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2 (11:07 a.m.)

3 JUSTICE STEVENS: We'll now hear argument in the
4 case of Tenet against John Doe.

5 Mr. Clement.

6 ORAL ARGUMENT OF PAUL D. CLEMENT

7 ON BEHALF OF THE PETITIONERS

8 MR. CLEMENT: Justice Stevens, and may it please
9 the Court:

10 This case, like the Totten case almost 130 years
11 ago, is at bottom an effort by alleged spies to obtain
12 additional compensation for services rendered.

13 JUSTICE O'CONNOR: Now, do you take the position
14 that the Federal Government couldn't enforce any provision
15 of such an agreement either?

16 MR. CLEMENT: That's correct. That's correct,
17 Justice O'Connor, with respect to the kind of espionage
18 arrangements and contracts we're talking about.

19 JUSTICE O'CONNOR: Well, suppose -- suppose
20 somebody, allegedly a former spy, is alleged to -- by the
21 Government to have breached the agreement by writing and
22 publishing a tell-all book about it.

23 MR. CLEMENT: Well, Justice O'Connor, I think
24 that actually points up the important differences between
25 the way that the CIA deals with its employees and the way

1 that it deals with its espionage agents like respondents
2 are alleged to be.

3 JUSTICE O'CONNOR: Yes, okay.

4 MR. CLEMENT: With respect to espionage
5 agents --

6 JUSTICE O'CONNOR: Would the Government be
7 without any recourse if it was an alleged espionage agent?

8 MR. CLEMENT: I believe that's true, Justice
9 O'Connor, because the espionage agents do not sign
10 prepublication review agreements. They do not receive
11 formal security clearances the way that an employee does.
12 And unlike an employee, they do not have access to a broad
13 swath of classified information that raises attendant
14 counterintelligence concerns. And so if you think about
15 the course of dealing that the agency has with its
16 employees, the employees are able to sue the agency in
17 court under, for example, title VII, and the agency can
18 turn around and sue their employees to enforce things like
19 the prepublication review agreement that was issue -- at
20 issue in this Court's Snepp decision. So in the
21 employment context, I think it's very difficult to say
22 that there's an implied term of the employment contract
23 that either side will not have judicial recourse.

24 JUSTICE STEVENS: But what if the employment
25 contract is with an American citizen to act as an

1 espionage agent and nobody else knew about it. Would --
2 would that -- would he be treated as an espionage agent or
3 as an employee?

4 MR. CLEMENT: If I understand your hypothetical,
5 Justice Stevens, I think that individual would be treated
6 as an espionage agent if it's just somebody for sort of a
7 one-off assignment.

8 And I think that -- that is illustrated by this
9 Court's decision in Totten. I mean, William Lloyd, for
10 example, was a U.S. citizen. He agreed with President
11 Lincoln to engage in espionage activities in the south.
12 And this Court held that when the estate of -- of Mr.
13 Lloyd came to seek compensation from a court, that there
14 was no judicial remedy to enforce that alleged agreement,
15 and the remedy, if any, lay with the President's
16 contingent fund.

17 JUSTICE KENNEDY: I -- I'd like your help on
18 this. Your interpretation of Totten -- does it say that
19 there is just no actionable contract, or does it say
20 there's no jurisdictions like political question? I mean,
21 you win under any of those theories, if we accept them.
22 But which is it?

23 MR. CLEMENT: Well, Justice Kennedy, it's a
24 difficult question to answer because I think there are a
25 lot of different strains underlying the Totten decision,

1 and I think there is --

2 JUSTICE O'CONNOR: Yes, but you need to get to
3 whether there is -- do you urge dismissal for lack of
4 jurisdiction in the district court or a dismissal on the
5 merits? It's not clear to me at all.

6 MR. CLEMENT: Well, Justice O'Connor, I think
7 it's better understood as simply a rule of dismissal, that
8 it's not really a pure jurisdictional defect. It's been
9 referred alternatively as a jurisdictional bar or as a
10 rule of dismissal, and of course, as this Court reminded
11 us recently in the Kontrick decision, people tend to use
12 terms like jurisdiction loosely in these contexts.

13 JUSTICE KENNEDY: Well, I'm -- I'm not going
14 away with a clear idea of your position.

15 MR. CLEMENT: Well --

16 JUSTICE KENNEDY: Do I -- do I -- does the
17 Government file under 12(b)(1) like a jurisdiction,
18 12(b)(6), no cause of action? Of course, you'd probably
19 do both, but I -- I want to know --

20 MR. CLEMENT: Well --

21 JUSTICE KENNEDY: -- what your best thinking is
22 of what Totten means. It seems to me that this just means
23 that there can be no contract formed under these
24 circumstances.

25 MR. CLEMENT: Justice Kennedy, I think the

1 general practice of the Government is to file under both.
2 I believe that's what happened here. I think the fact
3 that we file under both suggests that there is a little
4 bit of confusion about it. I would tend to agree with you
5 it's better understood as a rule of dismissal under
6 12(b)(6) because if you think about the Totten decision,
7 there's really two strains to the decision.

8 One is a recognition that the claim to relief
9 necessarily depends on a fact that the law has always
10 regarded as secret, and in a sense that case simply can't
11 proceed. And that's very analogous to this Court's
12 holding in Weinberger against Catholic Action.

13 There's a second strain to the case, though, and
14 that is that the very idea of walking into court and
15 filing the action is inconsistent with an implied term of
16 the contract or, indeed, the whole nature of the espionage
17 relationship. And I think particularly if you emphasize
18 that second strain of the Totten decision, I think it's
19 better understood as a 12(b)(6) dismissal because what
20 you're really saying is somebody is walking into court and
21 they are effectively pleading themselves out of court
22 because as -- if you look at this complaint here, it
23 starts out with a recitation of the fact that these
24 individuals allegedly engaged in espionage activities and
25 that they were denied certain promises that were made to

1 them after they carried out, quote, their end of the
2 bargain.

3 JUSTICE KENNEDY: If there's no cause of action,
4 there's nothing to -- to claim on, what's -- what's the
5 closest analogy? Is it like a promise to make a gift,
6 which is unenforceable? Is there kind of a contract
7 analogy that we can use?

8 MR. CLEMENT: I -- I mean, I -- you know, one --
9 one way of thinking about it, but I think it's a very
10 rough analogy, is it's almost like an unlawful contract.
11 It's a contract that the law just doesn't recognize. And
12 I think that -- that reflects the underlying reality of
13 these cases, which is there is something inherent in an
14 espionage relationship that when you enter an espionage
15 relationship, you understand that you have no protected
16 status under the law.

17 I think that has, with respect, been clear in
18 the -- not just in the Totten decision but from the very
19 beginning of the republic. I mean, ever since Nathan Hale
20 agreed to cross British lines as a spy, it was understood
21 that he had no legal recourse, that he had a status that
22 was not recognized at the law. And I think that is -- it
23 has always been thus, and I think there is no reason to
24 revisit the --

25 JUSTICE STEVENS: Does -- does that mean -- the

1 no legal recourse at all mean that you could torture an
2 agent if you were dissatisfied with his work performance?

