Spycraft and Government Contracts: a Defense of *Totten v. United States*

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Introduction

William A. Lloyd stood before his president, who was a tall, lanky man with piercing eyes, a craggy brow, and a strong, prominent chin. After his death, the president's country would come to see him as one of the greatest leaders in its history. The two men were discussing the beginning of a civil war that had riven their country, brother fighting brother, son fighting father, and which would, over the next four years, bathe the country in blood and fire. The President, Abraham Lincoln, was requesting that Lloyd travel south and gather information on the seceding confederacy. He was "to proceed south and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the Government of the United States . . . ."[1] Finally, President Lincoln made an offer of payment, which Lloyd accepted. Lloyd was not to see the President again.

The President and Lloyd's discussion eventually resulted in the United States Supreme Court case of *Totten, Administrator v. United States*.[2] *Totten* held that United States courts lack jurisdiction to hear complaints against the United States brought by parties who allege to have entered into contracts for secret services with the United States. In June, 1996, *Time* magazine discussed this venerable case in reporting on the situation of former Vietnamese commandos. The article stated that the Central Intelligence Agency (CIA), in responding to the allegations of commandos, "cited an 1875 Supreme Court case that it has used successfully to fend off past suits by agents who claimed to have been cheated."[3] How does a case decided in 1875 merit the attention of *Time* today?

This article discusses *Totten* and its progeny, including the recent case of *Vu Doc Guong v. United States*.[4] It also analyzes the continuing impact of *Totten* in the murky world of covert operations, using the recent case of the "Vietnamese Lost Commandos" as a point of focus.

The Interesting Case of Mr. Totten

Mr. Enoch Totten brought action in the United States Court of Claims[5] to recover monies due as the result of the services of his intestate, Mr. Lloyd. The Court of Claims found that Mr. Lloyd "proceeded, under the contract [with the President], within the rebel lines, and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the President; and that, upon the close of the war, he was only reimbursed his expenses."[6] The Court of Claims dismissed Mr. Totten's complaint, finding that the President lacked authority to enter into such a contract.[7]

The Supreme Court held that the President had authority to employ Mr. Lloyd to spy on the enemies of the United States. The Court also stated that under a contract to compensate such an agent it was lawful for the President to direct payment to Mr. Lloyd of the amount stipulated.[8] The Court then stated, however:

> Our objection is not to the contract, but to the action upon it in the Court of Claims. The

1. Totten, Administrator v. United States, 92 U.S. 105 (1875).

2. *Id.*

3. Douglas Waller, *Victims of Vietnam Lies*, TIME, June 24, 1996, at 44.

4. 860 F.2d 1063 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989).

5. The Court of Claims was renamed the United States Claims Court by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982). The Claims Court was subsequently renamed the United States Court of Federal Claims by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (1992).

6. *Totten*, 92 U.S. at 106.

7. *Id.*

8. *Id.*

> 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 [sic] sealed respecting the relation of either to the matter. This condition of engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. 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. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat recovery.[9]

With these findings, the Court affirmed the judgment of the Court of Claims.

Totten Progeny

Among other things, *Totten* held that when the government and a private party enter into an alleged agreement involving covert services, the private party necessarily makes an implied promise of secrecy about the existence of the agreement and the conditions and terms of the service.[10] The following are the few cases since *Totten* that have interpreted this holding.

In *De Arnaud v. United States*,[11] De Arnaud brought an action in the Court of Claims against the United States for services rendered during the Civil War. Specifically, in August 1861, De Arnaud entered into an agreement with Major General John C. Fremont.[12] Under this agreement, De Arnaud was:

> to go within the Confederate lines, make observations of the country in the states of Kentucky, Tennessee, and Missouri, to observe the position of the rebel forces, the strategic positions occupied by them, and advise [General Fremont] of the movements necessary to be made by the Union forces to counteract the movements of the enemy and to facilitate the advance of [Union] troops, and aid them in attacking and repulsing the Confederate forces.[13]

Ultimately, in early September 1861, De Arnaud was responsible for providing information to Brigadier General Ulysses S. Grant, which prompted General Grant to advance into Paducah, Kentucky ahead of Confederate forces.[14] After being paid $600 on General Fremont's orders, De Arnaud submitted a claim in the amount of $3,600 to President Lincoln in January, 1862, enclosing letters of commendation from a virtual Who's Who of Union Commanders in the Western Theater.[15] President Lincoln passed the claim to the Secretary of War for action, and the Secretary paid Mr. De Arnaud $2,000. De Arnaud then became insane, as the result of a head wound

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9. *Id.* at 106-07.

