “The Continuing Viability of the 1875 Supreme Court Case of *Totten v. United States*,” 53 ADMIN. L. REV. 1273 (Fall 2001). Pines, at the time he wrote this article, and currently, is in the Office of General Counsel at the CIA. What he does not acknowledge in the article, but is evident from his one-sided treatment of the *Totten* issue, is that the CIA authorized him to write the article provided none of the arguments could be used to help the Does against the Government. Having left the CIA, I do not face those limitations. Instead, I have relied on my memory of unclassified, non-confidential communications within the government to highlight the policy arguments in this section.

111 Similarly the CIA strenuously asserted that it should be free of the structures of the Freedom of Information Act. Although CIA benefits from several exemptions that take into consideration the classified nature of much of its activities, it does not have a blanket exclusion from Freedom of Information requests. See 5 U.S.C. § 552 (1995). See also Karen Winchester and James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. RICH. L. REV. 231, 255-60 and accompanying notes.
Second, *Totten* is said to deter frivolous lawsuits and attempts at graymail. The CIA knows of a community of former secret agents who have been “resettled” into the United States. The precise number of former agents in this community is, of course, classified, known only to the CIA. In the CIA’s nightmare scenario, if *Totten* were eviscerated as a means of dismissing espionage lawsuits, the floodgates would open and the CIA would drown in frivolous lawsuits from this community. Unstated by the CIA, because it is unexamined, is how *Totten* provides a more effective deterrent than an assertion of the state secrets privilege. For the CIA’s argument to make any sense, it must be shown that there is at least one resettled agent who does not file a lawsuit because he believes it will be swiftly set aside under *Totten* by a motion to dismiss but would not be under state secrets. Further, the deterrence argument is mushy because the CIA has not precisely calculated (and has not publicly stated) how many lawsuits related to espionage disputes have been filed against the Agency. If the truth is closer to handfuls than to hundreds, the CIA’s position is weakened. Some of these suits are brought by true former agents who make false claims. Other suits are brought by individuals who had no relationship with CIA but invent their claims out of whole cloth. Those who invent out of whole cloth, however, would presumably not have had any access to classified or sensitive information that could put any teeth into their attempts at “graymail,” that is, to attempts to induce the CIA to settle a case for money rather than allow classified information to be compromised.

Third, *Totten* is said to conserve CIA resources. At bottom, the CIA asserts that the Director of Central Intelligence would be distracted if the CIA used an evidentiary privilege to try to make these cases go away. The DCI is indeed busy and important. But if the CIA neither reveals how many espionage suits have been filed nor how many resettlees lurk out there in the community, it is impossible for outside observers to calculate the extra burden that the state secrets approach would create for the CIA. If the strike suit becomes more common, the Office of General Counsel, on behalf of the DCI, could prepare a standard state secrets privilege. After all, as much as the CIA would like to view its headquarters as a palace, the doors to the DCI’s suite are not closed to minions from the Office of General Counsel.

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112 Under PL-110, the U.S. Government may resettle up to 100 foreign citizens per year into the United States. 50 U.S.C. § 403h (2005). (When it is determined that “the admission of a particular alien into the United States for permanent residence is in the interest of national security or essential to the furtherance of the national intelligence mission, such alien and his immediate family shall be admitted to the United States for permanent residence…”). Not all defectors, however, come to the United States with the CIA’s assistance or under the PL-110 program. See Tenet v. Doe, Oral Arguments No. 03-1395, pg. 46 (2004). For the broader community of defectors, one organization called the Jamestown Foundation garnered an outstanding reputation for helping a broad range of defectors, including scientists and artists, who came to the U.S. from the Soviet Union during the Cold War.

113 Ironically, the case that created the state secrets privilege, which has been viewed as a less severe response than *Totten*, contains language that argues against in camera review. “The Court should not jeopardize the security which the privilege is meant to protect by insisting upon
Fourth, the CIA argues that secret proceedings are inherently flawed. Under a strict view of *Totten*, personnel in the judicial branch do not have a “need to know” classified information. Under a state secrets approach, the judge (and clerks and court reporters) might learn through classified declarations whether the plaintiff was actually a spy while under the *Totten* approach the CIA keeps this information to itself. Accordingly, *Totten* complements the CIA’s “compartmenting” of classified information while state secrets undermines it. Even if the court proceeding is sealed and *in camera*, the CIA has asserted that foreign intelligence services could breach court files and place listening devices into courtrooms to determine which espionage plaintiffs were actually secret agents and, of these cases, the details to the clandestine collection. This assertion is somewhat disingenuous. Sure, the state secrets approach requires the CIA to protect classified information in another forum. Sure, the additional exposure creates an additional potential for unauthorized disclosure. But, the disingenuous aspect to this argument is that when the CIA recognizes the governmental benefits to a court proceeding, for instance in an espionage or terrorism prosecution brought by the Justice Department, it does allow the courts to handle classified information in the criminal discovery process.\(^{114}\)

Fifth, even without access to the courts, secret agents are said to have adequate remedies. Agents can voice their complaints through a classified internal grievance process at CIA. Or, they can go to the CIA’s Office of Inspector General or to the CIA’s Congressional Oversight Committees, the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence.\(^{115}\) Lost in this argument is the fact that the CIA treats agents in place differently from resettled agents. The agents in place are quite often foreign citizens who reside in foreign countries. Conversely, many resettled agents become U.S. citizens and reside in the United States. Although *Totten* by its terms applies both to agents in place and to resettled agents, the potential remedies are most relevant to the latter category of individuals. While the CIA puts the specific differences between how it treats agents in place from resettled agents under the classified cloak, it can still be said that a complaining agent in place is treated much more summarily than the agent who goes farther along the intelligence cycle. On a related note, the CIA often asserts that it treats all agents fairly out of self-interest to maintain good relations with existing agents and to recruit more agents. For this reason, the Agency’s apologists claim


\(^{115}\) Pines, *supra* note 104, at 1300-01.
“the Agency takes every measure to ensure that it treats its assets and other persons with whom it contracts with fairness and respect.”116

Sixth, the CIA’s strongest argument is that Totten is an Executive Branch determination of what is classified information, namely the existence and the details of an espionage relationship. So viewed, the Totten doctrine can be tied to other cases that give the Executive broad latitude in defining what is a secret. The “constitutional investment of power in the President” necessarily includes the “authority to classify and control access to information bearing on national security.”117 Connecting Totten to Egan and Sims is good advocacy but not necessarily an argument that concludes a policy debate. The facts of Totten can be distinguished from Egan and Sims; the Totten injury is different from the Egan injury (the loss of alleged compensation rather than the denial of a security clearance) and Totten, unlike Sims, is not only about access to classified information in the Freedom of Information context.

Finally, the policy debate should not be limited to listing and then rebutting CIA arguments. With great ease, we can go beyond Totten into a broader debate about the use of the state secrets privilege. Some courts have interpreted the state secrets privilege as absolute. These courts do not balance the need for the information in the litigation against the Executive’s interest in protecting secrets.118 In such courts, despite the procedural differences between the Totten doctrine and the state secrets privilege, the plaintiffs in espionage disputes will end up as losers under either approach. Yet other courts are not so deferential in construing the state secrets privilege.119 Here, it may actually make a difference for espionage plaintiffs if the court views the dispute through a state secrets rather than a Totten lens.

