IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTHONY SHAFFER, Plaintiff, v. DEFENSE INTELLIGENCE AGENCY, *et al.*, Defendants.	)	Civil Action No. 1:10-cv-02119 (RMU)

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants Department of Defense, Defense Intelligence Agency, and Central Intelligence Agency, through undersigned counsel, respectfully move the Court to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, for summary judgment on Plaintiff's claim pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h). In support of this motion, Defendants refer the Court to the accompanying memorandum.

Dated: May 16, 2011.

Respectfully submitted,

TONY WEST
Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

VINCENT M. GARVEY
Deputy Branch Director

/s/ Scott Risner
JOHN R. TYLER (DC Bar No. 297713)
Assistant Branch Director
SCOTT RISNER (MI Bar No. P70762)

Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 514-2395
Fax: (202) 616-8470
Email: scott.risner@usdoj.gov

Attorneys for Defendants

Table of Contents

Table of Authorities

CASES **PAGE(S)**

OTHER MATERIALS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Introduction

"The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam); *see also Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation."). To vindicate those interests, the Department of Defense required Plaintiff Anthony Shaffer, as a condition of employment, to sign a secrecy agreement to protect classified information. Plaintiff voluntarily and knowingly signed several such agreements, on numerous occasions, that prohibit him from disclosing classified information and require him to submit proposed writings for prepublication review. *See* Compl. ¶ 3; Ex. 1, Pl.'s Secrecy Agreements. Yet Plaintiff now asks this Court to find that the Department of Defense (including its component, the Defense Intelligence Agency (DIA)) and the Central Intelligence Agency (CIA) violated his First Amendment rights when the Government determined that certain information Plaintiff seeks to publish is classified and, therefore, cannot be published.

Plaintiff lacks standing to raise the sole claim asserted in his complaint. It is a plaintiff's burden to establish the Court's jurisdiction over his case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). But Plaintiff alleges in his complaint that it was the publisher, and not Plaintiff, that had "full legal control" over publication of the manuscript when the United States determined that the information was classified. Compl. ¶ 17. Accepting that allegation as true, an individual has no First Amendment interests in a work that has been sold to another party. *See Burke v. City of Charleston*, 139 F.3d 401, 406 (4th Cir. 1998); *Serra v. U.S. Gen. Servs.*

Admin., 847 F.2d 1045, 1047 (2d Cir. 1988). A party cannot be injured by a prohibition on the publication of information in a book over which he has no control. Plaintiff has thus alleged no injury in fact, and his complaint should be dismissed.

Even if he has standing to bring this suit, Plaintiff's claim fails because there is no First Amendment right to publish classified information. *Snepp*, 444 U.S. at 510. Moreover, Plaintiff has no right to publish information protected under his secrecy agreements. The Government properly determined that certain portions of Plaintiff's account of his work for the Government reveal intelligence activities, sources, and methods, as well as information about military plans and the foreign activities of the United States that, if disclosed, could reasonably be expected to cause serious identifiable damage to our national security. In making this determination, the Government segregated the information that Plaintiff cannot publish from the details of his employment that he may publish, and in September 2010 a partially redacted version of the manuscript was published. Nonetheless, Plaintiff challenges the Government's determinations that certain information in the manuscript is classified and claims that the Government's determinations have violated his First Amendment rights.

In connection with this motion, the Government has conducted an updated assessment of the information at issue. The Government's pertinent classification determinations fully comply with Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), which governs the classification of information. In support of these determinations, the Government is submitting herewith an unclassified declaration from DIA and classified declarations from DIA and the CIA. Through the unclassified declaration, the Government has included as much justification of the determinations as can be disclosed on the public record. *See Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979); Unclassified Declaration of Robert A. Carr ("Unclassified

DIA Decl.") (Ex. 2), ¶ 8. A more detailed explanation in a public declaration or brief would, itself, damage national security for the same reasons that publication of Plaintiff's manuscript poses such danger. *See Ellsberg v. Mitchell*, 709 F.2d 51, 59 n.41 (D.C. Cir. 1983) ("It is one of the unfortunate features of this area of the law that open discussion of how the general principles apply to particular facts is impossible."). The classified declarations provide a more detailed explanation of the agencies' decisions. Because the disclosures of the explanations in the classified declarations could themselves endanger national security, they will be delivered separately to a secure facility in the Courthouse for this Court's *ex parte, in camera* review.[1]

The agencies' determinations that serious harm could result from the disclosure of the information in Plaintiff's manuscript are entitled to utmost deference. As courts have uniformly held, there is no more compelling government interest than national security, and the judiciary lacks the necessary expertise to second-guess the Executive Branch's reasoned, articulated concerns about the harm to national security that could result from the disclosure of secret government information. Under this well-established framework, the Court should conclude,

[1] These classified declarations provide highly sensitive information regarding the bases for the agencies' classification decisions with respect to Plaintiff's manuscript. Neither Plaintiff nor Plaintiff's counsel is authorized access to this classified information. Thus, national security concerns require *ex parte, in camera* review of the Government's classified declarations. *See Stillman v. CIA*, 319 F.3d 546, 549 (D.C. Cir. 2003) (national security concerns required *ex parte, in camera* review of the government's classified declaration in prepublication review case). *See also Holy Land Found. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (national security concerns required *ex parte, in camera* review of the government's classified declaration justifying plaintiff's designation as Specially Designated Global Terrorist); *Ellsberg*, 709 F.2d at 61 (national security concerns required *ex parte, in camera* review of the government's classified declaration asserting state secrets privilege); *Hayden*, 608 F.2d at 1386 (national security concerns required *ex parte, in camera* review of the government's declaration in a FOIA case). While *ex parte, in camera* review of the declarations involves some compromise of the adversary process, such a compromise is required to ensure the protection of critical national security information. *See Stillman*, 319 F.3d at 548 (in prepublication review cases "*in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm"); *Halkin v. Helms*, 690 F.2d 977, 995 (D.C. Cir. 1982); *Hayden*, 608 F.2d at 1385.

based on its review of the unclassified and classified declarations submitted in support of this motion, that the agencies' classification decisions were proper. For these reasons, and as set forth more fully below, this Court should grant Defendants' motion and dismiss Plaintiff's complaint.

Factual Background

The pertinent background that may be set forth on the public record is included in Defendants' Statement of Undisputed Material Facts, also filed today and incorporated in this motion by reference. Additional relevant facts in this case are classified, and are provided in the classified declarations that the Government is submitting for this Court's *ex parte, in camera* review.