3 MR. CLEMENT: I -- I don't believe that's true,
4 Justice Stevens, and what I would distinguish is between a
5 constitutional claim that an -- an agent -- an alleged
6 agent might have that doesn't depend on the espionage
7 relationship. As I would understand your question, I
8 mean, it would -- there would be a -- a substantive due
9 process claim that anybody could bring if the Government
10 tortured them. They wouldn't have to allege that I had a
11 secret espionage relationship with the Government and then
12 they tortured me. That would be irrelevant to their
13 claim.

14 JUSTICE SCALIA: Could I -- could I bring you
15 back to your -- your earlier discussion of a spy who is
16 also a -- a Government employee? Are you telling me that
17 he -- he cannot sue for his regular salary simply because
18 the work he was doing was -- was espionage? I mean, he's
19 -- he's a GS-whatever, GS-16, and the Government just
20 doesn't send him his monthly check.

21 MR. CLEMENT: Well, Justice --

22 JUSTICE SCALIA: He has no recourse for that
23 check just because he's been doing spy work?

24 MR. CLEMENT: No, that's not the position, and
25 -- and I -- and I apologize if I gave that impression in

1 answering Justice Stevens' hypothetical. I understood to
2 be the hypothetical that you had a Government employee who
3 engaged in a separate spy endeavor, if you will, and then
4 tried to sue to collect on the damages owed under that --
5 for that particular endeavor.

6 JUSTICE SCALIA: Okay, not -- not for his
7 regular GS salary.

8 JUSTICE STEVENS: No. My -- my hypothetical was
9 an individual who's not a Government employee but is hired
10 by the Government to engage in espionage activities.

11 MR. CLEMENT: Exactly. And as I indicated to
12 you earlier, Justice Stevens -- that in a sense that's not
13 a hypothetical. That's the Totten decision itself.
14 William Lloyd was -- or at least alleged that he was
15 employed by President Lincoln to engage in those services.
16 And in answer to Justice Scalia's question, if William
17 Lloyd happened to be an employee of the -- of the
18 Comptroller of Currency or something, he could still sue
19 to get whatever remedies he had --

20 JUSTICE SCALIA: He couldn't get the 5,000 bonus
21 for being a spy. Right?

22 MR. CLEMENT: That's exactly right. No bonus
23 dollars for being a spy under those circumstances.

24 JUSTICE GINSBURG: Could you clarify on the
25 employment question something else? It's -- it's in your

1 reply brief and you say you're contrasting this type of
2 claim with a title VII claim which -- in which you say
3 that the Court in Webster relied on the CIA's historical
4 practice of litigating employment disputes. The CIA's
5 historical practice, not the Court's rulings. Are you
6 suggesting that even with respect to employment
7 litigation, it's up to the CIA to decide what its practice
8 will be?

9 MR. CLEMENT: I don't think so, Justice
10 Ginsburg, but the point is that the reason that -- that I
11 think that the Government would have had almost no ability
12 to invoke a Totten-type defense in Webster or in a title
13 VII case is because of its course of dealing with its
14 employees. And I suppose that if the agency completely
15 changed its course of dealing with respect to its
16 employees or entered a very different course of dealing
17 with certain select employees, then a Totten defense might
18 become available in those circumstances.

19 But as I indicated earlier, I think if you look
20 at the overall nature of the agency's relationship and
21 rights vis-a-vis its employees, even its covert ones,
22 that's a very different relationship than the agency has
23 with respect to espionage agents. And again, that's
24 because they enter contracts with them. Each side has
25 certain litigation rights, and I think it would be a bit

1 of a stretch for the Government to come in and say that
2 there's an implied term of that employment agreement that
3 forecloses a judicial remedy.

4 JUSTICE GINSBURG: May I --

5 JUSTICE SCALIA: I guess the Government can't
6 enforce -- cannot enforce these contracts either. Right?
7 I mean, you take the good with the -- the bad with the
8 good?

9 MR. CLEMENT: That's exactly right, Justice
10 Scalia.

11 JUSTICE SCALIA: You've never sued a spy to --
12 who hasn't carried out his mission?

13 MR. CLEMENT: Certainly not -- I'm not aware of
14 such a suit, and I've been told by the agency that it's
15 impossible. And I think it just reflects the nature of
16 these agreements, and it does -- it --

17 JUSTICE GINSBURG: Can -- can we go back to the
18 -- another threshold question? You did press below and
19 Judge Tallman urged that the reason this case can't be in
20 the district court in California, or wherever, is it has
21 to be in the Federal Circuit. This is a contract claim
22 against the Government. Are you abandoning that position?

23 MR. CLEMENT: Yes, Justice Ginsburg, in fact we
24 have abandoned it. We abandoned that position at the cert
25 stage. We made that clear to the Court in our certiorari

1 papers, and we don't renew any type of jurisdictional
2 objection at this stage.

3 JUSTICE GINSBURG: Are you free -- are you free
4 to abandon it? Is the -- is the Government's surrender of
5 its immunity from suit for contracts, provided that the
6 suit is brought in the Federal Circuit -- is that
7 something that you are free -- Congress having said that,
8 that the executive is free to say, well, we could take
9 advantage of that, but we don't want to?

10 MR. CLEMENT: Justice Ginsburg, I think the
11 answer to that is that it probably is jurisdictional in
12 the pure sense and so if this Court disagreed with our
13 view that there wasn't a Tucker Act problem, this Court
14 could reach that issue and send the case back on the
15 Tucker Act grounds. So maybe I could explain to you why
16 it is that we think that there's not a Tucker Act problem,
17 at least at this stage of the litigation.

18 The Ninth Circuit's reasoning on this was a
19 little bit oblique, but as I understand it, there were two
20 parts to it. First of all, that there might be some kind
21 of substantive due process claim here that did not depend
22 on the contract but rather somehow stemmed from the fact
23 that there was some endangerment of these individuals and
24 that gave rise to some substantive due process right. And
25 even if that claim, as the Ninth Circuit recognized, is

1 not one that is formed on the contract or an implied
2 contract, it seems to me that that's a claim that's
3 clearly within the coverage of the Totten doctrine because
4 it is inherent in the espionage relationship that the
5 individual will be engaged in a -- in a situation where
6 they will be endangered.

7 And I think that was certainly true of William
8 Lloyd in the Totten case. When he crossed southern lines,
9 he was very much endangered, and that's something that
10 wasn't lost on President Lincoln. In footnote 3 of our
11 opening brief, we have a quotation from President Lincoln
12 about the inherent dangers of spies crossing lines and the
13 need for secrecy to protect that.

14 So that's why I think that claim is properly
15 understood as not being covered by the Tucker Act and not
16 being required to be brought in the Court of Claims, but
17 nonetheless a claim that is barred by the Totten doctrine.

18 The other point they made was with respect to
19 the specific regulations that the agency has internally,
20 and they suggest that there might be a claim here that was
21 based on the regulations independent of the contract. But
22 in order for that claim to go forward, the Court would
23 have to examine the unredacted version of the regulations.