Some commentators would not only cut back Totten but would address the “unfair” results from the state secrets privilege.120 They are less concerned with doctrinal distinctions than with

116 Id. at 1300.


118 See, e.g., Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982). “That balance has already been struck. Rather, the determination is whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case.” Id. at 990.

119 See, e.g., Monarch Assurance P.L.C. v. United States, 244 F.3d 1356, 1365 (Fed. Cir. 2001) (balancing the potential harm to the Government against the possible harm to plaintiffs in denying them full opportunity to make their case).

120 See, e.g., J. Steven Gardner, The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief, 29 WAKE FOREST L. REV. 567, 601-02 (1994) (proposing a statute which would compensate individuals whose claims have been “dismissed or substantially affected as the result of an assertion of the state secrets privilege”).
opening the Government’s grip on information. Whether or not Totten is incorporated into the state secrets privilege, these commentators suggest that current practices still give the Executive Branch too much leeway in keeping information from the public.\textsuperscript{121} They would do much more on the broader issue of reaching the right balance between judicial scrutiny and executive prerogative in dealing with classified information.\textsuperscript{122} They are less tolerant of the individual losing to the group. At a minimum, they would incorporate the Totten doctrine into the state secrets approach as a correct step toward more open government.

\textbf{IV. NATIONAL SECURITY KEYS}

There are many creative ways of determining how the courts should deal with espionage disputes. Something can be gained from comparisons to other fields.

In a college course on classical music, the professor tested us by dropping the record player’s needle on an unidentified disk. Identifying a piece we had been assigned was one task, and identifying a piece the professor was confident we had not heard before was another. The answers in our blue books were as simple as “Brahms” or “Beethoven.” Similarly, some Constitutional scholars can identify the authors of Supreme Court opinions even if the names are hidden from them in the text. Their skill encapsulates several layers of knowledge, a reading of a wide repertoire of cases and an ability to distinguish characteristic (or idiosyncratic) styles and approaches.\textsuperscript{123}

A method of shorthand could be used to analyze developments in national security law. The repertoire of leading cases is small and the number of new cases from the Supreme Court is manageable. Accordingly, a powerful and profound expression concerning espionage disputes or other national security matters is possible from simple statements that part of a legal opinion is written, say, in the “Korematsu” key. This system also helps us isolate the descriptive from the normative. To ask whether a new case is in a particular key—to compare—is to try to stay in the

\textsuperscript{121} See, e.g., “The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?”, 91 YALE L.J. 570, 577 (1982) (“The courts’ current interpretation of the state secrets privilege, however, has allowed the executive to withhold evidence and to defeat misconduct claims.”); Matthew Silverman, National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information, 78 IND. L.J. 1101, 1104 (2003) (“In so holding [Reynolds], the Supreme Court established a standard that provides little guidance to judges other than to rubber stamp the claim of privilege.”).

\textsuperscript{122} See Silverman, supra note 115, at 1122 (“In the area of military affairs, where the Executive yields enormous power, there does not seem to be a constitutional conflict in placing two weaker branches in a position to check the giant that controls public access to information.”).

\textsuperscript{123} Such a scholar, for example, will conclude that an opinion that places great importance on a statute’s legislative history was not written by Justice Scalia.
To ask why a composer or judge has chosen a particular key or why he or she should choose a particular key is to delve into first principles of psychology and philosophy. For clarity and consistency, the unacknowledged, uncontrolled, and unnecessary shifts between the descriptive and the normative modes are avoided. Thus, as new age cryptologists, we bridge the disparate realms of espionage and the law by developing phrases (“sounds like Ex Parte Milligan”) that represent pages of information for those who are in on the codes. That is what I do in the rest of this part of the article.

As our cryptonyms on espionage disputes, I have chosen three cases that concern Executive powers during three emergencies, the Civil War, World War II, and the current response to the Al Qaeda threat. For now, I leave aside a detailed analysis of the differences in the situations that underlie these keys, a war among ourselves, a war against state enemies, and a war against non-state enemies.

A. Korematsu

The Korematsu key contains the broadest judicial deference to Executive actions in response to a perceived threat during a conventional war. Under this key, the lawsuit related to an espionage dispute will be summarily dismissed.

During World War II, Korematsu, an American citizen of Japanese ethnicity, was convicted in federal court for violating an Exclusion Order that prevented him from remaining in San Leandro, California, contrary to the dictates of the Commanding General of the Western Command of the U.S. Army. The legislative authorization and delegation were broad, making it a crime for a person of “Japanese ancestry” to be in any military area or military zone “prescribed under the authority of an Executive Order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War . . .” Although the government feared that persons of Japanese ancestry were more prone to commit sabotage or espionage on behalf of Japan, no specific evidence was actually offered against Korematsu (as to

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124 To go further and to ask how we know the apple in front of us is actually there is to venture into epistemology, into the chasm between the idealists and empiricists that Immanuel Kant claimed to have bridged with *The Critique of Pure Reason*.

125 Because espionage relationships, depending on the specific duration, may be in place during war only, during peace only, or straddling wartime and peacetime, my approach could be criticized for viewing these relationships through the incorrect lens of emergency or war powers. Yet as a means of discussing judicial deference, I do have scholarly support for viewing a “national security” matter through the same lens as an emergency. See David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights In Times of Crisis*, 101 MICH. L. REV. 2565, 2567, n. 13 (2003).


127 *Id.* at 216.
acts or inclination) as a part of his conviction or as a part of the legal challenges to that conviction. Further, martial law had not been declared. Finally, no specific percentages were offered against the Japanese-Americans discriminated against, that is, the possibility of bad apples in the bushel, one in a hundred, one in a thousand . . . All the court mentions is that 5,000 Japanese-Americans “refused to swear unqualified allegiance to the United States.” This refusal to swear allegiance is not the equivalent of a likelihood to commit treason; the direct threat at that time was not from disloyalty per se, but from disloyalty so extreme that it manifested itself in hostile acts against the United States.

The *Korematsu* Court, ruling at a time when U.S. prospects in World War II were much better than during the dark days immediately after Pearl Harbor, openly admitted that many loyal Japanese-Americans had suffered under the exclusion orders. “There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.” In a cavalier swipe by justices who were not members of the suspect group, the Court asserted that “all citizens alike” suffer hardships during war. For the entire war Germany was an enemy of the U.S. and for most of the war Italy was an enemy; but U.S. citizens of German and Italian ancestry were not required to assume “the responsibility” of accepting curfews, exclusions, and detentions, as was the plight of over 100,000 Japanese-Americans during the war. Neither the Executive Branch nor the Legislative Branch offered any comparative analysis (e.g., the disloyalty Japanese-Americans versus German-Americans) to justify the discrimination against the Japanese. When the third branch spoke, it hid behind a

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128 *Id.* at 219.

