04-1495

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JEFFREY STERLING,

Plaintiff-Appellant,

v.

GEORGE TENET et al.,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

APPELLANT'S BRIEF

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STATEMENT OF JURISDICTION[1]

The District Court's jurisdiction over the claims of the Plaintiff-Appellant Jeffrey Sterling ("Sterling") arose from its authority to address claims pursuant to Title Seven of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981.

The District Court issued an unpublished Opinion on March 3, 2004, and dismissed Sterling's case in its entirety on the basis of the Government's invocation of the state secrets privilege. Final judgment was entered the

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[1] This document and the Joint Appendix have been reviewed prior to filing by the Appellee Central Intelligence Agency ("CIA") pursuant to the requirements of a secrecy agreement executed by Sterling's counsel in order to redact any information believed to be classified. Although this brief was not intended to contain any classified information, it may well be that the CIA redacts portions of this document under the guise of secrecy. Therefore, the version filed with the Court may contain redactions. Federal judges, of course, are exempt from routine security clearance processing and inherently hold valid security clearances to review any classified information. See DCID 1/19, ¶9.0 ("Judicial Branch Access to SCI"). Thus, this Court can and must review any unredacted version of a document which has been redacted, particularly Sterling's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint for Improper Venue or in the Alternative to Transfer Venue (dated May 31, 2002) and its accompanying exhibits. The information in those documents are especially highly relevant to this present dispute and, in fact, persuaded the Honorable Allen G. Schwartz to deny the CIA's initial invocation of the state secrets privilege.

same day. A timely notice of appeal was filed April 20, 2004. This Court's appellate jurisdiction was invoked under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(a) Whether the District Court erred in deciding that the Government properly invoked the state secrets privilege.

(b) Whether the District Court erred in its adjudication of Sterling's ability to prove a prima facia case of racial discrimination in light of the invocation of the state secrets privilege.

(c) Whether the District Court erred in dismissing Sterling's case in its entirety on the basis of the state secrets privilege.

STATEMENT OF THE CASE

The initial case was filed *pro se* by Appellant Sterling against George Tenet, then the Director of the Central Intelligence Agency ("DCI Tenet"), and Does #1-10 (collectively "CIA"), before the United States District Court for the Southern District of New York ("SDNY") on August 28, 2001.[2]

[2] The CIA considers portions of the *pro se* Complaint to be classified, an allegation that Sterling disputes, and the document was placed under seal four months after it was filed. A redacted version of the Complaint was publicly filed in January 2002, and it is that document that will be cited to in this brief.

Before filing an Answer, on April 18, 2002, the CIA filed a Motion to Dismiss the Complaint for Improper Venue or in the Alternative to Transfer Venue. The basis for dismissal was the formal assertion by DCI Tenet of the state secrets privilege. The parties thereafter briefed the issue, and the SDNY issued its decision on January 23, 2003, wherein it denied the CIA's Motion to Dismiss finding that the invocation of the state secrets privilege was "inappropriate". See Joint Appendix ("JA") at 16 (Sterling v. Tenet et al., No. 01 Civ. 8073, slip op. at 8 (S.D.N.Y. Jan. 23, 2003)("SDNY Decision")).[3] However, the court nevertheless transferred the case to the United States District Court for the Eastern District of Virginia ("EDVA").

Following transfer the CIA, again before filing an Answer, revived its invocation of the state secrets privilege in a Motion to Dismiss on August 18, 2003. Oral arguments were held December 5, 2003. By Opinion dated March 3, 2004, see JA at 70-87 (Sterling v. Tenet et al., Civil Action No. 03-CV-329, slip op. (E.D.V.A. Mar 3, 2004)("EDVA Decision")), the

[3] This decision was sent to the parties' counsel but issued under seal. The CIA claims it contains classified information, an assertion disputed by Sterling. Counsel for Sterling was not permitted to retain any copies of the decision and has had to work from memory with respect to its contents. The CIA publicly filed a redacted version of the SDNY decision on September 2, 2003. Due process cannot be satisfied unless this Court reviews the complete unredacted version of Judge Schwartz's decision.

district court granted the CIA's Motion and dismissed Sterling's Complaint without prejudice. This appeal timely followed.

STATEMENT OF RELEVANT FACTS

Sterling, an African-American, was an Operations Officer ("OO") for the CIA in the Near East and South Asia Division from 1993-2001. See JA at 88.[4] While employed by the CIA, Sterling experienced unlawful discriminatory practices at the hands of his CIA management. See Redacted Complaint at ¶¶5-11 (dated August 28, 2001).

Sterling arrived in New York in January 1999. Id. at ¶6. CIA management placed expectations on him "far above those required of non-African-American Operations Officers. Id. at ¶7. He was repeatedly passed over for operational opportunities and subjected to disparate treatment as the only African-American operations officer [THREE WORDS REDACTED BY CIA]. Id. at ¶8. In April 2000, CIA management, motivated by a discriminatory animus, presented him with an unrealistic and unjustified Advanced Work Plan that was considerably more demanding

[4] Although there are references within the record that Sterling's classified operational pseudonym was inadvertently released to the public, this is completely untrue. The name "Samuel L. Crawford" was an unclassified pseudonym created solely for Sterling's EEO proceedings. At the time, Sterling's relationship to the CIA remained covert. Since that time, the CIA

and "harsher" than any requirements placed on non-African-Americans. Id. at ¶7.

Sterling further contends that he was retaliated for utilizing the equal employment opportunity ("EEO") process. Id. at ¶9. Specifically, Sterling claims that although he was not scheduled to undergo updated security processing until 2001, CIA management scheduled him to undergo security processing in May 2000. Id. Furthermore, he claims that security processing is an "arbitrary regime within the CIA that is utilized more for its nature as a tool for intimidation than any substantive security implications." Id.

Sterling also claims management vandalized his personal property. Id. The discrimination Sterling suffered was part of a pattern and practice racial discrimination he suffered at the CIA. Finally, he was denied work opportunities and routinely passed over for assignments by CIA management because of his size, the color of his skin and his ability to speak a language (taught to Sterling by the CIA) that was not typical for the African-American race. Id.

Instead of filing an Answer, on April 18, 2002, the CIA filed a Motion to Dismiss the Complaint for Improper Venue or in the Alternative to Transfer

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has publicly acknowledged Sterling's employment relationship and he no longer requires a pseudonym.

Venue. The basis for dismissal was the formal invocation by the CIA's Director of the state secrets privilege. On January 23, 2003, the district court denied the CIA's Motion to Dismiss finding that the invocation of the State secrets privilege was "inappropriate". See JA at 16. However, it transferred the case to the EDVA.

A pretrial conference was held before Magistrate Judge Sewell on May 7, 2003, where the CIA requested an additional 60 days to consider whether to prepare an *ex parte, in camera* classified declaration to elaborate on the state secrets privilege asserted in New York. This request was denied, and the CIA filed a formal Motion, which Sterling opposed, on May 15, 2003. On July 17, 2003, Judge Lee, the district court judge assigned to the case, denied the CIA's request for an additional 60 days to consider whether it would invoke the State secrets privilege.

