MELINDA HAAG (CSBA 132612)
United States Attorney
JOANN M. SWANSON (CSBN 88143)
Chief, Civil Division
ABRAHAM A. SIMMONS (CSBN 146400)
Assistant United States Attorney

450 Golden Gate Avenue, 9th Floor
San Francisco, California 94102-3495
Telephone: (415) 436-7264
Facsimile: (415) 436-6748
Email: abraham.simmons@usdoj.gov

STUART F. DELERY
Acting Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Assistant Attorney General
SUSAN K. RUDY
STUART A. LICHT
Assistant Branch Directors
MARCIA K. SOWLES (DC Bar No. 369455)
Senior Counsel

U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Rm 7114
Washington, D.C. 20530
Telephone: (202) 514-4960
Facsmile: (202) 616-8470
Email: marcia.sowles@usdoj.gov

Attorneys for Defendant

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

WALTER R. ROULE, Plaintiff, v. DAVID H. PETRAEUS, DIRECTOR of the CENTRAL INTELLIGENCE AGENCY, Defendant.	Case No. C 10-4632 CW **DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** Date: September 20, 2012 Time: 2:00 p.m. Place: Courtroom 2, 4th Floor Before: Hon. Claudia Wilken

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PLEASE TAKE NOTICE THAT on September 20, 2012, at 2:00 p.m. before the Hon. Claudia Wilken, Courtroom 2 - 4th Floor, 1301 Clay Street, Oakland, California, defendant David H. Petraeus, Director of the Central Intelligence Agency ("CIA"), by and through his attorneys of record, will move this Court for an order dismissing this case, pursuant to Rules 12(b)(1) and (c) and 56, on two grounds. First, plaintiff's action should be dismissed because the very subject matter of the case centers on state secrets, namely the clandestine work assignments of covert CIA officers. Second, plaintiff's action should be dismissed because litigation of the action would require or risk the disclosure of evidence protected by the Director's assertion of the state secrets privilege. This motion is based on this Notice and the following memorandum of points and authorities filed in support of the motion, the unclassified Declaration of David H. Petraeus, filed herewith, the Classified Declaration of David H. Petraeus lodged for *in camera, ex parte* review, papers and records filed in this case, and on such evidence and oral argument as the Court may permit.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES TO BE DECIDED

1. Should this action be dismissed under *Totten v. United States*, 92 U.S. 105 (1875), because the very subject matter of the case centers on state secrets, namely the clandestine work assignments of covert CIA officers?

2. Should this action be dismissed under *United States v. Reynolds,* 345 U.S. 1 (1953), because information protected by the state secrets privilege would be required either in the presentation of plaintiff's case or defendant's defense thereto, or because the case is so infused with privileged state secrets material that further proceedings would pose an unacceptable risk of disclosing privileged state secrets information?

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This employment discrimination suit brought by a former covert employee of the CIA under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, is one of those exceptional circumstances in which dismissal is required to protect state secrets. "The Supreme Court has

long recognized that in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010)(en banc). The ability of the Executive to protect state secrets from disclosure in litigation has been recognized from the earliest days of the Republic, *see id.*, and has constitutional underpinnings based on the President's Article II powers to conduct foreign affairs and provide for the national defense. *See United States v. Nixon*, 418 U.S. 683, 710 (1974); *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007).[1]

Plaintiff, pleading under a pseudonym, alleges that the CIA discriminated against him on the basis of the race and national origin of his wife, who is Asian, and retaliated against him for raising a discrimination claim. Plaintiff claims, *inter alia*, that his clandestine work assignments were limited in comparison to the clandestine work assignments of his co-workers, who were also covert but had Caucasian spouses. Because of the covert nature of their work, virtually all of the details regarding CIA employment of plaintiff and his co-workers are classified pursuant to Executive Order 13,526, 75 Fed. Reg. 707 (2010). This classified information includes their identities, job titles and descriptions, work assignments, performance appraisals, and other information that goes to the core of plaintiff's claims and CIA's defenses.

Based upon his personal review of the facts of this case, David H. Petraeus, the Director of the CIA, has determined that disclosure of such information could reasonably be expected to cause serious harm to national security. To protect this information, the Director has formally

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[1] *See also Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) (state secrets privilege prevents the "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments"); *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972) ("Gathering intelligence information and other activities of the Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed Forces.").

asserted the state secrets privilege. *See* Unclassified Declaration and Formal Assertion of State Secrets Privilege and Statutory Privilege by David H. Petraeus, Director of the Central Intelligence Agency) ("Petraeus Decl.") (attached as Exhibit A). The Director's unclassified declaration is supported in further detail by his *ex parte, in camera* classified declaration.[2] Pursuant to the Department of Justice's policy (*see infra* at 10), Attorney General Eric Holder has also reviewed and approved the Director's assertion of the state secrets privilege. Although *Reynolds* does not require review and approval by the Attorney General when a different agency head has control of the matter, such review provides an additional layer of review to ensure a considered and narrowly tailored assertion of the privilege. *Mohamed v. Jeppesen Dataplan, Inc.,* 614 F.3d at 1080.

Courts have recognized that cases can be dismissed to protect state secrets in two circumstances. First, the Supreme Court's decision in *Totten,* 92 U.S. at 107, permits dismissal of a case where it is readily apparent from the allegations that the very subject matter of the action will require the disclosure of state secrets that would result in harm to national security. *See Tenet v. Doe*, 544 U.S. 1, 7-8 (2005); *Jeppesen*, 614 F.3d at 1077-78 (discussing the "*Totten* bar"). Second, state secrets is also an absolute evidentiary privilege that excludes evidence the disclosure of which would be expected to cause serious harm to the national security. *Id.* at 1077 (citing *Reynolds*, 345 U.S. at 6-7). While, unlike the *Totten* bar, a valid claim of privilege under *Reynolds* does not automatically require dismissal of the case, dismissal is required where it is apparent that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets. *Jeppesen*, 614 F.3d at 1079.