Plaintiff Anthony Shaffer was employed by DIA from 1995 to 2006 and has at all times relevant also served as an officer in the U.S. Army Reserve. Compl. ¶ 3. As a condition of employment in a position of special confidence and trust relating to the national security, and in consideration of being given access to classified information, Plaintiff voluntarily, willingly, and knowingly entered into numerous non-disclosure and secrecy agreements with the Department of Defense. *See* Ex. 1, Pl.'s Secrecy Agreements, attached to the Declaration of Wayne R. Scheller. Through those agreements, Plaintiff 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. *See, e.g.*, *id.*, Ex. A, ¶ 3 ("I hereby agree that I will never divulge such information unless I have officially verified that the recipient has been properly authorized by the United States Government to receive it or I have been given prior written notice of authorization from the United States Government Department or Agency . . . last granting me a security clearance that such disclosure is permitted."). He also agreed that he would submit written

material to the Department for review and receive written permission from the Department before taking any steps toward public disclosure. *See id.*, Ex. A, ¶ 4; *id.*, Ex. C, ¶ 3. Accordingly, Plaintiff concedes that he "is required by virtue of a secrecy agreement to submit all of his writings for prepublication review." Compl. ¶ 3. Plaintiff remains subject to the conditions of those agreements to this date. *See, e.g.*, Ex. 1, Pl.'s Secrecy Agreements, Ex. C, ¶ 8 ("Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, *and at all times thereafter*.") (emphasis added).

Plaintiff contends that he began writing a book in or around February 2007, based largely on his experiences in Afghanistan, where he was stationed in the course of his DIA employment. Compl. ¶¶ 3, 8, 11. He alleges that he hired a ghost writer and entered into a contractual agreement with a publisher, all prior to providing the contents of the manuscript to any part of the Department of Defense. *Id.* ¶¶ 8-10. In June 2009, Plaintiff submitted a draft manuscript to his Army Reserve chain-of-command, but did not submit the text to other components of the Department, including the Office of Security Review or DIA.[2] *Id.* ¶ 13, In February 2010, Plaintiff allegedly forwarded the manuscript to his publisher. *Id.* ¶ 17. Per Plaintiff's complaint, "[a]t this time full legal control of the publication of the manuscript was in the hands of the publisher." *Id.*

After learning of the manuscript and obtaining a copy to review, DIA determined that it contained a significant amount of classified information. *Id.* ¶ 24. Other components of the

[2] As alleged in Plaintiff's complaint, *see* Compl. ¶ 51, the Army is undertaking an internal investigation into Plaintiff's conduct and the circumstances leading to the publication of the book. Defendants reserve any and all rights to raise additional defenses as appropriate upon the completion of the investigation.

United States Government, including the CIA, reached the same conclusion. *Id.* DIA therefore contacted Plaintiff's publisher to express its concern that publication of the manuscript would cause harm to the national security of the United States. *Id.* ¶ 30.

Based on discussions between the Government, Plaintiff, and the publisher, some modifications were made to the manuscript. *Id.* ¶ 31. The manuscript was published on September 24, 2010, under the title, *Operation Dark Heart: Spycraft and Special Ops on the Frontlines of Afghanistan and the Path to Victory*. *Id.* ¶ 42. As published, the book contains numerous redactions in the form of black boxes. *See* Ex. 6 (published book).

Plaintiff filed this lawsuit on December 14, 2010. Dkt. 1. Plaintiff seeks to publish a revised edition of the book including the text previously redacted as classified (but otherwise identical to the published version). Defendants answered the complaint on April 1, 2011. Dkt. 14.

As the attached declarations reflect, the Government has concluded that there remain numerous passages in Plaintiff's manuscript, ranging from single words to full sentences, that continue to contain classified information. With this motion and memorandum, the Government is providing the following documents:[3]

Ex. 1: Declaration of Wayne R. Scheller and attached secrecy and non-disclosure agreements signed by Plaintiff

[3] Department of Justice ("DOJ") regulations require undersigned counsel to ensure the Court's cooperation in protecting the classified materials presented for its *ex parte, in camera* review. *See* 28 C.F.R. § 17.17(a)(2), (c). A DOJ Security Officer will brief Chambers *in camera* and *ex parte* as necessary for the sole purpose of providing information on the logistics of security arrangements and will remain available to provide full and complete information to the Court and its personnel regarding pertinent safeguarding and storage requirements for the classified materials. The classified materials will be delivered separately upon request of the Court to a secure facility in the Courthouse for this Court's *ex parte, in camera* review. The classified materials are being delivered to a secure DOJ storage facility for the DOJ Security Officer, pending delivery to the Court.

Ex. 2: Unclassified Declaration of Robert A. Carr (DIA) ("Unclassified DIA Decl.")

Ex. 3: Classified Declaration of Robert A. Carr (DIA) ("Classified DIA Decl.")

Ex. 4: Classified Declaration of Karen T. Pratzner (CIA) ("Classified CIA Decl.")

Ex. 5: Classified Declaration

Ex. 6: Published version of *Operation Dark Heart*[4]

Ex. 7: Classified table of material redacted from the manuscript

Argument

I. Plaintiff Lacks Standing to Pursue His Claim

Plaintiff claims that the Government was wrong to require the redaction of certain information from the September 2010 publication of *Operation Dark Heart*, and contends that the information was not, and is not, properly classified. Yet he asserts in his complaint that he transferred "full legal control" of the publication to the publisher as of February 2010, and that he thus could not control what information the publisher ultimately included in the published book. *See* Compl. ¶¶ 17, 31. By his own admission, he lacked a legal interest in that publication because he sold to his publisher all legal control over the publication. Plaintiff thus cannot satisfy the requirement of an injury in fact, and he lacks standing to bring a claim under the First Amendment.

[4] The Government is submitting a copy of the book, as published in September 2010, and a table of the classified information, to permit the Court to more easily review the information in its context within the manuscript. Counsel for Defendants consulted with counsel for Plaintiff regarding submission of the published version, and Plaintiff requested that it be submitted under seal to protect copyright interests in the book. The Government is thus filing Exhibit 6 under seal along with a motion for leave asking the Court to accept the sealed filing. The classified table will be submitted *ex parte* and *in camera*.

A. Applicable Legal Standard

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Gen. Motors Corp. v. Envtl. Prot. Agency*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction.").

Three requirements must be met to satisfy the "irreducible constitutional minimum of standing." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). "First and foremost, there must be alleged (and ultimately proved) an 'injury in fact' – a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Id.* at 103 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . . . And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury." *Id.* No standing exists if the court "would have to accept a number of very speculative inferences and assumptions in any endeavor to connect the alleged injury with [the challenged conduct]." *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980).