10. *Id.* The decision in *Totten* was also based on the public policy ground that when trial of an issue would lead to the disclosure of confidential matters related to the Government, suit is prohibited. *See* Weinberger v. Catholic Action of Hawaii, 454 U.S. 143, 146-47 (1981); Hudson River Sloop Clearwater, Inc. v. Department of the Navy, No. CV-86-3292, 1989 WL 50794, * 2 (E.D.N.Y. May 4, 1989). This article does not discuss this branch of *Totten*, which is a distant ancestor of the current extensive case law on the government's assertion of its state's secret privilege.

11. 151 U.S. 483, 493 (1894).

12. The famous "Pathfinder of the West" and less than stellar Union Civil War commander. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 350-54, 501 (1988).

13. *De Arnaud*, 151 U.S. at 484-85.

14. *Id.* at 485. Kentucky, as a border state, was neutral, having neither seceded from the Union, nor declared its allegiance. Hence, General Grant was hesitant to move into Kentucky unless Confederate forces entered Kentucky first. MCPHERSON, *supra* note 12, at 295-96.

15. *De Arnaud*, 151 U.S. at 486-87. The commanders included General Grant; Flag-Officer Andrew H. Foote, naval commander of the Army's gunboats on Western inland waters; and General M.C. Meigs, Quartermaster General of the Army.

suffered in late 1861, and remained insane until he recovered sufficiently in 1886 to bring his claim.[16]

In analyzing the case, the Supreme Court found it unnecessary to discuss the holding of *Totten*, dismissing De Arnaud's case as barred by the statute of limitations. The Court did not criticize the *Totten* decision and found, in dicta, that the work De Arnaud performed for General Fremont was not substantially different from the work Lloyd performed for President Lincoln.[17]

In *A.H. Simrick v. United States*,[18] the plaintiff claimed that from 1969 to 1976 he had a contract with the State Department and the CIA under which he was to establish a business in Mauritius, which would act as a cover for CIA agents.[19] In return, the CIA was to pay him a salary and buy all of his product at a fair market rate.[20] He alleged that his claim was not governed by *Totten* because his role was primarily that of a businessman and that there was little secret information that would have to be disclosed during the litigation.[21] The Court of Claims disagreed, finding that the case was controlled by *Totten*. The court stated that the contract, if one existed, required the plaintiff to engage in significant undercover intelligence work for the government. The court also found that the plaintiff would have to reveal secret matters to make his case and that the parties "understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter."[22]

The Court of Claims interpreted *Totten* again in *Mackowski v. United States*,[23] where the plaintiff claimed that she was an agent of the CIA hired to perform espionage activities in Cuba and that the CIA had failed to pay her expenses and other benefits as promised. The court found that the plaintiff could not prosecute her case without revealing secret matters which should not be disclosed, in violation of *Totten*.[24] The court also dismissed the plaintiff's argument that the government had waived its *Totten* defense because the plaintiff was released from Cuban prison due to the efforts of then Senator Frank Church.[25]

In *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*,[26] the district court analyzed *Totten*, stating that *Totten* had created two separate doctrines. The first was related to the state's secret privilege.[27] The second was "an independent doctrine, founded in prudence or public policy, that sometimes causes courts to dismiss plaintiffs' causes of action without letting them proceed to consideration by a finder of fact."[28] Applying these doctrines, the court then stated that *Totten* was decided on two separate grounds. First, public policy forbids a suit when the trial of the issue would inevitably lead to the disclosure of confidential matters. Second, the court stated that the *Totten* court had found that Lloyd's contract contained an implied term that forbade the parties ever to disclose the contents of the contract and that the act of bringing a suit constituted a breach of this implied term.[29]

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16. *Id.* at 489.

17. *Id.* at 493. De Arnaud's argument against *Totten* presaged by almost 100 years the argument advanced in *Vu Doc Guong v. United States*, 860 F.2d 1063 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989). In *Vu Doc Guong* the plaintiff argued that because he was a saboteur, and not a spy, *Totten* was inapplicable. *Id.* De Arnaud argued that because he was a "military expert," and not a "spy," that *Totten* was inapplicable. The Court, dispensing with this argument in dicta, stated: "[i]f it were necessary for us to enter into the question thus suggested, it might be difficult for us to point out any substantial difference in character between the services rendered by Lloyd [in *Totten*] and those rendered by Arnaud . . . ." *De Arnaud*, 151 U.S. at 493.