Dismissal of this case is compelled under both *Totten* and *Reynolds*. First, the case

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[2] The classified declaration of the Director has been lodged with classified information security officers of the Department of Justice, Litigation Security Group, Security and Emergency Planning Staff and is currently stored in an approved storage facility at the Department of Justice. It will be made available for the Court's review upon request.

should be dismissed under *Totten* because the very subject matter of the action centers on state secrets, namely the clandestine work assignments of covert CIA employees. Any litigation of the merits of plaintiff's claim that he was entitled to different clandestine work assignments than those he was given would require revealing details regarding the nature of plaintiff's and his co-workers' "secret services with the government." *Totten*, 92 U.S. at 107.

Second, in addition to the bar under *Totten,* the case should be dismissed under *Reynolds.* Because the privileged information here is at the core of plaintiff's claims, the litigation cannot proceed without privileged state secrets, either in the presentation of plaintiff's case or the Government's defense to plaintiff's allegations. Moreover, even if the claims or defenses might theoretically be established without relying on privileged state secrets information, further litigation presents a substantial risk that privileged state secrets information would be disclosed. In short, this is a paradigmatic example of a case where dismissal is necessary. Indeed, courts have dismissed similar Title VII actions filed by other covert CIA officers based on the state secrets privilege.

Accordingly, the Government requests that the Court uphold the assertion of the state secrets privilege and dismiss the complaint.

III. STATEMENT OF FACTS

Plaintiff alleges that he was a covert CIA employee. Complaint, ¶ 11. In his complaint, plaintiff alleges that his supervisor harassed and discriminated against him on the basis of the race and national origin of his wife and retaliated against him for raising a discrimination claim. *Id.* ¶¶ 27-37. To support these claims, he alleges that his supervisor "made discriminatory, defamatory, and false statements about [him] and his activities." *Id.* ¶ 13. He further alleges that his supervisor intimidated him with threats of retaliations, such as threatening to remove him from his assignment and to take away plaintiff's access to a covert communication system. *See, e.g., id.* ¶¶ 13-16, 18, 22-23. He also asserts that his supervisor "refused to authorize plaintiff to perform the functions necessary to his job duties including operational travel." *Id.* ¶ 17. In addition, plaintiff alleges that his work and travel assignments were limited and, as a

result, he received a second domestic assignment while his co-workers received overseas assignments. *Id.* ¶¶ 19-20. He also alleges that his supervisor continued his discriminatory and retaliatory conduct by causing his second domestic assignment to be cancelled. *Id.* ¶¶ 21, 24.

Plaintiff was employed by the CIA as a covert employee from January 2004 until November 2007, when he resigned. Petraeus Decl. ¶ 6. Virtually all of the facts regarding plaintiff's employment are classified. *Id.* ¶ 8. Plaintiff's true name, when associated with the CIA and this case, is classified. *Id.* The names of his supervisor and his co-workers, when associated with the CIA and this case, are classified. *Id.* Information concerning the specific CIA programs or activities on which plaintiff worked is classified. *Id.* His job description and those of his supervisor and co-workers are classified. *Id.* The nature of the work that they performed and the description of their work assignments are classified. *Id.* The location and nature of the facilities in which they worked are classified. *Id.*

Plaintiff contacted the CIA's Office of Equal Employment Opportunities ("EEO") and subsequently filed a formal administrative complaint alleging discrimination and harassment. *See* Declaration of Sheryl J. Brown-Norman, ¶ 6, 11 (ECF No. 21-1). The CIA's Office of EEO conducted an investigation, and plaintiff requested a hearing before an Equal Employment Opportunity Commission ("EEOC") Administrative Judge. *Id.* ¶ 13. The CIA filed a motion for a decision without a hearing (similar to a motion for summary judgment). *Id* Thereafter, on June 11, 2010, the Administrative Judge dismissed the complaint. *Id.* On July 19, 2010, the CIA adopted the Administrative Judge's decision and dismissed the complaint. *Id.*

Plaintiff filed this action under the name "Walter R. Roule" – the pseudonym given him during the administrative proceedings on his discrimination claim. Petraeus Decl. at 3 n.1. Defendant moved to dismiss this case, and the Court denied the motion on November 28, 2011. *See* Order (ECF No. 54). Defendant, thereafter, filed an answer. *See* ECF No. 61.

Plaintiff served a request for production of documents seeking, *inter alia,* (1) documents relating to his work performance, evaluations, and assignments, as well as those of his co-workers and his supervisors, (2) documents relating to or detailing the CIA's policies regarding

the job duties of its officers, and (3) documents relating to the CIA's policy regarding officer selection, assignments, placement, and compensation packages for overseas assignments. *See* Declaration of Abraham Simmons in Support of Defendant's Motion to Stay, Exhibit 1 (Defendant's Response to Plaintiff's Amended Requests for Production of Documents, at 5, 8, 9, 10) (ECF No. 67-1). On January 23, 2012, defendant served a response. With respect to each of the separate requests for production, defendant objected on the ground, *inter alia*, that they sought documents that may be protected by the state secrets privilege and CIA statutory privileges. *See, e.g., id.* at 3.

After email exchanges and a telephone conference between counsel for the parties, on April 30, 2012, the parties submitted a joint letter to Magistrate Judge Laurel Beeler. ECF No. 65. Although plaintiff concedes that the documents are classified, he contends that the documents should be produced because they are critical to his case. *Id.* at 4.

On May 1, 2012, defendant moved to stay this action (including all discovery) pending completion of the Government's deliberations regarding whether to assert the state secrets privilege. *See* ECF No. 66. On June 12, this Court referred the motion to stay to the Magistrate Judge Beeler. *See* ECF No. 74. Magistrate Judge Beeler denied the motion to stay without prejudice on June 21, 2012. *See* ECF No. 79.