129 The declaration of loyalty made a difference in *Ex Parte Endo*, 323 U.S. 283 (1944). Ruling on the same day it decided *Korematsu*, the Court determined that neither the Executive orders nor the federal statutes provided for the detention of a Japanese-American whose loyalty the government conceded. In a narrow ruling, the Court dodged the constitutional question of whether Endo could have been detained. Just so, in current jurisprudence, *Endo* stands more as a case about the proper filing of a habeas corpus petition than a bulwark against unfettered and unwise Executive discretion.


131 *Id.* at 219.

132 An apologist for the *Korematsu* decision might argue that the Italian-Americans and German-Americans were more dispersed across the American continent, that Italians and Germans had immigrated to the United States over a broader period of time, and that they were more “integrated” into American society. Perhaps, most forceful of all, the apologist could note that Imperial Japan’s threat to American territory, especially after its devastating strike on Pearl Harbor, was greater than the German and Italian threats. The last part to the apology, however, would have to explain why the internment program was not also put in place in Hawaii, with a much higher percentage of Japanese-Americans and more exposed to Japanese attacks than the West Coast. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME, 189, 211 (1998).
curtain of double-negatives. “We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.”133

The historical record shows that officials in the Roosevelt Administration knowingly exaggerated the threat from Japanese aliens and Japanese-Americans on the West Coast, hiding reports from the FBI and the Navy that said Japanese people did not pose any special threat.134 The government’s notion of a Japanese Fifth Column masked the hysteria, the racial stereotypes, and the racial animus that motivated the curfews and the internments, including the actions of individuals who, like the most despicable of vultures, descended to pick away at the businesses and the property that these Japanese were forced to leave behind as they made their way to the camps.135 The racism towards Japanese-Americans could have similarly and easily been connected to other countries at war with the United States, but descendants of these other countries, unlike Japanese-Americans, had their loyalty determined through individual hearings.136 Therefore, without any principled justification, the Roosevelt Administration gave some groups of Americans more legal process than it gave a more unpopular group. Tellingly, the court focused on the reasonableness of government action, not on the due process rights of those being excluded.

The calmness and the broader perspective of hindsight have led to a reassessment of Korematsu. In 1976 President Ford rescinded the Executive Order that applied to Korematsu.137 In this proclamation, the President reaffirmed the need to treat people as individuals. “We now know what we should have known then—not only was the evacuation wrong, but Japanese-Americans were and are loyal Americans.” Later, in 1984, Korematsu’s conviction was vacated by Judge Marilyn Patel in San Francisco through a writ of coram nobis because of the Government’s misconduct in misleading the Supreme Court about the facts of the case and in burying the statistics that questioned the overall danger from the Japanese-Americans during the war.138 In 1988 an apology and a $20,000 payment was offered to the surviving Japanese-Americans who were detained.139 And in 2004, one of the detention camps was converted into a museum.140

133 Korematsu, 323 U.S. at 224.
134 See JoAnne Hirase, The Internment of Japanese Americans: The Constitutional Threat Fifty Years Later, 19 J. CONTEMP. L. 143 (1993). Further, there is no indication that President Roosevelt agonized over the decision to put in place a program of curfews, exclusion, relocation, and detention of the Japanese on the West Coast; he is said to have approved this program in a short telephone conversation with his Secretary of War, Henry Stimson.
135 Id. at 163.
Even though *Korematsu* has been roundly criticized, this case has not been formally overruled.\textsuperscript{141} Our prior Chief Justice continued to defend part of its logic.\textsuperscript{142} Justice Rehnquist argued that the Court should not have lumped first-generation immigrants from Japan (“Issei”) with the second-generation (“Nisei”) who were U.S. citizens by location of their births. As to the Nisei, the Chief Justice states that they were not legally or properly treated:

The submissions by the military showed no particular factual inquiry into the likelihood of espionage or sabotage by Nisei, only generalized conclusions that they were “different” from other Americans. But the military has no special expertise in this field, and it should have taken far more substantial findings to justify this sort of discrimination, even in wartime.\textsuperscript{143}

Rehnquist’s argument that the military has “no special expertise in this field” could easily be extended to the supposed threat from the Issei. How could the military or a court measure the difference between Issei and other aliens, between Issei and the “average” American citizen? Yet in defending the disparate treatment between Japanese aliens on the one hand and German and Italian aliens on the other hand, Rehnquist stated that “distinctions that might not be permissible between classes of citizens must be viewed otherwise when drawn between classes of aliens.”\textsuperscript{144} In short, aliens have fewer protections than citizens. As a result, under Rehnquist’s approach, the threat from aliens during a war does not have to be as clearly defined as the threat from citizens to justify restrictions on liberty and, given an equal threat, the hardships imposed on aliens can be greater than those imposed on citizens. In this regard, it is easier to challenge the Rehnquist’s assertion that under the specific circumstances of *Korematsu* the Issei were

\textsuperscript{140}“Manzanar War Relocation Center was one of ten camps at which Japanese American citizens and resident Japanese aliens were interned during World War II. Located at the foot of the imposing Sierra Nevada in eastern California’s Owens Valley, Manzanar has been identified as the best preserved of these camps.” National Park Service, U.S. Department of the Interior, Manzanar, National Historic Site, available at http://www.nps.gov/manz/.


\textsuperscript{142}REHNQUIST, supra note 136, at 203. And in sync with the prior Chief Justice, the respected judge and scholar, Richard Posner, argues that the Government and the Court were correct in erring “on the side of caution” in handling the potential risk from disloyal Japanese. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY, 299 (Harvard University Press) (2003).

\textsuperscript{143}REHNQUIST, supra note 136, at 209.

\textsuperscript{144}Id. at 210.
treated in a constitutional way than to dismiss his general assertion that constitutional distinctions can be made between aliens and citizens during war. Even so, many commentators probably would find the distinctions between Issei and Nisei to be too fine. In their view, everything about Korematsu should be discarded.145

One commentator, representative of the scholarly reaction to Korematsu, writing well before the new era that began on September 11th, suggests that the “governmental excesses” that occurred against Japanese-Americans can be prevented by the courts exacting a “heightened scrutiny” of actions which the Executive Branch justifies in the name of military necessity or national security and by requiring the Executive to declare martial law before it suspends civil liberties.146 Despite Professor Yamamoto’s passionate plea for a “watchful” judiciary during periods of “national stress,” recent cases have come up short in adopting his recommendations.147

To me, it is naive to believe that the Korematsu key cannot be replayed today, that national security decisions based on prejudice are off the table. This time, the shift may be from ethnic to religious animus. Professor Jerry Kang shares some of my pessimism. He argues that even if the government had been truthful with the Supreme Court about the actual risk of sabotage and espionage from Japanese aliens and Japanese-Americans, this would not have affected the outcome. In his words, “This is so not because the suppression was in any way trivial or excusable. This is so because the Court thinking through its racial schemas, had no intention of interfering with the internment, whatever the evidence.”148 If Professor Kang is correct, and I believe he is, it is a sad commentary on the power that racism has to paralyze the judiciary from playing its proper constitutional role of protecting insular minorities.