18. 224 Ct. Cl. 724 (1980).

19. *Id.* Mauritius is a small island off the southeast coast of Africa, east of Madagascar. It is becoming something of an economic powerhouse, similar to Singapore. *See e.g.*, Chris Hall, *A Tiger is Born Off Africa . . . and its Claws May Get Sharper*, BUS. WK., Jan. 13, 1997, at 4.

20. *Simrick*, 224 Ct. Cl. 724.

21. *Id.* at 726.

22. *Id.* (quoting Totten, Administrator v. United States, 92 U.S. 105, 106 (1875)). The court also stated that the Supreme Court had summarily reaffirmed the *Totten* holdings in United States v. Reynolds, 345 U.S. 1, 11 n.26 (1953).

23. 228 Ct. Cl. 717, 718 (1981).

24. *Id.* at 720.

25. *Id.* at 719.

26. No. CV-86-3292, 1989 WL 50794 (E.D.N.Y. May 4, 1989).

27. *Id.* at * 2.

28. *Id.*

29. *Id.* (citing Ellsberg v. Mitchell, 709 F.2d 51, 65 n.60 (D.C. Cir. 1983)).

OPLAN 34A in North Vietnam and Laos, 1960-1969

Beginning in 1960, the Republic of Vietnam, in coordination with the CIA, organized an operation in which small teams, and on occasion single individuals, infiltrated into North Vietnam to establish long-term agent networks, to gather intelligence, and to perform small-scale sabotage aimed at de-stabilizing the communist government in Hanoi.[30] From its inception, however, the program was not particularly effective.[31] Because it was very difficult to determine whether teams were effective and whether they were compromised, the program's lack of success was not well understood at the time.[32]

In January 1964, this covert program was made the responsibility of the Department of Defense (DOD) and was titled OPLAN 34A.[33] Oversight of OPLAN 34A was the responsibility of a new organization titled Military Assistance Command Vietnam, Studies and Observations Group (MACVSOG).[34] The MACVSOG was a counterpart organization to the Vietnamese organization responsible for executing OPLAN 34A.[35] The staffing of MACVSOG rose from a handful in early 1964 to over 400 United States soldiers, sailors, airmen, and civilians at its largest.[36] The MACVSOG was a DOD-established joint unconventional warfare task force to which special United States ground, sea, and air units were assigned.[37]

At its inception, MACVSOG concentrated on the implementation of OPLAN 34A. Operations for the first year of OPLAN 34A were primarily oriented to sabotage and psychological operations.[38] These initial operations, for a number of reasons, resulted only in limited success.[39] As a result, MACVSOG changed its focus from implementing OPLAN 34A to inserting long-term agent teams into North Vietnam.[40] Between January 1964 and October 1967, when MACVSOG ceased to insert teams under OPLAN 34A, MACVSOG sent some forty teams of about 300 men into North Vietnam.[41] These long-term agent teams were invariably killed or captured upon landing.[42] The Joint Chiefs of Staff halted the long-term agent program in 1968 after an extensive review of the operation's results and a counterintelligence review were conducted. The reviews showed that the program was compromised and ineffective.[43]

OPLAN 34A was a covert and implicitly deniable military operation run by the Republic of Vietnam with United States oversight and funding.[44] The United States did not contract with the OPLAN 34A commandos; all contracts were between the commandos and the Republic of Vietnam.[45] The Republic

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30. Unknown author(s), Military Assistance Command Vietnam Studies and Observation Group Documentation Study, Bt1 through Bt3, Cb1, Cd1 (10 Jul. 1970) (unpublished report, on file with Joint Chiefs of Staff archives) [hereinafter Documentation Study]. The authors of the study are unknown due to its classification. The Documentation Study is a multi-volume after-action review of this program, currently classified TOP SECRET. Most of the MACVSOG Documentation Study was declassified in 1992, at the request of the Senate Select Committee for POW/MIA Affairs. Significant national security concerns remain, however, related to means and methods concerning the commandos' operations which remain classified. Nothing in this article is classified.

31. SEDGWICK TOURISON, SECRET ARMY SECRET WAR 315-17 (1995).

32. *See generally*, Documentation Study, *supra* note 30, at Cb2. Compare Cb97 (1966 Military Assistance Command Vietnam evaluation stating that "in general the information produced is of intelligence value") with Cb8 (security assessment in June 1968 evaluated that all the in place teams were probably under North Vietnamese control). Communication with the teams was almost exclusively by radio. The North Vietnamese security forces had significant success in "turning" the radio operators and feeding false information to the Military Assistance Command, Vietnam. *See generally*, TOURISON, *supra* note 31, at xviii.