24 And even if the Court is right that there's a
25 need for further proceedings on that question, it makes no

1 sense to interpret the doctrine in a way that requires the
2 Government to wait to assert a Totten defense until there
3 is a jurisdictional question cleared up that actually
4 requires discovery because I think what Totten recognized
5 is -- is there is a need to dismiss the claim at the
6 outset before any discovery because of the nature of the
7 suit.

8 So for those two reasons, we thought that the --
9 that the better view was that the Tucker Act problem was
10 either not presented because of the substantive due
11 process claim or not ripe and that we would pursue the
12 Totten act.

13 JUSTICE SCALIA: That -- that would make a lot
14 of sense if you really felt that what Totten is is -- is a
15 dismissal on the merits, just saying there's -- there's no
16 contractual claim. I -- I mean, if you didn't believe
17 that, if -- if you believed that what Totten says is we
18 have no jurisdiction, then we'd have no problem and we
19 could resolve all of the questions.

20 But it seems to me if you believe that Totten is
21 based mainly -- you know, it's a contract case and said
22 the contract is just totally invalid, we shouldn't be
23 reaching the contract issue. We should simply say that if
24 -- if we agree with you, that there's no substantive due
25 process claim here and -- and no claim based on the

1 regulations.

2 How do we get the authority to decide the -- the
3 contract question?

4 MR. CLEMENT: Well, I think whatever the status
5 the contract question has, whether it's 12(b)(1) or
6 12(b)(6), I think it's a -- it's a threshold issue and I
7 think this Court under the Rohrgas authority can reach
8 that issue at the outset. And I think it would be
9 particularly perplexing to have a doctrine that said that
10 when we have a suit that we know on the face of the
11 complaint cannot be brought in any court, that we are
12 going to not reach that issue in favor of trying to
13 determine first which court it properly belongs in, when
14 that inquiry in fact will get us into the exact classified
15 information that we know at the outset the suit should not
16 involve in the first place. And I think there is enough
17 flexibility in this Court's Rohrgas decision to allow the
18 Court to reach that threshold question first.

19 JUSTICE KENNEDY: And you're saying that if
20 there's no contract, then there's no substantive liberty
21 to protect under the -- under due process procedures.

22 MR. CLEMENT: I -- I think that follows, Justice
23 Kennedy. I think one of the difficulties with the
24 constitutional theory that's advanced on the other side is
25 it gives -- it seeks a right to enforce internal

1 procedural handling mechanisms for claims that we know
2 there's no legitimate expectation for their enforcement at
3 all. And it seems odd that this would develop in a way
4 where the procedural rights somehow trump the substantive
5 rights, and we know from Totten that there is no substance
6 here that can be brought forward in the courts.

7 I think in this respect it is also important to
8 recognize that, as a practical matter, an agent who's
9 negotiating in the shadow of the Totten decision and the
10 broader understanding that Totten reflects is likely to
11 seek assurances not just about compensation but about how
12 -- how their claims would be heard by the CIA and how
13 they're going to get their compensation. And I think
14 there's no particular reason to think procedural
15 assurances should be judicially enforceable when the
16 substantive assurances are not.

17 Now, one other point to make about the nature of
18 these agreements. Not only because of the nature of these
19 agreements does the agency end up in a position where it
20 cannot enforce these contracts itself through judicial
21 actions, but it also ends up in a situation where it may
22 have to give up-front payments that it otherwise wouldn't
23 have to give and the like. So there are consequences to
24 both sides of dealing in this way with these espionage
25 relationships as effectively outside the law. But again,

1 it has always been thus, and I think there is no principle
2 in -- in any recent development that requires this Court
3 to revisit the rule of Totten which, as I said, suggests
4 an -- it reflects an understanding that date backs --
5 dates back much further.

6 If I can make one other point, which is I think
7 even though the Totten decision reflects something more
8 than the state secrets privilege, because there's a more
9 fundamental defect with a suit that's premised on an
10 espionage agreement than just the fact that it tends to
11 compromise secret information, it is true that applying
12 the Totten rule of dismissal does provide a clear
13 mechanism that protects confidential information.

14 And I would analogize it to this Court's
15 decision in Snepp where the Court adopted a constructive
16 trust arrangement. The Court adopted that arrangement
17 where -- where an employee who violated a -- a
18 prepublication review agreement had to turn over all the
19 proceeds to the Government. And -- and the Court adopted
20 that remedy in favor of a damages remedy, and the Court
21 did so to send a clear signal to the employees that there
22 is no incentive whatsoever to violate the terms of these
23 agreements. In the same way, having a clear rule of
24 dismissal sends a clear message to espionage agents that
25 there's no point in even bothering to file the suit in the

1 first place. It will simply be dismissed.

2 JUSTICE SCALIA: Mr. Clement, the --

3 JUSTICE STEVENS: Mr. --

4 JUSTICE SCALIA: Go ahead. I'm sorry.

5 JUSTICE STEVENS: I just wanted to ask one. I
6 don't remember whether the briefs discuss it or not, but
7 is there a statute that prohibits the disclosure of secret
8 agents like this and does that -- if so, does that have
9 any relevance to this case?

10 MR. CLEMENT: Justice Stevens, there is such a
11 statute. There's a statutory provision that gives the
12 authority. It had been with the -- with the Director of
13 Central Intelligence. The recent Intelligence Reform Act
14 has transferred it to the Director of National
15 Intelligence. But it gives a requirement that the -- that
16 -- that the director protect sources and methods. I think
17 that that -- that statutory provision is consistent with
18 the general notion behind the Totten doctrine, but I don't
19 think it's --

20 JUSTICE STEVENS: And does the statute impose a
21 penalty on anyone for revealing the name of a secret
22 agent?

23 MR. CLEMENT: I don't think it -- it certainly
24 doesn't impose any kind of monetary penalty. There are,
25 under certain circumstances, criminal penalties for the

1 disclosure of classified information, but I think that
2 the --

3 JUSTICE STEVENS: But is the identity of an
4 agent a -- a type of classified information protected by
5 the statute?

6 MR. CLEMENT: I think it is. It's protected
7 both by the sources and method provision, and I think
8 revelation of a source could implicate the -- the criminal
9 prohibitions in the statute as well. And I think that
10 this statute -- I think you can see the extent to which
11 this -- this case implicates the core of the secrets that
12 the agency has. This Court in the Sims case described the
13 sources and methods protected by the statute as the heart
14 of the intelligence community.

15 JUSTICE SCALIA: Mr. Clement --

16 MR. CLEMENT: And this case involves both.

17 JUSTICE SCALIA: -- the -- the argument made by
18 the other side, which seems to me has some plausibility to
19 it, is that Totten was decided in an age when courts were
20 not as flexible as they are today. We -- we have
21 procedures for matters being kept confidential by courts.
22 We -- we allow hearings that are closed in matters that
23 never would have been done before. And since, the
24 argument goes, the -- the only purpose of Totten was to
25 preserve the secrets, why can't we preserve the secrets

1 that way? If and when it turns out that the prosecution
2 of this -- of this suit would require a secret to be
3 disclosed, we will terminate it or -- but -- but up until
4 then, why -- why decide in advance? Why not take a --
5 take a run at it and see?

