

## ABSTRACT

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*The Continuing Viability of the 1875 Supreme Court Case of Totten v. United States*

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Abstract by Frederick G. Jauss, IV

After the Civil War, the administrator of the estate of an alleged spy for the United States Government sued for breach of a secret contract that the deceased, William Lloyd, claimed to have entered with Abraham Lincoln for espionage services. The Supreme Court, in dismissing the claim, established the *Totten* Doctrine, which states that courts do not have jurisdiction to consider claims related to secret contracts since review of the alleged contract would both compromise intelligence operations and embarrass the US Government. Pines' article examines the *Totten* Doctrine and why it is important to the operations of the intelligence apparatus of the US Government to keep it as a bright line rule. Part I of the article discusses the *Totten* Doctrine and its progeny in detail. Part II describes the recent attacks on *Totten*, and why they should be rebuffed. Part III of the article concludes with an analysis of why the doctrine is valid and why it should continue to be protected.

In *Totten*, the Supreme Court took issue not with the ability of the President to enter into secret contracts, but with claims brought on the basis of secret contracts. Judicial review of secret contracts for secret services would needlessly endanger national security. Furthermore, bringing such a claim would constitute unclean hands, and would create a breach of contract in itself. Pines posits a third reason for dismissal of these claims, that of separation of powers. Review of the secret contracts would undermine the operation of the executive branch and their ability to work effectively. A final reason why claims should be dismissed under *Totten* is that the Federal government has not consented to be sued on these matters.

Obviously, there is notable opposition to the *Totten* Doctrine on the basis that it deprives plaintiffs of meritorious claims and deprives courts of reviewing those claims. In order to get around the wall of *Totten*, plaintiffs have begun to structure their complaints as torts or constitutional violations. Pines discusses *Doe v. Tenet*, the most successful of these recent claims. The Does were able to claim successfully that agency adjudication of their secret contract had deprived them of constitutionally protected liberty and property interests, and had violated their rights to substantive due process. The author asserts that these rulings are in error because allowing them to proceed invalidates *Totten*. Plaintiffs would only have the right to contest these processes if they have standing. Standing will only exist if there was a contract between the agency and the claimant. Therefore, before going into the constitutional issues, a court would have to first determine whether a contract existed, an analysis that is barred by the *Totten* Doctrine. Claims based on contracts that are alleged to be not secret should likewise be dismissed because in the event that the contract did contain secret services, the Agency would be forced to reveal classified information in order to refute the claim. The ability of courts to hold closed proceedings should not be seen as a viable method to hear the claims and still maintain secrecy, because most classified information is limited to a "need to know" basis. The "need" as been defined as a furtherance of government interests, not the interests of a litigant. Finally, courts are supposed to be open, and furtherance of this strategy would only promote a "starchamber" environment, something that is the antithesis of our judiciary. Pines concludes by defending the continuing need for the *Totten* Doctrine as necessary to the protection of national security. Without *Totten*, valuable intelligence assets would be placed at risk, a risk that cannot be taken.