IV. PLAINTIFF'S CLAIMS ARE ROOTED IN STATE SECRETS RELATED TO COVERT AGENTS AND ARE THEREFORE BARRED BY *TOTTEN*.

The Supreme Court has held that a case is barred under *Totten* "where the very subject matter of the action" is "a matter of state secrets." *Reynolds*, 345 U.S. at 11 n. 26 (citing *Totten*, 92 U.S. at 107). In such cases, the Supreme Court has determined that the potential harm of further litigation is so clear from the complaint that the case should be dismissed even without a formal assertion of the state secrets privilege. *See Tenet v. Doe*, 544 U.S. at 8. In *Totten*, the estate of a Civil War spy, William Lloyd, sued the United States for breaching an alleged agreement to compensate the spy for his espionage services during the Civil War. The estate claimed that under the contract, Mr. Lloyd was entitled to be paid $200 per month for his

services and that the Government had failed to make such payments. *Totten,* 92 U.S. at 106. Instead, the Government had allegedly only reimbursed him for his expenses. *Id.* The Supreme Court held that the action was barred because it was premised on the existence of a "contract for secret services with the government . . . [which was] a fact not to be disclosed." *Id.* at 107. In holding that the suit could not be maintained, the Court stated:

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

Id. at 106-07. The Court explained that if such claims could be maintained, then "whenever an agent should deem himself entitled to greater or different compensation than that awarded him, the whole service in the case, and the manner of its discharge, with the details on the dealings with individuals and officers, might be exposed, to the serious detriment of the public." *Id.* at 106-07.

The Supreme Court has reaffirmed the *Totten* bar in two recent cases. In *Tenet v. Doe*, 544 U.S. at 7, the Supreme Court dismissed a suit by two former Cold War spies alleging that the CIA had reneged on its obligation to provide them financial support. The Supreme Court found the action must be dismissed because a trial would require disclosure of an alleged clandestine relationship. In *General Dynamics Corp. v. United States*, __ U.S. __, 131 S.Ct. 1900, 1906 (2011), the Supreme Court applied the *Totten* bar to litigation over the termination of a federal contract. In that case, the Department of Navy terminated a fixed price contract for default and ordered the contractors to repay approximately $1.35 billion in progress payments for work that the Government never accepted. The contractors filed suit arguing that their default should be excused because the Government had failed to share its "superior knowledge" about how to design and manufacture the aircraft. The Supreme Court upheld the dismissal of the contractors' "superior knowledge" defense under *Totten* because "litigation of that defense 'would inevitably lead to the disclosure of' state secrets." *Id.* at 1907 (quoting *Totten*, 92 U.S. at 107). *Accord Weinberger v. Catholic Action of Haw/Peace Ed. Project*, 454 U.S. 139, 146-

47 (1981) (citing *Totten* in holding that whether or not the Navy had complied with an environmental statute "is beyond judicial scrutiny," where, "[d]ue to national security reasons," the Navy could "neither admit nor deny" whether it proposed to store nuclear weapons at a facility).

Plaintiff's claims should be barred for the same reasons. Plaintiff's central claim here centers on his supervisor's handling of his clandestine activities and assignments vis-a-vis those of his co-workers. *See, e.g.,* Complaint ¶¶ 13, 16-17, 19-21. Any litigation of the merits of this claim would inevitably require disclosure of the details of the job duties and work assignments of plaintiff and his co-workers. But, by the very nature of their work, virtually all of the facts regarding plaintiff's and his co-workers' employment with the CIA are state secrets. *See* Petraeus Decl. ¶¶ 8, 10, 19. This includes, *inter alia,* (1) plaintiff's true name and the names of his co-workers, when associated with the CIA and this case, (2) information concerning the specific CIA activities on which they worked, (3) his job description and those of his supervisor and co-workers, and (4) the nature of the work that they performed and the description of their work assignments. *Id.* ¶¶ 10, 19. In short, just as the claim in *Totten* that Mr. Lloyd was "entitled to greater or different compensation than that awarded him" would require revealing details regarding Mr. Lloyd's "secrets services with the government," 92 U.S. at 106, plaintiff's claim here that he was entitled to different covert work assignments than those he was given would require revealing details regarding his and his co-workers' "secret services with the government." Accordingly, plaintiff's complaint is barred by *Totten.*

V. DISMISSAL IS ALSO REQUIRED UNDER THE *REYNOLDS* STATE SECRETS PRIVILEGE.

Even if plaintiff's case is not barred by *Totten,* it should be dismissed under *Reynolds.* The existence of a privilege for military and state secrets to protect information vital to the national security or diplomatic relations "is well established in the law of evidence." *Reynolds*, 345 U.S. at 6-7. Although the privilege was developed in common law, *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998), the state secrets privilege has a constitutional foundation based

on the President's Article II powers to conduct foreign affairs and provide for the national defense. *See United States v. Nixon*, 418 U.S. at 710; *El-Masri v. United States*, 479 F.3d at 303.

The state secrets privilege is an absolute privilege and "even the most compelling necessity cannot overcome the claim of [state secrets] privilege." *Reynolds*, 345 U.S. at 11; *accord Jeppesen*, 614 F.3d at 1081 (if the information is protected by the state secrets privilege, "the evidence is absolutely privileged, irrespective of plaintiffs' countervailing need for it"); *Kasza*, 133 F.3d at 1166 ("the privilege is absolute"); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984) ("a party's need for the information is not a factor in considering whether the privilege will apply"). The effect of a valid state secrets privilege is that the protected information is "completely removed from the case." *Kasza*, 133 F.3d at 1169.