6 MR. CLEMENT: Well, Justice Scalia, there's a
7 couple of points to be made about that.

8 One, as this Court recognized in Reynolds -- in
9 the Reynolds state secrets context itself, even the
10 provisions of going forward, no matter what innovations
11 have been made, the -- the provisions of going forward and
12 handling classified information necessarily involve risks
13 that the information will be disclosed.

14 In the first place, both Totten and the state
15 secrets privilege itself are premised on the notion that
16 the information, if it is in fact privileged, is withheld
17 from the case. It's an absolute privilege. So the idea
18 is not that you have some sort of limited disclosure to
19 the court personnel and to the ultimate fact-finder in the
20 case and that's somehow all consistent with the state
21 secrets privilege. To the contrary. Once a determination
22 is made that a matter is state secrets, there's no further
23 disclosure of the information. You -- the whole premise
24 of state secrets is not that you try to prevent ultimate
25 disclosure to the general public. It's that once

1 something is privileged, you -- you treat the matter as
2 privileged and you take it out of the case.

3 JUSTICE GINSBURG: But you're not making that
4 statement with respect to anything that's classified.
5 There was something in your brief, reply brief, at 18 and
6 19 in which you -- you cite Reynolds and you say the
7 proper response to classified information in civil
8 litigation is to disregard the classified information, not
9 to order partial disclosure to court personnel. Are --
10 are you saying then in all of civil litigation if
11 information is classified, then it's just out of the case?

12 MR. CLEMENT: Justice Ginsburg, I think there
13 can be certain arrangements in certain civil litigation
14 where the Government can agree with a party to proceed --
15 as part of their overall agreement, to proceed on the
16 basis of classified information, but that would involve a
17 very different way of -- of proceeding than the normal
18 default rules. And I think absent some kind of agreement
19 for the Government to proceed in that way, the default
20 rule in civil litigation has always been that the
21 privilege is just that. It's -- the matter is -- the
22 matter is privileged and it's taken out of the case.

23 JUSTICE SCALIA: Yes. But you lose. I mean,
24 if -- if that matter is necessary for your case,
25 don't -- don't you lose?

1 MR. CLEMENT: Absolutely not, Justice Scalia,
2 not in civil litigation. And that's why the state secrets
3 privilege is, I mean, quite a remarkable doctrine in the
4 civil side of the case.

5 JUSTICE SCALIA: You're talking about civil
6 only.

7 MR. CLEMENT: Only civil.

8 JUSTICE SCALIA: I'm thinking of gray mail.
9 Certainly in the criminal -- criminal area, that isn't the
10 case.

11 MR. CLEMENT: That's exactly right, Justice
12 Scalia.

13 JUSTICE SCALIA: You either cough it up or you
14 lose.

15 MR. CLEMENT: Right, and a different bargain has
16 been reached in the criminal context, and in that context
17 to ameliorate the consequence of the sometimes difficult
18 choice of revealing classified information or proceeding,
19 the Congress has come through with the Classified
20 Information Procedures Act. That only applies in the
21 criminal side, though.

22 JUSTICE BREYER: I just want to ask one
23 question. Don't they have a claim interpreted favorably
24 to them that this has nothing to do with a contract,
25 totally nothing? Okay? But there happen to be some rules

1 over there in the CIA in their books somewhere, which
2 we've never read, and they say when we use a foreign
3 person as a spy, we'll pay him some money or we give him
4 something. We have some procedures. Now, we don't have
5 to do that as a matter of contract. We don't have to do
6 it at all, but we do it. And so there's a claim here that
7 we want to see that they're following their own rules.
8 They say Totten doesn't apply to that because Totten is
9 about contracts. Our claim isn't about contracts.

10 MR. CLEMENT: Justice Breyer, I have two
11 responses to that. The first is I think the -- that the
12 Totten doctrine extends more broadly than just the narrow
13 confines of the contract.

14 JUSTICE BREYER: But it doesn't extend to torts,
15 does it?

16 MR. CLEMENT: I would -- I mean, I would need a
17 specific hypothetical. I can't imagine a tort that by its
18 nature --

19 JUSTICE BREYER: Oh, you go --

20 MR. CLEMENT: -- depends on the relationship.

21 JUSTICE BREYER: You go ahead. You go ahead.

22 MR. CLEMENT: I can't imagine a tort that
23 depends on its very nature on the relationship.

24 But we're talking about regulations that, as I
25 understand the other side's allegations, are regulations

1 for handling secret contracts. So unless one can allege
2 that they were a party to a secret contract or at least a
3 secret relationship, there's no point in that individual
4 even being in a position -- they wouldn't even have
5 standing to challenge the regulation.

6 JUSTICE BREYER: So -- so you're saying if in
7 fact, when you look at those allegations, they're about
8 regulations for handling secret contracts, it's about a
9 contract, but if there were to be an allegation that it
10 has nothing to do with the contract at all, it's just a
11 way we handle retired foreign spies, Smiley for example,
12 or someone like that. It has nothing to do with it, you
13 see. Then could they -- what would be the rules then?

14 MR. CLEMENT: I still think the answer would be
15 that there would be no relief under that circumstance
16 because their -- their -- still their claim to having any
17 entitlement under those rules at all would -- I mean, you
18 know, total strangers don't have rights under those
19 regulations. Alleged spies would have rights under those
20 regulations, and the very idea of walking into court and
21 asserting your rights as an alleged spy is inconsistent
22 with the entire relationship and the contract that gave
23 rise to it.

24 I would also point you to the Weinberger
25 decision, Weinberger against Catholic Action, because

1 there this Court applied Totten to not force the Navy to
2 produce an environmental impact statement even though
3 there were regulations on the book -- and the concurring
4 Justices focused on those regulations -- where the
5 Department of Defense said we do produce an environmental
6 impact statement even if it's classified. So I think on
7 the authority of Weinberger as well, the very fact that
8 there are internal regulations on a subject, the entire
9 subject matter of which is secret, doesn't give rise to
10 judicially enforceable rights.

11 If there are no further questions, I'd like to
12 reserve the time for rebuttal.

13 JUSTICE STEVENS: Mr. Burman.

14 ORAL ARGUMENT OF DAVID J. BURMAN

15 ON BEHALF OF THE RESPONDENTS

16 MR. BURMAN: Justice Stevens, and may it please
17 the Court:

18 First, with respect to the question about the
19 due process rights below, I would note that the Government
20 does not challenge, and specifically said so in footnote 2
21 of the petition for cert and footnote 1 in their brief on
22 the merits, whether there is a due process claim here. I
23 would encourage you -- and I will come back to the due
24 process question if you're interested.

25 I'd encourage you to look at the respondents'

1 appendix, pages 72 to 74, where the CIA employee described
2 the fact that there are, in fact, regulations that are not
3 limited to enforcing a secret contract. That is not our
4 claim.

