UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KHALED EL-MASRI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	1:05-cv-01417-TSE-TRJ
GEORGE TENET, *et al.*,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION BY INTERVENOR UNITED STATES TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

The plaintiff alleges that, in the course of a clandestine intelligence operation overseas, he was detained for a period of months without access to an attorney, held in inhumane conditions and questioned in a coercive manner.

The claims and defenses pertinent to this lawsuit would require the CIA to admit or deny the existence of a clandestine CIA activity. Indeed, this alleged activity is "the very subject matter of this litigation." *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F. 2d 1236, 1243 (4th Cir. 1985). To avoid the consequences that flow from either admitting or denying the existence of CIA clandestine activities, the United States has intervened in the case and the Director of the Central Intelligence Agency has formally interposed the privilege for secrets of state. As is made clear in the classified *in camera ex parte* declaration of CIA Director Porter J. Goss, proceeding any further in this matter would create an unacceptable degree

of risk that information the revelation of which would damage the national security and international relations of the United States will be disclosed. Accordingly, this case should now be dismissed.

FACTS AND PROCEEDINGS

The plaintiff alleges that he was detained by officials of the Government of Macedonia; that those officials handed him over to CIA officials; that those CIA officials transported him to Afghanistan; that Afghan and CIA officials detained and interrogated him; that the conditions of his confinement were inhumane and his interrogation was coercive; and that after several months he was released in Albania. Complaint, *passim.*

At present, the United States has stated its interest in these proceedings pursuant to 28 U.S.C. § 517, and the Director of the Central Intelligence Agency has interposed a claim of state secrets privilege. That privilege claim is supported by both publicly filed and classified declarations of CIA Director Goss. The Court has stayed proceedings pending of the question whether this case can proceed in any form in light of the privilege. March 9, 2006 Order.[1] The United States now has formally moved to intervene. The present memorandum will show that the Court should dismiss this action, as allowing any further proceedings in this case would create an unacceptable risk that information will be disclosed which, in the broader national interest, should remain secret.

ARGUMENT

[1] The Court additionally granted the United States' request that disposition of the privilege claim be without oral hearing.

The Court of Appeals has recognized that "once the state secrets privilege has been properly invoked, the district court must consider whether and how the case may proceed in light of the privilege." *Fitzgerald*, 776 F. 2d at 1243. In this case, the United States has intervened to move to dismiss these proceedings on the basis of the state secrets privilege and the *Totten*[2] doctrine. *See Halkin v. Helms* (*Halkin I*), 598 F. 2d 1, 10 (D.C. Cir. 1978) ("The defendants are not asserting the privilege to shield allegedly unlawful actions: the state secrets privilege asserted here belongs to the United States and is asserted by the United States which is not a party to this action."); *Tenet v. Doe*, 125 S. Ct. 1230, 1237 (2005) (state secrets privilege does not replace "the categorical *Totten* bar . . . in the distinct class of cases that depend upon clandestine spy relationships"). The issues before the Court at this stage, accordingly, are 1) whether the privilege should be sustained and 2) whether this case may proceed or, as the United States urges, must be dismissed to protect secrets of state under the state secrets doctrine and the "categorical" *Totten* doctrine. *Tenet v. Doe*, 125 S. Ct. at 1237.

I. THE CLAIM OF STATE SECRETS PRIVILEGE IS ABSOLUTE, HAS BEEN ASSERTED PROPERLY, AND SHOULD BE SUSTAINED.

A. The Privilege Has Been Formally and Properly Asserted

[2] *Totten v. United States*, 92 U.S. 105 (1876).

The United States moves to dismiss this proceeding based on the state secrets privilege. The state secrets privilege is one of the privileges that belong uniquely to the Executive Branch, facilitating the Chief Executive's right and duty to protect the military and state secrets of the nation.[3] *See, e.g., United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Sterling v. Tenet*, 416 F. 3d 338, 343-44 (4th Cir. 2005); *cert. denied* 126 S. Ct. 1230 (2006); *In re Under Seal*, 945 F. 2d 1245, 1288 (4th Cir. 1991); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F. 2d at 1239-40; *Farnsworth Cannon, Inc. v. Grimes*, 635 F. 2d 268, 635 (4th Cir. 1980) (*en banc*).