33. Documentation Study, *supra* note 30, at C4.

34. *Id.* The abbreviation SOG originally meant "Special Operations Group." It was re-designated "Studies and Observations Group" in late 1964 without any change in function. *Id.*

35. *Id.* at Bt4 through Bt12. This organization and method of control is not singular to the Vietnam War. During the Korean War, the United States Army was involved in an operation almost identical to OPLAN 34A. *Vietnamese Commandos: Hearings Before the Senate Select Committee on Intelligence*, 102d Cong. 61 (1996) (statement of Major General (Ret.) John K. Singlaub) [hereinafter Singlaub Statement]. Major General Singlaub served 35 and 1/2 years in the Army, most of it in special forces, including the period of the Vietnam and Korean Wars. He was the commander for MACVSOG from May 1966 until August 1968. He left active service in 1978. *Id.* at 29-30.

36. Documentation Study, *supra* note 30, at C32-C33.

37. Singlaub Statement, *supra* note 35, at 30.

38. Documentation Study, *supra* note 30, at C9.

39. *Id.* at C12-C13.

40. *Id.* at C15-C18.

41. *Id.* at Cb63-Cb65. The last insertion of a long-term agent team occurred in October 1967. *Id.* at Cb65.

42. TOURISON, *supra* note 31, at 217.

43. Documentation Study, *supra* note 30, at C29.

of Vietnam companion organization to MACVSOG (under various names, the last being Strategic Technical Directorate, STD) forwarded requests for payment for agent missions to MACVSOG, which would audit the request and then issue a lump sum each month to STD from which it paid agents.[46]

The MACVSOG also developed other operations which eventually greatly eclipsed OPLAN 34A in scope and magnitude. It inserted Short-Term Roadwatch and Target Acquisition (STRATA) teams into North Vietnam, Laos, and eventually Cambodia. The mission of the STRATA teams was primarily the short-term reconnaissance of supply routes.[47] The MACVSOG also operated short-term psychological operations missions (for example, placing "poisoned" weapons in North Vietnamese weapons caches, and inserting decoy agent teams).[48] Additionally, it created a mini-army of Vietnamese, Montagnards, and other ethnic minorities, led by American soldiers, for long-range, hit-and-run reconnaissance and sabotage operations into Laos and Cambodia.[49]

The 1973 Paris Peace Accords contained a provision requiring that all prisoners of war involved in the Vietnam War be repatriated.[50] Neither the United States nor the Republic of South Vietnam demanded the return of the OPLAN 34A personnel, and North Vietnam did not release most of them.[51] Many of the commandos remained in prison until the fall of South Vietnam in April, 1975, and then, like most people closely connected to the Republic of Vietnam, they were placed in re-education camps.[52] North Vietnam did not begin to release most of the commandos until the late 1970s and some did not leave confinement until 1988 or later.[53]

Vu Doc Guong v. United States

The case of *Vu Doc Guong v. United States*[54] presented the Court of Appeals for the Federal Circuit with a claim by an OPLAN 34A commando who was suing the United States for breach of contract and lost wages. The plaintiff alleged that he was a Vietnamese commando and asserted a claim based on an alleged contract with the United States to perform covert military operations against North Vietnam.[55] The court found *Totten* to be controlling, holding that an alleged contract between a Vietnamese commando and the United States for the performance of covert operations against North Vietnam was not enforceable.[56] Guong argued that *Totten* only applied to contracts for "secret services" and that he was employed as a saboteur, which by its nature is neither secret nor concealed. The Court found this argument unconvincing, stating:

> [I]t 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. We are equally certain that the words secret and covert are synonymous, and, as stated in *Totten*, the existence of [the] contract . . . is itself a fact not to be disclosed.[57]

Guong also argued that *Totten* only prohibits disclosure and enforcement of contracts when doing so would compromise current government secrets.[58] The Court dismissed this argument, observing that *Totten* was decided ten years after the close of the Civil War and that the military secrets uncovered

44. Singlaub Statement, *supra* note 35, at 30.

45. *Id.* at 35-36; Documentation Study, *supra* note 30, at J12.

46. Documentation Study, *supra* note 30, at Cb12.

47. *Id.* at C19.