"This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co.*, 523 U.S. at 103-04. "[A] deficiency on any one of the three prongs suffices to defeat standing." *US Ecology, Inc. v. U.S. Dep't of the Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of

evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. "In response to a summary judgment motion, . . . the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.'" *Id.* (quoting Fed. R. Civ. Proc. 56(e)).

Article III standing cases teach that the relevant substantive law underlying each case determines who is the owner of each cause of action, and thereby determines who has standing to advance each cause of action. *Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 76 (1991) ("[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents."); *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1339-1341 (Fed. Cir. 2007). A First Amendment plaintiff is not excused from satisfying the constitutional requirement of standing, but must also demonstrate that he has suffered some concrete personal harm and injury in fact to have standing to challenge government action. *See In re Navy Chaplaincy*, 534 F.3d 756, 760-61 (D.C. Cir. 2008), *affirming* 516 F. Supp. 2d 119 (D.D.C. 2007) (Urbina, J.) (navy chaplains who do not allege specific personal injury do not have standing); *see also Valley Forge Christian Acad. v. Americans United*, 454 U.S. 464, 485-486 (1982) (lack of distinct injury under First Amendment destroys standing).

B. Because He Alleges That He Had Transferred "Full Legal Control" Over His Book Prior to Its Redaction, Plaintiff Has Not Alleged an Injury in Fact

To satisfy the requirement of an injury in fact, a plaintiff must have suffered "an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. That requires a plaintiff to demonstrate an injury that "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n.1. *See also Raines v. Byrd*, 521 U.S. 811 , 819 (1997) (party must have personal stake in the outcome of the litigation to have standing).

The sole count in Plaintiff's complaint alleges a violation of the First Amendment in the form of a denial to publish certain information in a book. *See* Compl. ¶¶ 52-64. But an individual lacks a First Amendment interest in something that he has sold to another party. The Second Circuit recognized this in *Serra v. U.S. General Services Administration*, 847 F.2d 1045, 1047 (2d Cir. 1988), where the court held that a sculptor who sold his interest in a work could not bring a First Amendment challenge to the government's movement of or alterations to his work. The court found that the individual had "relinquished his own speech rights in the sculpture when he voluntarily sold it." *Id.* at 1049. More recently, in *Burke v. City of Charleston*, 139 F.3d 401, 406 (4th Cir. 1998), the Fourth Circuit held that an artist who sold his mural to a restaurant property owner lacked an injury in fact, and thus standing to complain, when that owner made changes to the work to satisfy a local ordinance. The court similarly held that the plaintiff "relinquished his First Amendment rights when he sold his mural to the restaurant owner, who alone has the right to display the mural." *Id.* at 403. In such circumstances, the artist could not show "a concrete injury, rather than a mere tangential effect, at best." *Id.* at 406.

Here, Plaintiff alleges that he transferred "full legal control" over the book to the publisher no later than February 2010, when he forwarded a copy of his manuscript to the publisher.[5] Compl. ¶ 17. Only after that point did DIA contact the publisher – because Plaintiff had not provided DIA with a copy of the manuscript before sending it to his publisher. *See id.* ¶ 30 (alleging that the Department of Defense contacted the publisher on August 13, 2010, "to

[5] The Government reserves the right to challenge the factual basis for allegations made in Plaintiff's complaint, for purposes of the merits of Plaintiff's claim. But because a plaintiff has the burden of alleging and proving facts sufficient to establish the basis of the Court's jurisdiction, *see Lujan*, 504 U.S. at 561, for purposes of this motion and his jurisdictional burden the Government accepts this particular allegation as true.

express its concern that publication of *Operation Dark Heart* could cause damage to U.S. national security"). Plaintiff further alleges that he, "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.* ¶ 31.

Like the artists in *Serra* and *Burke*, Plaintiff alleges that he has sold all interest in the work to another party. By Plaintiff's own account, his agreement with the publisher provided that, upon delivery of the manuscript of the book, the publisher would have "full legal control" over the book's publication. There is no allegation in the remainder of the complaint that hints at some residual right in the text that has been retained by the Plaintiff. *Cf. Serra*, 847 F.2d 1049 (recognizing that if the artist "wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for sale of his work"). Having sold his work to another party, Plaintiff lacked legal control and interest in the work after completion of the sale. Under these facts, he could thus suffer no personal injury when alterations were made to the work at the request of the Government. Plaintiff has alleged no injury in fact, and lacks standing to bring this case.

II. If Plaintiff Has Standing, Defendants Are Entitled to Summary Judgment

Even if the Court determines that Plaintiff has standing, Defendants are entitled to summary judgment on his complaint.

Summary judgment is appropriate where "there is no genuine issue of material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Summary judgment is properly regarded "not as a disfavored procedural shortcut, but rather as an integral part of the Federal

Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

Plaintiff does not challenge the prepublication review requirement to which he is subject, or contend that he has a right to publish classified information. Rather, Plaintiff contends that "[l]ittle to none" of the information redacted from the manuscript is classified. Compl. ¶ 38. In reviewing the Government's classification of national security information, district courts must give the agency sufficient opportunity to present detailed *in camera* affidavits and "accord substantial weight to [those affidavits] concerning the details of the classified status" of the information in dispute. *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982); *see Stillman*, 319 F.3d at 548-49 (In prepublication review cases, "*in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm" with the "appropriate degree of deference" given to the Executive Branch concerning its classification decisions.) (quoting *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983)); *Stillman v. CIA*, 517 F. Supp. 2d 32, 38 (D.D.C. 2007) (in prepublication review case on remand, granting summary judgment for the government on the basis of classified affidavits reviewed *in camera* and *ex parte*). Because of the Executive Branch's unique expertise concerning the adverse effects of the disclosure of national security information, so long as the declarations are submitted in good faith and contain "reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification," the judiciary "cannot second-guess [the Government's] judgments" with respect to classification decisions. *McGehee*, 718 F.2d at 1148-49.

Applying these standards, there is no genuine issue of material fact as to Plaintiff's claim for judicial review of the Government's determination that certain information properly is classified, and the Court should grant summary judgment for Defendants.

A. Plaintiff Has No First Amendment Right to Publish Classified Information

Plaintiff alleges that the DoD, DIA, and CIA violated his First Amendment rights by denying him the right to publish certain information in the manuscript. *See id.* ¶ 61. Plaintiff asserts that the Government has "failed to demonstrate the existence of substantial government interests that would enable them to prohibit the publication of" information contained in the book. *Id.* ¶ 58.

