



unredacted copy of his manuscript, so as to create a supporting declaration that would address the various redactions. Based on the defendants' arguments, that document would necessarily be considered and have to be treated as classified. The defendants refused to cooperate and denied the requests.

As a result of the impasse, Shaffer has been unable to file an Opposition to the defendants' Motion and the issue was brought to the attention of the Court to decide how this case should proceed. After reviewing the parties' Joint Status Report (filed July 22, 2011), the Court issued a Minute Order on September 22, 2011, stating:

It is hereby ORDERED that the parties shall submit supplemental briefing regarding the procedures by which the parties and the court shall prepare and review the filings in this matter. In particular, the parties shall discuss (1) the propriety of ex parte filings; (2) methods by which the plaintiff may prepare his filings; and (3) methods by which the parties may reach areas of agreement on how to proceed. The plaintiff shall file a brief expressing his views on or before October 5, 2011; the defendants shall file an opposition on or before October 11, 2011; and the plaintiff shall file a reply, if desired, on or before October 17, 2011.

As elaborated further below, Shaffer believes the defendants' refusal to allow his use of a secure computer system to draft a supporting declaration, as well as foreclosing access to his own book, violates his ability to exercise his First Amendment rights to challenge the classification decisions. The Executive Branch is improperly using national security as both a sword and a shield for the pure purpose of precluding Shaffer from having a meaningful opportunity to challenge unreasonable and unsustainable classification decisions.

Thereby, Shaffer respectfully requests, among other relief, that the Court order the defendants to provide the requested access so that he can submit an Opposition to the Court to counter the pending Motion.

#### **FACTUAL SUMMARY**

Shaffer is a highly experienced and decorated intelligence officer with 25 years of field experience. He was formerly employed by the defendant DIA from 1995 - 2006 and

recently retired as a Lt. Col. in the U.S. Army Reserves. He is required by virtue of a secrecy agreement to submit all of his writings for prepublication review. In 2001, just after the 9/11 attacks, he returned to active duty for a thirty-month period and had two successful combat tours to Afghanistan during which he participated in the search for senior Al Qaeda leadership. In recognition of successful high risk/high gain operations he received the Bronze Star Medal for performance as an Operations Officer. Shaffer is currently a Fellow and Special Lecturer at the Center for Advanced Defense Studies in Washington, D.C. and appears regularly as an expert commentator on network and cable television and radio, particularly with respect to military matters. Complaint at ¶3 (filed December 14, 2010).

Shaffer started writing "The Darker Side of the Force: A Spy's Chronicle of the Tipping Point in Afghanistan", which was the original title for what was later renamed Operation Dark Heart, in or around February 2007. The book offers a direct, detailed, eyewitness account of the 2003 "tipping-point" of the war in Afghanistan and provides an examination of the events and decisions where mistakes were made in strategy. It recommends a detailed, alternate plan to the current failing Counterinsurgency strategy that could result in victory in Afghanistan. Additionally, the book details protected disclosures made to the Executive Director of the 9/11 Commission on pre-9/11 intelligence failures (based on information developed through Operation "ABLE DANGER") while in Afghanistan in October 2003. Some of the events described in the book led to Shaffer being awarded the Bronze Star. Id. at ¶8.

In or around December 2008, Shaffer hired a then current *Washington Post* reporter and author, Jacqui Salmon, to serve as his ghostwriter. Ms. Salmon conducted several independent interviews, relied upon unclassified documents, read books on the topic, and created the story line and chapter structure based on the personal observations and commentary provided by Shaffer. Id. at ¶9. In February 2009, Shaffer entered into an

agreement with Thomas Dunne Books/St. Martin's Press ("St. Martin's Press" or "publisher") to publish Operation Dark Heart. Id. at ¶10.

In March 2009, Shaffer notified his Army Reserve chain-of-command that he was writing a detailed book on his experience in Afghanistan and requested guidance on how to comply with all appropriate security and ethical regulations. His Army Reserve leadership consulted with the 80<sup>th</sup> Training Command and U.S. Army Reserve Command and instructed him on what they understood the proper process to be in order to fully conform to security standards outlined in AR 350-1 so that no classified information would be contained or published in the book. Id. at ¶11.