48. *Id.* at C47, C49, and C51.

49. Singlaub Statement, *supra* note 35, at 37-38, 56, 59. This operation was entitled "OPLAN 35."

50. TOURISON, *supra* note 31, at 269.

51. *Id.* at 272.

52. *Id.* at 292, 296.

53. *Id.* at 273, 304.

54. 860 F.2d 1063, 1065-66 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989).

55. *Id.* at 1064.

56. *Id.* at 1067.

57. *Id.* at 1065 (citing Totten, Administrator v. United States, 92 U.S. 105, 107 (1875)).

58. *Id.*

by Mr. Lloyd were certainly not still military secrets ten years later.[59] The Court continued:

> Certain former government officials and military historians may perhaps have uncovered and divulged details of military actions in which plaintiff claims to have participated. The legality of those disclosures, however, are governed by other standards or principles which reflect strong First Amendment concerns . . . Those cases, however, do not modify the *Totten* precedent, and do not deal with a cause of action against the government predicated upon an alleged contract for secret or covert services.[60]

Recent Lost Commandos Litigation and Legislation

On 24 April 1995, Au Dong Quy and 280 others filed suit in the United States Court of Federal Claims alleging that each plaintiff was an OPLAN 34A commando, or represented the estate of an OPLAN 34A commando, and had a contract with the United States during the Vietnam War providing for monthly wages and other benefits.[61] They also alleged that their contract promised, upon capture, continued payment of the monthly wage.[62] The government filed a motion to dismiss in February 1996, asserting among other things: lack of privity, lack of jurisdiction under *Totten*, and expiration of the statute of limitations.[63]

The case generated significant national media attention, culminating in a segment on the television news program *60 Minutes*.[64] Congressional interest in the Lost Commandos' story was also increasing, and on 19 June 1996, the Senate Select Committee on Intelligence met to hear testimony on the issue.[65] As a result, the Court of Federal Claims stayed the litigation, pending possible resolution of the Commandos' issues by legislative means.[66] Subsequently, Congress passed into law a provision for compensation of all persons who were captured or incarcerated by the Democratic Republic of Vietnam as a result of the participation by that person in operations conducted under OPLAN 34A or its predecessor.[67]

The Need to Contract for Secret Services

In recent history, the United States has conducted numerous unconventional warfare operations, many of which were similar to OPLAN 34A.[68] For example, in his testimony before the Senate Select Committee on Intelligence, Major General (Retired) John K. Singlaub stated that the United States conducted such unconventional warfare operations during the Korean War.[69] He stated that there were probably hundreds of Koreans who were in a situation similar to the OPLAN 34A Commandos.[70]

The United States Supreme Court has recognized the importance of secrecy in intelligence gathering.[71] In *CIA v. Sims*,[72] for example, the CIA entered into research contracts, often

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59. *Id.*

60. *Id.* at 1065-66 (citing Snepp v. United States, 444 U.S. 507 (1980) (per curiam); New York Times Co. v. United States, 403 U.S. 713 (1971)).

61. Complaint ¶¶ 1-2, Au Duong Quy, et al./ Lost Army Commandos v. United States, No. 95-309C (Fed. Cl. filed Apr. 24, 1995).

62. *Id.* at ¶ 7.

63. Defendant's Motion to Dismiss, Au Duong Quy, et al./ Lost Army Commandos v. United States, No. 95-309C (Fed. Cl. Feb. 2, 1996).

64. *60 Minutes: Lost Commandos* (CBS television broadcast, May 5, 1996).

65. *Vietnamese Commandos: Hearings Before the Senate Select Comm. on Intelligence*, 104th Cong., 2d Sess. (1996). Subsequent to the hearings, Section 649 (subsequently re-numbered 657) of the DOD Authorization Act was introduced before the Senate. *See* Comments Before the Senate Concerning Amendment 4055 to the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, *reprinted in* 142 CONG. REC. S6439-41 (daily ed. June 19, 1996). Unfortunately, some senators sponsoring the bill disregarded Major General Singlaub's testimony and incorrectly reached the conclusion that "the United States apparently contracted with South Vietnamese nationals to conduct covert military operations in North Vietnam." Statement of Senator John S. McCain, *id.* at S6440.

66. Order, Au Duong Quy, et al./ Lost Army Commandos v. United States, No. 95-309C (Fed. Cl. July 2, 1996) (order staying litigation).

67. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 657(a)(1), 110 Stat. 2422, 2584 (1996).

68. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 100-25, DOCTRINE FOR ARMY SPECIAL OPERATIONS FORCES 2-5 through 2-6, 3-4 through 3-6, 3-8 through 3-9 (12 Dec. 1991) [hereinafter FM 100-25].

69. Singlaub Statement, *supra* note 35, at 61.

70. *Id.*

71. *See* CIA v. Sims, 471 U.S. 159 (1985), (discussed *infra*); Baldridge v. Shapiro, 455 U.S. 345, 361 (1982); Haig v. Agee, 453 U.S. 280, 307 (1981).

72. 471 U.S. at 161.

through intermediaries, with numerous universities, research foundations, and similar institutions. Some of the agreements contained an explicit promise of confidentiality so that the identities of the researchers would not be disclosed.[73] The Court commented on the importance of agreements for secrecy, stating "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."[74]

The Legal Relationship Between the Parties when Covert Services are Obtained

The legal relationship between the United States and those who perform covert services is a separate factor which should be considered in conjunction with the *Totten* doctrine. Before a plaintiff can successfully pursue any contractually-based action in federal court, he must be in privity of contract with the United States. If there is privity, the United States, as a matter of policy, attempts to adequately compensate the covert operative. Without privity, however, the United States has no legal obligation to compensate. In such a case, the covert operative may attempt to turn to the federal courts for relief, but the courts lack jurisdiction over such disputes unless there is privity of contract between the parties. Thus, the issue of whether there is privity in the first place may be another way to keep a dispute involving *Totten* doctrine issues out of the public eye.

The Contract with the Filipino Scouts

For clear policy reasons, the United States attempts to take care of, and to compensate, the operatives in unconventional warfare operations that it has fostered.[75] The largest exercise of this policy, in terms of claimants, concerned the United States commitment to pay the "Filipino Scouts" for services rendered while fighting as guerrillas during the Japanese occupation of the Philippine Islands during World War II. Prior to the outbreak of World War II, the Philippine Commonwealth had established its own army, with a strength of approximately 120,000 men.[76] After the outbreak of the war, the United States Congress authorized money to mobilize, to train, to equip, and to pay the Philippine Army.[77] Hence, a relationship with many aspects of a direct contractual relationship existed between the Philippine Army and the United States. After the fall of Corregidor in May 1942, Lieutenant General Jonathan M. Wainwright, commander of all troops in the Philippines, ordered the surrender of all troops under his command.[78]

In late 1942, a spontaneous guerrilla movement arose in the Philippines, supported with supplies and weapons from the sea. The movement continued until the end of the war, providing valuable services to the United States at all stages.[79] After the conclusion of the war, Congress provided an appropriation of $200 million for the benefit of the former members of the Philippine Army for service rendered during the war, including service during the Japanese occupation. As a result, the United States Army, over a period of several years, identified and paid thousands of individuals who had performed guerilla service, placing their names on permanent rosters.[80]

Thus, where a clear contractual relationship for covert services exists, the United States will pay legitimate claims of operatives. On the other hand, absent some sort of contractual relationship which establishes privity, the issue is whether the claims may be properly disposed of by the agency, Congress, or the courts.

The Contractual Relationship

Federal statutes defining the jurisdiction of the federal district courts state that "[t]he district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount . . . upon any express

73. *Id.* at 165.

74. *Id.* at 175 (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam)). In *Snepp*, the Supreme Court held that an agreement containing promises of secrecy could not be enforced because the possibility of public disclosure of confidential information and the accompanying inability of the United States to guarantee the security of relations with foreign sources would impermissibly impair intelligence gathering. *Snepp*, 444 U.S. 507.

75. *See* Letter from George J. Tenet, Central Intelligence Agency, to Honorable Arlen Specter, Chairman, Senate Select Committee on Intelligence (June 18, 1996), *reprinted in* 142 CONG. REC. S6440-41 (daily ed. June 19, 1996) [hereinafter Tenet Letter]. In pertinent part, the letter states that:

> [T]he creed of the Central Intelligence Agency, then as now, is to protect, [to] defend, and [to]compensate its assets for the sometimes mortal risks they take on our behalf. That is the only credible position for a secret intelligence service to take if it is to win and [to] hold the loyalty of its assets.

76. Besinga v. United States, 14 F.3d 1356, 1358 (9th Cir. 1994).

77. *Id.*

78. David W. Hogan, *MacArthur, Stilwell, and Special Operations in the War Against Japan*, 25 U.S. ARMY WAR C. Q., PARAMETERS 104, 106 (Spring 1995).