5 JUSTICE SOUTER: But they are regulations that
6 the -- that depend upon the existence of a spy-principal
7 relationship --

8 MR. BURMAN: Actually we don't believe that's
9 correct, Your Honor. We believe that --

10 JUSTICE SOUTER: Well, are you claiming that
11 your -- your people are -- were not spies?

12 MR. BURMAN: We allege that they were coerced
13 into that relationship, but we do --

14 JUSTICE SOUTER: Well, however got there --

15 MR. BURMAN: Correct.

16 JUSTICE SOUTER: -- they -- they -- your claim
17 is that they're spies and that, therefore, whatever your
18 procedural claims may be, whatever your substantive due
19 process rights may be, as I understand it, depends upon
20 the assumption of a spy-principal relationship.

21 MR. BURMAN: We do not agree with that, Your
22 Honor.

23 JUSTICE SOUTER: Why?

24 MR. BURMAN: We believe that PL-110 allowed the
25 admission of people essential to the United States without

1 any comment on whether they had formerly been spies and
2 that these regulations do not require us to prove as an
3 essential element even to the CIA, much less to the
4 district court --

5 JUSTICE SCALIA: You --

6 MR. BURMAN: -- that they were spies for the
7 CIA.

8 JUSTICE SCALIA: -- you don't have to prove that
9 they were spies, but you have to prove that -- that they
10 had a contractual relationship with the United States.
11 And the only contractual relationship you're asserting is
12 the relationship of a spy.

13 MR. BURMAN: We disagree with that, Your Honor.

14 JUSTICE SCALIA: Oh --

15 MR. BURMAN: We do not believe -- and in fact,
16 the Ninth Circuit went out of its way to make very clear
17 to the district court that if we try to plead around and
18 base a claim on a contract, the district court should
19 dismiss that.

20 JUSTICE SCALIA: Now, wait. What -- what is the
21 basis on which you assert these regulations are applicable
22 to you --

23 MR. BURMAN: We --

24 JUSTICE SCALIA: -- to your client?

25 MR. BURMAN: -- we say that the -- we believe we

1 can show, once we are allowed to proceed -- and it's
2 premature at this time to decide whether we'll be
3 successful in this or not. We believe we can show that
4 the CIA has internal regulations that say as to PL-110
5 resettles, we will provide continued financial and
6 security support in these circumstances, a need-based
7 standard.

8 JUSTICE SCALIA: And -- and the agency comes in
9 and says, prove that you're a PL-110 resettlee.

10 MR. BURMAN: The agency --

11 JUSTICE SCALIA: And -- and what is your
12 response to that?

13 MR. BURMAN: The agency has never --

14 JUSTICE SCALIA: Your response is I was
15 resettled because I was a spy.

16 MR. BURMAN: No. We don't have to say that. We
17 can say we were resettled under PL-110, which they have to
18 inform at the time the INS Commissioner that they were
19 bringing in people as PL-110 resettles. They're not
20 required to tell the INS Commissioner that they were
21 spies, just that they're essential.

22 JUSTICE SOUTER: What if -- what if the
23 Government takes a slightly different tack and -- and you
24 bring your essentially PL-110 neutral claim, and the
25 Government says, the only relationship upon which this

1 claim can be based by these particular Does is a spy
2 relationship? We claim privilege, and on the basis of
3 that privilege, we -- we claim dismissal. What is your
4 response to that?

5 MR. BURMAN: If that were an essential element
6 of our claim, which we believe it is not --

7 JUSTICE SOUTER: Well, they're not saying it's
8 an essential element in the sense that only a spy can make
9 a 110 claim. They're saying that the only basis upon
10 which you can make a 110 claim is the spy relationship.
11 You have no other. How do you respond to that?

12 MR. BURMAN: Hence the reason we brought the
13 case as Does. A procedure that was not known for that
14 purpose at the time of Totten, that their own information
15 officer and their brief and their position in Webster
16 admits preserves the identity, preserves the secret. They
17 acknowledge --

18 JUSTICE SOUTER: But, look, you're talking about
19 procedural means. I want to know what your immediate
20 response to their claim of privilege is. Are you going to
21 say we weren't spies?

22 MR. BURMAN: The advantage of the Reynolds
23 procedure is if they had made the claim of privilege, we
24 would know what they were claiming was privileged.

25 JUSTICE SOUTER: They are making the claim of

1 privilege on the ground that the only basis for your 110
2 claim is or can be, on facts known to them, that your
3 clients were spies. Do you respond by saying, yes, we
4 were spies, or do you respond by saying, we weren't spies?

5 MR. BURMAN: We respond by saying we have an
6 entitlement to a fair process within the agency, a
7 confidential process --

8 JUSTICE SOUTER: Let's assume that you have a
9 really obnoxious court --

10 (Laughter.)

11 JUSTICE SOUTER: -- that wants a substantive
12 response, do you respond by saying they're right, we're
13 spies, or they're wrong, we weren't spies?

14 MR. BURMAN: If their position is that they
15 can't confirm or deny to the district court whether we
16 were spies --

17 JUSTICE SOUTER: They are claiming a privilege
18 on the grounds that the only basis for your claim can
19 possibly be the spy relationship based on facts known to
20 them. In order to defeat that privilege, you've got at
21 least to start by saying, no, we weren't spies and we
22 don't claim to be. Are you going to say that or aren't
23 you?

24 MR. BURMAN: We are not going to say we were not
25 spies. We are going to --

1 JUSTICE SOUTER: Then I don't know why you're
2 not out of court on Totten.

3 MR. BURMAN: Because we are not claiming the
4 benefit of a bargain to be a spy. We are not seeking
5 compensation --

6 JUSTICE BREYER: What is a PL --

7 JUSTICE SOUTER: You are -- you are --

8 JUSTICE BREYER: What is a PL-110 settlee?

9 MR. BURMAN: A PL-110 resettlee allowed the CIA
10 and the FBI to bring in up to 100 people per year that
11 were deemed essential to the U.S. They could have been
12 simply very important scientists who wished to defect.

13 JUSTICE BREYER: Okay. So you would say this --

14 MR. BURMAN: They could have been any --

15 JUSTICE BREYER: Are -- are you claiming that
16 your answer to Justice Souter's question is we will assume
17 for purposes of this case -- we're not admitting whether
18 it's true or not, but we're going to assume we're not
19 spies --

20 MR. BURMAN: We believe --

21 JUSTICE BREYER: -- because we win even if we're
22 not spies because we are essential persons?

23 MR. BURMAN: If we had made the Totten mistake
24 of suing in our own name, we would be out of court, but we
25 have sued as Does and we have said we are satisfied with

1 the CIA concluding internally whether we are entitled to
2 PL-110 status.

3 JUSTICE BREYER: All right, but my guess is --
4 well, he's pushed you and it sounds like it to me -- that
5 the only basis on which you could say you were an
6 essential person is that you're a spy.

7 MR. BURMAN: We don't --

8 JUSTICE BREYER: He's -- he's not a scientist.
9 He's not a --

10 MR. BURMAN: Since they have not contested our
11 PL-110 status until a somewhat desperate comment in the
12 reply brief, we have never had to face this question
13 because there has been no question that we are PL-110
14 resettlers, and that as long as we do not disclose our
15 identity, which we've been careful not to do, unlike
16 Totten, there is no state secret that is -- is at risk.