Analyzing a state secrets privilege claim under *Reynolds* involves three steps. *Jeppesen*, 614 F.3d at 1080 (citing *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1202 (9th Cir. 2007); *El-Masri*, 479 F.3d at 304. First, the Court must ascertain that the procedural requirements for invoking the privilege have been satisfied. *Jeppesen*, 614 F.3d at 1080. Second, the Court must determine whether the information is properly privileged. *Id.* Finally, the Court must determine whether the case can proceed without risking the disclosure of the protected information. *Id.*[3]

As explained below, the Government has met the procedural requirements for invoking the privilege, and the information is properly protected. Moreover, the action should be dismissed because privileged information would be required in the presentation of plaintiff's case or defendant's defense thereto, or, more generally, because the case is so infused with

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[3] The circumstances under which a case may be dismissed under *Reynolds* are, therefore, broader than under the *Totten* bar, so long as the strict procedural requirements governing invocation of the privilege are satisfied. Under *Reynolds,* a case may be dismissed not only where the very subject matter of the case is a state secrets, as *Totten* provides, but also where the privileged information is necessary to establish a claim or defense. *See Al-Haramain*, 507 F.3d at 1197.

privileged information that further proceedings would impose an undue risk of disclosing privileged information.

A. The Government Complied with the Procedural Requirements for the Assertion of the State Secrets Privilege.

To ensure that the privilege is invoked only when necessary, the Government must satisfy three procedural requirements: (1) there must be a "formal claim of privilege;" (2) the claim must be "lodged by the head of the department which has control over matter;" and (3) the claim be made "after actual personal consideration by that officer." *Jeppesen*, 614 F.3d at 1080 (quoting *Reynolds*, 345 U.S. at 7-8). The claim of privilege "must reflect the certifying official's *personal* judgment." *Jeppesen,* 614 F.3d at 1080 (emphasis in original). The basis for the assertion of the privilege also must be presented "in sufficient detail for the court to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege." *Id.*

The Government complied with *Reynolds'* procedural requirements. First, the state secrets privilege has been formally asserted by the Director of the CIA in his declaration. *See* Petraeus Decl. ¶ 9. Second, the Director of the CIA is the highest-ranking officer in the CIA, which has control over the records and information implicated by this case. *Id.* ¶ 1. Third, as explained in his declaration, the Director has personally considered the matter and has determined that disclosure of the information at issue would pose a serious risk of harm to national security. *Id.* ¶¶ 3-4, 9. The Director's classified declaration describes in detail the information subject to the claim of privilege, and explains how disclosure of the information at issue would harm the national security of the United States. *See* Classified Declaration of David H. Petraeus, Director of the CIA.

In addition, although not required by *Reynolds*, the Attorney General also reviewed and approved the assertion of the state secrets privilege pursuant to procedures established by the Department of Justice ("DOJ") See Memorandum from the Attorney General at 1 (Sept. 23, 2009) (available at the DOJ website at www.justice.gov/opa/documents/state-secrets-

privilege.pdf).[4] Accordingly, the Government has not only satisfied the *Reynolds* procedural requirements for the assertion of the state secrets privilege, but it has taken additional steps to ensure a considered and narrowly tailored assertion of the privilege. *See Jeppesen*, 614 F.3d at 1080.

B. The Information Is Protected by the State Secrets Privilege.

After the state secrets privilege has been properly invoked, the Court "must make an independent determination whether the information is privileged." *Al-Haramain*, 507 F.3d at 1202. The privilege must be sustained if the Court is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. "If this standard is met, the evidence is absolutely privileged, irrespective of the plaintiffs' countervailing need for it." *Jeppesen*, 614 F.3d at 1081 (citing *Reynolds*, 345 U.S. at 11 ("[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.")); *accord Kasza*, 133 F.3d 1166; *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982).

While the state secrets doctrine does not represent "'a surrender of judicial control over access to the courts,'" *Jeppesen*, 614 F.3d at 1082 (quoting *El-Masri*, 479 F.3d at 312), in evaluating the need for secrecy, courts must "acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves

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[4] Under the procedures, DOJ "will not defend an assertion of the privilege without the *personal approval* of the Attorney General (or, in the absence or recusal of the Attorney General, the Deputy Attorney General or Acting Attorney General)." *Id.* ¶ 4(A) (emphasis added). Once the "head of the department" personally determines that the state secrets privilege applies, that agency must request that DOJ present the claim in the litigation. *Id.* ¶ 2(A). A DOJ Assistant Attorney General then must make a formal written recommendation as to "whether or not [DOJ] should defend the assertion of the privilege in litigation." That recommendation is made to DOJ's "State Secrets Review Committee," *id.* ¶ 2(B), comprised of senior DOJ officials. The Committee then makes a recommendation to the Associate Attorney General, who, through the Deputy Attorney General, makes a final recommendation to the Attorney General." *Id.* ¶ 3 & n. 2.

second guessing the Executive in this arena." *Al-Haramain*, 507 F.3d at 1203; *accord Kasza v. Browner,* 133 F.3d at 1166 (quoting *Reynolds*, 345 U.S. at 10) ("The asserted privilege is accorded the 'utmost deference.'"). As the Supreme Court has stressed, "what may seem trivial to the uninformed, may be of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *CIA v. Sims*, 471 U.S. 159, 178 (1985) (quoting *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978). *Accord Halperin v. CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980) ("Each individual piece of intelligence information, much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.")

Here, as described in general and unclassified terms, the state secrets privilege extends to two basic categories of information: (1) any information concerning specific CIA programs or activities on which plaintiff worked, and (2) any information concerning CIA employment of plaintiff and his co-workers. Petraeus Decl. ¶ 10. The Director in his unclassified declaration has explained on the public record why disclosure of the above categories of information reasonably could be expected to cause significant harm to national security. *See* Petraeus Decl. ¶¶ 15-34. The basis for the Director's privilege assertion is set forth in detail in his classified declaration.[5] *See* Classified Petraeus Decl.

