UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTHONY SHAFFER	*	
	*	
Plaintiff,	*	
	*	
v.	*	
	*	Civil Action No: 10-2119 (RMC)
DEFENSE INTELLIGENCE AGENCY	*	
et al.	*	
	*	
Defendants.	*	

* * * * * * * * * * * *

PLAINTIFF'S OPPOSITION TO DEFENDANTS'
SECOND MOTION FOR SUMMARY JUDGMENT

(ORAL ARGUMENTS REQUESTED)

In this action plaintiff Anthony Shaffer ("Shaffer") legally challenged the pre-publication classification decisions of the defendants Defense Intelligence Agency ("DIA"), the Department of Defense ("DoD") and the Central Intelligence Agency (collectively referred to as "defendants") with respect to text redacted from Shaffer's book Operation Dark Heart: Spycraft and Special Ops on the Frontlines of Afghanistan and the Path to Victory (St. Martin's Press, 2010)("Operation Dark Heart").

The defendants have requested that this Court grant them summary judgment as to their classification decisions. As to do so would prematurely infringe upon Shaffer's Constitutional First Amendment rights to challenge the propriety of the Government's classification decisions the defendants' Motion should be respectfully denied without prejudice pending further proceedings as suggested below.

FACTUAL BACKGROUND

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

retired as a Lt. Col. in the U.S. Army Reserves. He is required by virtue of various secrecy agreements 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 appears regularly as an expert commentator on network and cable television and radio, particularly with respect to military and national security matters. First Amended Complaint at ¶3 (filed February 13, 2012)("FAC"); Declaration of Anthony Shaffer at ¶ 2 (dated March 22, 2013)("Shaffer Decl."), attached as Exhibit "B" to the Defendants' Second Motion for Summary Judgment (filed April 26, 2013)("Defs' SJ Memo").

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. FAC at ¶8; Shaffer Decl. at ¶7.

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. FAC at ¶9; Shaffer Decl. at ¶8. 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. FAC at ¶10; Shaffer Decl. at ¶9.

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 80th 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. FAC at ¶11; Shaffer Decl. at ¶10.

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. FAC at ¶12; Shaffer Decl. at ¶11. A copy of Shaffer's draft manuscript was first submitted in June 2009 to his Army Reserve chain-of-command. FAC at ¶13; Shaffer Decl. at ¶12. 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. FAC at ¶14; Shaffer Decl. at ¶13.

By Memorandum dated December 26, 2009, the Staff Judge Advocate for the Headquarters 94th 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. FAC at ¶15; Shaffer Decl. at ¶14. By memorandum dated January 4, 2010, the Assistant Division Commander, who was a Colonel, Headquarters 94th 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. FAC at ¶16; Shaffer Decl. at ¶15.

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. FAC at ¶17; Shaffer Decl. at ¶16. 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. FAC at ¶18; Shaffer Decl. at ¶17.

DIA claims to have first learned of Operation Dark Heart on or about May 27, 2010. FAC at ¶19; Shaffer Decl. at ¶18. On June 18, 2010, Shaffer received a phone call from his commanding general of the 94th 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. FAC at ¶21; Shaffer Decl. 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. FAC at ¶21; Shaffer Decl. at ¶20. 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. FAC at ¶22; Shaffer Decl. at ¶21.

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…" FAC at ¶23; Shaffer Decl. at ¶22. 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. FAC at ¶24; Shaffer Decl. at ¶23.

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*. FAC at ¶25; Shaffer Decl. at ¶24. 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 94th 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. FAC at ¶25; Shaffer Decl. 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. FAC at ¶27; Shaffer Decl. at ¶26. 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." FAC at ¶28; Shaffer Decl. at ¶27.

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. FAC at ¶29; Shaffer Decl. at ¶31. 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. FAC at ¶30; Shaffer Decl. at ¶32.

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. FAC at ¶31; Shaffer Decl. at ¶35. 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. FAC at ¶32; Shaffer Decl. at ¶36.

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.

FAC at ¶33; Shaffer Decl. at ¶37.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. Ye DoD did, however, allow the publisher's attorney to participate in classified conversations regarding the contents of the book. FAC at ¶34; Shaffer Decl. at ¶38.