Sterling's Opposition also requested that the district court order the CIA to process his local attorney, George Doumar, for a limited security approval so that he and his original attorney, Mark S. Zaid, could converse openly about the merits and arguments surrounding this case. For no stated reason, the CIA refused. This dispute was never adjudicated by the district court. The CIA also refused to allow Sterling's cleared counsel to review relevant documents, notably his own briefs filed before the SDNY and the

SDNY Decision, which the CIA considered classified. A Motion to Permit Cleared Counsel Access to Relevant Filings (dated August 21, 2003) was filed, but this also was never formally addressed by the district court. Additionally, on the eve of Sterling's opposition brief being due before the EDVA, the CIA seized important EEO cases files from Sterling's attorneys upon threats of their loss of security clearance and criminal prosecution and ten years imprisonment. See JA at 95. This, too, became the subject of a motion by Sterling to seek return of the documents. The district court denied the motion as moot after dismissing the case.

The Court warned the CIA that it had not "show[n] good cause for the need for a supplemental declaration on a matter that was addressed and disposed of on the merits by the transferring court, the United States District Court for the Southern District of New York." See July 18, 2003, Order, at 1-2, citing SDNY Decision at 8. Despite the district court's word of caution, the CIA nevertheless revived its state secrets privilege invocation in a Motion to Dismiss on August 18, 2003.

Following full briefing and oral arguments, the district court granted the CIA's motion and dismissed Sterling's Complaint in its entirety without prejudice on March 3, 2004.

SUMMARY OF ARGUMENT

The district court abdicated its responsibility by granting the CIA's request to dismiss Sterling's case in its entirety based on the state secrets privilege. Sterling demonstrated a prima facia case of racial discrimination, and was prepared to proceed forward with his case without utilization of classified information.

Even to the extent classified information could conceivably come into play during the course of discovery, the district court failed to at least first attempt to take into account adequate protective measures commonly employed as a matter of course in today's age of terrorism and espionage litigation. It would have been a simple matter for the court to impose certain precautions, as have other district courts, which would have allowed Sterling's case to proceed and grant him his day in court.

Contrary to the district court's understanding, it has the absolute authority to question and reverse any classification decisions proffered by the CIA. Moreover, it could have done so with respect to any piece of evidence Sterling wished to offer to support his case or any information that the CIA believed it required to defend itself, rather than take an extreme measure and dismiss the case at its earliest stage.

The failure of the district court to have exercised its constitutional and statutory responsibility to uphold the intent of the Founding Fathers to maintain the appropriate separation of power between the Judiciary and Executive Branches constitutes reversible error.

ARGUMENT[5]

The Founding Fathers of our country created a tri-partite system of government for very important reasons, primary among them the need to ensure checks and balances and prevent the abuse of power. See Mistretta v. United States, 488 U.S. 361, 380 (1989)(it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty").

In recent decades, however, the Judiciary has increasingly abdicated its responsibility to the Executive Branch whenever cries of national security arise and, in particular, in response to the invocation of the state secrets privilege in civil proceedings.

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[5] The district court treated the CIA's Motion to Dismiss as one for summary judgment. JA at 75. A district court's grant of summary judgment is reviewed *de novo*. James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375 (4th Cir. 2004).

The state secrets privilege is a Cold War judicially created privilege. It can be dismantled or modified as the courts see fit. Though its creation stems from a ruling of the United States Supreme Court, it has primarily been the Courts of Appeals - including this one – and district courts that have shaped, interpreted and implemented the privilege since 1953. This case demonstrates the avoidable inequities that follow abdication of responsibility by federal judges who fail to seriously challenge *ex parte, in camera* assertions by Executive Branch officials or shirk their authority to pursue available protective mechanisms to allow litigation that has the possibility of seemingly touching upon classified information.

The lower court's actions and rulings are replete with contradictions, and reveal the obvious frustration of its inability of how to best deal with unfounded dire warnings of doom espoused by the CIA were Sterling's litigation to continue. There is no legal or factual distinction with respect to how courts and litigants can adequately protect alleged classified information in civil or criminal proceedings. The alleged concerns regarding the unauthorized release of classified information are identical.

In recent years the U.S. District Court for the Eastern District of Virginia has become one of the most knowledgeable and experienced courts in the

country with respect to utilizing and protecting classified information. That knowledge and experience must and should be taken into account.

In its simplest form, this case is nothing more than a routine Title VII action alleging employment discrimination against a federal agency. Federal courts adjudicate such disputes every day. In this case, however, the CIA succeeded in arbitrarily eliminating the lawful rights of an African-American former federal employee to challenge acts of racial discrimination on the grounds of national security.

The government's increased use of secrecy as a sword rather than a shield has reached endemic proportions, particularly in this Circuit.[6] The Executive Branch, and in particular the CIA, appears blinded by an ambition to weaken the historical notion of separation of powers by attacking the courts' ability to adjudicate judicial matters, both civil and criminal, that may encroach upon national security information. That must now stop.

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[6] See e.g., *Justice Dept. Defies Judge on Moussaoui*, Associated Press, Sept. 10, 2003; *Defiance in Moussaoui case draws law experts' criticism; Attorney general's action appears to undermine federal judges' authority*, Balt. Sun, July 16, 2003; *U.S. Will Defy Court's Order In Terror Case*, New York Times, July 15, 2003; *Secret Court Says F.B.I. Aides Misled Judges In 75 Cases*, New York Times, Aug. 23, 2002.

I. THE CIA DID NOT APPROPIATELY INVOKE THE STATE SECRETS PRIVILEGE OR, ALTERNATIVELY, WAS NOT ENTITLED TO OUTRIGHT DISMISSAL OF STERLING'S CASE AT SUCH AN EARY STAGE

The state secrets privilege has its origination in the leading Supreme Court case of United States v. Reynolds, 345 U.S. 1 (1953), where the United States Air Force successfully dismissed a third party claim against a defense contractor that sought to expose classified information concerning an experimental aircraft. Id. at 7-8.

It was historically designed to be "a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security." Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991), citing In re U.S., 872 F.2d 472, 474 (D.C.Cir.), cert. denied, 110 S. Ct. 398 (1989). However, over the years the privilege has been judicially expanded by lower courts to permit the exploitation by the government to seek complete dismissal of a lawsuit even before filing an Answer.

"Dismissal of a suit, and the consequent denial of a forum without giving the plaintiff [his] day in court, however, is indeed draconian. '[D]enial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked.'"

Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1242 (4th Cir. 1985). Sadly, what was rare 20 years ago is now far more commonplace when it comes to the CIA. It is time the courts no longer permit further exploitation and exercise its authority to allow these cases to proceed.