The Director's assertion of the privilege with respect to these categories of information should be upheld. First, the state secrets privilege properly protects information concerning the specific CIA programs or activities on which plaintiff worked. *Sterling v. Tenet*, 416 F.3d 338, 346 (4th Cir. 2005) ("We hardly need defend the proposition that CIA personnel, activities, and objectives must be protected from prying eyes."). As the Director explained, disclosure of information regarding the programs and activities on which plaintiff worked could reasonably

[5] While *ex parte, in camera* classified submissions are not required for assertion of the privilege, *see Reynolds,* 345 U.S. at 8, the Government has typically provided such submissions in order to assist a court in ascertaining whether the circumstances for the privilege assertion are appropriate. *See, e.g., Kasza,* 133 F.3d at 1169-70; *Jeppesen*, 614 F.3d at 1084 n. 6.

be expected to cause serious harm to national security because such information would reveal the focus of intelligence activities and the covert methods used to gather intelligence. Petraeus Decl. ¶¶ 16-18. Disclosure of such information could alert foreign intelligence agencies or terrorist organizations to a focus of CIA intelligence activities and enable them to undertake counter-actions to hinder CIA's ability to gather intelligence. *Id.* ¶ 17.

Second, the state secrets privilege also properly protects information concerning CIA employment of plaintiff and his co-workers. This includes information that might reveal (a) the identities of CIA officers and employees, (b) the job titles, duties, work assignments of plaintiff and other covert employees and the criteria and reasons for making the work assignments and employment decisions, (c) sources and methods used by covert employees, (d) the targets and focus of CIA intelligence collection and operations, and (e) the location of CIA covert facilities.

For example, disclosure of the identities of current covert employees would compromise the ability of such employees to continue to serve in a clandestine role. Petraeus Decl. ¶ 20. In addition, disclosure of the identities of current or former covert employees of the CIA could jeopardize their lives and the lives of their family members as well as persons who may have had contact with them. *Id.* Indeed, Congress has recognized the CIA's unique need to protect from public disclosure even the names of its overt employees. Section 6 of the Central Intelligence Act of 1949, as amended, provides that the CIA shall be exempt from the provisions of any laws which require publication or disclosure of "the organization, *names*, official titles, salaries, or number of personnel employed by the [CIA]." 50 U.S.C. § 403g (emphasis added). Based on this provision, courts have held that the identities of CIA employees should be protected from disclosure. *See*, *e.g., Frugone v. CIA*, 169 F.3d 772, 774-75 (D.C. Cir. 1999) (finding in a Freedom of Information Act suit that CIA properly refused to confirm or deny the existence of records concerning plaintiff's alleged employment relationship with the CIA); *Minier v. CIA*, 88 F.3d 796, 801 (9th Cir. 1996) (same).

Similarly, information relating to the job titles, duties and work assignments of plaintiff and other covert employees, and the criteria and reasons for making the work assignments and

employment decisions regarding them is also properly protected from disclosure by the state secrets privilege. *See* Petraeus Decl. ¶¶ 22-30. As the court recognized in *Sterling*, the responsibilities of covert CIA employees "inherently involve state secrets." 416 F.3d at 346. Among other concerns, information regarding the duties and work assignments of plaintiff and other covert employees would reveal the methods (commonly known as "tradecraft") used by covert CIA officers to gather and analyze intelligence information, the targets and focus of CIA intelligence collection and operations, and, in some cases, even possibly sources, if any, used by a covert employee. Petraeus Decl. ¶¶ 25-30. Courts have repeatedly recognized that these are exactly the types of information which the state secrets privilege protects. *See*, *e.g.*, *Jeppesen*, 614 F.3d at 1086 (holding that "information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources or methods" is protected by state secrets privilege); *Al-Haramain*, 507 F.3d at 1204 (applying the privilege to "the means, sources and methods of intelligence gathering"); *Sterling*, 416 F.3d at 346 ("information that results in . . . 'disclosure of intelligence-gathering methods or capabilities' . . . falls squarely within the definition of state secrets") (quoting *Molerio v. FBI*, 749 F.2d 815, 820-21 (D.C. Cir. 1984)).[6] *See also CIA v. Sims*, 471 U.S. at 175-76 ("The continued availability of [intelligence] sources depends on CIA's ability to guarantee the security of information that might compromise them and even endanger [their] personal safety.") (quoting *Snepp v. United States*, 444 U.S. 507, 512 (1980) (per curiam)).

Finally, information regarding the location of CIA covert facilities is also protected by the state secrets privilege. Public disclosure that the CIA has a covert facility in any given location could lead hostile foreign intelligence services or terrorists to identify personnel

[6] Congress has also recognized the need to protect such information from disclosure. Section 102A(i)(1) of the National Security Act of 1947 ("NSA"), as amended, 50 U.S.C. § 403-1(i)(1), provides that the Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure." Pursuant to Section 102A and consistent with Section 1.6(d) of Executive Order 12,333, the CIA is required to protect intelligence sources and methods from unauthorized disclosure. Therefore, the information is not only protected by the state secrets privilege, but it is also protected from disclosure by statute.

working at the facility. Petraeus Decl. ¶ 32. It also could increase the likelihood of a terrorist attack at that location. *Id.* In addition, with respect to locations overseas, official acknowledgment that the CIA maintains a covert field installation could cause the host government to publicly distance itself from the United States Government or take other measures to reduce the effectiveness of a CIA office. *Id.* ¶ 31. Based on such concerns, courts have recognized that need to protect the location of covert CIA facilities. *See Blazy v. Tenet*, 979 F. Supp. 10, 23-24 (D.D.C. 1997) (CIA properly withheld the location of covert facilities in a FOIA case); *Earth Pledge Foundation v. CIA,* 988 F. Supp. 623, 627-28 (S.D.N.Y. 1996), *aff'd per curiam*, 128 F.3d 788 (2d Cir. 1997) (CIA properly refused to confirm or deny the existence of a station in the Dominican Republic).