17 JUSTICE SCALIA: But if the question comes up,
18 you're going to have to disclose the identity. I mean, if
19 -- if it is controverted whether indeed you're -- you're a
20 spy or not, then what do you do? Do you say, well, we'll
21 -- we'll do it in camera? That's right? I mean, you --
22 you think that -- that a United States district court has
23 all of these security facilities available as Langley? I
24 mean --

25 MR. BURMAN: We --

1 JUSTICE SCALIA: -- trust me, it doesn't.

2 MR. BURMAN: We do not believe that we have to
3 have -- that we have to disclose anything to the district
4 court to have standing as Does to seek a fair procedure
5 within the CIA. At the time of Totten, the idea of having
6 a Doe being able to sue was not recognized for a plaintiff
7 who wanted to protect his identity. We have that now as
8 of the last --

9 JUSTICE BREYER: Do we have to change Totten?
10 Because, look, what I'm now thinking is, A, if you're
11 suing on a contract, you win because you're a spy, if you
12 win. If you're suing on promissory estoppel, you win
13 because you're a spy, if you win. If you're suing on PL-
14 110, you win because you're a spy, and if you're suing on
15 due process, you win because you're a spy. So no matter
16 what, you can't win unless you're a spy.

17 Now, they -- they have Totten, and it -- it --
18 that sounds to me as if you're there. And do we have to
19 overturn Totten for you to win?

20 MR. BURMAN: I do not believe so, but you should
21 not expand Totten in the dramatic way the Government asks.
22 And it does not counsel for you to expand Totten when they
23 cannot define a clear line as to where this
24 jurisdictional, which they use in the brief but abandon
25 here -- they cannot explain to you why in Webster -- they

1 argued on pages 37 to 40 of their brief for exactly the
2 same interpretation of Totten that they are arguing now.
3 They specifically said that it should not be up to the
4 courts to look behind the scene of the privilege in
5 Reynolds, and yet the Court rejected that position.

6 In Hamdi, they said there cannot be a secret
7 proceeding with due process and the courts cannot review
8 whether we've made that available, and the Court rejected
9 that.

10 Things have changed since the time of Totten.
11 That does not require overruling Totten, but it certainly
12 does not counsel expanding Totten in the dramatic way that
13 the executive asserts, a way that basically says to the
14 Court you have absolutely no role in determining whether
15 our assertion that the state secret is an essential
16 element here is in fact the case and whether it truly is a
17 state secret.

18 We -- if there's anything we ought to be able to
19 decide it's what our case is about. We may have loosely
20 used bargain in the complaint, but the district court and
21 the Ninth Circuit have now made it very clear that we
22 cannot have a contract claim, we cannot have a due
23 process, whether substantive or procedural, based upon a
24 contract, we cannot have a promissory estoppel claim. The
25 Ninth Circuit has decided all of that against us.

1 What we still have, though, is a claim to a
2 fair, internal agency procedure.

3 JUSTICE GINSBURG: Attached to what? I mean,
4 you can -- a fair procedure leading nowhere is not a
5 claim. You have a right to a fair procedure because it's
6 attached to some substantive right.

7 MR. BURMAN: That's what we haven't yet had the
8 opportunity to prove as to what it is in these
9 regulations. But if you would look at -- again, at the
10 respondents' appendix 72 to 74, the agency's witness that
11 they voluntarily made available, did not make any
12 assertion of privilege, did not make any assertion that
13 this was confidential asked, are there agency regulations
14 that you know of that relate to the resettlement of these
15 PL-110 people who are resettles from foreign countries?
16 Yes. Are there regulations that deal with the
17 determination of the level and extent of benefits to be
18 given resettles? Yes. And are there agency regulations
19 that deal with grievances by resettles? Yes.

20 We think no minimal due process allows them to
21 tell us the wrong standard and not to give us notice and
22 an opportunity to be heard in a confidential proceeding --

23 JUSTICE KENNEDY: What's --

24 JUSTICE GINSBURG: You still have --

25 JUSTICE KENNEDY: -- what's your best case for

1 that? What's your best case for that proposition?

2 MR. BURMAN: Well, certainly Matthews v.
3 Eldridge.

4 JUSTICE KENNEDY: Because it sounds to me like
5 due process in -- in the air.

6 MR. BURMAN: We don't believe it is, Your Honor.
7 We -- we don't know for sure until we are entitled to
8 litigate the regulation.

9 JUSTICE KENNEDY: No, no. We know enough at the
10 summary judgment stage for us to -- to decide whether the
11 case can go forward or the dismissal stage.

12 MR. BURMAN: Well, there has been no summary
13 judgment --

14 JUSTICE KENNEDY: Or dismissal stage.

15 MR. BURMAN: At -- at the dismissal stage, our
16 pleadings have to be accepted as true, and we believe that
17 the pleadings sufficiently assert that there are
18 regulations there that create a -- a property interest and
19 that --

20 JUSTICE GINSBURG: That create a property right?

21 MR. BURMAN: Yes.

22 JUSTICE GINSBURG: But the property right is the
23 contract with the United States. I mean, you can't get
24 away from the contract by calling it a property right.

25 MR. BURMAN: We do not believe there is a

1 contract and we do not believe we have to rely on it. We
2 were -- the Does were coerced into what they did. They do
3 not seek compensation.

4 JUSTICE STEVENS: What is your strongest case?
5 I don't think Matthews addresses it. What is your
6 strongest case for the notion that you have a property
7 interest even though you don't have a contract?

8 MR. BURMAN: Probably Perry v. Sindermann in the
9 sense that there was clear that the contract was over but
10 the Court indicated that --

11 JUSTICE KENNEDY: Well, that was the firing of a
12 school teacher. There was --

13 MR. BURMAN: It was a nonrenewal.

14 JUSTICE KENNEDY: -- there was -- there was an
15 interest in having your job, contract property, and
16 interest in getting back salary, contract property. Not
17 this case.

18 MR. BURMAN: The -- what the Court actually, I
19 believe, focused on there and in Goldberg v. Kelly was the
20 question of whether there were regulations --

21 JUSTICE KENNEDY: Goldberg v. Kelly, welfare
22 benefits, money.

23 MR. BURMAN: We believe this is in a sense the
24 equivalent of a welfare benefit.

25 JUSTICE BREYER: Perry v. Sindermann. Is that

1 -- that's the nontenured teacher?

2 MR. BURMAN: Yes.

3 JUSTICE BREYER: There's no property right
4 there, I don't think. I've always taught that as a ground
5 that it wasn't compared to Roth where there was. All
6 right. So -- so -- but there was a First Amendment
7 interest of some kind.

8 MR. BURMAN: And I believe the Court indicated
9 that it would be possible if there were practices and
10 policies that had been established that set substantive
11 standards for continuing that there would be a property
12 right in a fair procedure for determining that internally
13 at the school.

14 JUSTICE BREYER: You're probably right if they
15 have -- I see what you're saying.

16 MR. BURMAN: We also believe there is a liberty
17 interest. These people came to the U.S. in danger. The
18 mere fact of labeling them essential to the United States
19 and bringing them in in the PL-110 status, taking away
20 their identity, giving them a false identity, false
21 references, changing their occupations, all of those
22 things we believe -- we have an argument -- created a
23 liberty interest in continuation of the protection. It's
24 the special relationship, the Dushane-type argument that
25 the -- that the Ninth Circuit relied on.