Plaintiff's First Amendment claim fails for the simple reason that "[c]ourts have uniformly held that current and former government employees have no First Amendment right to publish properly classified information to which they gain access by virtue of their employment." *Stillman*, 517 F. Supp. 2d at 38. Plaintiff here is bound by secrecy agreements, the very purpose of which are to prevent the unlawful disclosure of classified information relating to the Government's foreign relations and intelligence activities, sources, and methods. *See* Ex. 1, Pl.'s Secrecy Agreements. Plaintiff's secrecy and non-disclosure agreements – agreements he signed voluntarily and knowingly – require him to obtain written authorization from the United States Government prior to disclosing classified information to anyone not otherwise authorized to receive it, and to comply with all applicable laws and regulations governing the disclosure of classified information. *See, e.g., id.*, Ex. C, ¶ 3. This allows the United States to ensure that Plaintiff's proposed writings would not disclose classified information. It is in the context of these binding secrecy agreements and the Government's compelling need to protect national security that the Court should consider Plaintiff's claim that the Government violated his right to free speech. *See, e.g., Snepp*, 444 U.S. at 510.

It is well-settled that the prepublication review requirement imposed by secrecy agreements such as those signed by Plaintiff passes constitutional muster, and he does not

contend otherwise in his complaint. *See id.* at 510 n.3 (prepublication review requirement imposed on government employees with access to classified information is not an unconstitutional prior restraint); *McGehee*, 718 F.2d at 1146 (upholding the CIA's prepublication review scheme in context of First Amendment challenge). In *Snepp*, the Supreme Court considered whether a former CIA employee's similar secrecy agreement was an improper prior restraint on free speech. Concluding that it was not, but rather was reasonable and enforceable, the Court recognized the Government's compelling interest in the protection of national security:

> The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.

Snepp, 444 U.S. at 510 n.3; *see also Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (government has a compelling interest in protecting national security information). Indeed, the *Snepp* Court concluded that, even in the *absence* of an express agreement, the CIA could have imposed reasonable restrictions on employee activities to protect these compelling interests. *Snepp*, 444 U.S. at 501 n.3.

In light of the Government's compelling interest, courts uniformly have concluded that there is no First Amendment right to publish properly classified information: "[i]f the Government classified the information properly, then [plaintiff] simply has no first amendment right to publish it." *Stillman*, 319 F.3d at 548; *see also Snepp*, 444 U.S. at 510 n. 3; *McGehee*, 718 F.2d at 1143 ("CIA censorship of 'secret' information contained in former agents' writings and obtained by former agents during the course of CIA employment does not violate the first amendment."); *United States v. Marchetti*, 466 F.2d 1309, 1315-16 (4th Cir. 1972) ("Although the First Amendment protects criticism of the government, nothing in the Constitution requires the government to divulge [national security] information."). Thus, the only question presented

by Plaintiff's claim is whether the information identified by the Government in the manuscript properly is classified.

B. The Government's Classification Decisions Are Entitled to Utmost Deference

The Executive Branch's classification determinations are entitled to "utmost deference" by the judiciary. *See Taylor v. Dep't of the Army*, 684 F.2d 99, 109 (D.C. Cir. 1982) (requiring "utmost deference" to affidavits of military intelligence officers) (quoting *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978)). The D.C. Circuit has emphatically "reject[ed] any attempt to artificially limit the long-recognized deference to the executive on national security issues." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) (reviewing cases).

This judicial deference to the Executive Branch in matters of national security and foreign relations is appropriate given the Executive's constitutional role:

> [I]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . . "The President is the constitutional representative of the United States with regard to foreign nations. . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch . . . ." [The President] has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319, 320 (1936) (quoting 8 U.S. SEN. REPORTS, COMMITTEE ON FOREIGN RELATIONS, at 24 (Feb. 15, 1816)) (internal quotation marks omitted). The Executive Branch's ability to maintain secrecy with regard to foreign intelligence matters is essential. *Id.*; *see Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be

published to the world. . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."). In *Egan*, the Supreme Court repeated that:

> [the President's] authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.

484 U.S. at 527. *See also Holy Land Found.*, 333 F.3d at 164 (permitting *ex parte, in camera* review of declarations in light of "the primacy of the Executive in controlling and exercising responsibility over access to classified information, and the Executive's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business") (internal quotation omitted).

Because of the President's constitutional role in national security matters, the Executive Branch is uniquely situated to assess the national security consequences of the disclosure of particular information. *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) ("Mindful that courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns."); *Egan*, 484 U.S. at 529 (judgments as to harm that would result in the disclosure of certain information "must be made by those with the necessary expertise in protecting classified information"). Only the nation's intelligence community has a complete picture of which disclosures pose a danger to national security. Courts commonly refer to this as the "mosaic theory" of intelligence:

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate . . . . "The courts, of course, are ill-equipped to become sufficiently steeped in foreign

> intelligence matters to serve effectively in the review of secrecy classifications in that area."

Halkin, 598 F.2d at 8 (quoting *Marchetti*, 466 F.2d at 1318). The Government's assessment of potential harm must be respected because "each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance itself." *Gardels v. CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982) (quoting *Halperin v. CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980)).

The judiciary, which lacks this necessary "broad view" of foreign intelligence matters, *see Marchetti*, 466 F.2d at 1317, is not in a position to second-guess the national security and foreign relations concerns articulated by the Executive Branch. As the D.C. Circuit explained:

> America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore. . . . It is abundantly clear that the government's top counterterrorism officials are well-suited to make this predictive judgment. Conversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security.

Ctr. for Nat'l Sec. Studies, 331 F.3d at 928; *McGehee*, 718 F.2d at 1149 ("judicial review of CIA classification decisions, by reasonable necessity, cannot second-guess CIA judgments on matters in which the judiciary lacks the requisite expertise."); *Frugone*, 169 F.3d at 775. In short, "it is the responsibility of the [Executive], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *CIA v. Sims*, 471 U.S. 159, 180 (1985). This Court should, therefore, accord substantial weight to the Government's declarations concerning the national security harms that may result from disclosure of information in Plaintiff's manuscript.[6]

[6] For this same reason, any declaration or other submission by Plaintiff disputing the substance of the Government's classification experts' proper determinations is due no weight. Plaintiff

Of course, the utmost deference owed to the national security judgments of the Executive Branch does not mean that courts have no role to play in the review of agency classification decisions in the prepublication review context. *See Ctr. for Nat'l Sec. Studies*, 331 F.3d at 932 ("In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role."). The D.C. Circuit has noted that when a court conducts its *in camera* review of agency declarations, it must assure itself that the agency's explanations provide "reasonable specificity" and "demonstrat[e] a logical connection between the deleted information and the reasons for classification." *McGehee*, 718 F.2d at 1148.