Based on Director's classified and unclassified declarations, the Court should find that the Government has fully and sufficiently demonstrated the basis for the privilege assertion in this case, and thus should exclude the privileged information from further proceedings in this case.

C. The Exclusion of Privileged Information Requires Dismissal of Plaintiff's Claims.

When a court sustains a claim of privilege, it must then resolve "'how the matter should proceed in light of the successful privilege claim.'" *Al-Haramain*, 507 F.3d at 1202 (quoting *El-Masri*, 479 F.3d at 304). The evidence subject to the privilege is "completely removed from the case." *Kasza*, 133 F.3d at 1166. When possible, the privileged information "'must be disentangled from nonsensitive information to allow for the release of the latter.'" *Id*. (quoting *Ellsberg*, 709 F.2d at 57). But "when, as a practical matter, secret and nonsecret information cannot be separated," the court must restrict a party's access "not only to evidence which itself risks the disclosure of a state secret, but also those pieces of evidence or areas of questioning which press so closely upon highly sensitive material that they create a high risk of inadvertent or indirect disclosures." *Jeppesen*, 614 F.3d at 1082 (quoting *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1143-44 (5th Cir. 1992); *see also Kasza*, 133 F.3d at 1166 ("[I]f seemingly

innocuous information is part of a . . . mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from [secret] information.").

While some cases may "proceed accordingly, with no consequences save those resulting from the loss of evidence,'" *Al-Haramain*, 507 F.3d at 1204 (quoting *Ellsberg*, 709 F.2d at 64), courts have found that dismissal is necessary where the resolution of the case may implicate the privileged information for one of three reasons. *See Jeppesen*, 614 F.3d at 1083. First, if the plaintiff cannot prove the elements of his claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case. *See Kasza*, 133 F.3d 1159, 1166 (9th Cir. 1998). Second, "if the privilege deprives the *defendant* of the information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant." *Id.* at 1166 (quoting *Bareford v. General Dynamics Corp.*, 973 F.3d at 1141) (emphasis in original). Third, "even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because – privileged evidence being inseparable from the nonprivileged information that will be necessary to the claims or defenses – litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets." *Jeppesen*, 614 F.3d at 1083.

All three reasons apply here, compelling dismissal of the case. Privileged information would be required not only for plaintiff to establish his case but also for defendant to establish a defense. Moreover, because the facts underlying the claims and defenses are "so infused with these secrets," litigation of the merits of the claims would present an unjustifiable risk of revealing state secrets. *Jeppesen*, 614 F.3d at 1088. Based on these concerns, at least two courts have dismissed similar Title VII actions filed by other covert CIA employees based on the state secrets privilege. *See Sterling v. Tenet*, 416 F.3d at 346-48; *Tilden v. Tenet*, 140 F. Supp. 2d 623 (E.D. Va. 2000). *See also Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 79 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6, 2005 WL 3696301(D.C. Cir. 2005) (dismissing

action by former FBI contract translator challenging her termination because the nature of plaintiff's work assignments and the events surrounding her termination were the subject of state secrets).[7]

1. Privileged Information Would Be Required for Plaintiff to Prove His Case.

Because the facts underlying plaintiff's claims are so infused with state secrets, plaintiff cannot prove either his harassment/discriminatory treatment claim (Count I) or his retaliation claim (Count II) without relying on privileged information.

Plaintiff's Claim Alleging Harassment/Discriminatory Treatment Based on Race and National Origin Discrimination: Plaintiff's claim focuses on his clandestine activities, duties, and work assignments. For example, he alleges that his supervisor made "discriminatory, defamatory, and false statements about [him] and his activities." Complaint, ¶ 13. He also alleges that his supervisor had threatened to remove him from his assignment and take away his access to a covert communications system. *Id.* ¶¶ 14, 16. In addition, he alleges that his work assignments and travel opportunities were limited because his wife is Asian, while his co-workers with Caucasian spouses received better work assignments and travel opportunities.

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[7] Applying the state secrets privilege, the Ninth Circuit and other circuits have dismissed a variety of types of cases. *See, e.g., Jeppesen,* 614 F.3d 1085-86 (dismissing allegations of foreign nationals who alleged that they had been illegally detained and tortured); *El Masri*, 479 F.3d at 310 (dismissing claims alleging that plaintiff had been illegally detained and tortured as part of the CIA rendition program); *Tennenbaum v. Simonini*, 372 F.3d 776, 778 (6th Cir. 2004) (dismissing claims that federal employees had conducted criminal espionage investigation of plaintiff solely because he was Jewish); *Kasza v. Browner*, 133 F.3d at 1168-70 (dismissing action by former workers at classified Air Force facility alleging violation of a federal environmental statute); *Black v. United States*, 62 F.3d 1115, 1118-19 (8th Cir. 1995) (dismissing action alleging that Executive branch had engaged in "campaign of harassment and psychological attacks' against plaintiff); *Bareford v. General Dynamics Corp*., 973 F.2d at 1141 (dismissing actions alleging manufacturing and design defects in military weapons); *Zuckerman v. Gen. Dynamics* Corp., 935 F.2d 544 (2d Cir. 1991) (dismissing claim against defense contractors for a wrongful death); *Fitzgerald v. Penthouse International, Ltd,* 776 F.2d 1236, 1237 (4th Cir. 1985) (dismissing libel action based on a magazine article on Navy classified marine mammal program); *Halkin v. Helms*, 690 F.2d 977 at 981 (dismissing action alleging unlawful CIA surveillance); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.3d at 281 (dismissing action alleging tortuous interference with classified contract to perform services for the Navy).

Complaint, ¶¶ 17, 19. He also claims that he received a second, presumably less prestigious, domestic assignment while his co-workers received overseas assignments. *Id.* ¶ 20.