In April 2009, two highly qualified Army Reserve officers – a military attorney with the rank of Major whose civilian employment is with the U.S. Army Special Operations Command and a Colonel who works as a civilian contractor for the Director of National Intelligence – were appointed to conduct the review of the book. Id. at ¶12. A copy of Shaffer's draft manuscript was first submitted in June 2009 to his Army Reserve chain-of-command. Id. at ¶13. In or around October 2009, Shaffer made multiple national public announcements on Fox News, MSNBC, and the Jerry Doyle Radio program, all of which, upon information and belief, are routinely viewed by the defendants, that his book on Afghanistan was nearing completion and undergoing an Army security review for publication in early to mid-2010. Id. at ¶14.

By Memorandum dated December 26, 2009, the Staff Judge Advocate for the Headquarters 94<sup>th</sup> Training Division, U.S. Army Reserve Center, Fort Lee, Virginia, stated that based on his review of the manuscript it was his understanding that Shaffer used only unclassified information and open sources in his memoir. He provided a favorable legal opinion that Shaffer could accept compensation for his memoir, a fact that Shaffer relied upon in good faith. Id. at ¶15. By memorandum dated January 4, 2010, the Assistant Division Commander, who was a Colonel, Headquarters 94<sup>th</sup> Training Division, U.S. Army Reserve Center, Fort Lee, Virginia, issued a favorable legal and operational

security review of the memoir and approved its publication. With receipt of this letter Shaffer was told he had complied with the instructions provided to him by the Army Reserve with respect to all legal obligations he was required to take for a classification review of his manuscript, an assertion that Shaffer also relied upon in good faith. In fact, Shaffer understood that submission through his chain-of-command with the U.S. Army Reserve, the governmental entity that held his security clearance, fully complied with any and all pre-publication review requirements that might obligate him. *Id.* at ¶16.

Following Shaffer's receipt of the final favorable approval of the U.S. Army Reserve's security and ethical reviews, on or about February 23, 2010, a copy of the manuscript was forwarded to the publisher and a publishing date of August 31, 2010 was scheduled. At this time full legal control of the publication of the manuscript was in the hands of the publisher. *Id.* at ¶17. During Spring 2010, Shaffer announced during multiple national interviews on such television networks as Fox News, MSNBC, BBC, Sky News, Alhurra TV, al Jazerra (English language) and numerous radio programs, many of which are monitored by the defendants, that his book had been formally approved by the U.S. Army Reserve and would be published by August 31, 2010. *Id.* at ¶18.

DIA claims to have first learned of Operation Dark Heart on or about May 27, 2010. On June 18, 2010, Shaffer received a phone call from his commanding general of the 94<sup>th</sup> Division and was informed that DIA was demanding access to the already cleared manuscript. He was told that the Division's decision was not to share it with DIA based on its prior retaliatory activities against him, particularly with respect to its ongoing refusal to re-adjudicate his security clearance, and because of concerns that DIA had waited until the very last minute to insinuate itself into the process. The Army Reserve believed that the book had been reviewed and approved as having been completely clear of any classified information. *Id.* at ¶20.

At no time did Shaffer ever interfere with or request that the Army Reserve not provide DIA with a copy of Operation Dark Heart. Although DIA was well aware of how to contact Shaffer and/or his attorney, not one DIA official ever requested a copy of the memoir directly from Shaffer, his attorney, his literary agent or publisher. Had a copy been requested by DIA, Shaffer and/or his attorney would have willingly and immediately complied. *Id.* at ¶21. On July 10, 2010, Shaffer was requested by his Army Reserve leadership to provide a copy of Operation Dark Heart to the Army and he immediately did so. *Id.* at ¶22.

On July 11, 2010, Shaffer was notified by his Army Reserve leadership that the Department of the Army had decided to provide DIA a copy of Operation Dark Heart. He was also told that the Army Reserve was standing by its approval for the book to be published. It was noted that there was “tremendous pressure” being brought upon the Army by DIA to withdraw the Reserve’s approval for the publication of the book. Shaffer was told to be aware there is a “huge target on your back...” *Id.* at ¶23. By July 14, 2010, DIA had been provided a copy of Operation Dark Heart from the Army’s General Counsel’s Office and had disseminated copies to, among others, U.S. Special Operations Command, defendant CIA and the NSA. Following its preliminary review DIA claimed to have identified significant classified information contained within the memoir, as did the other entities as well. *Id.* at ¶24.