79. *Id.* at 112.

80. *See* Guerrero v. Marsh, 819 F.2d 238, 239-41 (9th Cir. 1987); Information Paper, Admin. L. Div., OTJAG, Army, DAJA-AL, subject: Filipino Claimants to U.S. Veterans Status as a Result of Guerilla Service During World War II (17 June 1974).

or implied contract with the United States . . . ." [81] In addition to that provision, the federal statute which establishes the jurisdiction of the Court of Federal Claims provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon . . . any express or implied contract with the United States . . . ." [82] Relying on this provision of the Tucker Act, federal courts have held that a party must be in privity of contract with the United States to assert a claim based on that contract in the Court of Federal Claims.[83] Absent privity, "there is no case." [84]

In tandem, these provisions grant exclusive jurisdiction to the Court of Federal Claims for nontort and contract claims against the government for money damages in excess of $10,000. [85] Without privity, however, this court lacks jurisdiction to hear the claim. [86] A contract with the United States is the sine qua non of jurisdiction in this court.

Unfortunately for lawyers, the legal relationship between the United States and a party to an agreement to conduct unconventional warfare is often unclear. For example, during the Vietnam War, an anti-Communist army of indigenous tribesmen fought a guerilla war in Laos, providing significant support to American forces.[87] This army was trained, equipped, and transported by the CIA, and the operation was conducted covertly.[88] Laos was a declared neutral, and the official position of all parties to the war was to recognize that neutrality; hence, the CIA operation was deniable.[89] Many of the tribesmen were Hmong and have been attempting to obtain compensation for their efforts during this guerilla war.[90] The Hmong have been unsuccessful in their attempts to obtain any compensation from the United States.[91] It is unclear whether there was any contractual relationship between the tribesmen who fought this guerilla war and the United States.[92]

Unconventional warfare operations generally involve some contracting for covert services. As in OPLAN 34A, however, there might not be a direct relationship between the United States and the operative. If the United States does not directly contract with the operatives, the United States has no legal obligation to them. If a direct contractual relationship *is* created, then the operatives are in privity of contract with the United States, and the Court of Federal Claims will have jurisdiction over claims under the contract which exceed $10,000. If the Court of Federal Claims has jurisdiction, government attorneys should then invoke the *Totten* doctrine, when applicable, to protect the interests of the United States in covert operations.

Totten's Role in Maintaining the Viability of Contracts for Secret Services

Unconventional warfare and special operations are an integral part of the total United States defense posture and are an instrument of its national policy.[93] The *Totten* doctrine, as expanded in later cases interpreting it, most notably *Vu Doc Guong*, forms a vital link between funding and maintaining such operations. Without this doctrine, disgruntled operatives in United States sponsored unconventional warfare operations could pressure the United States into paying the operatives, so as to avoid damage to national interests. If adequate payment were not made, the claimant presumably could pursue the

81. 28 U.S.C. § 1346(a)(2) (1997).

82. Tucker Act, 28 U.S.C. § 1491 (1982).

83. *See* Erickson Air Crane of Wash. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1983); Oakland Steel Corp. v. United States, 33 Fed. Cl. 611, 613 (1995).

84. Katz v. Cisneros, 16 F.3d 1204, 1210 (Fed. Cir. 1994).

85. A.E. Finley & Assoc. Inc. v. United States, 898 F.2d 1165 (6th Cir. 1990); Smith v. Orr, 855 F.2d 1544 (Fed. Cir. 1988); Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Hewitt v. Grabicki, 794 F.2d 1373, 1382 (9th Cir. 1986); Goble v. Marsh, 684 F.2d 12 (D.C. Cir. 1982); Amalgamated Sugar Co. v. Bergland, 664 F.2d 818 (10th Cir. 1981); Graham v. Henegar, 640 F.2d 732 (5th Cir. 1981), *reh'g denied*, 646 F.2d 566.

86. Regarding the OPLAN 34A Commandos, if a legal commitment is found, such commitment would create a significant monetary liability to the OPLAN 34A Commandos and other operatives involved in the many operations similar to OPLAN 34A. Singlaub Statement, *supra* note 35, at 61. The recent legislation granting compensation to the Lost Commandos has forestalled, if not completely eliminated, the resolution of the nature of the United States legal commitment to the Lost Commandos. *See supra* note 67 and accompanying text.