Because the nature of his activities, duties, and work assignments are state secrets, plaintiff cannot even attempt to establish a *prima facie* case, much less prove his claim, without relying on privileged information. To establish a *prima facie* case of disparate treatment, plaintiff must establish that he was subject to an adverse employment action under circumstances that would support an inference of discrimination, most commonly by demonstrating that he was treated differently than similarly situated colleagues. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Plaintiff's attempt to make this predicate showing would necessarily implicate privileged information. Proving, for example, simply that co-workers to whom he tries to compare himself were similarly situated would require disclosure of privileged information. As a threshold matter, plaintiff would be required to present evidence comparing his job title and duties to those of his purportedly similarly situated co-workers. This evidentiary burden would be problematic because the job titles held by these covert employees and their duties are among the pieces of information that are protected by the state secrets privilege. *See* Petraeus Decl. ¶¶ 22-25. Moreover, even if plaintiff could somehow establish that the positions are similar, he would then have to show that his co-workers are similarly situated to him with respect to experience, skills, training and job performance. This inquiry into the background and actions of covert officers would likewise require disclosure of information protected by the privilege. *Id.* ¶¶ 23-30.

Further, plaintiff also would need to establish that his co-workers received better work assignments to establish even an inference of discrimination, in addition to demonstrating why his treatment constituted an adverse action. Such an inquiry would require disclosure of the details of the specific assignments given to plaintiff and his co-workers. The inquiry would then require disclosure of information on how those assignments are evaluated for purposes of promotion or other decisions regarding different career tracks and opportunities within the CIA. Such details would necessarily implicate privileged information regarding (1) the programs or

activities on which plaintiff and his co-workers had worked, (2) the job titles and the duties, training and experience required for different positions, and (3) the work assignments of plaintiff and his co-workers. However, all of this information is protected by the state secrets privilege. Petraeus Decl. ¶ 22. And disclosure of these privileged details would, in turn, reveal other privileged information about the methods used by the CIA for its intelligence activities, the targets of its intelligence collection, and confidential sources, if any, with whom plaintiff or his co-workers may have had contact. Petraeus Decl. ¶ 24-30. In sum, any effort by plaintiff to establish even the essential elements of his case would required disclosure of privileged information.

Plaintiff does not dispute the fact that he needs privileged information to establish his case. He has submitted discovery requests which seek comparative information regarding plaintiff and his co-workers with respect to their assignments and evaluations. Moreover, in the parties' letter to Magistrate Judge Beeler, plaintiff's counsel asserts that she "clearly has a need to know" such information. Joint Letter to Magistrate Judge Beeler, dated May 26, 2012, at 4 (ECF No. 65). This Court should, therefore, dismiss this case because, as even plaintiff recognizes, plaintiff cannot establish his claims without relying on privileged information.

The Fourth Circuit has upheld the dismissal of a similar case against the CIA based on plaintiff's need for privileged information to establish his case under Title VII. *Sterling*, 416 F.3d at 346-47. In that case, a covert CIA officer alleged that he had suffered disparate treatment based on his race. As here, he alleged that his assignments had been limited and that his co-workers received better assignments. The court held that "[t]here is no way for Sterling to prove employment discrimination without exposing at least some classified details of the covert employment that gives context to his claim." *Id.* at 346. The court found that "[i]t would be impossible" for plaintiff "to show that he was treated worse than similarly situated non-African American agents" without requiring disclosure of "the comparative responsibilities of Sterling and other CIA officers, the nature and goals of their duties, the operational tools provided (or denied) to them, and their comparative opportunities and performances in the

field." *Id.* The court also found that "[s]imilar comparative evidence" would be "necessary for Sterling to meet his further burden of establishing that he suffered an adverse action." *Id.* The court explained that proof that he suffered an adverse action "would require inquiry into state secrets such as the operational objectives and long-term missions of different agents, the relative job performance of these agents, details of how such performance is measured, and the organizational structure of CIA intelligence-gathering." *Id.* at 347. *Accord Tilden v. Tenet*, 140 F. Supp. 2d at 627 (dismissing Title VII case against the CIA because "there is no way the [case] can proceed without disclosing state secrets"). For identical reasons, plaintiff's harassment/disparate treatment claim should be dismissed.

Plaintiff's Retaliation Claim: Plaintiff's retaliation claim should be dismissed for the same reason. Indeed, some of the allegedly adverse actions plaintiff claims were taken in retaliation for his EEO activities are the same actions plaintiff claims were based on discrimination. *See, e.g.,* Complaint, ¶¶ 19-20 (claims regarding failure to be "promoted" to an overseas assignment). Whether framed as a claim of discrimination or retaliation, plaintiff would still need to rely on privileged information to prove his claim regarding his failure to receive an overseas assignment.

The same is true with respect to his allegations of retaliation regarding the cancellation of a second domestic assignment. Complaint ¶¶ 21, 24. To establish even a *prima facie* case for retaliation, plaintiff must show that after he engaged in some prior protected EEO activity, he was subsequently subjected to an adverse action, and that a causal link exists between the two. *Dawson v. Entek Int'l*, 630 F.3d 928, 936 (9th Cir. 2011). To prove the requisite adverse action, plaintiff must adduce proof of a materially adverse action that "could well dissuade a reasonable [person[] from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). In this case, plaintiff must establish, *inter alia*, that the cancelled domestic assignment was so much more favorable than other positions for which he was considered that the cancellation would have dissuaded a reasonable person from filing an EEO complaint. This would require a comparison of the duties of the various

positions, and evidence showing how the positions were evaluated in terms of promotion or how they affected career opportunities within the CIA. But such an inquiry would be impossible without resorting to privileged information because the descriptions of the various positions themselves are privileged. *See* Petraeus Decl. ¶¶ 30; *see also id.* ¶¶ 26-29. Accordingly, plaintiff's retaliation claim must rest on privileged information and, therefore, should also been dismissed.