On July 22, 2010, a DIA public affairs official called Shaffer and informed him that DIA had read the manuscript and believed it contained “classified information”. By this time, the publisher had already arranged for numerous pages of the book to be available for the public to review on *Amazon.com*. *Id.* at ¶25. On August 6, 2010, Lieutenant General Ronald Burgess, Director, DIA, sent a memorandum to Lieutenant General Richard P. Zahner, Deputy Chief of Staff for Intelligence (G2), Department of Army, and requested that the Army take all necessary steps to revoke the favorable operational and security ethics review provided by the 94<sup>th</sup> Training Division. Additionally, it was

requested that Shaffer be ordered to formally submit his memoir for an information security review by defendant DoD, as well as take all necessary action to direct his publisher to withhold publication pending review. Id. at ¶26.

On or about August 6, 2010, the Department of Army rescinded the Army Reserves' favorable approval for the publication of Operation Dark Heart. Id. at ¶27. On August 10, 2010, Shaffer was notified by the Army Reserve via e-mail that the "Department of the Army has concluded that the clearance review conducted by the 94th Division was insufficient, and that you will need to request in writing a review by the Department of the Army." Id. at ¶28.

Upon request, by letter dated August 11, 2010, St. Martin's Press sent the Department of Army a copy of the finished book, which was scheduled for publication in less than three weeks. Id. at ¶29. On Friday, August 13, 2010, just as St. Martin's Press was readying its initial shipment of the book, defendant DoD contacted it to express its concern that publication of Operation Dark Heart could cause damage to U.S. national security. The publisher agreed to temporarily delay publication to allow discussions between the defendants and Shaffer to take place. Id. at ¶30. Shaffer, as the author, had absolutely no legal control over the publication of Operation Dark Heart and could only offer recommendations that the publisher, which was willing to cooperate with the defendants as much as possible, could accept or reject as it saw fit. Id. at ¶31.

Notwithstanding the decision to delay publication, the defendants were explicitly notified at the outset that several dozen review copies of Operation Dark Heart had already been distributed and that it would be virtually impossible to retrieve those books, at least not without arousing suspicion. Thus, whether the defendants sought to block publication of or even negotiate redaction of text from the book, it was inevitable that someone would likely post and reveal the alleged "classified" information online. Id. at ¶32. On August 16, 2010, DoD and DIA officials, to include its General Counsel George

Peirce, met with representatives of the publisher in New York City to express its continuing concerns regarding publication of Operation Dark Heart. Id. at ¶33.

On August 16, 2010, Shaffer's counsel also notified defendant DoD's counsel via e-mail that:

My client and I are more than willing to cooperate with the USGOVT to ensure there is no legitimately classified information within his book. It is in no ones interest for this to occur. That is exactly why Mr. Shaffer timely and properly submitted his manuscript for prepublication review through his Army Reserve chain of command, which held his current clearance, thereby fulfilling his lawful requirement.

That said, I am sure we can argue about the process that led to the initial issuance and then rescission of the approval to publish, and no doubt there will be opportunity to do so in the future, but we would like to focus on the present situation and see if we can arrive at an amicable resolution that would satisfy all concerned and allow the book to be publicly sold with as little delay as possible.

Id. at ¶34. Although Shaffer's undersigned attorney informed defendant DoD that he currently maintained a Secret level clearance and desired to participate in any meetings involving his client in order to facilitate any negotiations, the defendants refused to allow Shaffer's counsel access to the unredacted first edition of Operation Dark Heart. DoD did, however, allow the publisher's attorney to participate in classified conversations regarding the contents of the book.

Shaffer was originally informed that the defendants had identified eighteen items of concern with his book, and he was requested to meet at the Pentagon with officials of the defendants on August 19, 2010, to discuss the specific text. Based on conversations between DoD and the publisher, it was understood that the meeting would involve "surgical editing" only to meet as many of the defendants' concerns as possible. Id. at ¶36. Shaffer fully cooperated with the defendants over the course of several meetings in August and September 2010 to negotiate any classification concerns. Contrary to the



initial statements by the defendants as to “surgical editing”, the defendants requested significant changes to include modifying information that had been previously declassified, taken completely from open sources or obtained by Ms. Salmon, Shaffer’s ghost writer. As part of the negotiations Shaffer willingly agreed to modify or delete certain text, and to the extent agreement could not be reached the publisher agreed to redact the text from a revised edition. *Id.* at ¶37. Eventually, approximately 250 pages out of 320 pages of Operation Dark Heart were required to contain redactions in order to allegedly prevent the disclosure of classified information.

By on or about September 3, 2010, legal representatives of defendant DoD provided the publisher, without Shaffer’s advance knowledge or consent, with an unclassified copy of Operation Dark Heart that the Government had approved for publication in its present form. That copy was accepted by the publisher for publication. *Id.* at ¶39. On September 9, 2010, the publisher notified DoD that the book was considered complete and the pages were being sent to the printer. Notwithstanding this fact, defendant DoD continued to attempt to have Shaffer modify or delete text. *Id.* at ¶40.