The state secrets privilege is without peer among governmental privileges. As a manifestation of the President's Article I powers to conduct foreign affairs and provide for the national defense, the state secrets privilege has constitutional underpinnings. *See United States v. Nixon*, 418 U.S. 683, 710 (1974); *see also United States v. Marchetti*, 466 F. 2d 1309, 1315 (4th Cir. 1972) ("Gathering intelligence information and the other activities of the [CIA], 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."). In view of this constitutional underpinning, courts have recognized that "the privilege to protect state secrets must head the list" of the

[3] The state secrets privilege differs from information protected by the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3. CIPA addresses the use, disclosure and protection of classified information in "any criminal case in a district court of the United States." *Id.* at § 3. CIPA has no application to civil litigation.

various governmental privileges recognized in our courts. *Halkin I*, 598 F. 2d at 7.

Unlike other evidentiary privileges, the protection given state secrets is "absolute;" and consequently, the government's legitimate interests may not be overcome by a court's evaluation of a litigant's need for national security information in a case. *In re Under Seal*, 945 F. 2d at 1288. While "the showing of necessity" by a party to a lawsuit "will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate," the Supreme Court has stated unequivocally that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11; *Halkin I*, 598 F. 2d at 7; *Halkin v. Helms* (*Halkin II*), 690 F. 2d 977, 990 (D.C. Cir. 1982). Thus, in evaluating a claim of state secrets privilege, the court does not balance the interests of the United States in protecting its secrets against the interests of the litigant in deciding whether the privilege claim should be sustained. *Halkin II*, 690 F. 2d at 990.

The subjects potentially encompassed by the privilege include both military and other state secrets. *See Sterling*, 416 F. 3d at 346 (quoting *Reynolds*, 345 U.S. at 7). As to the latter, the Court of Appeals has recognized: "There is no question that 'information that would result in . . . [sic] 'disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments' falls squarely within the definition of state secrets." 416 F. 3d at 346 (quoting *Molerio v. FBI*, 749 F. 2d 815, 820-21 (D.C. Cir. 1984)); *Zuckerbraun v. General Dynamics Corp.*, 935 F. 2d 544, 546 (2d Cir. 1991) (privilege applies where disclosure "would be inimical to national security").

The requirements for invoking the privilege, moreover, clearly have been met here. The Supreme Court in *Reynolds* addressed how the privilege must be asserted:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over that matter, after actual personal consideration by that officer.

345 U.S. at 7-8.

Here, a formal claim of state secrets privilege has been asserted by the Director of the Central Intelligence Agency. The entire thrust of the complaint in this case is that the CIA engaged in an intelligence activity in a foreign country. The privilege is asserted by the Director, as head of the CIA, the agency plaintiff alleges is responsible for the acts alleged in the complaint. *See Marchetti*, 466 F. 2d at 1317 (noting that the CIA is "one of the executive agencies whose activities are closely related to the conduct of foreign affairs and to the national defense").

The Director's declaration plainly constitutes the formal claim required by *Reynolds*. Moreover, his personal consideration of the national security interests sought to be protected by his claim is apparent from the Director's declarations before the Court. The bases for his judgment that, as a matter of policy, the CIA cannot admit or deny allegations of clandestine activity overseas are addressed in the Director's publicly filed declaration, Claim of State Secrets Privilege ¶¶ 7-8, and more exhaustively in his classified declaration submitted for this Court's *in camera, ex parte* consideration. *See* Classified Declaration of Director Goss, Parts IV and V. The purpose of the claim of privilege is to protect 'classified intelligence sources and methods from unauthorized disclosure and thereby avoid damage to the national security and our nation's conduct of foreign affairs." Claim of State Secrets Privilege ¶ 8. The effect of the claim of privilege in this case, accordingly, "falls squarely within the definition of state secrets." *Sterling*, 416 F. 3d at 346

(citations omitted).

Director Goss's invocation of the state secrets privilege satisfies the procedural requirements of *Reynolds*. *See Bowles v. United States*, 950 F. 2d 154, 156 (4th Cir. 1991) ("The Secretary of State in the case at hand properly invoked the privilege by stating that he was 'asserting a formal claim of privilege . . . [sic] based upon information conveyed to [him] [sic] by United States Government advisors in the course of their official duties and *upon [his] [sic] own personal determination* that the nature of the information in question require[d] [sic] an assertion of privilege" (emphasis in original)).