2. Privileged Information Would Be Required for Defendant to Establish a Defense.

In this case, even if plaintiff "were somehow able to manage the impossible feat of making out all of the elements of a Title VII claim without revealing state secrets," *Sterling,* 416 F.3d at 347, the CIA would then be required to articulate a legitimate, nondiscriminatory reason for its actions regarding plaintiff. *Id.* In this case, both plaintiff's disparate treatment claim and his retaliation claim center on the work assignments he received or did not receive. As explained in the Director's declaration, the reasons for making the particular assignments to plaintiff and his co-workers could not be fully articulated or placed in proper context without disclosing privileged information. In order to explain the basis for its decisions, the CIA would be required to disclose privileged information regarding the job titles and work assignments of both plaintiff and his co-workers as well as details regarding their job performances and the criteria used by the CIA to evaluate their performance and to make certain assignments. Petraeus Decl. ¶ 24. Disclosure of such details would, in turn, reveal still other privileged information regarding the methods used by the CIA to collect intelligence information and the targets and focus of its intelligence activities. *Id.* ¶¶ 25-30.

The circumstances here are, thus, similar to those in *Sterling.* In that case, the court explained, in order for the CIA to establish that it had a legitimate, non-discriminatory reason for its assignments, the CIA "would have to show exactly why the CIA gave Sterling different assignments and operational tools from his peers." *Sterling*, 416 F.3d at 347. The court found that the evidence required to make such a showing "would inescapably reveal the criteria

inherent in sensitive CIA decisionmaking" and thus should be dismissed. Accordingly, even if plaintiff could establish his claim without relying on privileged information, the action should still be dismissed because privileged information is required for defendant to establish a defense.

3. Litigating the Case Would Impose An Unacceptable Risk of Disclosing State Secrets.

Even assuming that plaintiff's claims and defendant's defenses could be theoretically established without relying upon privileged evidence, courts have found that dismissal is required where the non-privileged information is so entwined with privileged information that litigating the case on the merits "would impose an unacceptable risk of disclosing state secrets." *Jeppesen*, 614 F.3d at 1083. That is exactly the situation presented here.

First, as in *Sterling*, "the very methods by which evidence would be gathered in this case are themselves problematic" because many of the witnesses, including the plaintiff, would be current or former covert officers of the CIA. 416 F.3d at 347. "Forcing such individuals to participate in judicial proceedings – or even give a deposition – risks their cover" and would reveal their identities. *Id. Accord El Masri*, 479 F.3d at 309-10. And the identities of former and current covert employees are one of the categories of information which the assertion of the state secrets privilege seeks to protect. Petraeus Decl. ¶¶ 19-20.

Second, aside from disclosing the identities of covert CIA employees, any attempt by plaintiff or other covert officers to describe their activities would inherently pose serious risks because it is "doubtful what information they could provide that would not have national security implications." *Sterling*, 416 F.3d at 347. "Almost any relevant bit of information could be dangerous to someone, even if the agent himself was not aware that giving the answer could jeopardize others." *Id*.

Third, even if plaintiff and other covert employees could attempt to avoid testimony involving classified information, there is a substantial danger that such information would be released inadvertently or indirectly by a process of elimination. As the Fourth Circuit explained

in *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d at 281,

> [i]n an attempt to make out a prima facie case during an actual trial, plaintiff and [his] lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing.

In these circumstances, "state secrets could be compromised even without direct disclosure by a witness." *Fitzgerald v. Penthouse Int'l., Ltd.*, 776 F.2d at 1240.

> For example, if a witness is questioned about facts A and B, the witness testifies that fact A is not a military secret, and the government objects to any answer regarding fact B, by implication one might assume that fact B is a military secret.

Id. at 1243 n.10. *Accord General Dynamics*, 131 S.Ct. at 1907 ("Each assertion of the privilege can provide another clue about the Government's covert programs or capabilities.") This danger is especially great where "the privileged and non-privileged material are inextricably linked." *Bareford*, 973 F.2d at 1144. The Ninth Circuit recognized this danger in *Jeppesen*, 614 F.3d at 1089. The Ninth Circuit explained that

> [a]dversarial litigation, including pretrial discovery of documents and witnesses and the presentation of documents and testimony at trial, is inherently complex and unpredictable. Although district courts are well equipped to wall off isolated secrets from disclosure, the challenge is exponentially greater in exceptional cases like this one, where the relevant secrets are difficult or impossible to isolate and even efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication. In these rare circumstances, the risk of disclosure that further proceedings would create cannot be averted through the use of devices such as protective orders or restrictions on testimony.

Id.

In sum, this case presents the classic example of a case in which the assertion of the state secrets privilege requires dismissal. Information protected by the state secrets privilege would be required by plaintiff to establish his case and by defendant to establish a defense. Moreover, because the claims are so infused with the privileged information, any attempt to litigate the merits of the claims poses an unacceptable risk of disclosing privileged information. While courts have acknowledged the potentially harsh result dismissal imposes on individual plaintiffs, they have nonetheless concluded that "the state secrets doctrine finds the greater public good –

ultimately the less harsh remedy – to be dismissal." *Bareford*, 973 F.2d at 1144. The interest at issue in this case "is not simply that of a private party . . . but rather the compelling interest of the United States Government in maintaining, through a privilege protected by constitutional principles of separation of powers [highly sensitive information]." *In re United States*, 872 F.2d 472, 482 (D.C. Cir.), *cert. denied*, 493 U.S. 960 (1989).

VI. CONCLUSION

For these reasons, this Court should uphold the Director's assertion of the state secrets privilege and dismiss this action.

Respectfully submitted,

STUART R. DELERY
Acting Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

SUSAN K. RUDY
STUART A. LICHT
Assistant Branch Directors

MARCIA K. SOWLES
Senior Counsel
United States Department of Justice
Civil Division, Federal Programs Branch

MELINDA HAAG
United States Attorney

JOANN M. SWANSON
Chief, Civil Division

/s/
ABRAHAM A. SIMMONS
Assistant U.S. Attorney