A. The District Court Failed To Look Behind DCI Tenet's Invocation Of The State Secrets Privilege And Ensure It Is Appropriate And Narrowly Construed

The CIA submitted two declarations executed by DCI Tenet. One declaration was filed for public review, the other - which is allegedly classified - was offered to the Court in camera, ex parte. The district court acknowledged reviewing DCI Tenet's classified declaration. JA at 71.[7]

The only publicly available substantive statement asserted by DCI Tenet for why Sterling's case needed to be dismissed was the conclusory assertion that the "sensitivity of the information over which I claim this privilege is sufficiently critical to the ability of the CIA to perform its intelligence collection mission, and to the safety of its officers in vulnerable positions throughout the world..." See Declaration and Formal Claim of State secrets

[7] However, there is no evidence in the record that the district court reviewed any other unredacted versions of documents purportedly classified, such as Sterling's briefs filed before the SDNY. The contents of those documents were highly relevant to the invocation of the state secrets privilege, and it was an abuse of discretion for the district court not to have reviewed them.

Privilege and Statutory Privilege by George J. Tenet, Director of Central Intelligence at ¶7 (dated August 18, 2003)("DCI Tenet Decl."). DCI Tenet claimed that "by litigating this case, there is the possibility of disclosure of both 'Secret' and 'Top Secret' classified information." JA at 71.

The CIA's invocation was not enough to justify dismissal. Courts, of course, can review an assertion of the state secrets privileges, and must first ensure that the individual asserting the formal privilege is the head of the department with control over the information and has personally considered the matter. See Reynolds, 345 U.S. at 7-8; Zuckerbraun, 935 F.2d at 546. While the CIA claimed below that the privilege is not subject to a balancing test, this is not entirely true.[8]

[8] The qualifying language is "[w]hen *properly* invoked, the state secrets privilege is absolute." Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C.Cir. 1983), cert. denied, 465 U.S. 1038 (1984)(emphasis added). Courts must undertake a balancing inquiry and investigation into the basis for the invocation before the privilege is deemed applicable and absolute. This is not the same as balancing the needs between the litigant to use the information and the government's desire to exclude it. Cf. 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 court's inquiry is into the legitimacy of the government's invocation of the privilege, its application to the facts in the particular case and an investigation into whether disclosure would reasonably cause damage to national security interests.

If an agency formally invokes the privilege, the district court then must undertake a serious and substantive review of the government's claims:

> [T]he more compelling a litigant's showing of need for the information in question, the deeper "the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." ... [T]he more plausible and substantial the government's allegations of danger to national security, in the context of all the circumstances surrounding the case, the more deferential should be the judge's inquiry into the foundations and scope of the claim.

Reynolds, 345 U.S. at 10. Thus, it is clear that courts must engage in a balancing inquiry to determine whether the privilege is applicable.

However, it is not the extent to which a balancing of interests is undertaken that nowadays becomes the focal point of a court's assessment of the invocation of the privilege but whether or not any substantive review is conducted at all. The Supreme Court wanted to ensure that "[m]ere compliance with the formal requirement, however, is not enough." In re U.S., 872 F.2d at 475. "To some degree at least, the validity of the government's assertion must be judicially assessed." Molerio v. Federal Bureau of Investigation, 749 F.2d 815, 822 (D.C.Cir. 1984).

The Court itself must assess the appropriateness of the government's invocation of privilege. "Once the privilege has been formally claimed, the court must balance the 'executive's expertise in assessing privilege on the

grounds of military or diplomatic security' against the mandate that a court 'not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role.'" Virtual Defense and Development International v. Republic of Moldova, 133 F.Supp.2d 9, 23 (D.D.C. 2001), quoting In re U.S., 872 F.2d at 475-476.

Thus, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." Reynolds, 345 U.S. at 9-10.[9] "Without judicial control over the assertion of the privilege, the danger exists that the state secrets privilege will be asserted more frequently and sweepingly than necessary leaving individual litigants without recourse." NSN International Industry v. E.I. DuPont De Nemours, 140 F.R.D. 275, 278 (S.D.N.Y. 1991),

[9] It is highly relevant to note that fifty years after the Supreme Court decided the Reynolds case that very dispute is back in court again. Recently declassified documents revealed that the Executive Branch may have misled the courts concerning the validity of the alleged classified information in question in the Reynolds proceedings. Thus, the very case that created the privilege now demonstrates the dangers surrounding misuse and abuse of the privilege. "*Government's Ugly Secret*", Los Angles Times, Apr. 21, 2004, at B14; "*The Secret of the B-29*", Los Angeles Times, Apr. 18-19, 2004, at 1; "*A 1953 case echoes in high court: The administration asks that fraud-on-court allegations be dismissed*", National Law Journal, June 10, 2003, at 5; "*The secret's out: 17th century doctrine invoked to challenge 1953 ruling based on Air Force's national security claim in fatal crash*", Miami Daily Business Review , Mar. 11, 2003.

citing Ellsberg, 709 F.2d at 57. Although "utmost deference" is to be accorded to the executive's expertise, see United States v. Nixon, 418 U.S. 683, 710 (1974), the government must show, and the court must separately confirm, that "the information poses a reasonable danger to secrets of state." Halkin v. Helms, 690 F.2d 977, 990 (D.C.Cir. 1982).[10]

One important area of inquiry is whether the invocation is too broad. Black v. CIA, 62 F.3d 1115, 1119 (8th Cir. 1995). It is also established precedent that the assertion of the state secrets privilege is "not to be lightly invoked." Reynolds, 345 U.S. at 7. In recent years there are a few, but unfortunately growing, number of cases where a plaintiffs' complaint is dismissed from the outset before an Answer is filed and without any opportunity for discovery. See e.g. Edmonds v. Dep't of Justice, 323 F.Supp.2d 65 (D.D.C. 2004); Tilden v. Tenet, 140 F.Supp.2d 623 (E.D.V.A. 2000).

Before the last decade most courts had found such an extreme remedy to be too distasteful and an anathema to our historical notions of liberty and

[10] This is exactly what the SDNY did, and why DCI Tenet's invocation of the privilege was rejected as inappropriate. The EDVA, to the contrary, simply abdicated its responsibility and accepted DCI Tenet's invocation without question. See JA at 72 ("the Court is obligated to honor the DCI's assertion of this privilege").

due process. For example, in In re U.S. the government sought dismissal based on the state secrets privilege in a case that alleged illegal activities of the Federal Bureau of Investigation. Id. 872 F.2d at 473-74. The district court denied the government's attempt to dismiss the case without answering the Complaint. Id. at 474.