---

does not have the requisite "broad view" of foreign intelligence matters to assess the effect that disclosure of the disputed information could have on our national security. Courts have repeatedly, and necessarily, rejected the views of plaintiffs on the question of whether a particular disclosure may harm national security. *See, e.g.*, *Snepp*, 444 U.S. at 512 ("When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA – with its broader understanding . . . could have identified as harmful."); *ACLU v. U.S. Dep't of Justice*, 548 F. Supp. 219, 223 (D.D.C. 1982) ("Nor does the Court perceive any way in which adversary proceedings in connection with plaintiff's participation in the *in camera* review could assist [the court], even if adequate security precautions could be arranged."). Views rejected by courts include those of former CIA case officers. *See Snepp*, 444 U.S. at 512; *Gardels*, 689 F.2d at 1106 & n.5 (former agent's "own views as to the lack of harm which would follow the disclosure requested by plaintiff" is insufficient to justify further inquiry beyond the Agency's "plausible and reasonable" informed position). *See also Halperin*, 452 F. Supp. at 51 (Even though plaintiff was a self-proclaimed "scholar and actor in the field of foreign policy and national security," nothing in "plaintiff's submissions justifie[d] the substitution of this Court's judgment or the informed judgment of plaintiff for that of the officials constitutionally responsible for the conduct of United States foreign policy as to the proper classification of [documents]."), *aff'd*, 612 F.2d 586 (D.C. Cir. 1980); *Students Against Genocide v. Dep't of State*, 50 F. Supp. 2d 20, 24 (D.D.C. 1999) ("Plaintiffs cannot simply substitute their judgment for the United States government's judgment that additional disclosure would be harmful."), *aff'd in part, remanded in part*, 257 F.3d 828 (D.C. Cir. 1999). In contrast, the Government's reasoned judgment that disclosure of the information would pose a risk to national security is entitled to substantial weight.

Consistent with the standards set forth below, the declarations of Robert A. Carr and Karen T. Pratzner– each classification experts and original classification authorities – satisfy this requirement by providing detailed explanations of why the information at issue is properly classified.

For all these reasons, courts accord deference to the Government's declarations across the entire spectrum of national security jurisprudence. In prepublication review cases such as this, the D.C. Circuit has held that courts "should defer to [agency] judgment as to the harmful results of publication" because the judiciary "cannot second-guess [agency] judgments on matters in which the judiciary lacks the requisite expertise." *McGehee*, 718 F.2d at 1148-49 (internal quotation marks and citations omitted); *see also Stillman*, 319 F.3d at 549 (observing, in the context of a prepublication review case, that there is an "appropriate degree of deference owed to the Executive Branch concerning classification decisions"); *Berntsen v. CIA*, 618 F. Supp. 2d 27, 30-31 (D.D.C. 2009).[7] This Court should similarly accord the utmost deference to the submitted declarations concerning the classified status of the information in Plaintiff's manuscript.

C. The Information Identified in the Government's Declarations Is Properly Classified Pursuant to Executive Order 13526

As explained in the declarations submitted herewith, the Government's classification decisions with respect to Plaintiff's manuscript meet the standards required by the Executive Order governing the classification of information by the Executive Branch, Executive Order 13526. Executive Order 13526 requires four conditions for the classification of national security

[7] Similarly, in the Freedom of Information Act (FOIA) context, because "executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure," the classification of information "is a matter as to which the agency has a large measure of discretion." *Salisbury*, 690 F.2d at 970, 973 (quotation marks and citations omitted); *see Halperin*, 629 F.2d at 147-48 (according "substantial weight" to agency declarations asserting protection of national security interests).

information: (1) the information must be classified by an "original classification authority"; (2) the information must be "owned by, produced by or for, or [be] under the control of" the Government; (3) the information must fall within one of the authorized classification categories listed in section 1.4 of the Executive Order; and (4) the original classification authority must "determine[ ] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage." Exec. Order 13526, § 1.1. Here, the Government has met all four requirements.

1. The Information At Issue Was Classified By An Original Classification Authority

The passages redacted in the manuscript contain information that has been determined to be properly classified by an original classification authority under the Executive Order. The Executive Order defines "Original Classification Authority" as "an individual authorized in writing . . . by agency heads or other officials designated by the President, to classify information in the first instance." *Id.* § 6.1(gg). Robert A. Carr is the Director of the Defense Counterintelligence and Human Intelligence Center within DIA, and has original classification authority. Unclassified DIA Dec. ¶¶ 2, 4. Karen T. Pratzner is an Associate Information Review Officer for the National Clandestine Service of the CIA, and also has original classification authority. Classified CIA Decl. ¶¶ 1, 4. Those individuals have each determined that each redacted passage addressed in their declarations concerns information that is properly classified in satisfaction of the criteria of Executive Order 13526. *See id.*

2. The Information At Issue "Is Owned By, Produced By or For, or Is Under the Control of" the Government

The information at issue "is owned by, produced by or for, or is under the control of" the Government. Here, Plaintiff voluntarily signed a secrecy agreement in which he agreed not to

disclose classified and certain other government information that he obtained during the course of his employment. *See* Ex. 1, Pl.'s Secrecy Agreements, Ex. C, ¶ 3. Plaintiff himself recognizes that he was required by virtue of his secrecy agreements to submit the manuscript for prepublication review, *see* Compl. ¶ 3, and acknowledges in his complaint that the book was based "on his experience in Afghanistan," where he was employed by the Department of Defense, *id.* ¶¶ 8, 11. *See Knopf v. Colby*, 509 F.2d 1362, 1371 (4th Cir. 1975) ("neither should [plaintiff] be heard to say that he did not learn of information during the course of his employment if the information was in the Agency and he had access to it."); *see also Wilson v. McConnell*, 501 F. Supp. 2d 545, 554 (S.D.N.Y. 2007) (question is whether the Government had control or ownership of the information when it was originally classified), *aff'd*, 586 F.3d 171 (2d Cir. 2009). Plaintiff also agreed that any classified information learned in the course of his DoD employment is and will remain the property of the agency the United States Government. *See* Ex. 1, Pl.'s Secrecy Agreements, Ex. C, ¶ 7. The portions of Plaintiff's manuscript that relate to the Government's classified intelligence activities, sources, and methods, its military plans and operations, its foreign activities and relations, and its technical capabilities relating to national security is therefore information that "is owned by, produced by or for, or is under the control of" the Government, and satisfies the second condition of the Executive Order.