The Bush Administration, with some Congressional authorization, is engaged in a “war against terror.”149 If the Bush Administration concludes that its needs even broader powers to address the Al Qaeda threat, or, most tellingly, if another large terrorist attack occurs on U.S. soil, what may have seemed an anachronism may become good policy at the switch of a trigger. If the elected branches of government again reflect a racist consensus that a Fifth Column exists within the homeland, then the general detention of Muslim-Americans, without the government having


148 Kang, supra note 138, at 986.

to articulate or to prove individual disloyalty, may no longer be out of bounds. Accordingly, despite recent Equal Protection jurisprudence, *Korematsu* is the darkest cloud on the horizon that threatens to bring down a very hard rain.

**B. Milligan**

At the other end of the spectrum, the *Milligan* key is assertive, not deferential. Under this key, the espionage plaintiff will have the greatest chances for success in court.

Lambdin P. Milligan was a resident of Indiana, who on an order from the military commander of the Indiana District, was detained during the Civil War. Milligan was charged with “conspiracy against the government of the United States,” “affording aid and comfort to Rebels,” “disloyal practices,” and violating “the laws of war.” He was tried by a military tribunal that, unlike a federal jury, did not require a unanimous verdict. At the end of trial, Milligan was sentenced to be hanged. When these military proceedings took place martial law had not been declared in the area where Milligan was arrested, and Congress had not approved the use of the Indiana military tribunal nor passed any statute that specifically articulated these charges.

After the writ of habeas corpus had been restored, the Supreme Court reviewed this case and focused as much on individual rights as on Executive prerogatives, more on the possibility that Milligan could have been tried in civilian courts than on the adequacy and fairness of the procedures in the military tribunal. In the majority’s view, “Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.” The majority opinion questions whether, even if Congress had loaned its imprimatur to the detention and conviction, the conditions in Indiana were such that the judiciary should have approved of martial law. “It is difficult to see how the safety for the country required martial law in Indiana.”

The Executive’s treatment of Milligan could be viewed as flawed in procedure, that is, as missing the preliminary step of a declaration of martial law before he was subjected to the military tribunal. In fact, this is a view of Chief Justice Chase’s concurring opinion. But the majority, as noted, doubts whether the situation in Indiana would have justified either an Executive or a Legislative declaration of martial law, another reason this case stands for a polar example of judicial activism.

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150 As the son of Muslims, who immigrated to the U.S. from Iran, this is of more than academic interest to me.

151 *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 6 (1866).

152 *Id.*

153 *Id.* at 127.

154 *Id.*
Milligan shows skepticism of Executive definitions of exigency and views military tribunals for civilians as a last resort under the most extraordinary conditions. Justice Davis presents the importance of the Milligan decision within the common dichotomy of liberty and security discussed earlier in this article. “Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”

For Justice Davis, when push comes to shove, individual rights should prevail.

Unlike Korematsu, there is no undercurrent of racial animus to Milligan’s detention and conviction. Lambdin Milligan, after all, was part of the state’s political elite, having sought, without success, the Democratic nomination for Governor of Indiana in 1864. In a case where there were specific allegations of disloyalty and plotting against the Government, this 19th century court was quite open about potential Executive excesses and abuse. “By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.” Further, the Milligan Court, not indulging the elected branches, does not grant any leeway beyond being able to suspend the writ of habeas corpus during emergencies or wars. “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.” In this opinion, the repetition of absolutes reveals a vigilant judiciary, “guardians,” who will not budge from a line that our Constitution draws in the sand.

The Milligan opinion, of course, is popular with scholars and commentators. Even a conservative Justice had some good things to say about the decision.

155 Id. at 124-25.
157 Milligan, 71 U.S. (4 Wall.) at 119.
158 Id. at 120-21.
159 During World War II, to allow the Executive to include a person of dual American-German citizenship in a prosecution before a special military commission for his part in a plot that landed saboteurs onto beaches in New York and Florida, the Court limited Milligan by stating that the Civil War precedent did not apply to an “enemy belligerent.” Ex Parte Quirin, 317 U.S. 1, 45 (1942).
160 See e.g., DARWIN KELLEY, MILLIGAN’S FIGHT AGAINST LINCOLN (1973); GEORGE P. FLETCHER, ROMantics AT War: GLORY and GUILT in THE AGE OF TERRORISM (2002); Erwin Chemerinsky, Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement, 51 UCLA L. REV 1619, 1643 (2004); Samuel Issacharoff and Richard Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 THEORETICAL INQUIRIES IN LAW 1 (2004).
161 REHNQUIST, supra note 136, at 137, stating:
A classic contender for expressing *Milligan*’s activist key is from the Korean War when the Supreme Court overturned the seizure of American steel mills despite President Truman’s stated purpose of preventing work stoppages from labor strikes.\(^{162}\) The advantage of *Milligan* over *Youngstown Steel* for this article is that when placed along with *Korematsu* and *Hamdi* it is consistent in measuring the Executive’s power to detain individuals during emergencies or war.\(^{163}\)

The *Milligan* decision is justly celebrated for its rejection of the government’s position that the Bill of Rights has no application in wartime. It would have been a sounder decision, and much more widely approved at the time, had it not gone out of its way to declare that Congress had no authority to do that which it never tried to do. *Id.*

\(^{162}\) *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

\(^{163}\) *Milligan*’s 20\(^{th}\) century offspring is *United States v. Robel*, 389 U.S. 258 (1967), a Cold War era case holding unconstitutional a statute that made it a crime for a machinist, who was a member of a “Communist-action organization”, to continue to work in a shipyard which the Secretary of Defense had designated as a “defense facility.” This opinion, eschewing any balancing test, determined that individual liberty trumps group security unless a statute is narrowly drawn. As it famously states: “Implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this Nation apart. . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.” *Id.* at 264. The Court did not downplay the risks of sabotage and espionage, conceding that it was important to keep employees of questionable allegiance from occupying sensitive positions in national defense. Even so, there was no evidence that this machinist was a risk, and the statute was not specifically designed to ensure that only questionable employees were drawn into its net.

Particularly troubling to the Court was that the statute did not take into consideration whether the individual was a “passive or inactive member” of the suspect organization or group. *Id.* at 266. A high point of judicial activism to this opinion, often cited to attempt to counter those who would lump individuals into suspect groups in the name of national security, is when the court states: “However, the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.” *Id.* at 263.