B. <u>The Circumstances of this Case Are Appropriate for the Claim of Privilege</u>

In *Reynolds,* the Supreme Court directed that, in evaluating a properly asserted claim of state secrets privilege "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." 345 U.S. at 8.[4] Upon consideration of the public and classified declarations supporting the claim, it is clear that the circumstances of this case support the assertion of the privilege. It is inarguable that this case involves allegations which focus on the Nation's intelligence information, sources and methods. Accordingly, this Court should sustain the privilege.

As the Director discusses in his declarations, harm to national security interests flows regardless of whether a litigant's allegations are well founded or not, given the consequences of a

[4] While it is the Court's duty to determine whether the circumstances of the case are appropriate for the interposition of the claim, the Court should give "utmost deference" to the Executive's determination that the matters over which the privilege is claimed should remain undisclosed. *See infra* pp. 8-9.

denial:

> The denial of CIA involvement may, by itself, provide the informed intelligence analyst useful information about the CIA's capabilities and the scope and thrust of CIA activities. Even where that is not the case, the United States cannot simply deny the existence of such activities where none exist. If that were the policy, the United States' failure to deny such activities in other circumstances would be tantamount to an admission of such clandestine activities in these and other circumstances.

Claim of State Secrets Privilege ¶ 8.

A further explication of his reasoning in this regard is provided in the Director's classified declaration for the Court's *in camera, ex parte* consideration. This is a case in which the responsible executive official has determined that "no further information regarding the bases for my claim of privilege can be disclosed on the public record without revealing the very information" which the privilege claim seeks to protect. Claim of State Secrets Privilege ¶ 10. Indeed, the Director has determined that '[t]he full scope of the information protected by the claim of privilege is itself privileged from disclosure." *Id. In camera* review of the Director's classified submission in support of his claim of privilege is warranted, especially where the Court's review of classified information expressly has been requested by the responsible agency head. *See Sterling*, 416 F. 3d at 342 ("The district court conducted an *ex parte, in camera* examination of both declarations. It satisfied itself that the Director had personally considered the national security implications of both the information that Sterling would need to establish his case as well as the information that would likely become public if the litigation were to continue.").

Where a claim of military or state secrets is asserted, "the court is the final arbiter of the propriety of its invocation." *In re Under Seal*, 945 F. 2d at 1288. The role of the Judicial Branch in reviewing a claim of state secrets privilege, however, is informed by both constitutional and practical considerations. As to the former, the Supreme Court has recognized that the state secrets

privilege is grounded in the constitutional responsibilities of the President over foreign affairs and the national defense. *See Nixon*, 418 U.S. at 710, and cases discussed above. As to the practical considerations, courts frequently have turned to this Circuit's observation in *Marchetti*:

> The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear 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. The courts, of course, are ill equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

466 F. 2d at 1317 (quoted in *CIA v. Sims*, 471 U.S. 159, 178 (1985); *Sterling*, 416 F. 3d at 347; *Halkin I*, 598 F. 2d at 9).

Consideration of the Constitution's assignment of these duties to the Executive Branch – where the performance of the functions creates experience in national security, foreign intelligence, and foreign affairs – has led to a deferential standard for reviewing claims of state secrets privilege. "As to these areas of Art. II duties," the Supreme Court concluded, "the courts have traditionally shown the utmost deference to Presidential responsibilities." *Nixon*, 418 U.S. at 710; *see also Halkin I*, 598 F. 2d at 9 ("The standard of review here is a narrow one. Courts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets.") (citation omitted). And once "a judge has satisfied himself that the dangers asserted by the government are substantial and real, he need not – indeed, should not – probe further." *Sterling*, 416 F. 3d at 345.

Applying that deferential standard of review here, the materials before the Court more than adequately support the Director's judgment that the information subject to his claim of privilege may not be disclosed without harm to our national security. The bases for his judgment cannot be addressed on the record, beyond the Director's explanation in his publicly filed declaration, in view

of his judgment that any further discussion would be harmful. The Supreme Court and this Circuit have emphasized that courts should not always require *in camera* presentations of classified information in order to resolve state secrets claims. *Reynolds*, 345 U.S. at 10; *Sterling*, 416 F. 3d at 344-45. At the same time, as *Sterling* itself reflects, there are cases in which an agency head's judgment that harm to the national security would flow from litigation of a case cannot be articulated on the public record without "jeopardiz[ing] the security which the privilege is meant to protect." *Reynolds*, 345 U.S. at 10. The type of information that cannot be addressed, either through admission or denial, in further proceedings in this case is identified the Director's classified submission. The United States respectfully submits that the Director has articulated fully his rationale for concluding that allegations such as plaintiff makes may not be admitted or denied in this proceeding in the interest of national security. The Court, accordingly, is urged to sustain the CIA Director's formal claim of state secrets privilege.