In or around late September 2010, defendant DoD paid nearly \$50,000 to the publisher to destroy 9,500 copies of the first printing of Operation Dark Heart on the basis that publication threatened national security. *Id.* at ¶41. The publisher then printed a second edition of Operation Dark Heart of approximately 50,000 copies with redactions and it was published on or about September 24, 2010. *Id.* at ¶42.<sup>1</sup>

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<sup>1</sup> St. Martin’s Press has scheduled the issuance of a paperback edition of Operation Dark Heart for October 11, 2011.

The *New York Times*, however, had purchased a review copy of the first edition of Shaffer's book from an online book seller and on September 9, 2010, it publicly broke the story of the DoD's efforts to suppress the book and the negotiations to purchase and destroy all available copies of the first edition of Operation Dark Heart. See "Pentagon Plan: Buying Books to Keep Secrets," *New York Times*, September 9, 2010, available at <http://www.nytimes.com/2010/09/10/us/10books.html>. Id. at ¶43.

At the same time additional copies of the first edition that had been distributed for review started to appear for sale. One copy allegedly sold on E-bay for over \$2,000.00. See "eBay Sellers Buck Defense Department & Sell Uncensored Version of Operation Dark Heart" at [http://www.mediabistro.com/galleycat/ebay-sellers-buck-defense-department-sell-uncensored-version-of-operation-dark-heart\\_b12647](http://www.mediabistro.com/galleycat/ebay-sellers-buck-defense-department-sell-uncensored-version-of-operation-dark-heart_b12647). Id. at ¶44.

On September 18, 2010, the *New York Times* published an article entitled "Secrets in Plain Sight in Censored Book's Reprint", which is available for review at <http://www.nytimes.com/2010/09/18/us/18book.html>, in which the following, none of which has been confirmed by either Shaffer or his counsel, was claimed to be a list of some of the information that was redacted by the defendants from the first edition of Operation Dark Heart. The redactions allegedly included:

- Identification of the National Security Agency's nickname as "The Fort";
- The location of defendant CIA's training facility at Camp Peary, Virginia;
- The name and abbreviation of the Iranian Revolutionary Guard Corps;
- The fact that "Sigint" means "signals intelligence";
- That Shaffer's cover name in Afghanistan was "Chris Stryker," and that the name was derived from John Wayne's character in the 1949 movie "The Sands of Iwo Jima"; and
- A description of a plan by NSA technicians to retrofit an ordinary-looking household electronic device and place it in an apartment near a suspected militant hideout in Pakistan.

Id. at ¶45.

On or about September 29, 2010, The Federation of American Scientists posted on its website at [http://www.fas.org/blog/secrecy/2010/09/behind\\_the\\_censor.html](http://www.fas.org/blog/secrecy/2010/09/behind_the_censor.html) comparison copies of pages from the unredacted first edition side-by-side to the second edition that contained redactions thereby permitting anyone to completely identify what was redacted allegedly as constituting “classified” information. A side-by-side comparison of the redacted vs. unredacted index of the book was also posted on October 5, 2010, at <http://www.fas.org/sgp/news/2010/09/dark-index.pdf>. *Id.* at ¶46.

On September 29, 2010, the *HuffingtonPost.com* posted an article entitled “‘Operation Dark Heart’: Comparing The Censored Version With The Real Thing”, which stated that “Among the more unnecessary redactions: the name of ‘Deliverance’ star Ned Beatty – ‘which is not properly classified in any known universe’ -- but is blacked out on page 15 of the book. Overall, the national security classification exemplified in the new book ‘does not exactly command respect,’ writes [Steve] Aftergood [of the Federation of American Scientists].” *Id.* at ¶47. On October 4, 2010, the *Army Times* published an article entitled “Censored book masks sensitive operations”, which is available at <http://www.armytimes.com/news/2010/10/army-book-100410w/>, and undertook a before and after analysis of the information redacted from the revised edition of Operation Dark Heart. *Id.* at ¶48.

On May 16, 2011, defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. The substantive information presented in support of their Motion was “classified” and filed *in camera* and *ex-parte*. Contemporaneously, the defendants’ counsel notified the undersigned of thirteen pieces of information that were originally

asserted to be classified from within Shaffer's book were now considered unclassified.