In fact, the Supreme Court intended the typical state secrets case to pertain to matters of discovery, not the entire case from the outset. See JA at 16. Most courts, even those that eventually dismissed the case based on the state secrets privilege, have at least provided the plaintiff an opportunity to pursue his/her claim in good faith. See e.g., Molerio, 749 F.2d at 822-26 (affirming dismissal on ground of privilege after FBI answered complaint and complied with discovery requests); Ellsberg, 709 F.2d at 70 (reversing dismissal); Halkin, 690 F.2d at 984, 1009 (affirming dismissal after parties had fought "the bulk of their dispute on the battlefield of discovery"); Halkin v. Helms, 598 F.2d 1, 5 (D.C.Cir. 1978)(affirming partial dismissal and reversing decision rejecting privilege that was certified as interlocutory appeal). See also Reynolds, 345 U.S. at 11-12 (remanded for further proceedings without privileged material); DTM Research, LLC v. AT & T Corp., 245 F.3d 327 (4th Cir. 2001)(quashing of subpoena that threatened state secrets did not foreclose possibility of fair trial and did not warrant

dismissal); Northrop Corp., 751 F.2d at 400-02 (remanded for further proceedings without privileged material); Halpern v. United States, 258 F.2d 36, 44 (2d Cir. 1958) (remanded for trial *in camera*).

However, notwithstanding the Supreme Court's admonition to lower courts to carefully and closely assess the privilege so as not to grant it lightly, the district court erroneously disregarded the Supreme Court's instructions by following selected narrow Circuit Court jurisprudence calling into question the ability of a federal judge to challenge the assertions of the Executive Branch. See JA at 76 ("subsequent jurisprudence has held that courts lack the expertise to second guess an executive official's use of the state secrets privilege, and that 'courts should accord the utmost deference to executive assertions of privilege upon grounds of military or diplomatic secrets")(citation omitted).

The degree of deference to be extended to the Executive Branch on matters of national security was recently the subject of discourse and debate by the Supreme Court following rulings by this very Circuit. In Hamdi et al. v. Rumsfeld et al., ___ U.S. ___, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004), at a difficult time in our Nation's history, the Supreme Court was "called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an 'enemy combatant' and to address

the process that is constitutionally owed to one who seeks to challenge his classification as such." Id. at 2635. This Circuit had held that the detention was legally authorized and that no further opportunity was available to challenge the status label assigned by the Executive Branch. Id. The relevance of the Hamdi proceedings derives most notably from the discussion of the appropriate level of deference that is to be extended to the Government's security and intelligence interests.

This Circuit had also found that the district court's actions had failed to extend the appropriate deference. Id. at 2636, citing Hamdi et al. v. Rumsfeld et al., 296 F.3d 278, 279 (4th Cir. 2002). It also believed that separation of powers principles prohibited a federal court from "delv[ing] further into Hamdi's status and capture." Hamdi, 124 S.Ct. at 2638, quoting Hamdi et al. v. Rumsfeld et al., 316 F.3d 450, 473 (4th Cir. 2003).

Granted, the Sterling case does not involve matters touching upon criminal law, but the discussion of deference and principles of separation of powers is not only analogous but compelling. The concerns are identical. The direction from the Supreme Court is clear.

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to actual prosecution of war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-

> honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

Hamdi, 124 S.Ct. at 2649-50.

Moreover, any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. Id. at 2650 (emphasis added).

These principles must also apply to a court's analysis surrounding the invocation of the state secrets privilege.

B. The District Court Erroneously Decided It Neither Could Or Should Adjudicate The Classification Status Of Specific Documents Or Evidence That Might Be Utilized By Either The CIA Or Sterling

The district court understandably noted that it is not "an intelligence agency." JA at 80. However, it surprisingly continued to observe that:

> it is not the place of the Court to oversee the classification of documents and information, to examine or question the rationale of why officials classified this information at the level it is, or to redetermine whether information is truly "Secret" or "Top Secret." The only time in which a court should deny the privilege is if, after an examination of the agency head's declaration of his reasoning behind asserting the privilege, it is transparently obvious that the agency is engaging in an abuse of the privilege.

Id. This perception was echoed during oral arguments.

> MR. ZAID: And there's a distinction here as to what we're arguing on with respect to the government's motion and then

> secondarily this issue. Because I see them as very separate issues. One is whether or not this case, just after the complaint filed, is to be dismissed outright. The second is whether we can proceed forward and on a case-by-case basis meaning document by document or information by information and categories, whatever. You decide whether state secrets privilege could attach or statutory privilege could attach to certain information.
>
> THE COURT: Wait a minute. You re saying that under your theory then I would have to contradict the director's declaration and decide for myself in a vacuum what would be admitted, what would not be admitted and what affects national security and what would not affect national security?
>
> MR. ZAID: Well, I think you have the authority to do that.
>
> THE COURT: Well, maybe I do. But I don't think that comports with my understanding of Reynolds and some of the other state secrets cases.

See JA at 47.

The Court later stated:

> I have -- and *I' m not hesitant to express some sense that the Court really does not have a way to do anything more than to look at the declaration and make a judgment whether it qualifies under the state secrets privilege.* I don't think I need to reach the other issues involved about the substance of Mr. Sterling complaint.

Id. at 68 (emphasis added).

This applied rationale is entirely erroneous. For one thing, it is a fundamental constitutional and statutory role of a federal district judge to assess the propriety of an agency's classification decision. Moreover, there

is absolutely no legal basis upon which the district court could impose this new "obvious transparency" requirement in order to determine an agency's abuse of the privilege. The district court did exactly what it claimed it would not do, and that is to simply become a "'rubber stamp' for the executive's use of the state secrets privilege". JA at 79. Given the fact that the court repeatedly noted it was neither an intelligence agency, could not second-guess CIA determinations, would not examine or question agency rationale, and did not possess the proper expertise, then there is simply no way for the district court to even understand, much less substantively review, the DCI's declaration for examples of obvious abuse.

The CIA, in fact, has a history of ensuring its abuse of the classification system is nowhere close to being obvious. Events surrounding the tragedy of 9/11 and the current war in Iraq certainly underscore the problems with CIA classification and abuses of the national security system. Indeed, it is customary of the CIA to present contradictory information and inconsistent arguments regarding how it treats allegedly classified information before the courts for the sole purpose of defeating litigation.

For example, in Stillman v. Department of Defense et al., 209 F.Supp.2d 185, 224 fn.26 (2002), rev'd on other grounds, Stillman v. Central Intelligence Agency et al., 319 F.3d 546 (D.C.Cir. 2003), the district court

concluded that the CIA's efforts to preclude counsel from reading his own client's manuscript as part of a prepublication review challenge "strongly suggests that the CIA is denying access in litigation in order to maintain an advantage in litigation."

"While judges should acknowledge, their limitation in areas where they lack expertise, the difficult task in assessing a claim of 'state secrets' privilege calls for a particularly judicial expertise balancing the government's need for secrecy against the rights of individuals." Halkin, 598 F.2d at 15. However, the Supreme Court has made it clear:

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.

United States v. United States District Court (Keith), 407 U.S. 297, 320 (1972). "Although the judicial competence factor arguably has more force when made in the foreign rather than domestic security context, the response of Keith to the analogous argument is nevertheless pertinent to any claim that foreign security involves decisions and information beyond the scope of judicial expertise and experience." Zweibon v. Mitchell, 516 F.2d 594, 641 (D.C.Cir. 1975)(en banc).