II. WHERE, AS HERE, STATE SECRETS ARE CENTRAL TO THE CASE AND FURTHER PROCEEDINGS RISK THEIR DISCLOSURE, DISMISSAL IS REQUIRED.

A. The Law Requires Dismissal Where, As Here, State Secrets Are Central to the Adjudication of a Case and May Thereby be Compromised.

If the unavailability of the information protected by the privilege precludes either the plaintiff(s) or defendant(s) from establishing their respective legal positions on the ultimate issues in the case, then the case must be dismissed. *See Fitzgerald,* 776 F.2d at 1241); *Farnsworth Cannon, Inc.,* 635 F.2d at 281. In addition, as in this case, "in some circumstances sensitive military [or state] secrets will be so central to the subject matter of

the litigation that any attempt to proceed will threaten disclosure of the privileged matters." *Fitzgerald*, 776 F.2d at 1241-42. In such cases, the action must be dismissed. *Farnsworth Cannon,* 635 F.2d at 281.

As in *Fitzgerald,* state secrets are central to this action. *See* 776 F.2d at 1242. In *Fitzgerald,* the issue was whether the plaintiff had been defamed by statements in a magazine article that he had committed espionage. *Id.* Among the issues to be decided at trial were: (i) whether the statements at issue were defamatory, and (ii) if defamatory, whether the charge of espionage was true, and (iii) if not true, whether the magazine had actual doubt about the accuracy of the article and, if so, had acted recklessly and with actual malice, or with knowledge that the libel was false. *Id.* There is no doubt that the truth of the statements at issue is a central question for resolution at trial in defamation actions. *Id.* at 1242.

Similarly, the plaintiff's claim in this case plainly seeks to place at issue alleged clandestine foreign intelligence activity that may neither be confirmed nor denied in the broader national interest. As noted above, he alleges that he was detained by officials of the Government of Macedonia; that those officials handed him over to CIA officials; that those CIA officials transported him to Afghanistan; that Afghan and CIA officials detained and interrogated him; that the conditions of his confinement were inhumane and his interrogation was coercive; and that after several months he was released in Albania. Complaint, *passim.* As the Director of the Central Intelligence Agency makes clear in his declaration filed on the public record, the United States neither admits nor denies allegations that it has conducted clandestine intelligence activities abroad. Declaration of Porter J. Goss at ¶ 7. In this case, moreover, even stating precisely the harm that may

result from further proceedings in this case is contrary to the national interest. *See* ¶ 9 of Director Goss' public record declaration; *see especially* ¶ 17of the Director's classified *in camera ex parte* declaration. As the Director points out at ¶ 8 of his public record declaration, "In view of the allegations of CIA involvement, parties in this case have a special incentive to probe the CIA's foreign intelligence interests, authorities, and methods generally and seek information and evidence to establish or refute claims and defenses." *Compare Farnsworth Cannon*, 635 F.2d at 281 ("[i]n an attempt to make out a *prima facie* case during an actual trial, the plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit" and "such probing in open court would inevitably be revealing"). This is not a matter where classified information is at the periphery of the case and can be cabined and avoided. *See, e.g,. DTM Research L.L.C. v. AT&T Corp.,* 245 F.3d 327, 334 (4th Cir. 2001). Virtually all of the information pertinent to this case, including whether or not the basic allegations of the complaint are true, involve secrets of state.

B. <u>The Risk of Disclosure Alone Warrants Dismissal.</u>

The United States is certainly "mindful that the invocation of the state secrets privilege in this case will deny the Plaintiff a forum under Article III of the Constitution for adjudication of [his] claim." *Tilden,* 140 F. Supp. 2d at 626. "Only when no amount of effort and care on the part of the court and parties will safeguard privileged material is dismissal warranted." *Fitzgerald,* 776 F. 2d at 1243.