On June 7, 2011, in order to properly respond to the defendants' Motion, Shaffer's counsel requested the opportunity for him to use a secure computer to draft a sworn declaration to challenge the classification determinations that led to the redactions in his book. Additionally, a request was made for access, again in a secure setting, to an unredacted version of the manuscript he created so that the specific portions of the book alleged to be classified could be directly addressed. The defendants denied both requests and as a result, the current dispute arose. All efforts to secure a compromise between the parties failed.

### **ARGUMENT**

The law surrounding a prepublication classification review of a former federal employee's manuscript and the ability to judicially challenge any of the Government's determinations is well-settled. "The government has no legitimate interest in censoring unclassified materials," and, thus, "may not censor such material, contractually or otherwise." McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983). If a federal agency censors a manuscript because it contains classified information, the author is entitled to judicial review of that decision to ensure that the information in question is, in fact, properly classified under the standards set forth in the applicable Executive Order. Wilson v. CIA, 586 F.3d 171, 185 (2<sup>nd</sup> Cir. 2009). See McGehee, 718 F.2d at 1148 (employee retains "a strong first amendment interest in ensuring that CIA censorship of his [work] results from a proper classification of the censored portions"); United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972)(noting right to judicial review in this

context). See also Snepp v. United States, 444 U.S. 507, 513 n.8 (1980)(observing that CIA clearance procedure is “subject to judicial review”).

Before addressing the Court’s specific request, Shaffer wishes to make clear what is and is not, at least from his perspective, currently at issue:

- Shaffer desires to draft a sworn declaration specifically addressing the classification status of the redacted text in his book, particularly to identify unclassified source(s) for the information. He also desires to explain to the Court what transpired during the meetings he had with representatives of the defendant to discuss the text including statements made by these individuals;
- Shaffer has no intention of providing classified information to the Court other than through references in the redacted text contained in his book;
- Given that the defendants consider the redacted text to be classified, Shaffer, who is bound by numerous secrecy non-disclosure agreements, must also treat the information as classified until instructed otherwise by the defendants or upon an Order of this Court. Therefore, in order to address the specific redactions in his book he must necessarily reference the exact language and cannot do so in an unclassified filing. It is unlawful for Shaffer to use a personal computer to type this information, and he needs access to a copy of the unredacted version of his book to do so. Thus, he needs use of a secure government computer in order to create his declaration;
- The “classified” content of Shaffer’s sworn declaration, as described above, will not be shared with his undersigned counsel until such time it properly undergoes a classification review and is authorized for release;<sup>2</sup>

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<sup>2</sup> Although both of Shaffer’s counsels possess Secret security clearances neither has executed a secrecy, non-disclosure agreement in this specific matter, nor has been granted authorized access to any of the redacted information. Therefore, they are not bound by any obligation surrounding its handling or dissemination. Notwithstanding this position, because of the threatened, if not pursued, retaliatory actions of the defendants against counsel in other similar cases including the undersigned, guidance from the Court is needed as to the extent to which counsel can quote from specific text from Shaffer’s book that is now publicly available on the Internet and elsewhere. A similar, though not identical, issue was recently before Judge Paul Friedman in Saifullah Paracha, et. al., v. Barack Obama, et al., No. 04-CV-2204 (D.D.C.), involving the use by counsel, who did possess authorized access to classified information relating to his client, of documents made available through Wikileaks. See e.g. “Guantánamo Detainee’s Lawyer Seeks a

(Continued...)

- Shaffer is not seeking to *publicly* file classified information with the Court.<sup>3</sup> Of course, the Court will necessarily have *in camera* access to the “classified” version of Shaffer’s declaration as Article III judges are automatically eligible for access to classified information. 28 C.F.R. § 17.46(c). So, too, will the defendants;
- Shaffer is not, at this time, seeking to compel the defendants to disclose classified information to his counsel;<sup>4</sup>
- Shaffer is not seeking to compel the defendants to disclose classified information to him other than, as a technically ironic matter, granting him access to the very book he and his ghost writer wrote; and
- Shaffer is not, at this time, seeking access for either him or his counsel to review the allegedly classified declarations submitted *in camera, ex parte* by the defendants in support of their Motion.