Justice Brennan, accepting that individual liberty trumps group security, also emphasizes the need for proper procedures. “But in areas of protected freedoms, regulation based upon mere association and not upon proof of misconduct or even of intention to act unlawfully, must at least be accompanied by standards of procedural protections sufficient to safeguard against indiscriminate application.” *Id.* at 282. Brennan, J., concurring in result. The dissent, at the other end of the spectrum, gives great deference to the other two branches, allowing group security to trump individual liberty. “Having less confidence than the majority in the prescience of this remote body when dealing with threats to the security of the country, I much prefer the judgment of Congress and the Executive Branch that the interest of appellee in remaining a member of the Communist Party, knowing that it has been adjudicated at Communist-action organization, is less substantial than the public interest in excluding him from employment in
To be sure, *Korematsu* differs from *Milligan* in one fundamental sense as a measure of judicial deference; the *Korematsu* Court deferred to the two other branches of government while the *Milligan* Court chose not to defer to the will of only one branch. But this difference is not so significant to my analysis. Unlike Part III where it was necessary to ensure that a similar pattern of facts was being selected, namely the category of espionage disputes, this part identifies three leading cases in national security law as moods, themes, or keys of judicial deference. That said, it is tempting to speculate, first, whether the *Korematsu* Court would have disallowed the internment of Japanese-Americans if only the Executive branch had spoken and, second, whether the *Milligan* Court would have allowed a trial of a civilian in a military tribunal if the two other branches had supported this. Indeed, if a reasonable argument is made that the “swing vote” of one branch of government would not have effected the outcome of either case, the status of these cases as polar opposites is reinforced.

The swing vote seems a more likely possibility in *Milligan* than in *Korematsu*. By the Chief Justice’s concurring opinion in *Milligan*, four justices made explicit that another branch would have changed their vote: “We think that Congress had power, though not exercised, to authorize the Military Commission.”\(^\text{164}\) Under this concurring view, there would have been judicial deference as long as the appropriate branch had spoken.

In *Korematsu*, by contrast, although Justice Black in the majority opinion and Justice Frankfurter in a concurring opinion specifically note the support of the Legislative and the Executive, the Court seems so inclined toward deference that it would have allowed the exclusion orders if either the Legislature alone or the Executive alone had enacted them. Nowhere does Justice Black or Justice Frankfurter say that the two branches tipped the balance for them. For the World War II court, the case revolves around the war power of the other two branches, without strictly delineating the boundaries of that power, such that the references to “Congress and the Executive” or “Congress and the President” can easily be combined into the single concept of a war-making authority.

### C. *Hamdi*

critical defense industries.” *Id.* at 285. White, J., dissenting. Echoing the *Korematsu* decision that permitted the internment of Japanese-Americans, although not brazen enough to cite that case, Justice White concludes: “Some Party members may be no threat at all, but many of them undoubtedly are, and it is exceedingly difficult to identify those in advance of the very events which Congress seeks to avoid.” *Id.* In other words, if someone must suffer from national security decisions it should be individuals from suspect groups, not the nation as a whole. To the extent that recent decisions give the Executive branch latitude in the national security field, Justice White’s dissenting view can be said to have prevailed.

\(^\text{164}\) *Milligan*, 71 U.S. (4 Wall.) at 137.
Hamdi is an intermediate key, a chord that includes notes from Korematsu and Milligan. Under this key, the court will attempt to split the difference between the parties to an espionage dispute.

Yaser Esam Hamdi was born in Texas. After his birth, he retained his U.S. citizenship but spent most of his life in Saudi Arabia with his family. From there, as an adult, he traveled to Afghanistan, where in the course of military battles after September 11th he was captured with Taliban/al Qaeda forces and turned over to U.S. military authorities. The U.S. Defense Department initially detained him in Guantanamo Bay, but, when they learned and confirmed that he was a U.S. citizen, transferred him for detention in a military brig first in Norfolk, Virginia, then in Charleston, South Carolina.

The O’Connor plurality opinion in Hamdi accepts the Government’s argument that Congress had authorized Hamdi’s detention in the Authorization For Use of Military Force, passed in the week after September 11. This authorization extended to those individuals who were part of or supported forces in armed conflict against the United States in Afghanistan. But as soon as O’Connor turns to the Due Process Clause, unlike in Korematsu, it becomes clear that the Government will not get all it sought. In what has become a favorite quotation for the defenders of civil liberties, O’Connor declared: “We have long since made clear that a state of war is not a blank check when it comes to the rights of the Nation’s citizens.”

The Hamdi decision even refers to other keys from this article’s national security framework. First, leaning toward the Government, it distinguishes Milligan by noting that the Civil War detainee was not a prisoner of war who had carried a rifle “against Union troops on a Confederate battlefield.” Second, further leaning toward the Government, it relies on Ex Parte Quirin, a leading case which also distinguished Milligan, to conclude: “There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.” In other words, U.S. citizenship, by itself, does not guarantee an individual a criminal trial in connection with his detention. Third, leaning in favor of the individual, Justice O’Connor finds support not in the majority opinion from Korematsu but in Justice Murphy’s dissenting opinion. Unlike the Korematsu majority, the Hamdi plurality will delve into some aspects of the military’s activities. In an implicit reference to the Milligan and Korematsu keys, O’Connor acknowledges that a

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166 Id. at 2635-36.
167 Id. at 2636.
168 Id. at 2653.
169 Id. at 2650, quoting Youngstown at 587.
170 Id. at 2642.
171 Id. at 2640.
172 Id at 2650. “[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.” Id.
tension exists between the autonomy necessary for the government to attain military or foreign policy goals and the process that a citizen is due before he is deprived of a constitutional right.\textsuperscript{173}

Justice O’Connor, at neither pole of the national security pendulum, views the judiciary’s role as striking the proper balance between individual rights and group interests. She attempts to square the circle left open by the Founders and the Constitution. To do so, she expresses a reasonable lesson from history:

Moreover, as critical as the Government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.\textsuperscript{174}

With a shift toward the \textit{Milligan} key, the \textit{Hamdi} plurality emphasizes: “We reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.”\textsuperscript{175}

Having determined that \textit{Hamdi} deserves some constitutional protection, Justice O’Connor attempts to answer how much process he is due. A full-blown Article III trial is not necessary; the Government has a rebuttable presumption in its favor; and the Government may use hearsay to make the case for detention. All in all, a proceeding before a military tribunal might be sufficient. But no matter the form or the forum, \textit{Hamdi} “must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.”\textsuperscript{176} To the extent that the Government’s case rests on classified information, however, Justice O’Connor’s opinion does not spell out how these secrets can be protected when determining the reasonableness of \textit{Hamdi}’s detention.\textsuperscript{177} That detail, among many others, was left for the lower courts to work out.

Justice O’Connor expresses a basic confidence in the judiciary’s ability to strike the right balance between group security and individual liberties in national security cases.

\textsuperscript{173} \textit{Id.} at 2646.
\textsuperscript{174} \textit{Id.} at 2647.
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id.} at 2648.
\textsuperscript{177} The extent that a defendant should be privy to classified information has been a contentious issue in other counter-terrorism fronts. \textit{See e.g.}, United States v. Moussaoui, 382 F.3d 453, 478-81 (4th Cir. Sept. 13, 2004).
We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitation safeguarding essential liberties that remain vibrant even in times of security concerns.\(^{178}\)

Stating the goal is much easier than striking a balance that will stand the test of time. That is as true for *Hamdi* as it is for espionage disputes.