Here, however, "[t]here are no safeguards that this Court could take that would adequately protect the state secrets in question." *Tilden,* 140 F. Supp. at 626. Further proceedings in this case would present a clear risk that state secrets would be subject to

disclosure. Since the classified information at issue is not at the periphery of the case, protecting it from disclosure in further proceedings will not be as simple as advising the Court of a few discrete classified facts or subjects that cannot be inquired into, or attempting to substitute certain facts as "Location A" or "Headquarters City," or providing substitute unclassified descriptions of certain facts. The very fact that a state secret might be at issue with respect to particular allegations or claims might be impermissibly revealing.

As the Fourth Circuit has observed:

> The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear 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.

Marchetti, 466 F.2d at 1318; *see also Halkin I*, 598 F.2d at 8 ("[i]t requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic . . . . Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate"). The potential for such disclosures is very real in this case. See Parts II and IV C. of the Director's *in camera ex parte* declaration.

Given the sensitivity of the matters at the heart of the plaintiff's allegations, any attempt to secure evidence – far less to discuss these allegations in a public hearing – inherently risks the disclosure of even small bits of information which, if disclosed, would injure the broader interests of the United States.

C. <u>The Plaintiff's Interest Cannot Overcome the United States' Privilege.</u>

When the national security conflicts with an individual's interest in pursuing his claim

in federal court, the interests of the individual must give way. As the Court of Appeals held in *Sterling*, the privilege requires dismissal if the subject matter of a case inevitably concerns privileged information. *Sterling*, 416 F.3d at 347 (once the State secrets privilege is properly invoked, "dismissal follows inevitably when the sum and substance of the case involves state secrets"). The Court of Appeals in *Sterling* recognized that the methods and operations of the Central Intelligence Agency are state secrets. Where the very question on which the case turns is itself a state secret, or the circumstances make clear that state secrets will be so central to the litigation that any proceeding necessarily would encompass privileged matters, dismissal is appropriate. 416 F.3d at 348.

Courts have noted the potentially harsh result dismissal imposes on individual plaintiffs, but nonetheless concluded that "the state secrets doctrine finds the greater public good -- ultimately the less harsh remedy -- to be dismissal." *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992), *cert. denied*, 507 U.S. 1029 (1993). As the Fourth Circuit observed in *Fitzgerald:*

> When the state secrets privilege is validly asserted, the result is unfairness to individual litigants -- through the loss of important evidence or dismissal of a case -- in order to protect a greater public value. * * * [w]here, as here, the very question upon which the case turns is itself a state secret, the litigant will often find himself without a forum to redress his grievances. The burden of protection of a public value falls upon him alone.

776 F.2d at 1238-39 n.3.

Nonetheless, if the privileged information is central to the case, dismissal is appropriate. *Sterling, supra; Tilden*, 140 F. Supp.2d at 626 ("[t]here is no way in which this lawsuit can proceed without disclosing state secrets"); *Fitzgerald,* 776 F.2d at 1243; *Farnsworth Cannon*, 635 F.2d at 281; *Halkin II*, 690 F.2d at 998-99; *Bareford*, 973 F.2d at

1141; *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998). *See also Zuckerbraun*, 935 F.2d at 547-48; *Bowles*, 950 F.2d at 156 ("If the case cannot be tried without compromising sensitive foreign policy secrets, the case must be dismissed."); *Black v. United States*, 62 F.3d 1115, 1118-19 (8th Cir. 1995) (dismissal appropriate because information covered by the state secrets privilege "is at the core of [plaintiff's] claims"), *cert, denied,* 517 U.S. 1154 (1996); *Clift v. United States*, 808 F. Supp. 101 (D. Conn. 1991) (dismissing on state secrets grounds).

The plaintiff will undoubtedly contend that dismissal of this action would be unfair. However, where, as here, allegations of a clandestine activity constitute the core of this dispute and plaintiff can be expected to probe foreign intelligence information, sources and methods, the law is clear that his private interest must give way. The state secrets privilege and related statutory protections "may defeat worthy claims for violations of rights that would otherwise be proved." *Maxwell v. First Nat'l. Bank of Md.*, 143 F.R.D. 590, 598 (D. Md. 1992) (internal quotation omitted), *aff'd,* 998 F.2d 1009 (4th Cir. 1993) (Mem.), *cert denied*, 510 U.S. 1091 (1994). In *Sterling*, the Court of Appeals recognized that its decision 'place[d], on behalf of the entire country, a burden on Sterling that he alone must bear." Nonetheless, the Court of Appeals held that 'the fundamental principle of access to the court must bow to the fact that a nation without sound intelligence is a nation at risk." 416 F.3d at 348. 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. 1989).