> The role Congress has assigned the courts in assessing claims of "national security" under the Freedom of Information Act gives further support to the need for an independent, De novo assessment of the government's claim of privilege. In amending FOIA in 1974, Congress explicitly rejected both the Supreme Court's decision in EPA v. Mink, (limiting the court's role in assessing security classifications under FOIA) and President Ford's argument in opposition to the amendments ("the courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise.") The 1974 Amendments explicitly empower courts to make a De novo determination of the propriety of a security classification.

Halkin, 598 F.2d at 16 (citations omitted).

It is unquestionable that a district court has the ability and authority to substantively challenge the Government's assertions of privilege. To have not done so disregards both Supreme Court precedent and the fundamental principles of constitutional and statutory authority that govern our society.

C. District Courts, And Particularly The Eastern District Of Virginia, Are More Than Capable Of Handling Cases That Potentially Involve Classified Information And Ensuring Such Information Is Adequately Protected From Unauthorized Disclosure

It was the duty and obligation of the district court to make every conceivable attempt to fashion procedures that would have allowed Sterling's case to continue. Sterling presented a number of safeguards that other courts have successfully implemented, but to no avail.

This Circuit has specifically noted that district courts have the authority to "fashion appropriate procedures to protect against disclosure." Fitzgerald, 776 F.2d at 1243. See generally Comment, *Keeping Secrets from the Jury: New Options for Safeguarding State Secrets*, 47 Fordham L.Rev. 94, 109-113 (1978) (discussing options short of dismissal for the protection of state secrets); J. Zagel, *The State Secrets Privilege*, 50 Minn. L.Rev. 875, 885-88 (1966) (discussing procedures to protect secrets yet allow cases to go forward); Cf. Classified Information Procedures Act, 18 U.S.C. App. (1980)(procedures for the use of classified information in criminal trials). "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal warranted." Fitzgerald, 776 F.2 at 1244.

It is no longer the case where courts are incapable of handling information, whether privileged or classified, without taking adequate protections and safeguarding the information. In recent years the unfortunate rise in actual and attempted terrorist activities, as well as espionage, against our country have led to a large number of prosecutions where classified information was involved. Yet those cases exist, are ongoing or have been tried.

The district court was frustrated by the "unique bind" it was placed in by the CIA's invocation of the state secrets privilege. JA at 78. Part of the problem was the district court's misunderstanding of the classification nature of much of the information at issue or the simple ability to devise protective procedures. For example, it noted:

> Virtually all of Plaintiff's duties as an Operations Officer are classified. The location of Plaintiff's workplace is classified. All of Plaintiff's supervisors and most of his co-workers names are classified (hence Defendants John Does #1-10). The basic duties that a Court would ask a jury to perform as fact finder, such as to examine what Plaintiff's duties were, and to compare these duties to similarly situated Operations Officers, are impossible to achieve because all of this information is classified.

Id.[11] However, these observations are simply either untrue or exaggerated. Sterling's duties as an Operations Officer could easily be discussed in an

[11] The district court further noted that the only way a jury could hear Sterling's case would be to "choose jurors who have the applicable security clearances. Because the whole point of a jury in the American judicial system is to randomly choose citizens regardless of race, sex, economic status – or other intangibles, such as one's eligibility for a security clearance – this is an impossible goal to reach." JA at 78-79. Sterling has never argued that his case should proceed in a manner that would permit full use of classified information so as to create the concern noted by the court. Instead, he has continuously asserted that his case could proceed with *unclassified* information, particularly in a redacted format if necessary. Moreover, in order to have his day in court, Sterling would certainly be willing to consider waiving his right to a jury trial and allow the district court judge, who is permitted to review any classified information, to adjudicate the dispute.

unclassified manner. See JA at 96-101. His workplace location is not classified. See Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint for Improper Venue or in the Alternative to Transfer Venue (dated May 31, 2002) and accompanying exhibits; JA at 16. In any event, the specific location is irrelevant. In CIA cases, it is routine to simply refer to a work location as either Domestic Location "A" or Overseas Location "B". The parties know the location, as does the Court. The same applies to names of CIA officials, who can be identified by initials or pseudonyms. These concerns can be mitigated without question (as discussed further below).[12]

The Supreme Court has directly addressed the issue of dealing with the CIA's concerns that civil litigation may reveal classified information. In fact, Webster v. Doe, 486 U.S. 592 (1988), limits the extent to which any lower courts can dismiss a complaint without at first allowing the plaintiff an opportunity to pursue discovery even when the state secrets privilege is invoked. Although Webster did not involve the state secrets privilege, that

[12] Additionally, any depositions could be taken at CIA headquarters or some other government office before a cleared court reporter. Copies of transcripts and other discovery responses that may contain classified information would be maintained by the CIA or DOJ, but would be available to the district court for full examination at the appropriate time.

fact is irrelevant.[13] The issue was whether or not a federal court can adjudicate a claim against the CIA in light of the fact the CIA and its missions are enveloped nearly completely in secrecy. Yet the Court rejected outright the CIA's attempt to shield itself from the civil litigation process when it ruled:

> the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof that would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.

Id. at 604.

The district court attempted during oral arguments to explore the possible ways in which this case could proceed so as to protect Sterling's

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[13] Webster examined the CIA's ability to shield its information through statutory privileges. Any attempt by the CIA to claim that Sterling's case should be dismissed based on certain statutory privileges that protect intelligence sources and methods from unauthorized disclosure should be rejected. Although Sterling does not dispute the existence of the statutory authority, see Central Intelligence Agency v. Sims, 471 U.S. 159, 168-69 (1985)(discusses scope of statutory authority), the statutory authority of the CIA Director, however, is not akin to a privilege, at least certainly not one of the magnitude of the state secrets privilege. The SDNY Decision addressed this point and stated that "Tenet cites no authority in his Motion Brief in which an action was dismissed at the outset based upon a statutory privilege." See JA at 16.

rights while at the same time ensure the United States' interests to protect classified information are met. The effort failed.

This Circuit explicitly recognized that "there may be a case where an *in camera* hearing or other special procedure is necessary to properly determine whether the invocation of the state secrets privilege makes it impossible to go forward." Wen Ho Lee, 2003 WL 21267827, at *13 (4th Cir. June 3, 2003)(a copy of this decision is reproduced in the addendum to this brief pursuant to Local Rule 36(c) of the Federal Rules of Appellate Procedure). Although the Wen Ho Lee case was not one of those cases because "knowing the particular contents of specific documents would not have assisted the court's decision", id., Sterling's case was rife with evidence of relevant unclassified information that could both generally and specifically allow him to pursue his claims.[14]

Additionally, because both Sterling and at least one of his counsel have knowledge of allegedly "classified" facts, the district court could have taken the opportunity to hear *in camera* evidence to further assist it in deciding whether the state secrets privilege was appropriate. Indeed, Sterling

[14] Several attorneys and former employees of the CIA, who collectively have decades of experience with classified information, stated that Sterling's case could be litigated without requiring classified information to be brought into the public arena. see JA at 96-105.

suggested to the district court that he submit interrogatories, document production requests and deposition notices, along with a description of what information would be expected, to enable the district court to truly assess the applicability of the privilege. JA at 61. This suggestion was erroneously declined.