In the end, the law from the *Hamdi* case was truncated. The Executive, rather than implement a process that complied with the Supreme Court’s guidelines on due process, partially retreated and negotiated a deal. In exchange for Hamdi renouncing his American citizenship, the Executive released him to Saudi Arabia.\(^{179}\)

### D. The Espionage Dispute Under Three Keys

It is extremely difficult, if not impossible, to predict what key will influence the composition of a Supreme Court decision in the national security field. *Milligan*, *Korematsu*, and *Hamdi*, each in a different key, all remain good law. To be blunt, the Supreme Court’s jurisprudence on national security has been a hodge-podge of contradictory applications of core principles.\(^{180}\) Yet as soon as the key to a composition is detected, perhaps by flipping through the pages of a new Supreme Court opinion, the rest of the composition can be easily predicted.

If the Court handles an espionage dispute under the *Korematsu* key, it will give great deference to the Executive Branch, reluctant to address issues of whether the plaintiff was actually a spy and, if so, whether he or she was fairly treated. This Court, even if it has the means to protect the classified information, will not innovate and will err on the side of being too protective, of more heavily weighing the risks of the intentional or inadvertent disclosure of vital information concerning foreign affairs or military relations. Here, the individual suffers the consequences before the group does. This Court, very much like in *Totten*, trusts the Executive Branch to have done the right thing.

Or, if the Court handles an espionage dispute under the *Milligan* key, it will give little deference to the Executive Branch, tilting toward the individual’s rights and emphasizing that, unless

\(^{178}\) *Hamdi*, 124 S.Ct at 2652.


\(^{180}\) Whether this inconsistency is part of a larger pattern is for constitutional scholars to decide. See, e.g., CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT (2004).
martial law has taken over a territory, courts should remain open to hear individual grievances. This Court will discount the possibility that classified information will be improperly disclosed, either by intention or by inadvertence, during the discovery process or at trial. Further, this Court, trying a civil variant of the Classified Information Procedures Act, will implement procedures, such as sealed pleadings and in camera, ex parte proceedings, to protect the secrets. Finally, this skeptical court will not agree with the CIA’s characterization of the catastrophes that will occur if some of the secrets happen to be revealed to the public. This Court will compose as the Ninth Circuit majority did in Doe v. Tenet.

Or, if the court handles an espionage dispute under the Hamdi key, it will attempt to resolve the contradictions between Milligan and Korematsu by taking a middle path. Such an attempt to choose a middle path, fraught with its own dangers, does not guarantee that the Court will find the right way.

Under all three keys, liberty and security are obvious factors in the balance. What is not so obvious is a systemic shift that occurs from concern for the individual to concern for the group when the Government perceives that a significant percentage in a group’s bushel are bad apples. In Korematsu’s terms, if the risk of sabotage from Japanese-Americans is very low and not significantly higher than the risk from the general population, the case is strong for individual hearings rather than group internment. The higher the risk, the greater the case for group treatment. But where does the shift occur? At one in a thousand? At one in a hundred? Or, more important, how great must the disparity be between the percentage for the suspect group and the percentage for the general population? The Supreme Court did not face up to those questions in Korematsu, has not faced up to them in other cases, and probably never will. To do so, might limit their flexibility in adopting standards for a variety of national security cases.181

Against this current, and to confuse matters even more, is the possibility that when a percentage of bad apples is very low it might be particularly difficult to pull them out of the bushel. If the bad apples represent potential terrorists, armed with anthrax, ricin or suitcase nukes and, if time is short, then pressures for a blanket policy instead of individual treatment will be great and sophisticated comparisons of percentages will be beyond a public gripped with fear.182 In such circumstances, the Constitution and the courts might provide very little protection to the innocent citizens who are rounded up for no reason other than their connection to the suspect group. That would be Korematsu revisited. And if the suspect group is defined on racial lines, these citizens, unlike members of a suspect Communist Party or members of a suspect religion, will have nothing short of suicide to change their status.

181 Consider Dorothy and her companions’ painful reactions when Toto reveals to them that the Wizard of Oz is not the powerful man on the screen, framed by flames of fire, but the impotent geezer behind the curtain of a machine.

182 The temptation to torture may also occur. See, e.g., Oren Gross, Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience, 88 Minn. L. Rev. 1481 (2004).
E. The Supreme Court Resolution

Not many Supreme Court decisions have specifically related to the CIA’s intelligence activities.183 Of the rare cases concerning CIA matters that bubble to the Supreme Court’s surface, the CIA usually wins.184 But since people at the CIA seem satisfied by nothing less than total confidence and approval, they may believe they have a mixed record in light of Webster. In any event, the CIA had a good record at the Supreme Court when certiorari was granted in 2004 to resolve how espionage disputes should be handled.

The Supreme Court was unanimous in reversing the Ninth Circuit decision in Doe v. Tenet.185 In so doing, the Supreme Court reaffirmed the Totten doctrine in its 19th century splendor. As Chief Justice Rehnquist explained: “No matter the clothing in which alleged spies dress their claims, Totten precludes judicial review in cases such as respondents’ where success depends upon the existence of their secret espionage relationship with the Government.”186 The CIA could not have asked for more. Despite the passage of 130 years, this Supreme Court remains as categorical as the Totten court on espionage disputes.

The Supreme Court made clear that the state secrets privilege is separate from the Totten doctrine. In short, the Supreme Court did not accept the Ninth Circuit’s suggestion to view Totten through the state secrets prism. Reynolds, the Court stated, “in no way signaled our retreat from Totten’s broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden.”187

183 On the leading cases, Totten’s jurisdictional bar stems from a White House operation and the Reynolds state secrets privilege springs from military activities.

184 See e.g., United States v. Richardson, 418 U.S. 166 (1974) (ruling that a federal taxpayer did not have standing to challenge the limited accounting of CIA expenditures under the Central Intelligence Agency Act of 1949 as a violation of the regular Statement and Account clause under Art. 1, § 9 of the Constitution); Snepp v. United States, 444 U.S. 507 (1980) per curiam (imposing a constructive trust on the profits from a book that a former CIA case officer wrote about what he considered the CIA’s shameful activities during the Vietnam War, not because the book contained any classified information or secrets, but because the book was not submitted to the CIA for “pre-publication” review as the author had agreed by signing an agreement of “trust” with his employer); Central Intelligence Agency v. Sims, 471 U.S. 159 (1985) (deferring greatly to the Director of Central Intelligence’s determination of what is an “intelligence source,”’ exempt from disclosure under the Freedom of Information Act, and not factoring in the public’s right and need to know about the government’s operations).

186 Id. at 1236.
187 Id.
The Supreme Court gave some guidance on an open issue from the *Totten* case itself. The *Totten* “rule of dismissal” is best viewed as a “prudential standing doctrine” or “the sort of ‘threshold question’ we have recognized may be resolved before addressing jurisdiction.” What remains to be seen, however, is whether this was only a specific move to avoid a jurisdictional issue under the Tucker Act, which the Government claimed to waive in its filings, or whether this means that *Totten* is never a complete jurisdictional bar.