Finally, Shaffer wishes to state at the outset what neither this Court nor the parties will find in addressing the issues at hand, and directly calls upon the defendants to

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Voice on WikiLeaks Documents,” *New York Times*, April 27, 2011, available at <http://www.nytimes.com/2011/04/28/us/28gitmo.html>; “Lawyers for Guantánamo Detainees Allowed to See Leaked Files,” *New York Times*, June 10, 2011, available at [http://www.nytimes.com/2011/06/11/us/politics/11wiki.html?\\_r=2](http://www.nytimes.com/2011/06/11/us/politics/11wiki.html?_r=2).

<sup>3</sup> Thus, there is no question before the Court at this time as to whether the Judiciary is empowered to evaluate the consequences of a release of sensitive information because Shaffer is not attempting to release sensitive information other than to authorized Judicial officials.

<sup>4</sup> Thus avoiding for the time being the question that consumed the Court in *Stillman v. DoD et al.*, 209 F.Supp.2d 185, 197 (D.D.C. 2002), *rev’d on other grounds*, *Stillman v. CIA et al.*, 319 F.3d 546 (D.C. Cir. 2003), as to why “the government has been less than straightforward as to why it denied Mr. Zaid access to this information. Defense counsel has consistently argued a position that is belied in part by the evidence defendants have submitted to this Court. In light of the serious allegations that DOD and the CIA are intentionally denying plaintiff’s counsel access in order to retaliate against plaintiff for asserting his First Amendment rights, such inconsistencies by the government in explaining its decision are, to say the least, suspect.” Indeed, the Court went further than simply being suspect and postulated that “the CIA is denying access in litigation in order to maintain an advantage in that litigation.” *Stillman*, 209 F.Supp.2d at 197 fn.7. One can apply that concept to this case as well although in a different context.

demonstrate otherwise beyond mere analogous references to dicta in earlier case decisions involving factual matters completely distinct from that faced here.

- There is no statute adopted by Congress that precludes Shaffer from providing classified information to this Court in a manner deemed appropriate by the Court. If there is the defendants should be required to cite to it.
- There is no regulation adopted by the Executive Branch that precludes Shaffer from providing classified information to this Court in a manner deemed appropriate by the Court. If there is the defendants should be required to cite to it.
- There is no case law issued by the Judiciary that precludes Shaffer from providing classified information to this Court in a manner deemed appropriate by the Court. If there is the defendants should be required to cite to it.

**(1) What is the propriety of ex parte filings?**

Shaffer does not envision submitting any documents *ex parte* and has no objection to the defendants reviewing his *in camera* filings. Obviously, the defendants have already filed *ex parte* declarations. At this time Shaffer is not presenting a challenge to that practice, which has been accepted in this Circuit. See Boening v. CIA, 579 F. Supp. 2d 166, 174 (D.D.C. 2008)(“prepublication review cases can and should begin with *ex parte* and *in camera* consideration”), See also Stillman, 319 F.3d at 548-49 (“we anticipate that *in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm.”), citing McGehee, 718 F.2d at 1149.

Notably, no prepublication decision stands for the premise, or isolates, that it is only the Government that can submit *in camera* classified declarations. In fact, the D.C. Circuit in Stillman was quite explicit that such practice was permissible when it noted that the “district court should first inspect the manuscript and consider any pleadings and declarations filed by the Government, *as well as any materials filed by Stillman*, who describes himself an ‘expert in classification and declassification.’” Stillman, 319 F.3d at

548-49 (emphasis added). Additionally, in Berntsen v. CIA, 511 F. Supp. 2d 108 (D.D.C. 2007), which was handled by the undersigned counsel, the Court was presented and was willing to accept a classified declaration from the plaintiff submitted *in camera* to challenge the Government's classification decisions.

Thus, respectfully, the issue is not whether any *ex parte* filings should be permitted but whether Shaffer will be allowed to submit a classified declaration *in camera*.

**(2) What are the methods by which the plaintiff may prepare his filings?**

What Shaffer proposes is simplistic in nature. He needs to use a secure Government computer at a location to be determined in order to fulfill his legal obligations to the defendants to protect classified information as well as meet the standard adopted in a stream of prepublication review cases that requires the plaintiff to present a declaration that provides specific citations to the portions of his book he argues have been improperly classified.<sup>5</sup>

Shaffer is merely attempting to abide by the guidance set forth in prior pre-publication review cases, as well as meet the demands of the defendants as delineated in those cases. In Boening, 579 F. Supp. 2d at 170, the defendants demanded "Plaintiff provide the pinpoint citations for any material he claims is already in the public domain." See also McGehee, 718 F.2d at 1141 n.9 ("An ex-agent should demonstrate, however, at an appropriate time during the prepublication review, that such information is in the

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<sup>5</sup> The defendants have made clear that Shaffer "is required by his written secrecy agreements to submit all of his writings for review by the Government prior to their disclosure, and has agreed never to disclose certain information or material obtained in the course of employment to anyone not authorized to receive it without prior written authorization." Joint Status Report at 5-6 (filed July 22, 2011). Shaffer does not challenge this assertion. Indeed, he merely wishes to fulfill his obligations to the defendants as outlined in these agreements.



public domain. The CIA cannot reasonably bear the burden of conducting an exhaustive search to prove that a given piece of information is not published anywhere.”). This is exactly what Shaffer desires to do.