In Tilden, the court believed "there are no safeguards that this Court could take that would adequately protect the state secrets in question." 140 F.Supp.2d at 627. In support the district court relied on several prior Circuit Court pronouncements. See Bowles v. United States, 950 F. 2d 154 (4th Cir. 1991)(dismissal warranted because "no amount of effort or care will safeguard the privileged information.); Fitzgerald, 776 F. 2d at 1243 (dismissal of defamation action warranted "because there was simply no way [the] case could be tried without comprising sensitive military secrets); Molerio, 749 F.2d at 815 (dismissal of Title VII lawsuit warranted because without disclosure of state secrets, insufficient evidence of discrimination existed).

These observation are simply incorrect, and are certainly inconsistent with the present day functioning of the federal court system, particularly in the Eastern District of Virginia. As the Supreme Court recently noted,

"We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual's case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns." Hamdi, 124 S.Ct. at 2652.

Several district courts, in resolving challenges pertaining to the Guantanamo Bay detentions in the aftermath of the Supreme Court's opinion in Hamdi, have already implemented similar if not identical safeguard protections that would function just as well in Sterling's case upon remand. Judge Kollar-Kotelly of the U.S. District Court for the District of Columbia noted that:

> Counsel would be required to have a security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee, and would be prohibited from sharing with the detainee any classified material learned from other sources. The Court pointed out that the Government's decision to grant an individual attorney a security clearance amounts to a determination that the attorney can be trusted with information at that level of clearance. Furthermore, any attorney granted the clearance would receive appropriate training with respect to the handling of classified information, commensurate with the level of clearance granted and the type of classified material to which the attorney would be expected to have access. The Court also indicated that there are significant statutory sanctions relating to the misuse or disclosure of classified information. *see, e.g.*, 18 U.S.C. § 793 (addressing sanctions for gathering, transmitting or losing defense information);

> 18 U.S.C. § 798 (addressing sanctions for disclosure of classified information). Finally, the Court's framework presupposes full compliance by Petitioners' counsel.

Odah et al. v. United States of America, 2004 U.S. Dist. LEXIS 20968, *38-39 (D.D.C. Oct. 20, 2004)(citations omitted)(a copy of this decision is reproduced in the addendum to this brief pursuant to Local Rule 36(c) of the Federal Rules of Appellate Procedure)

District Judge Green, who is coordinating all the Guantanamo Bay cases within the U.S. District Court for the District of Columbia, recently issued a lengthy decision detailing with precision all the steps that will be taken by the court and counsel "to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information...." In re Guantanamo Detainee Cases, 2004 U.S. Dist. LEXIS 22525 ,*3 (D.D.C. Nov. 8, 2004)(a copy of this decision is reproduced in the addendum to this brief pursuant to Local Rule 36(c) of the Federal Rules of Appellate Procedure). Again, there is absolutely no difference between protecting and safeguarding classified information in a criminal versus civil matter.

Some of the procedures that Judge Green set in place have already been utilized in the Sterling matter by his counsel, and there is no reason why

these procedures cannot be implemented upon remand to allow the case to proceed. They include, but are not limited to:

- Counsel submitting all writings requesting access to classified information to a security officer for review. Id. at *10-11;

- The Government arranging for an appropriately approved secure area for the use of counsel to work with classified information. All information shall be stored and maintained in the secure area. Id. at *11-12;

- Allowing counsel to challenge the Government's assertions that there does not exist a "need to know" the sought-after classified information. Id. at *16; and

- Ensuring counsel understands the serious ramifications, to include civil and criminal penalties, which could occur were violations to occur. Id. at *18,25.

The district court below did not undertake the necessary and permissible efforts to attempt to allow Sterling's case to proceed.

II. THE DISTRICT COURT COULD HAVE TRIED STERLING'S TITLE VII CLAIMS WITHOUT JEAPOARDIZING NATIONAL SECURITY

Title VII was enacted "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." Alexander v. Gardner-Denver

Co., 415 U.S. 36, 44 (1974). These lofty goals, however, mean nothing to the CIA.

The district court noted that in a "routine Title VII case ... Plaintiff Sterling could probably prove a prima facia case for race discrimination. However, the fact of the matter is that the DCI has stated that all of the information which Plaintiff needs to prove his prima facia case of race discrimination is classified at either Secret or Top Secret." JA at 79-80.

The CIA does not get to choose the evidence upon which Sterling desires to rely. Although it can certainly object on grounds of privilege, that is an evidentiary matter for the Court to rule upon. Additionally, even the Court does not have the ability to restrict Sterling from presenting his factual case in the manner he sees fit, albeit, again, subject to the exclusion of certain information due to appropriate invocation of privilege.

> The unavailability of the evidence is a neutral consideration, and, whenever it falls upon a party, that party must accept the unhappy consequences. If the assertion of the privilege leaves plaintiff without sufficient evidence to satisfy a burden of persuasion, plaintiff will lose. If plaintiff's case might be established without the privileged information, dismissal is not appropriate.

Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 271-272 (4th Cir. 1980)(citations and footnote omitted). Although upon rehearing en banc the full court in Farnsworth ultimately upheld the government's invocation of

privilege to dismiss the action, that decision in large part relied on the fact that plaintiff's counsel would not recognize the information perceived by the government to be classified. Id. at 281. This is not the case here. Moreover, the Farnsworth court noted that "[i]t is evident that any attempt on the part of the plaintiff to establish a prima facia case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of the its state secrets precludes any further attempt to pursue this litigation." Id. Thus the plaintiff in Farnsworth could not demonstrate with the non-privileged evidence available to it their prima facia case. Yet, here, as detailed below, Sterling can do so.

However, the district court held that Sterling's case must be dismissed in its entirety because state secrets were critical to the resolution of core factual questions in the case, and Sterling's ability to prove his case necessarily depends or threatens the disclosure of privileged information. JA at 80-81 (citations omitted).[15] The district court never really examined the factual arguments Sterling set forth to prove a prima facia case for the very reasons discussed above that it believed it was not permitted to do so.

[15] The CIA below had argued that the court should grant summary judgment because the invocation of the privilege deprived it of a valid defense. The district court did not adopt that position. JA at 81. The CIA did not cross-appeal that determination.

> Although plaintiff argues that the redacted administrative EEO record contains sufficient unclassified direct and indirect evidence of discrimination for him to make his prima facia case, it is not for the Court, in this case, to second guess the judgment of the DCA in asserting the state secrets privilege. The potential for inadvertent exposure of classified information, even relying upon the EEO file, is simply too great.

Id. at 82.[16] If it is not the court's role to do so, then whose is it?

Though the CIA dictated to the district court through its filing of DCI Tenet's classified declaration the evidence that it believed Sterling would need to prove his discrimination claim, its briefs were essentially devoid of any analysis regarding Title VII claims. Given that a significant amount of evidence exists that has already been declassified, it is telling that the CIA made absolutely no effort to provide any public rationale as to why Sterling cannot allegedly satisfy his Title VII claim.