3. The Information At Issue Falls Within the Classification Categories of Section 1.4 of the Governing Executive Order

The information in Plaintiff's manuscript falls squarely within several of the classification categories under section 1.4 of the Executive Order. Under that section, information shall be considered for classification if it concerns at least one of the following:

(a) military plans, weapons systems, or operations;
(b) foreign government information;

(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
(d) foreign relations or foreign activities of the United States, including confidential sources;
(e) scientific, technological, or economic matters relating to the national security;
(f) United States Government programs for safeguarding nuclear materials or facilities;
(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
(h) the development, production, or use of weapons of mass destruction.

Exec. Order 13526, § 1.4. As described more fully in the Government's declarations, the information at issue in Plaintiff's manuscript falls into at least five of the eight categories: § 1.4(a), (b), (c), (d), and (g). *Id.*; Classified DIA Decl. ¶¶ 11, 13,14; Classified CIA Decl. ¶ 15. Accordingly, the Government satisfies the third classification requirement of § 1.1 of Executive Order 13526.

4. Disclosure of the Information At Issue Could Reasonably Be Expected to Cause Identifiable Harm to National Security

Finally, the Government has satisfied the fourth requirement for the classification of information under the Executive Order. The information at issue in Plaintiff's manuscript includes information classified at the "SECRET" and "TOP SECRET" levels. *See* Unclassified DIA Decl. ¶ 11; Classified CIA Decl. ¶ 12; Classified Declaration at Ex. 5

Executive Order 13526 provides that "SECRET" level classification "shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security[8] that the original classification authority is able to identify or describe." Exec. Order 13526, § 1.2(a)(2). The Order provides that "TOP SECRET" level classification "shall be applied to information, the unauthorized disclosure of which reasonably

[8] The Executive Order defines "damage to the national security" as "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information." Exec. Order 13526, § 6.1(*l*).

could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe." *Id.* § 1.2(a)(1). As Mr. Carr describes in his unclassified declaration and in greater detail in his classified declaration, and as Ms. Pratzner describes in her classified declaration, the disclosure of certain information contained in Plaintiff's manuscript could reasonably be expected to cause such damage to national security.

The Government's judgment that the publication of information contained in Plaintiff's manuscript could cause harm to our national security is neither vague nor speculative. Courts have held that, in cases concerning national security, the harm alleged by the Government need not "rise to the level of certainty," but must merely be "real and serious enough to justify the classification decision." *McGehee*, 718 F.2d at 1150. As the D.C. Circuit explained:

> A court must take into account . . . that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm rather than an actual past harm. If we were to require an actual showing that particular disclosures . . . have in the past led to identifiable concrete harm, we would be overstepping by a large measure the proper role of a court . . . .

Halperin, 629 F.2d at 149 (in FOIA context); *Klaus v. Blake*, 428 F. Supp. 37, 38 (D.D.C. 1976) ("The national security issue is necessarily speculative. Intelligence deals with possibilities. Our knowledge of the attitudes of and information held by opponents is uncertain. Determinations of what is and what is not appropriately protected in the interests of national security involves an analysis where intuition must often control in the absence of hard evidence. This intuition develops from experience quite unlike that of most Judges."). Moreover, as discussed above, "[d]ue to the mosaic-like nature of intelligence gathering, for example, what may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in context." *McGehee*, 718 F.2d at 1149.

Thus, the law simply requires that a responsible Executive Branch official make a reasoned judgment that it is in the interest of the United States to maintain the confidentiality of the information at issue given the possible harm that the disclosure of that information could cause. The declarations submitted in this case do precisely that, and they explain that disclosure of the information at issue could reasonably be expected to seriously and gravely damage national security by undermining that confidentiality.

The Government's classified declarations demonstrate with reasonable specificity a logical connection between the information at issue and the reasons for classification. *McGehee*, 718 F.2d at 1148-49. For the reasons set forth below and in those declarations, serious harm could be expected to result from the disclosure of certain information in Plaintiff's manuscript relating to military plans and operations; intelligence activities (including special activities), intelligence sources, methods and activities; foreign government information; the foreign relations or foreign activities of the United States, including confidential sources; and the vulnerabilities or capabilities of systems relating to the national security. *See generally* Classified DIA Decl.; Classified CIA Decl. Below, the Government offers a public discussion of each category of the Executive Order at issue in this information, with significantly greater detail provided in the Government's classified declarations. Accordingly, the Government has satisfied the fourth, and final, component of proper classification.

i. Military Plans or Operations

Section 1.4(a) of Executive Order 13526 provides for classification of information concerning "military plans, weapons systems, or operations." Releasing information about military intelligence operations defeats one of the purposes of using secret intelligence components in the first place. Classified DIA Decl. ¶ 13. This category includes information

concerning operations both past and future. *Am. Civil Liberties Union v. Dep't of Defense*, 752 F. Supp. 2d 361, 369-70 (S.D.N.Y. 2010). Even when operations have already taken place, the disclosure of information concerning the operations may still allow individuals to exploit that information to frustrate future military operations. *See, e.g.*, *Miller v. U.S. Dep't of Justice*, 562 F. Supp. 2d 82, 101 (D.D.C. 2008).

Here, as explained in Mr. Carr's declaration, Plaintiff seeks to publish information about clandestine intelligence operations conducted in Afghanistan. Classified DIA Decl. ¶ 13. The information involved, and why its disclosure could reasonably be expected to cause serious harm to the national security, is described in greater detail in Mr. Carr's classified declaration. Accordingly, the Government properly classified information concerning military plans and operations in Plaintiff's manuscript. Exec. Order 13526, § 1.4(a).

ii. Foreign Government Information

Section 1.4(b) of Executive Order 13526 provides for classification of information concerning cooperative endeavors between the United States Government and foreign intelligence components. Under the Executive Order, the "unauthorized disclosure of foreign government information is presumed to cause damage to the national security." Exec. Order 13526, § 1.1(d). "It is clear that, even without the presumption of identifiable damage to the national security that is accorded foreign government information, disclosure of such cooperation with foreign agencies could not only damage the [Government's] ability to gather information but could also impair diplomatic relations." *Malizia v. DOJ*, 519 F. Supp. 338, 344 (S.D.N.Y. 1981) (internal quotation omitted).