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. FAC at ¶35; Shaffer Decl. at ¶39. 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. FAC at ¶36; Shaffer Decl. at ¶40. 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. FAC at ¶37; Shaffer Decl. at ¶42.

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. FAC at ¶38; Shaffer Decl. at ¶43. 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. FAC at ¶39; Shaffer Decl. at ¶45.

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. FAC at ¶40; Shaffer Decl. at ¶46.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. FAC at ¶41; Shaffer Decl. at ¶47.

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*. FAC at ¶42; Shaffer Decl. at ¶48.

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*. FAC at ¶43; Shaffer Decl. at ¶49.

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 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.

FAC at ¶44; Shaffer Decl. at ¶50.

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* 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*. FAC at ¶45; Shaffer Decl. at ¶51.

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. FAC at ¶46; Shaffer Decl. at ¶52.

Shaffer filed this action on December 14, 2010.

PROCEDURAL BACKGROUND

On May 16, 2011, defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment in which they argued that Shaffer lacks standing to pursue his claim and that defendants are otherwise entitled to summary judgment. The defendants' substantive arguments were set forth in classified declarations that were filed *in camera* and *ex parte* with the Court.

Shaffer notified the defendants that in order to properly respond to their Motion and provide the Court cognizable arguments, as well as abide by the obligations imposed upon him by various secrecy non-disclosure agreements, he would need access to a secure government computer, as well as the 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 argued he was unable to file an Opposition to the defendants' Motion and the issue was brought to the attention of the Court to decide how to 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.

The substantive portions surrounding the access dispute were briefed and by Order dated January 12, 2012, the Honorable Ricardo Urbina, who was then handling this

matter, denied the defendants' Motion to Dismiss without prejudice and directed Shaffer to file an Amended Complaint. As a result, the access issues were never addressed. Shaffer filed his First Amended Complaint on February 14, 2012. The Court (the matter now having been reassigned from Judge Urbina on April 20, 2012) then addressed a dispute pertaining to Shaffer's standing and resolved the question, which is irrelevant to this current dispute, in his favor by Memorandum Opinion dated November 2, 2012.

While the legal proceedings were ongoing, by letter dated August 3, 2012, Shaffer asked the Department of Defense's Office of Security Review ("OSR") to conduct a new classification review of the manuscript so that he could publish a revised edition of the book. Shaffer Decl. at ¶54. During the administrative security review process, Plaintiff met with OSR personnel, was given "temporary" access to his "classified" manuscript, and was afforded the opportunity to submit materials in support of his contention that information redacted from the book was not properly classified because it had been officially disclosed by the Government. Id. at ¶56. By letter dated January 18, 2013, OSR informed Shaffer that approximately 200 of the 433 previously redacted passages were no longer classified.

As the new review had been completed and the litigation was to proceed the access issues were again raised during two status conferences on January 30, 2013 and February 13, 2013. The Court ordered the defendants to indicate whether they would grant Shaffer access to a secure computer system. By Status Report dated February 27, 2013, the defendants notified the Court "that they will not provide Plaintiff with access to a secure government computer to prepare his declaration."

Pursuant to this Court's Order, Plaintiff submitted a thirty-three page sworn declaration and supporting exhibits to the defendants on March 22, 2013.[1] On April 26, 2013, the defendants filed the instant Second Motion for Summary Judgment.

ARGUMENT[2]

Protecting the national security interests of the United States is paramount. No one involved with this litigation disputes that. In the environment of recent high-profile unauthorized leaks of classified information by, among others, Private Bradley Manning and Edward Snowden, which have caused, according to the Government's arguments, significant harm to our country's national security interests Shaffer should be applauded for his participation in a legal proceeding in which he has properly sought to challenge governmental classification decisions. That he chose to follow the rules every step of the

[1] Portions of Shaffer's sworn declaration have been redacted as "classified". Shaffer's undersigned counsel has not been permitted the opportunity to review those portions. The Court, of course, should do so.