Shaffer’s classified sworn declaration, which would not be accessed by his counsel, would be submitted to the defendants for prepublication review and it can be redacted as they see fit before filing on the public record.<sup>6</sup> The un-redacted version, however, would be submitted to the Court for its *in camera* review and full consideration as part of Shaffer’s forthcoming Opposition filing.

In his sworn declaration Shaffer intends to detail the classification discussions he had with officials employed by the defendants when he voluntarily participated in an effort to address their concerns in August/September 2010.<sup>7</sup> This would include producing to the Court the unclassified source materials that he submitted to the defendants at that time.<sup>8</sup>

While Shaffer contends his declaration would be unclassified the defendants will most

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<sup>6</sup> To ensure there is no misunderstanding, Shaffer’s counsel would not review any of the portions of the declaration that involves discussion of the allegedly classified information but he would logically assist Shaffer in preparing other portions that do not relate to the challenged classified information. Furthermore, while it is true that Shaffer’s counsel at the time of the filing of this lawsuit noted he has not had access to the complete unredacted manuscript, *see* Compl. 2 n.1, there are copies publicly available from sources other than Shaffer including on the Internet. *Id.* ¶¶43-48.

<sup>7</sup> Whether those conversations are classified, in part or in full, is a fact known to the defendants as its representatives obviously participated in the meetings. It is Shaffer’s understanding that the discussions he engaged in were not classified but that is not his decision to make.

<sup>8</sup> In Boening, 579 F. Supp. 2d at 174-75, which was also handled by the undersigned counsel, the plaintiff submitted public source materials, including published newspaper articles, to challenge the CIA’s classification decisions. The CIA sealed the entire exhibit as classified. Thus, Shaffer faces numerous risks of being accused of releasing or possessing classified information based on the whim of the defendants, which is why allowing him the use of a secure government computer not only protects the information in question but also ensures he will not be arbitrarily punished, to include criminally, under the guise of violating his secrecy/non-disclosure agreement(s).

assuredly claim otherwise. Given that he admittedly has no authority to determine what is or is not classified he must take the appropriate steps to ensure the information is protected from even inadvertent disclosure (as well as ensure he does not violate any of his previously executed secrecy/non-disclosure agreements), while at the same time nevertheless protecting his own First Amendment rights to challenge the propriety of the defendants' classification decisions.

Obviously, even merely quoting the actual redacted text of the book, which would appear to be an obvious necessity given the posture of this case, involves referencing information alleged by the defendants to be currently classified. For example, the *New York Times*' September 18, 2010, article entitled "Secrets in Plain Sight in Censored Book's Reprint" (<http://www.nytimes.com/2010/09/18/us/18book.html>), alleges to specifically publish information taken directly from an unredacted first edition of Operation Dark Heart that the defendants currently consider classified. The redactions allegedly included:

- Identification of the National Security Agency's nickname as "The Fort";
- The location of defendant CIA's training facility at Camp Peary, Virginia;
- The name and abbreviation of the Iranian Revolutionary Guard Corps;
- The fact that "Sigint" means "signals intelligence";
- That Shaffer's cover name in Afghanistan was "Chris Stryker," and that the name was derived from John Wayne's character in the 1949 movie "The Sands of Iwo Jima"; and
- A description of a plan by NSA technicians to retrofit an ordinary-looking household electronic device and place it in an apartment near a suspected militant hideout in Pakistan.

Accepting this information for purposes of this instant response to be true, for Shaffer to specifically craft a declaration that states that the term "Sigint", as apparently used somewhere in his book, means "signals intelligence", and then any attempt on his part to explain to the Court using public source information that this fact is actually unclassified,

would be considered a violation of his non-disclosure, secrecy agreements in that he would have created a classified document without authorization and on an unsecure computer system. Thus, it is not sufficient to simply accept the defendants' suggestion that Shaffer can "submit[] an unclassified declaration and unclassified supporting materials (such as copies of, and citations to, specific official disclosures by the Government) for consideration by the Court." Joint Status Report at 5 (filed July 22, 2011).