In arriving at its conclusion, the Supreme Court accepted the Government’s facile distinction of *Webster*. “But there is an obvious difference, for purposes of *Totten*, between a suit brought by an unacknowledged (though covert) employee of the CIA and one filed by an alleged former spy.” The Court correctly notes that CIA regulations allow CIA employees to bring Title VII claims related to hiring and promotion decisions. But, contrary to fact, the Court indicates that it is only for case officer interactions with agents that the Government has a “core concern” in preventing the “relationship with the Government from being revealed.” The Court does not realize, probably because the Government did not admit this, that the CIA has “deep” cover officers and non-official cover officers for whom it is just as important—if not more important than for espionage relationships—that the relationship with CIA not be revealed.

Nowhere does the Supreme Court mention the balance between an individual’s right to legal redress against the group’s need for security. There is no indication from the opinion that the Court agonized about the unfairness to the Doe plaintiffs, the unfairness of making individuals sacrifice their particular claims for the sake of the national security. The Court, citing *Sims*, supports “absolute protection” for the espionage relationship. Otherwise, the Court believes that sources could “close up like a clam,” the Government could be subject to graymail, and secrets could be spilled. This is a deferential decision, in the spirit of *Korematsu*, which unabashedly plays into the mystique of espionage.

The Court, as mentioned, did not view *Totten* and *Webster* in tension. The Justices accepted that *Totten* could bar financial disputes with covert agents but not bar financial disputes with covert employees. One clue to the Court’s disparate use of *Totten* may be differences between agents and employees in terms of the mutuality of remedies with the CIA. This is a point that Acting Solicitor General Paul Clement emphasized during oral argument.

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188 Id. at 1234 n.4. I thank Professor Dycus for reminding me of this important point.
189 Id. at 1237.
190 Id.
191 See id. at 1238.
192 Tenet v. Doe, Oral Argument of Solicitor General, No. 03-1395, p. 17 (2004). “Not only because of the nature of these agreements does the agency end up in a position where it cannot enforce these contracts itself through judicial actions, but it also ends up in a situation where it may have to give up-front payments that it otherwise wouldn’t have to give and the like. So there are consequences to both sides of dealing in this way with these espionage relationships as effectively outside the law.” Id.
Employees of the CIA, although employees at will, are paid against a standard government scale and sign contracts with the CIA concerning the use of classified information and the submission of manuscripts for pre-publication review. If the CIA refuses to pay an employee, the employee can sue to obtain the back pay. If the employee refuses to undergo pre-publication review, the CIA, under Snepp, can seek to enforce that review and can obtain a constructive trust on any profits that the employee makes from publication. On the other hand, the espionage agent does not sign the same papers the employee does, for example, not agreeing to pre-publication review.

To win the Tenet v. Doe case, the Government took great advantage of Snepp. In the Government’s view, the Totten defense, much like Snepp, creates a disincentive for agents to break their promises to the CIA, most importantly, the promise to keep the entire arrangement a secret. “[H]aving a clear rule of dismissal sends a clear message to espionage agents that there’s no point in even bothering to file the suit in the first place.”\(^\text{193}\) That is the clear message that the Supreme Court has broadcast for the CIA. As a result, bureaucrats at the CIA could not be happier.

V. CONCLUSION

In discussing whether there should be a judicial role for resolving espionage disputes, this article has used a historical framework, covering Totten, Guong, Webster, and Doe v. Tenet, and has used a musical framework, identifying the keys of Korematsu, Milligan and Hamdi. So far, however, this article has avoided a firm pronouncement on whether Totten should continue as good law. In this regard, this article has fostered silence on an ultimate issue.\(^\text{194}\)

Yet, between the lines, this article has been skeptical of full executive privilege in espionage disputes. Since 1875, when Totten was decided, the courts have handled greater amounts of classified information, have developed measures for safekeeping such information, and have created rights and procedures for individuals as part of a due process revolution. These are undisputed facts behind the Ninth Circuit’s view of Totten. Therefore, the typical espionage dispute is now set against a very different backdrop.

Indifferent to innovation, a step behind the beat, the CIA insisted on the benefits of simpler times. Now that the CIA has gotten its way with a unanimous Supreme Court, any time a complaint is filed whose allegations stem from a dispute about the terms of a secret agreement for secret services, the chances for quick dismissal are very high. If the judge still views Totten as a jurisdictional bar, subject matter jurisdiction could said to be lacking within the four corners

\(^\text{193}\) Id. at 18-19.

of the complaint and the CIA would not have to file anything for dismissal.\footnote{See FED. R. CIV. P. 12(b)(1).} Or the judge might dismiss in response to a CIA motion that states, without any outside declarations or affidavits, that the plaintiff has failed to state a claim upon which relief could be granted.\footnote{See FED. R. CIV. P. 12(b)(6).} Or the case might be dismissed on a “threshold question” of prudential standing. Whatever the subtleties between threshold questions and jurisdictional bars, the CIA, in effect, will be able keep espionage plaintiffs from having their claims go to trial. Because the CIA is disinclined to do more than it has to, it prefers \textit{Totten} in a pure form. The CIA minimizes explanations to opposing litigants and to the courts.

It is true that the CIA cannot bring suit against its agents for breaches of espionage deals, breaches which range from complete fabrications or double-dealing to a lack of diligence in meeting the case officer’s intelligence requirements. Just so, the lack of contractual remedies for both the agent and the CIA is symmetrical. This symmetry, however, does not adequately consider the huge disparity in power between an intelligence organization and an individual. Something the Supreme Court has missed is that once an individual has been recruited, having crossed Karla’s bridge to the other side, he is at the organization’s mercy. The CIA can survive the consequences of an agent that blows the lid off an operation. But the agent almost certainly will not survive if the CIA reveals him to his home country as a spy. Under a fairer view, espionage deals are more like a contract of adhesion than commercial transactions that result from equal bargaining power. To return to spy novels, case officer Smiley has a coercive power over agent Karla.

The CIA’s stingy response on espionage disputes stems less from reasoned strategy than from bull-headed arrogance. The stinginess only backfires when the CIA confronts an entity that views itself as a final arbiter of disputes, an assertive court that stands in the way of defiance, an independent entity that is also concerned about fairness to individual plaintiffs. Accordingly, the Ninth Circuit majority in \textit{Doe v. Tenet}, specifically noted its perplexity that the CIA, even \textit{in camera}, would only trust federal judges with redacted versions of internal CIA regulations. “[B]ut we do not know what is in the unredacted portions or whether other undisclosed regulations might bear on the subject. Because the government relied on its right to dismissal under \textit{Totten} and the Tucker Act, the record is not fully developed.”\footnote{\textit{Doe v. Tenet}, 329 F.3d 1135, 1143-44 (9th Cir. 2003).} It would have peeved the \textit{Doe} majority even more if they realized that as a general policy the CIA considers federal judges to be cleared to whatever level is necessary for a case. On CIPA matters, the judge is not even asked to fill out a background questionnaire or to take a polygraph examination as Executive Branch employees must do for access to the same information.\footnote{In this context, where the court has the authority to dismiss criminal charges, the CIA pays greater respect to the judicial branch.} To be sure, in the \textit{Doe v. Tenet} case, the CIA eventually did provide an unclassified declaration from the CIA’s Information
Review Officer. But this was a general declaration that contained the double negatives of lawyers. “I can inform the court unequivocally that there are no agency or other federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110.”199 In all that, the CIA’s IRO chose not to reveal to the court in a classified declaration whether, in truth, the Does had been secret agents for the CIA and, if so, what non-judicial process, if any, the CIA had provided the Does in attempting to resolve their dispute. The CIA may object that the crux of Totten is that the spymasters do not have to go into those details, but that objection is too stingy.