As explained in the Government's declarations, Plaintiff's draft manuscript contains information about highly sensitive foreign government information classified at the "TOP

SECRET" level. The information involved, and why its disclosure could reasonably be expected to cause grave harm to the national security, is described in greater detail in the classified declarations. Accordingly, the Government properly classified the foreign government information in Plaintiff's manuscript. Exec. Order 13526, § 1.4(b).

iii. Intelligence Sources, Methods, and Activities

Section 1.4(c) of Executive Order 13526 provides for classification of information concerning intelligence activities (including special activities), intelligence sources and/or methods. As Mr. Carr explains in his declaration, the continued availability of foreign intelligence sources is of critical importance to our national security, but intelligence sources can be expected to furnish information only when confident that they are protected from exposure by the absolute secrecy surrounding their relationship with the Government.

Case law is replete with examples of the types of harm that result from the disclosure of intelligence sources, methods, activities and information relating to foreign relations or foreign activities. *See, e.g.*, *Snepp*, 444 U.S. at 512 ("[T]he [government] obtains information from the intelligence services of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the [government's] ability to guarantee the security of information that might compromise them . . ."); *Fitzgibbon v. CIA*, 911 F.2d 755, 763-64 (D.C. Cir. 1990) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and *the appearance of confidentiality* so essential to the effective operation of our foreign intelligence service." (emphasis in original; internal citations and quotation omitted)); *Salisbury*, 690 F.2d at 971-72 (upholding classification decision to protect future efficacy of an intelligence method); *Military Audit Project v. Casey*, 656 F.2d 724, 747 (D.C. Cir. 1981) (court protected dates on which

certain activities were conducted because "it would seem obvious that a foreign intelligence agency would be in a better position to crack the CIA's funding system if it knew the dates on which secret actions took place").

Here, the information includes intelligence sources, methods, and activities that, if disclosed, reasonably could be expected to cause serious harm to our national security. That includes information concerning specific sources, particular intelligence gathering methods, and the identities of personnel involved in clandestine operations. The specific information involved and the harm that could be reasonably expected to result from disclosure are described in Mr. Carr's classified declaration. The Government thus properly classified this information concerning intelligence sources, methods and activities. Exec. Order 13526, § 1.4(c).

iv. Foreign Activities and Foreign Relations

Executive Order 13526 also protects information relating to the "foreign relations or foreign activities of the United States." Exec. Order 13526, § 1.4(d). The necessity to protect such information is quite straightforward. In the words of President Washington:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

1 MESSAGES AND PAPERS OF THE PRESIDENTS at 194, *quoted in Curtiss-Wright Export Corp.*, 299 U.S. at 320-321.

The serious harm that can result from the unauthorized disclosure of information relating to our foreign activities is widely recognized. *See, e.g.*, *Snepp*, 444 U.S. at 512 ("[T]he CIA obtains information from the intelligence sources of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA's

ability to guarantee the security of information that might compromise them."); *McGehee*, 718 F.2d at 1149-50 ("We also believe, on the basis of plausible scenarios put forward in the CIA affidavit, that the United States could suffer significant strategic and diplomatic setbacks as a result of the disclosure of the deleted information."); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 627 (S.D.N.Y. 1996) (acknowledging the disruption that could occur to foreign relations if it were disclosed that the Government operated a field installation in a foreign country), *aff'd*, 128 F.3d 788 (2d Cir. 1997).

As Mr. Carr explains in his classified declaration, certain information in Plaintiff's manuscript implicates the foreign relations and/or foreign activities of the United States. If that information is disclosed through a revised edition of *Operation Dark Heart*, that disclosure will seriously harm the Government's ability to cooperate with foreign allies in intelligence operations by greatly impairing the confidence and trust our allies have in the United States. *See* Classified DIA Decl. DIA properly classified this information. Exec. Order 13526, § 1.4(d).

v. Vulnerabilities or Capabilities of Systems, Installations, Infrastructures, Projects, Plans, or Protection Services Relating to the National Security

Finally, Executive Order 13526 protects information relating to "vulnerabilities or capabilities, installations, infrastructures, projects, plans, or protection services relating to the national security." Exec. Order 13526, § 1.4(g). The Government must be able to maintain the confidentiality of such information when its disclosure could compromise the effectiveness of our intelligence collection programs. *See People for the Am. Way Found. v. Nat'l Sec. Agency*, 462 F. Supp. 2d 21, 32 (D.D.C. 2006). As explained in the Government's declarations, Plaintiff seeks to publish certain information falling within this category that is currently classified at the "TOP SECRET" level. That information cannot be further discussed in this public filing, but the

nature of the information and the grave harms that would result from its disclosure by Plaintiff are addressed in the Government's classified declarations. As explained therein, the Government has properly classified that information pursuant to the requirements of the Executive Order.

* * * * *

The Government seeks to prevent the disclosure only of the classified information in Plaintiff's manuscript. As the redacted manuscript itself (filed under seal) reveals, the Government has made a significant effort to segregate classified and unclassified material. *See* Ex. 6 (Pl.'s Published Book). Moreover, the Government has determined that certain information that was properly classified at the time of the book's publication in September 2010 no longer warrants classification; that information is identified in Exhibit 7 (but not in the Government's declarations), and the Government is notifying Plaintiff that he is no longer barred from publishing that information.

In sum, as set forth above, certain specific information contained in Plaintiff's manuscript meets the requirements for proper classification pursuant to Executive Order 13526 because (1) it is within the control of the Government and derived from Plaintiff's employment with the DoD, (2) it falls within the classification categories listed in the Executive Order, and (3) government officials with original classification authority have determined that disclosure of the information (4) could reasonably be expected to result in serious damage to national security.

D. The Government Has Not Officially Released Into the Public Domain The Classified Information Contained in The Manuscript

Plaintiff asserts that information redacted from the manuscript was "supported by open source material" or has otherwise been previously publicly disclosed. Compl. ¶ 56. To the extent Plaintiff alleges that any of the information was declassified for publication or otherwise publicly available, he is either incorrect on the facts or misunderstands the law. None of the

material at issue in the Government's declarations has been declassified or officially disclosed. Classified DIA Decl. ¶¶ 8, 66; Classified CIA Decl. ¶ 39. Moreover, even assuming *arguendo* that some of the information redacted from the manuscript has been *unofficially* disclosed, that is irrelevant to the issue before this Court: whether the information is properly classified.

As discussed above, Plaintiff has no First Amendment right to publish classified information. Articulating a standard embraced by the D.C. Circuit, the Fourth Circuit Court of Appeals succinctly explained the line between what a former government employee may and may not disclose:

> [Plaintiff] retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.

Marchetti, 466 F.2d at 1317. In *Knopf v. Colby*, 509 F.2d at 1370, which the court described as the "sequel" to the *Marchetti* litigation, the Fourth Circuit elaborated on the meaning of "public domain" and held that classified information "was not in the public domain unless there had been official disclosure of it."