With respect to the issue of allowing Shaffer to access an unredacted copy of his own book, this too arises from a very simple premise. There is no other way for Shaffer to identify and challenge any of the specific text purported to be classified, much less present an argument to the Court, if he does not have access to the original copy of his book. Not surprisingly, he concededly lacks the mind of a computer that would allow him to have memorized every single redaction that is contained on 250 of the 320 pages of Operation Dark Heart. The Court can see for itself the extensive redactions that were imposed upon Shaffer's writings that sometimes filled the majority of a page in the book. Exhibit "1".<sup>9</sup> Without access to the original manuscript there is absolutely no way that Shaffer can present the type of "pin-point citations" the Government – including one of the defendants in this case – successfully argued to Judge Sullivan in Boening was necessary in order for a First Amendment challenge to be made. 579 F. Supp. 2d at 170.

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<sup>9</sup> The Court, if it wishes, can also examine several examples of the type of information allegedly redacted by the defendants from Shaffer's Book. The Federation of American Scientists posted online what purports to be pages 30, 55, 56, 195 and 257 of both the unredacted and redacted versions of Operation Dark Heart in a side-by-side comparison at [http://www.fas.org/blog/secrecy/2010/09/behind\\_the\\_censor.html](http://www.fas.org/blog/secrecy/2010/09/behind_the_censor.html).

As a result, the defendants are violating Shaffer's First Amendment rights to challenge their classification decisions.

At its core, the refusal of the defendants to allow Shaffer access to a secure computer, as well as his un-redacted manuscript, has been undertaken primarily, if not solely, for the purpose of securing a litigation advantage rather than protecting the sanctity of classified information. This fact pattern is even more outrageous than experienced in Stillman where the issue was solely whether counsel would be granted access as the plaintiff in that case retained full access at all times to his "classified" manuscript. See Stillman, 209 F.Supp.2d at 197 fn.7 (Government "is denying access in litigation in order to maintain an advantage in that litigation").

There should be no mistake that this Court possesses absolute authority to control how information is accessed and presented to it, and that includes ordering the defendants to permit Shaffer to use a secure computer system and review his unredacted manuscript to draft a sworn declaration that the Government would consider to be classified. See In re Sealed Case, 494 F.3d 139, 154 (*D.C. Cir. 2007*)("nothing in this opinion forecloses a determination by the district court that some of the protective measures in CIPA, 18 U.S.C. app. III, which applies in criminal cases, would be appropriate ... so that his case could proceed")(State Secrets case). See also Webster v. Doe, 486 U.S. 592 (1988)("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").

Therefore, Shaffer respectfully requests that this Court order the defendants to allow him access to his unredacted manuscript and a secure Government computer by which to draft a sworn declaration.

**(3) What are the methods by which the parties may reach areas of agreement on how to proceed?**

Regrettably, all efforts, which lasted for weeks as the defendants decided their course of action, undertaken by Shaffer and his counsel to reach an agreement on the issues in this dispute failed. As noted above, this matter is straight-forward: in order to legally protect himself and the integrity of the information Shaffer requires access to a secure Government computer to draft his sworn declaration. Nor can Shaffer even begin to respond to the defendants' Motion without actual access to the redacted text from his book.

There is no foreseeable avenue for compromise based on the defendants' steadfast denials but Shaffer is certainly amenable to discussing any options the Court wishes to raise.<sup>10</sup>

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<sup>10</sup> The Court may be interested to know that an identical issue is currently being litigated before Judge Beryl Howell in *De Sousa v. CIA et al.*, Civil Action No. 09-00896 (D.D.C.), a case also being handled by the undersigned. See "U.S. Seeks to Withhold Secret Data From Judge," *New York Times*, May 27, 2011, available at <http://www.nytimes.com/2011/05/27/us/politics/27secret.html>. In fact, at one point Judge Howell ordered the Government defendants to allow the undersigned counsel to use a secure Government computer to draft an opposition brief. Ultimately, the parties verbally argued the merits of the defendants' Motion, but this was only possible because the undersigned avoided discussion of classified information. Unfortunately, such an option is not available in this case given the nature of the challenge. It is Shaffer's belief that the defendants are taking a hard-line no compromise approach in his case in order to also maintain a litigation advantage in other cases such as *De Sousa*.

Dated: October 5, 2011.

Respectfully submitted,

/s/

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