1 But I would hasten to add it is premature to
2 determine whether we win on the merits, and the Government
3 is absolutely wrong in their brief in suggesting that
4 unless we can prove at this point that we can win on the
5 merits, that we don't have standing. We have standing to
6 make a claim for fair procedures. Those procedures may
7 include confirming internally to the CIA our identity and
8 they may include confirming whether we satisfy whatever
9 the need-based standard is that the CIA has identified.

10 We have made every possible effort to comply
11 with the covenant that Totten imposed in a contract, a
12 contract that we don't believe we have. We sued as Does.
13 We have sought preapproval of every single filing. We had
14 -- counsel that learned any confidential information were
15 precleared by the agency. That is not what happened in
16 Totten. Those are procedures, as Justice Scalia has
17 suggested, that did not -- were not recognized at the time
18 of Totten just like the due process claim was not
19 recognized at the time of Totten. And it is a claim that
20 can be done internally to the CIA.

21 JUSTICE KENNEDY: You think that Totten would be
22 decided differently today because of the -- our due
23 process jurisprudence?

24 MR. BURMAN: We believe that Totten didn't know
25 to make a claim other than contract.

1 JUSTICE KENNEDY: I -- that's not my question.

2 MR. BURMAN: Yes, we do.

3 JUSTICE KENNEDY: Suppose Mr. Totten is here
4 today.

5 MR. BURMAN: And if there were regulations in
6 the Totten situation that created some sort of meaningful
7 standard that would be applied by an internal procedure,
8 which the record shows here the CIA has an internal
9 procedure, not just regulations setting out the standard,
10 but a review process. We simply want to have a fair,
11 internal procedure.

12 This case really is not about the protection of
13 state secrets, but the limits of the executive authority
14 to unilaterally assert without any review by the court --

15 JUSTICE GINSBURG: How would the court -- a
16 court go about monitoring this fair procedure --

17 MR. BURMAN: We -- we don't believe the court
18 would have a role in monitoring the fair procedure. It
19 would simply determine whether the procedure that the CIA
20 has described in the court record already satisfied
21 minimum standards of -- of due process. If the court
22 found that it did not --

23 JUSTICE GINSBURG: And then you -- you said that
24 -- suppose you knew what it was on paper and then you
25 wanted to complain to a court, that's not what they gave

1 us. They said that in their regulations, but they gave us
2 something much less.

3 MR. BURMAN: It's possible that the CIA would
4 assert that there is some reason that it gave less than
5 its regulations that would be a state secret. It's hard
6 for us to imagine what that would be, but in fact that is
7 open on remand for the -- for the CIA to argue that.

8 JUSTICE SCALIA: Do these regulations just set
9 forth a procedure or do they set forth some substantive
10 entitlement?

11 MR. BURMAN: They seem to do both. They -- we
12 haven't, of course, seen them in full yet, but they set
13 forth a procedure and then they also say that there is
14 some sort of need, age, indigency, and health-based
15 standard for continuing the support. And if you'll
16 notice --

17 JUSTICE BREYER: Then it will be worse for them.
18 I mean, they say, look, frankly we'd rather reveal the
19 names of one or two spies than we would like to reveal our
20 procedures for dealing with the spies we bring into the
21 United States. It will take someone who reads those about
22 15 minutes with a computer to locate 400 resettled spies.
23 That will be a terrible disaster.

24 MR. BURMAN: If that was an external process,
25 but we agree it should be internal to the CIA, that the

1 process for applying that standard must remain internal to
2 the CIA. The Does share the interest in protecting their
3 identity and the identities of others like them.

4 We -- we believe that the Government --

5 JUSTICE BREYER: What's your answer? What is
6 your response?

7 MR. BURMAN: That there's no external -- there
8 -- there will be no public knowledge of that information,
9 that they can explain their -- they can apply their
10 process internally, apply the need-based process
11 internally, and that will not be litigated in the courts
12 if they assert executive -- or state secret privilege as
13 to that, and we assume that they would at that point. But
14 we -- we agree --

15 JUSTICE SCALIA: But the court would say you
16 don't have a cause of action unless it knows what -- what
17 these regulations say. Surely the regulations have to be
18 disclosed to the court at least.

19 MR. BURMAN: We -- we believe that's the case
20 and they have not yet said that it would hinder the state
21 secrets at all to disclose them, and they have disclosed
22 quite a bit and said that the remainder they are holding
23 back only a need-to-know basis. They have not asserted
24 any state secret privilege with the remaining regulations.

25 And we know, in fact, from the letter that is in

1 the record from -- between the CIA and the Justice
2 Department in which the -- there was basically an
3 understanding that there would be regulations like this in
4 order to make sure that these PL-110 resettlers did not
5 effectively become wards otherwise on -- on the Government
6 and that the CIA would continue some responsibility for
7 them.

8 The -- we are not aware of any case in which
9 this Court has suggested that there is an obligation of
10 the district court to look behind the use of Doe and
11 determine in a public manner the identity of the person.
12 That -- the Government seems to assume that they have some
13 entitlement to have a self-inflicted harm that they would
14 demand that the identity of the Does be disclosed publicly
15 and that they're entitled to do that. We do not believe
16 that that's a required part of the use of Does.

17 And in any event, we think it is somewhat
18 similar to the criminal context where, if the Government
19 is going to insist on moving forward in some way that is
20 an affirmative defense like that, they may well have a
21 responsibility for not being able to defend their position
22 if they, at the same time, say that the state secret
23 privilege applies. But at this point, anyway, that has
24 not been presented to the district court.

25 We -- we find it strange that the Government so

1 quickly now says, unlike what it argued in Webster, that
2 there is this type of contract which is not subject to the
3 jurisdictional bar, and that is a contract with their own
4 employees when they tell us that those same employees are
5 going to know a much broader swath, as Mr. Clement said,
6 of secrets. If their rationale made sense as something
7 that was so compelling that the Court should create a
8 jurisdictional bar for what the courts would otherwise
9 have the capacity and the competence to do, you would
10 think it would apply in that situation as well.

11 But the fact is they lost Webster, and so they
12 have to try to say that there is something still very
13 broad about Totten but explain away Webster, and they
14 simply cannot convincingly do that. Webster was the same
15 argument by them. Reynolds was the same argument by them,
16 and they lost.

17 JUSTICE STEVENS: May -- may I ask you what is
18 probably a stupid question? Why isn't the contract barred
19 by the statute of frauds?

20 MR. BURMAN: Well, we haven't thought about that
21 because we haven't proceeded on -- on the contract. There
22 may well -- we -- it probably is.

