

SCALIA, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 03–1395

GEORGE J. TENET, INDIVIDUALLY, PORTER J.
GOSS, DIRECTOR OF CENTRAL INTELLI-
GENCE AND DIRECTOR OF THE CEN-
TRAL INTELLIGENCE AGENCY, AND
UNITED STATES, PETITIONERS *v.*
JOHN DOE ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[March 2, 2005]

JUSTICE SCALIA, concurring.

I join the Court’s opinion because I do not agree with JUSTICE STEVENS’s concurrence, painting today’s action as a vindication of his opinion concurring in the judgment in *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 112 (1998), in which he would have held that a jurisdictional bar does not prevent the resolution of a merits issue. When today’s opinion refers to the issue in *Totten v. United States*, 92 U. S. 105 (1876), as “the sort of ‘threshold question’ we have recognized may be resolved before addressing jurisdiction,” *ante*, at 5, n. 4, it is surely not referring to the run-of-the-mill, nonthreshold *merits* question whether a cause of action exists. And when it describes “the unique and categorical nature of the *Totten* bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry,” *ibid.*, it is assuredly not describing the mere everyday absence of a cause of action. As applied today, the bar of *Totten* is a jurisdictional one.

Of course even if it were not, given the squarely applicable precedent of *Totten*, the absence of a cause of action is

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so clear that respondents' claims are frivolous—establishing another *jurisdictional* ground for dismissal that the *Steel Co.* majority opinion acknowledges. See 523 U. S., at 89.