The unclassified Final Agency Decision dated May 24, 2001, the substance of which served as the basis for this litigation, and the EEO Report of Investigation and its exhibits reveal how simple it is to protect the

[16] In an exchange with government counsel during oral arguments, it was made clear that the government believed – and ultimately the district court accepted – the argument that either the DCI's declaration is accepted or rejected outright. And if accepted, "the case is over." See JA at 65.

identities of CIA officials and operational activities yet still permit public discussion and litigation of the relevant issues. See JA at 143-202.

The CIA's invocation of the state secrets privilege was nothing more than an effort to shield the CIA from exposure of the fact that it discriminates against minorities. Significant anecdotal evidence exists that the CIA discriminates against African-Americans in particular, and direct evidence exists that it discriminated against Sterling specifically. This case presented one of the best opportunities to prove that the CIA discriminates against African Americans, and it was also a case that caused significant embarrassment for the CIA due to the extensive publicity it generated.[17] These are the reasons, not national security, as to why the CIA sought

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[17] See e.g., "*Keeping Secrets*", U.S. News & World Report, Dec. 22, 2003; "*Discrimination suit against CIA allowed to continue*", Federal Human Resources Week, Sept. 19, 2003; "*Court rejects CIA's 'state secrets' bid; Now it seeks to shift the case to its home state*", National Law Journal, Sept. 15, 2003; "*Did the CIA Discriminate Against a Black Agent?*", CNN – Connie Chung Tonight, July 2, 2002; "*Out in the Cold; Agent Jeffrey Sterling charges the CIA with racial discrimination*", People, May 20, 2002; "*CIA invokes national security privilege to block suit*", Federal EEO Advisor, May 9, 2002; "*CIA tries to suppress claim, cites national security*", Federal Human Resources Week, May 7, 2002; "*CIA Sued By Former Agent*", CNN – The Point, Mar. 5, 2002; "*Black Ex-Agent Sues Over Alleged CIA Bias*", LA Times, Mar. 3, 2002; "*Former CIA case officer who is black contends agency discriminated against him*", Associated Press, Mar. 2, 2002; "*Fired by CIA, He Says Agency Practiced Bias*", New York Times, Mar. 2, 2002.

desperately to shroud itself in a cloak of secrecy. In addition to Title VII claims involving classified information that have been litigated, there have been dozens of EEOC cases brought against the CIA, each of which have necessarily involved the taking and compiling of classified evidence.

The CIA's invocation of the state secrets privilege at the initial stage of the litigation reflected a fundamental misunderstanding of employment discrimination claims. It treated this matter no differently than if data concerning classified weapons systems were at issue, as noted by Judge Schwartz when he rejected the privilege as grounds for dismissal in this matter. See JA at 15-16.

A. The Applicable Disparate Treatment Analysis Would Not Impact National Security Even Under The Strictest Standards

In a disparate treatment case under Title VII, a plaintiff can prove unlawful discrimination through either direct evidence of racial animus, or indirect, circumstantial evidence. In the latter case a plaintiff must use the "prima facie" model developed in McDonnell-Douglas Corp. v. Green, 411 U.S. 793 (1973), and updated in cases such as Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

The easiest and most obvious method of proof involves direct evidence of racial animus. Rizzo v. Means Services, Inc., 632 F. Supp. 1115 (N.D. Ill.

1986). If there is direct evidence of unlawful discriminatory animus that motivates an employment decision, then that is sufficient evidence of intent to support a claim of unlawful discrimination. Spagnuolo v. Whirlpool Corporation, 641 F.2d 1109 (4th Cir. 1981). Thus, where there is direct evidence of discrimination, this Circuit has held that the McDonnell-Douglas analysis does not apply. Spagnuolo, 641 F.2d at 1113. See also Lovelace v. Sherwin Williams Company, 681 F.2d 230, 242 (4th Cir. 1982)(direct evidence of discriminatory intent obviates need for McDonnell-Douglas analysis).

1. Unclassified Direct Evidence of Discrimination Could Be Presented Thereby Negating The CIA's State Secret Concerns

Sterling alleged the existence of direct evidence of discriminatory intent; namely that a supervisor told him that he could not receive certain positions because he was black. See Redacted Complaint at ¶10. That Sterling was told he was "too black" cannot in any sense of the imagination justifiably threaten national security. Sterling claims, in part, that his Advanced Work Plan ("AWP") was different than those received by similarly situated non-African America officers. See JA at 143-188. Since Sterling was the only African-American officer at his post, and claims that his AWP was different

than all other officers, he can use any other generic officer at the post as a comparator. See also JA at 189-202.

The CIA claimed that Sterling would have to present evidence about the requirements of his position as a covert operations officer, establish that he met those requirements, and compare his performance and experiences with the performance and experiences of covert operations officers outside of his protected class. Yet experienced former CIA officials, both of whom are attorneys and participated in their own discrimination lawsuits against the CIA, noted that this was simply untrue. The district court could easily have handled issues surrounding Sterling's AWP without crossing over the threshold into classified information. See JA at 96-101.[18] In fact, the class

[18] Additionally, Robert Baer, a former CIA operations officer, told *The New York Times* that he agreed that the demands put on Sterling for developing new agents were unreasonable. *Fired by CIA, He Says Agency Practiced Bias*, *New York Times*, Mar. 2, 2002. He noted it was "incomprehensible ... why any manager would give anyone a two-month limit." Id. Indeed, he asserted it was "an outrageous requirement. It often occurs that people go a whole tour of two or three years who don't recruit a single agent." Id. Another former CIA case officer, Michael Osbourne, who is African American, admitted that "[r]egularly, Blacks don't get assignments, are sent on certain types of mission, and a part of the experiences enable us to fail." *CIA Sued By Former Agent*, CNN – The Point, Mar. 5, 2002. Both Baer and Osbourne are still bound by their secrecy agreements and know not to publicly discuss classified information. Yet, they specifically addressed the very type of evidence Sterling could use to prove the CIA commits racial discrimination. These are just two of many experts Sterling could have had

action lawsuit pursued by women of the CIA involved similar claims as that of Sterling, and yet their case was permitted to proceed. Id.

2. Unclassified Cumulative Indirect Evidence Confirmed Unlawful Race Discrimination in this Case

Even without direct evidence, a plaintiff is entitled to show discrimination "through the cumulative effect of indirect evidence having sufficient probative force independent of the presumption's meager predicates to warrant submission...." Lovelace, 681 F.2d. at 240. The EEO materials in this case demonstrated that substantial indirect evidence existed to meet this criteria. See JA at 143-188.