87. WILLIAM COLBY, HONORABLE MEN, MY LIFE IN THE CIA 194-200 (1978).

88. *Id.*

89. *Id.* at 191-92.

90. Thomas W. Lippman, *Laotian Claims U.S. Owes a Debt*, WASH. POST, Sept. 18, 1995, at A16.

91. *Id.*

92. See KENNETH CONBOY, SHADOW WAR: THE CIA'S SECRET WAR IN LAOS (1995) for an exhaustive study of the CIA's involvement in Laos.

93. FM 100-25, *supra* note 68, at 2-1.

action in court, exposing the details of the operation as necessary to prove the case. The *Totten* doctrine, therefore, protects the national interests of the United States and prevents the untoward exposure of intelligence assets.

Critics have stated that *Vu Doc Guong's* interpretation of *Totten* was incorrect. It has been argued that *Vu Doc Guong* misstated and misapplied the *Totten* doctrine by holding that secret contracts bar a suit, regardless of whether the service provided is secret.[94] Thus, in *Vu Doc Guong*, Guong argued that *Totten* was only applicable to contracts for secret services, not sabotage services, because sabotage services, by their very nature, are neither secret nor concealed.[95]

The argument that the *Totten* doctrine does not include sabotage is overly simplistic and demonstrates a fundamental misunderstanding of covert operations. The fact that the results of sabotage are frequently public[96] does not create any less need to maintain secrecy over the means and methods employed, both during and after a war or operation. Secrecy of the identity of the operatives is important, so that they can maintain their freedom and are available to perform further operations. Secrecy of the methods employed is also important, so as to ensure that technologies, personnel assets, and information are not revealed to the enemy.

Additionally, the nature of the services performed should not control whether secrecy is important. The United States has many reasons to hide the existence and nature of its relationships. Hence, in instances of sabotage, as in espionage, if the employment of the operator is secret, and if the United States desires that the employment remain secret, it is immaterial what services are performed. The *Totten* doctrine, by barring jurisdiction over contracts for covert services, prevents the existence, nature, and extent of the relationship of the parties from being divulged in court.

Totten was not decided based on the secret nature of the service, although the Supreme Court discussed the secret nature of the service Lloyd provided. Rather, the Court in *Totten* based its decision on the finding that "[b]oth employer and agent must have understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter."[97] The court analyzed the nature of the service as evidence that such a provision should be implied in the contract. Hence, focusing on the nature of the covert service misses the basis for the Court's opinion in *Totten*. The *Vu Doc Guong* court correctly decided that the nature of the service is immaterial and that the issue of importance is whether the parties at the formation of the contract intended that their "lips remain forever sealed."[98]

Conclusion

The *Totten* doctrine, as expanded and interpreted by later cases, most importantly *Vu Doc Guong*, is as integral a part of the United States unconventional warfare posture as unconventional warfare and special forces are an integral part of the total defense posture of the United States.[99] Without the *Totten* doctrine, covert operations would be more difficult to execute, and operatives would be more difficult to recruit and to protect and would be less effective. The *Totten* doctrine provides a black-letter rule that is both efficacious and simple in application. For these reasons, the *Totten* doctrine should remain the law regarding contracts for covert services.

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94. *See, e.g.*, Theodore Francis Riordan, *Judicial Sabotage of Government Contracts for Sabotage Services*, 13 SUFFOLK TRANSNAT'L L. REV. 807, 815 (1989).

95. Vu Doc Guong v. United States, 860 F.2d 1063, 1065 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989). The court in *Vu Doc Guong* dismissed this argument, stating that no action can be brought to enforce a contract with the government if the contract is secret or covert at the time of its formation. *Id.*

96. In Mr. Guong's case, he was tasked to blow up ships and destroy harbor facilities in North Vietnam.

97. Totten, Administrator v. United States, 92 U.S. 105, 106 (1875).

98. Additionally, the Court in *Vu Doc Guong* did not rule or comment on whether there was any distinction between the secrecy of Guong's sabotage activities and the secrecy of his contract. *See Vu Doc Guong*, 860 F.2d 1063. Hence, it can be argued that the Court did not abandon the language in *Totten* that: "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." *Totten*, 92 U.S. at 106. The better argument, however, is that *Totten* was decided on the basis of an implied contract of secrecy, as demonstrated by the nature of the services provided, and the pursuit of a suit in a court is a breach of that implied contract provision.

99. Understandably, the *Totten* doctrine is also vital to the mission of the CIA. *See* Tenet Letter, *supra* note 75.