On espionage disputes, the Supreme Court missed an opportunity to repeat the reasonable approach it charted in Hamdi. The dichotomy which the CIA presented between the Totten approach and the state secrets approach for handling espionage disputes was false. Because this choice is not always either/or, an intermediate or hybrid position is possible. Thus, the hybrid approach I outline below may be considered by lower courts courageous enough to work around Totten or as a Congressional remedy to Totten.

Under a hybrid approach, the judiciary should require the Executive to file a written response to dismiss an espionage dispute. This filing should be in two versions, an unclassified version that goes to the plaintiff in addition to the court and a classified version that goes only to the court, filed ex parte under seal. The unclassified version would be standard, neither confirming nor denying whether the plaintiff actually had an espionage relationship with the Government, and would explain the damage to national security if the Government confirmed either the existence or the details of the relationship. The General Counsel of the government agency would sign the classified affidavit, stating that he or she had consulted the head of the agency on this filing.200

The public would not learn which claims have some basis in fact and which claims are bogus. The classified affidavit, treating another branch of government with full respect, would state whether the plaintiff had any relationship with the CIA, whether as a staff employee, a contractor, or an agent; would provide copies of any written agreements and correspondence, other than operational instructions between the CIA and the agent; would indicate for plaintiffs who were or are agents, whether or not they were paid, and, if so, how much; would state what non-monetary benefits the plaintiffs received; would describe the length, quality, and significance of their services, including the number of intelligence reports that the agent caused to be generated; would indicate what non-judicial remedies the CIA is aware that the plaintiff has previously pursued; and would reveal what other non-judicial remedies are available. The plaintiff would be allowed to make supplemental filings beyond the complaint, but neither the

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199 Doe, at 1144, n. 6.

200 This will not result in any significant additional burden to the DCI. Even when the CIA has prevailed on the strict Totten approach, the General Counsel has kept the DCI informed of claims by actual agents. For claims which the CIA views as bogus, the consultation between the General Counsel and the DCI would obviously be pro forma.
plaintiff nor plaintiff’s counsel would be allowed to participate at the *ex parte, in camera,*
hearing where the CIA will stand behind its classified filing before the judge.201

Under my hybrid approach, the court would almost never allow the lawsuit to continue. The *Hamdi* analogy only goes so far. When an individual is detained, he is a defendant, whether or not the Government concedes that label. There, the playing field is leveled by giving the detainee some notice and some opportunity to rebut. In the espionage situation, the individual is a plaintiff who puts the Government on notice by filing suit. He has an opportunity to make his case through the factual assertions of the complaint. Accordingly, compared to *Hamdi,* it is less necessary to give the *Totten* plaintiff full process and not as unfair to exclude him from the secret hearing.

Even though the judiciary does not reverse the Government’s actions under my hybrid approach, the espionage plaintiff is given more process, more attention than under the strict *Totten* approach, because the Executive has to appear in court. While the secrets are safe and the process is short, requiring the Executive to explain its action to the court is a check, by itself, on arbitrary and capricious behavior. If the court is not satisfied by the Executive’s explanations under the hybrid approach, the court might in the extreme allow the case to proceed. At a minimum, an unsatisfied court should refer the matter to the CIA’s Office of Inspector General and/or the CIA’s oversight committees.202 A referral should not result in an improper disclosure (confirming that there was some basis to the plaintiff’s allegations) because both the Inspector General and the oversight committees have staff with appropriate security clearances. In other words, through the court’s security officer (an employee assigned from the Justice Department) this referral could easily be conveyed through “secure channels.”

The Supreme Court is not to blame for missing the chance to put this hybrid approach into practice. Most of the people with the knowledge of reasonable alternatives for handling classified information on espionage matters are at the CIA.203 They probably concluded that unsolicited candor with the Court about intermediate solutions would have undercut the

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201 Plaintiffs who were actually spies will object to being excluded. They will argue that including them, as opposed to bogus plaintiffs, in the hearing will not cause any additional disclosures because the hearing can be closed and because they already know the secrets. There are several legitimate objections to this. First, hostile intelligence services might determine which plaintiffs were actual spies by monitoring who goes into the court for the hearings. Second, as a result of the CIA’s tradecraft, the plaintiffs are unlikely to know everything the CIA believes about their true worth as human sources. Third, there is unfairness to bogus plaintiffs who do not get the same day in court.

202 The oversight committees were created as a result of extensive Congressional hearings in the mid-1970s chaired respectively by Senator Frank Church and Congressman Otis Pike into CIA abuses and excesses. *The 9/11 Commission Report* at 89-90.

203 Having handled the *Doe* case at earlier stages in the litigation, I was prevented from saying anything that could have affected how the Supreme Court ruled in *Tenet v. Doe.*
likelihood of having their extreme position prevail. The Doe result from the Supreme Court proves that their tactics were effective. But it does not prove that the best sort of justice was done.

Notions of the Executive as the sole organ in foreign relations and notions about the commander-in-chief have the potential to paralyze. As an antidote, it is useful to emphasize that the judicial role which I advocate would not cover the case officer’s recruiting and running of agents, areas of executive expertise, but would cover whether the government has kept its end of a simple bargain, an area of judicial expertise. Thus, in a variation on Hamdi, I advocate an approach that straddles two ideals.

Even though the CIA has prevailed on the Totten doctrine, it could adopt my approach on its own. On the one hand, blowing on the Totten trumpet, the CIA could remind the judiciary, for separation of power reasons and for the efficacy of intelligence operations, that it has the prerogative not to say anything about the espionage dispute. On the other hand, to reassure the judiciary that an injustice has not been done, the CIA could reveal significant details about the dispute. Those who advise the CIA on its legal matters may trot out a “slippery slope” argument to reject this approach. My approach, unlike theirs, is less about a bargaining between branches of government and expresses confidence that once the CIA adopts a reasonable line, it will be able to hold it.

I would apply my approach more broadly in the national security realm. Rather than adopt an extreme initial position that is gradually cut back by the courts, the Executive could, while reminding the judiciary and the public of its broad discretion on foreign policy and military matters, in a spurt of welcome self-enlightenment, foresee a reasonable equilibrium and put that future into the present.

Rather than privately mock the judges and the members of Congress who might not understand the intricacies of intelligence operations, my approach entails a greater effort to educate other parts of the government and the public. If John Le Carre can demonstrate George Smiley’s talents, so should the CIA be able to display the real spymasters. The CIA must do more to convince courts, the legislature, and the public that it does not stiff covert agents. The Supreme Court, by again dropping a thick curtain over all financial disputes between case officers and agents, has not done much to build our confidence about what goes on behind the scenes in espionage matters. Totten remains too much of an invitation for the CIA to be smug and silent about its conduct.