This standard has been adopted by the D.C. Circuit, which has applied it in the FOIA context to determine whether agencies properly have withheld information as classified under the Executive Order. Courts apply three criteria in analyzing whether a piece of information is in the public domain: (1) the information at issue must be as specific as the information that has been publicly disclosed; (2) the disputed information must exactly match the information publicly disclosed; *and* (3) the information sought to be released must already have been publicly released through "an official and documented disclosure." *See Fitzgibbon*, 911 F.2d at 765 (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983)); *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003) (same); *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir.

2009) (same).[9] This Circuit has consistently and stringently applied the official public disclosure requirement in cases where plaintiffs seek the release of classified information. *See Public Citizen v. Dep't of State*, 11 F.3d 198, 202 (D.C. Cir. 1993) (cataloging cases and describing "stringency" of the test).

Plaintiff's claim that certain information in the manuscript was "supported by open source material," Compl. ¶ 56, and his allegations of unofficial disclosures of the information at issue fail to satisfy these requirements. That certain information exists in the public domain does not itself meant that similar or even identical information cannot properly be classified. Even when the Government has made an official public release of a general discussion of a subject matter, that will not be deemed a basis for release of more specific information, where the agency explains in its declarations that release of the more detailed information poses a threat to the national security. *See Public Citizen v. Dep't of State*, 787 F. Supp. 12, 14 (D.D.C. 1992), *aff'd*, 11 F.3d 198 (D.C. Cir. 1993). Moreover, Plaintiff must identify not simply public source information or unofficial disclosures, but rather "an official and documented disclosure." *Afshar*, 702 F.2d at 1133. The courts have repeatedly emphasized the "critical difference between official and unofficial disclosures," *Fitzgibbon*, 911 F.2d at 765, and have stated that no disclosure of information will be deemed "official" for purposes of arguing that it has been publicly disclosed where the disclosure is made by "someone other than the agency," *Frugone*, 169 F.3d at 774. *See also* Exec. Order 13526, § 1.1(c) ("Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.") Even if Plaintiff could point to similar information existing in open source

[9] Plaintiff, not the Government, carries the burden to produce specific information for which all three criteria have been met and thus, to establish that the information is in the public domain. *See Afshar*, 702 F.2d at 1130.

documents, declassification requires that the information's availability result from an official disclosure.

Furthermore, even limited or inadvertent disclosures by an agency itself are not deemed to be official public disclosures of information that is otherwise properly classified. For example, in *Wilson v. CIA*, the Second Circuit held that neither the purported disclosure of the classified dates of service of a former covert employee in a private letter to the former employee, written on CIA letterhead and not marked "CLASSIFIED," nor even the letter's subsequent publication in the Congressional Record was an official and documented public disclosure of the information by the CIA. *Wilson*, 586 F.3d at 187-91. Similarly, in *Students Against Genocide v. Department of State*, 50 F. Supp. 2d 20, 20 (D.D.C. 1999), the plaintiffs argued that the Department of State could not protect a document that it determined would "tend to reveal [classified] sources and methods" because the information was previously shared by the then-U.N. Representative with representatives of other nations at a meeting of the U.N. Security Council. The court found that any limited disclosure did not place the information in the public domain, and that plaintiffs "cannot simply substitute their judgment for the United States government's judgment that additional disclosure would be harmful." *Id.* at 24; *see Carlisle Tire & Rubber Co. v. U.S. Customs Serv.*, 663 F.2d 210, 219 (D.C. Cir. 1980) (deferring to determination in affidavits of U.S. Customs Service officials that "serious adverse consequences" would result from further release of document subject to "inadvertent and limited disclosure" in reading room of Customs Service).

Courts recognize that there is a critical difference between speculation about classified information by the media or general public and the release of certain classified information by an

individual who foreign intelligence agents may know to have been in a position to know the information as true.

> As a practical matter, foreign governments can often ignore unofficial disclosures of CIA activities that might be viewed as embarrassing or harmful to their interests. They cannot, however, so easily cast a blind eye on official disclosures made by the CIA itself, and they may, in fact, feel compelled to retaliate.

Wilson, 586 F.3d at 186. As the Fourth Circuit stated in a prepublication review case involving a book by a former employee of the intelligence community:

> It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so. The reading public is accustomed to treating reports from uncertain sources as being of uncertain reliability, but it would not be inclined to discredit reports of sensitive information revealed by an official of the United States in a position to know of what he spoke.

Knopf, 509 F.2d at 1370. The *Knopf* court emphasized that former employees could not publish classified information that appeared in press accounts and elsewhere if it had not been released by the Agency in an official and documented disclosure:

> It is true that others may republish previously published [press] material, but such republication by strangers to it lends no additional credence to it. [Plaintiffs] are quite different, for their republication of the material would lend credence to it, and, unlike strangers referring to earlier unattributed reports, they are bound by formal agreements not to disclose such information.

Id.

None of the information that the Government has identified as classified here has been officially publicly released into the public domain. Classified DIA Decl. ¶¶ 8, 66; Classified CIA Decl. ¶ 39. The Government has explained in the attached declarations that serious harm could result from allowing Plaintiff to publish this information in a revised version of the book. *See generally* Classified DIA Decl.; Classified CIA Decl. The Government cannot include a more detailed discussion of such harm in this public brief because the public disclosure

arguments themselves would risk disclosure of the information that the Government must protect. *See Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979). Accordingly, Plaintiff cannot satisfy the requirements of official release by the Government into the public domain. *See Fitzgibbon*, 911 F.2d at 765 (citing *Afshar*, 702 F.2d at 1133).

Conclusion

For the reasons stated herein, Plaintiff's own factual allegations fail to give rise to an injury in fact, and he thus lacks standing to bring this case. Plaintiff also has no First Amendment right to publish the disputed information in the manuscript. The Government has identified risks of serious and grave harms to national security if that information is disclosed in a revised version of the book, and the Government's judgment that such information is properly classified is entitled to substantial deference. Accordingly, this Court should conclude that Defendants are entitled to judgment as a matter of law on Plaintiff's claim and enter judgment for Defendants.

Dated: May 16, 2011.

Respectfully submitted,

TONY WEST
Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

VINCENT M. GARVEY
Deputy Branch Director

/s/ Scott Risner
JOHN R. TYLER (DC Bar No. 297713)
Assistant Branch Director
SCOTT RISNER (MI Bar No. P70762)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Telephone: (202) 514-2395
Fax: (202) 616-8470
Email: scott.risner@usdoj.gov

Attorneys for Defendants