3. Even Under The McDonnell-Douglas Analysis There Was Substantial Unclassified Evidence of Discrimination To Prove A Prima Facie Case and Pretext

Sterling demonstrated that he could make a showing of a prima facie case as set forth by McDonnell-Douglas and Sanderson Plumbing. The law recognizes that because most employers will not advertise their unlawful discrimination, McDonnell-Douglas established a three-part procedure for circumstantial evidence to show unlawful discrimination. See also Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). However, this

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testified on his behalf, and the district court could have controlled the flow of evidence. See Webster, 486 U.S. at 604.

procedure was never intended to be "rigid, mechanized or ritualistic." Id. Under this familiar analysis, Sterling initially would have to show that he is a member of a protected class and was differently treated from similarly situated white employees. EEOC v. Metal Service Company, 892 F.2d 341 (3d Cir. 1990). Once Sterling makes out a prima facie case, the burden shifts to the CIA to raise a legitimate, non-discriminatory reason for the disparate treatment.

At least two witnesses interviewed during the EEO process, notably Affiants E-8 and E-9, were white officers who were similarly situated but differently treated from that of Sterling. Affiant E-8's statement, which was among the materials confiscated from Sterling's counsel by the CIA on September 12, 2003, strongly supported Sterling's allegations even in its edited form.[19] This twice-redacted affidavit retains substantial evidence of a prima facie case under the strict McDonnell-Douglas standard and also contains evidence of pretext. By itself this evidence would overcome

[19] This Court should absolutely conduct an in camera review of the unredacted version of the EEO file to judge some of the evidence for itself. Given that the CIA is asking this Court to review DCI Tenet's classified declaration, any argument by the CIA that "classified" evidence that supports Sterling's discrimination claims cannot be reviewed is specious. And, given that the viability of Sterling's entire lawsuit is on the line, it is only fair that all available evidence be examined by this Court.

summary judgment even assuming a court applies the McDonnell-Douglas standard.

Affiant E-8, who is a white male officer, admitted that when he and Sterling compared AWP's, Sterling's AWP "required approximately twice as much in approximately half the time." This witness added that Sterling's AWP was "strikingly different" from his and that he could not provide an "alternative explanation" other than discrimination. Id. Additionally, this witness confirmed on the record - the identity of the supervisor is redacted - that the CIA "did not take an interest in Complainant and did not make an effort to see that he had a successful tour." Finally, Affiant E-8 recalled that another officer told him that "they - meaning management - and specifically [redacted name] were on (Complainant) from day one." JA at 189-202.[20]

[20] Nor does the evidence stop there. Affiant E-8 reiterates that Sterling's AWP was "harsher than mine" and that apparently the office "wished to present goals which would be difficult if not impossible to meet" by Sterling. In fact, Affiant E-8 details many areas where Sterling was treated differently than himself and other similarly situated employees. He believed that Sterling's cover was "undesirable cover" and that Sterling was apparently "the only one" in this category. He relates that Sterling had been passed over for a position that was unfilled and then readvertised, and that management delayed issuing Sterling's personnel evaluation ("PAR"). This is important given that Affiant E-8 testified that "I know of no other c/o who did not receive a PAR on time." Thus, clear unclassified evidence exists to demonstrate that Sterling's treatment was worse than and different from other similarly situated white officers. It is beyond doubt that the aspects of Sterling's "cover status" could be discussed in an unclassified environment,

Once a legitimate, non-discriminatory reason is proffered, Sterling must set forth evidence to show that the proffered reason was pretext. Reeves, 530 U.S. 133. That Affiant E-8 admits that the office "wished to present goals which would be difficult if not impossible" for Sterling to meet confirms that any non-discriminatory rationale for such an AWP was likely false. Showing that the CIA's purported non-discriminatory explanation is false is evidence of pretext sufficient to show a case of unlawful discrimination. Id. at 144. Affiant E-8 concludes that although he cannot prove that Sterling was discriminated against, he admits Sterling was treated "badly" and that he "cannot rule out" racial discrimination, particularly because he "did see actions which raised legitimate questions...about a possible discriminatory [] view of [Plaintiff.]"

Affiant E-9 also confirmed that Sterling was "given unrealistic requirements... and then denied the tools and resources necessary to complete the task assigned." Id. at 203-214. Once he could not meet impossible requirements, Sterling was labeled a "troublemaker and non-performing case officer." Affiant E-9's redacted response reveals examples of Sterling being subject to unlawful discrimination. It confirms that

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or simply redacted to be presented as the unclassified Affiant 8's testimony demonstrates.

Sterling was the "only African-American operations officer" and that "management appeared to go out of its way to make his life very difficult." The statements of Affiant E-9 are especially extraordinary given that he expresses grave concerns that one supervisory individual involved deals "extremely harshly" and "extra-administratively" with those individuals whom he believes are a threat to his career."

Though Affiant E-10 was apparently not close to Sterling, and answered a truncated set of questions relating to potential retaliation only, he felt the need to add that "Plaintiff may have been discriminated on his FRQ request for an opening...which he had submitted the previous year." Id. at 215-220.

Affiant E-11 conveys short answers only, but nevertheless notes that management wrote negative comments into Sterlings's FRQ, and did not tell Plaintiff about it, which was different than the way other persons were treated. Even this admission is revealing, since Affiant E-11 expresses concerns that any officer who speaks his mind or disagrees with management "is given less to do or moved. Others chose to resign..."

The CIA may again respond with self-serving evidence such as that contained in the Affidavits of E-6 and E-7, which evidence will easily be seen as non-credible and pretextual when compared with other evidence in the affidavits. Affiant E-7 states, for example, that "the goals and objectives

of Sterling's AWP were "fair, realistic, obtainable..." Id. at 143-188. Yet, this is directly contradicted by the affidavits of Affiants E-8 and E-9. Affiant E-6, who was Sterling's supervisor, writes long, self-serving answers, and also notes that the AWP was doable and reasonable and denied that Sterling was being set up to fail. Id. at 117-142. This is directly contradicted as false and pretextual by Affiants E-8 and E-9.

These examples confirm that there is substantial information in the declassified file already that could prove unlawful discrimination, and that there is ample room to explore these issues further through discovery, which would be controlled by the district court as the Supreme Court in Webster envisioned. If it is the case, given restrictions that may arise later in Sterling's effort to obtain additional evidence, that Sterling cannot muster evidence sufficient to meet the standards for a showing of unlawful discrimination under Title VII, then the CIA can present a motion to dismiss at the summary judgment stage.

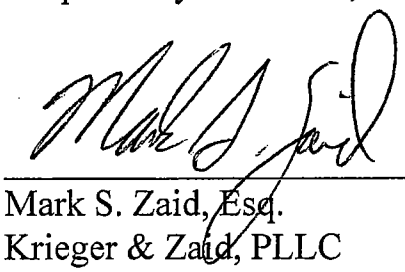
CONCLUSION

As the great American statesman Patrick Henry once said, "To cover with the veil of secrecy the common routine of business is an abomination in the eyes of every intelligent man and every friend to his country."

Therefore, based on the foregoing, the decision of the district court should be reversed and remanded for proceedings consistent with the arguments set forth above.

Date: December 10, 2004

Respectfully submitted,



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