III. PLAINTIFF'S ALLEGATIONS OF CLANDESTINE OVERSEAS

ACTIVITY ARE ALSO BARRED BY *TOTTEN*.

As the foregoing analysis makes clear, this case must be dismissed because its subject matter necessarily and inevitably concerns privileged information, and the disclosure of such information would damage the national security and international relations of the United States, as explained in the Director's classified *in camera ex parte* declaration. However, dismissal would also be required under the distinct and "more sweeping" doctrine: "the categorical *Totten* bar." *Tenet v. Doe*, 125 S. Ct. at 1237 (2005). Because the United States has invoked the state secrets privilege, there is no need for this Court to rely on *Totten* here, but the Supreme Court's recent decision in *Tenet v. Doe* leaves no doubt that dismissal would be required here in any event.

A. The Supreme Court Also Recognizes a "Categorical" Bar to Suits Where the "Very Subject Matter of the Action" is a Secret.

As the Supreme Court explained in *Tenet v. Doe*, *Totten* held that an alleged secret contract for espionage may not be the subject of suit. *Totten* was a suit brought by the administrator of the estate of a person who alleged he entered into a contract with President Lincoln to gather intelligence during the Civil War but had not been fully paid for the services he rendered. *Totten*'s holding that the administrator's suit must be dismissed in the public interest was cited approvingly in *Reynolds*, the Court's later seminal decision on the state secrets privilege. 345 U.S. at 533 n.26. But the Supreme Court has made clear that *Totten* is not merely "an example of the state secrets privilege," but serves as an independent "bar" to litigation where, "'[d]ue to national security reasons,' the [government] could 'neither admit nor deny' the fact that was central to the suit." *Tenet v. Doe*, 125 S. Ct. at 1237 (quoting *Weinberger v. Catholic Action of Haw./Peace Ed. Project*, 454 U.S. 139,

146-147 (1981), which in turn cited *Totten*).

B. The *Totten* Bar Warrants Dismissal at the Outset Where the Very Subject Matter of a Suit Is an Alleged Clandestine Foreign Intelligence Activity.

Central to plaintiff's claims are his allegations of a clandestine CIA foreign intelligence activity. The Supreme Court's reasoning and holding in *Tenet v. Doe* make clear that the "categorical *Totten* bar" applies in cases such as this. 125 S. Ct. at 1237.

Suits which allege clandestine foreign intelligence activities, no less than suits which allege covert espionage agreements, belong to a category of cases where the "very subject matter of the action [is] a matter of state secret." *Tenet v. Doe*, 125 S. Ct. at 1236-37 (quoting *Reynolds*, 345 U.S. at 11 n. 26, which in turn described *Totten*). Where plaintiff's complaint is grounded in allegations of an alleged clandestine relationship or activity, immediate dismissal is appropriate, even without a formal invocation of the state secrets privilege. *Id.*[5]

Thus, in a case such as this one, there is no need for an agency head to invoke the state secrets privilege in relation to each particular allegation of a complaint because the

[5] The Court in *Tenet v. Doe* recognized that "application of the *Totten* rule of dismissal . . . may be resolved before addressing jurisdiction," 125 S. Ct. at 1235 n.4, explaining:

> It would be inconsistent with the unique and categorical nature of the *Totten* bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry – to first allow discovery or other proceedings in order to resolve the jurisdictional question.

alleged clandestine activity forms the very subject matter of the lawsuit. In cases such as this, *Tenet v. Doe* recognizes what Director Goss and earlier CIA Directors appreciated – that the government cannot admit or deny such allegations without harmful consequences. 125 S. Ct. at 1238; *see* Claim of State Secrets Privilege ¶ 8. As the Court of Appeals expressed in *Marchetti*,

> Gathering intelligence information and the 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. Const., art. II, § 2. Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest.

466 F. 2d at 1315.

As Part II discusses with regard to the state secrets doctrine, this case cannot proceed, and no special procedures could adequately protect the interests articulated by the Director in his publicly filed and classified declarations. Apart from that, the *Totten* bar would require dismissal of this suit, which on its face seeks to litigate alleged clandestine foreign intelligence activities.

CONCLUSION

For the foregoing reasons, this action should be dismissed.

Dated: March 13, 2006

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I hereby certify that on this date, a true copy of the foregoing was served on the plaintiff by depositing it in the United States Mail, first class postage fully prepaid, addressed to his counsel as follows:

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