23 JUSTICE STEVENS: Yes.

24 MR. BURMAN: And there -- we -- we -- but we do
25 not proceed on the contract.

1 The Does, in fact, do not underestimate the
2 risks of disclosure of their identities and of their
3 relationship with the CIA. Perhaps they put too much into
4 the complaint describing at some length what they did, but
5 the reason for that, I suggest, is understandable. It was
6 subject to preapproval by the agency. Why not put the
7 equities in there even though they're not essential
8 elements of your claim and see if the agency approves
9 them? The agency approved them. We should not be thrown
10 out of court because we put into the complaint allegations
11 which the agency admits using the Doe, do not threaten any
12 secrets, and which are not part of the essential elements
13 of our claim.

14 JUSTICE SCALIA: Are all of these what you call
15 110 resettles -- are they all CIA resettles?

16 MR. BURMAN: It does not appear that they are.

17 JUSTICE SCALIA: Some of them State Department
18 and --

19 MR. BURMAN: At -- at least -- my understanding
20 is at least the FBI and perhaps the Commissioner of INS at
21 the time for -- perhaps at the request of other agencies.
22 It appears that all three agencies had the ability to
23 create this exception to the normal immigration procedure.

24 If the Does can show on remand that the CIA's
25 regulations are as they allege and that PL-110 status

1 generally, which is what the CIA witness McNair basically
2 said, that many PL-110 resettlers are in continued danger
3 because of the nature of which we brought them in,
4 regardless of what they did before we decided to bring
5 them in, or if they can show that in their particular
6 situation there is a -- a special relationship of danger
7 created, we believe we would have a substantive due
8 process argument and a procedural due process argument.
9 That is not today's question.

10 The Government has agreed that for purposes of
11 today's question, it should be assumed that we can make
12 out a due process claim. That claim is --

13 JUSTICE KENNEDY: I'm not quite sure where the
14 Government has said that. You talk about footnote 2. All
15 it said was that they're not appealing the point that you
16 have to go to the Court of Claims.

17 MR. BURMAN: And also in footnote 1 in the -- in
18 their brief on the merits to this Court. I think it's on
19 page 7. My reading of that is that they are not
20 challenging the due process analysis, and it would be
21 premature to challenge the due process analysis at this
22 time, which is what the Court said in Webster. We believe
23 that our due process argument is stronger than the due
24 process argument that was made in Webster, but the Court
25 in any event said that's not what is -- what is before us

1 at this time. And -- and we believe that that's the same
2 situation now.

3 JUSTICE STEVENS: Do you agree --

4 JUSTICE SCALIA: I'm just wondering what --

5 JUSTICE STEVENS: Excuse me. Do you agree your
6 due process argument does depend on having either a
7 property interest or a liberty interest?

8 MR. BURMAN: Yes.

9 JUSTICE SCALIA: I'm just wondering what's, you
10 know, some foreign -- I don't know who -- who the Does
11 spied on, but let's assume -- you say they're in danger.
12 Somebody may be interested in -- in the subject. What
13 kind of security provisions do you have in your law office
14 that would -- that would make them immune from the kind of
15 intrusion that foreign espionage services --

16 MR. BURMAN: In -- in general, we have not been
17 allowed to take information outside of the agency. Even
18 when we're in the clear --

19 JUSTICE SCALIA: I'm not talking about the
20 agency. Just about the name of your clients. I think
21 it's -- there are countries interested in -- in, you know,
22 who was spying on them.

23 MR. BURMAN: That was their decision to trust us
24 with that, and ironically under the Government's theory of
25 this case, the Does --

1 JUSTICE SCALIA: Well, but it may lead -- it may
2 lead to other agents and -- and one of the problems about
3 allowing suits like this is that this information about
4 who the agents are will be brought to a lawyer, kept in
5 his law office, and much more readily accessible to -- to
6 foreign powers than -- than it would be at Langley.

7 MR. BURMAN: And under the agency's theory of
8 this case, there is nothing that stops the Does from
9 making their identities public because there is no
10 enforceable contract that the agency can enforce. The
11 agency wants to keep Snepp. It wants to live with
12 Webster, and the only thing it has left is to somehow
13 carve out a rule that applies to these people who have
14 done everything they possibly could, including not telling
15 me who they are.

16 Our files within our office do not identify them
17 in writing, is my understanding, by name. I certainly am
18 not aware of who they are. I know what's alleged in the
19 complaint and nothing more than that.

20 But certainly the risk of gray mail, the risk of
21 the Does -- people in the Does' position disclosing
22 something is totally irrelevant to the question of whether
23 Totten creates some sort of bar that applies not just to a
24 contract claim but to a claim where there is no contract,
25 where it is not alleged that it is based upon a contract,

1 and where the parties have done everything possible -- the
2 Does, the plaintiffs, have done everything possible to
3 honor the confidences that the Government wants to keep.

4 Thank you, Your Honors.

5 JUSTICE STEVENS: Thank you, Mr. Burman.

6 Mr. Clement, you have about 4 and a half minutes
7 if you need them.

8 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF THE PETITIONERS

10 MR. CLEMENT: Justice Stevens, just a few
11 points. And may it please the Court, just a few points in
12 rebuttal.

13 First of all, as I think Justice Kennedy's
14 question indicated, there was no waiver of any due process
15 argument. If you look at those footnotes, the only thing
16 that's waived is the Tucker Act concern that we talked
17 about earlier.

18 Second of all, I think in thinking about this
19 PL-110 claim, it's important to acknowledge, as I think
20 Justice Scalia was suggesting, that it is the PL-110 claim
21 to the CIA. And as I understand their argument, it
22 depends on their being a significant difference between
23 coming into court and saying I'm an unacknowledged spy and
24 I'd like to sue the CIA and coming into court and saying I
25 am an unacknowledged PL-110 resettlee with a claim against

1 the CIA, please hear my claim. I would say there's no
2 material difference in terms of all of the policies that
3 undergird the Totten doctrine between those two. And I
4 would note that even the Ninth Circuit recognized at 35a
5 and 37a of the petition appendix that the respondents
6 would have to establish a relationship with the agency.

7 The final two points I would make is, first of
8 all, they would like to make some benefit of the fact that
9 they are suing as Does as opposed to the Totten case. I
10 would make two points about that.

11 First of all, presumably the reason that William
12 Lloyd could use his name in the Totten case is because it
13 was a suit by his estate and he was deceased, so he didn't
14 have a concern about retaliation.

15 (Laughter.)

16 MR. CLEMENT: I would also say that the
17 difference between suing under Doe and suing under your
18 name just makes clear that both sides to this litigation
19 start with the premise that the fundamental fact of this
20 litigation turns on a secret. They don't want their name
21 revealed any more than we want the name revealed, and that
22 just underscores how this is all about a secret, just as
23 in Totten.

24 The last point I would make is they asked you to
25 take their pleadings as a given at this stage in the

1 litigation, and I would ask you to look at those
2 pleadings. The complaint is replete with references to
3 the espionage relationship, and the complaint itself cites
4 Totten or the Totten doctrine no less than seven times. I
5 would suggest that if this claim is not Totten-barred,
6 then no claim is.

7 With that, I'd ask the court below be reversed.

8 JUSTICE STEVENS: Thank you.

9 The case is submitted.

10 (Whereupon, at 12:01 p.m., the case in the
11 above-entitled matter was submitted.)

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