[2] Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party may successfully support its motion by identifying those portions of "the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials," which it believes demonstrate the absence of a genuine dispute of material fact. Fed. R. Civ. P. 56(c)(1); Celotex, 477 U.S. at 323. In determining whether there exists a genuine dispute of material fact sufficient to preclude summary judgment, the Court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of its position. Id. at 252. Moreover, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted). Summary judgment, then, is appropriate if the non-movant fails to offer "evidence on which the jury could reasonably find for the [non-movant]." Id. at 252.

way is why it is imperative that this Court afford him the fullest of Constitutional protections in allowing him to call into question the propriety of the defendant's decisions. In doing so Shaffer has entered a Wilderness of Mirrors that is the classification system; a system that is continually excoriated by senior U.S. Government officials as completely flawed and subject to abuse. Indeed, the Government Accountability Office just recently announced that pursuant to Congressional request it was conducting an investigation into the overclassification of security materials. See *http://www.fas.org/sgp/gao/gao-hunter.pdf* (posting GAO letter of July 30, 2013).

For example, at an August 24, 2004 hearing of the Committee on Government Reform's Subcommittee on National Security, Emerging Threats and International Relations of the House of Representatives, J. William Leonard, then the Director (also called "Classification Czar") of the Information Security Oversight Office within the National Archives & Records Administration, testified:

> "It is no secret that government classifies too much information. What I find most troubling . . . is that some individual agencies have no idea how much information they generate is classified, whether the overall quantity is increasing or decreasing, what the explanations are for such changes . . . and most importantly of all, whether the changes are appropriate."

http://www.fas.org/sgp/congress/2004/082404transcript.html. At the same hearing Carol A. Haave, Undersecretary of Defense for Counterintelligence and Security testified that: "I do believe we overclassify information. I do believe that it is extensive." She estimated that as much as 50% of the information is overclassified. Id.

Shaffer contends that "[l]ittle to none" of the information redacted from the manuscript is classified. FAC at ¶37. In response the defendants claim "whether something is classified is a determination that rests solely with the Executive." Defs' SJ

Memo at 8. That, of course, is completely inaccurate as the final decision and proper oversight authority of the Executive's determinations lie with this Court.

This is not to say that judicial deference does not play a role in prepublication review challenges. It clearly does, but "the Court will not just rubber stamp the government's classification decision. To uphold the government's classification decision, the Court must satisfy itself 'from the record, *in camera* or otherwise, that the [government agencies] in fact had good reason to classify, and therefore censor, the materials at issue.'… The Court will not rely on any 'presumption of regularity' if rational explanations are missing." McGehee v. Casey, 718 F.2d 1137, 1148-49 (D.C. Cir. 1983).

I. SHAFFER HAS A FIRST AMENDMENT CONSTITUTIONAL RIGHT TO A FAIR AND LEGITIMATE JUDICIAL CHALLENGE TO THE GOVERNMENT'S PREPUBLICATION REVIEW DETERMINATIONS WHICH HE HAS THUS FAR BEEN DEPRIVED OF BY THE DEFENDANTS

Ironically, there really is little to no disagreement between the parties as to the general state of the relevant law in this proceeding. Thus, the vast majority of the defendants' brief, which goes on for pages and pages reciting basic case law, requires no response.

Shaffer has no right to publish any properly classified information. Snepp v. United States, 444 U.S. 507, 510 (1980). But notwithstanding being subject to a variety of secrecy/non-disclosure agreements executed over the years, Shaffer unquestionably possesses a First Amendment right to publish any and all unclassified information. As the D.C. Circuit has noted, secrecy agreements, such as the ones Shaffer executed, do not extend to "unclassified materials or to information obtained from public sources." McGehee, 718 F.2d at 1142. The government may not censor such material, "contractually or otherwise." United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir.),

cert. denied, 409 U.S. 1063 (1972).[3] Indeed, the defendants acknowledge that they seek "to prevent the disclosure only of the classified information in Plaintiff's manuscript." Defs' SJ Memo at 24.

What this Court must also evaluate is not only whether the information is properly classified but the extent to which Shaffer has a First Amendment right in the process to challenge the Government. Shaffer contends that process is itself shrouded by First Amendment protections, at least until the time the Court renders a determination in favor of the defendants thereby eliminating Shaffer's constitutional rights.

Throughout this litigation Shaffer has been at an unparalleled disadvantage. Not only has his counsel been kept completely in the dark as to the substance of the current dispute, and therefore severely restricted in what he can do to provide informed legal advice, but Shaffer himself has been prohibited from providing this Court with relevant information.

A. The Governing Law Of Prepublication Review Challenges

The law surrounding the Court's role in prepublication review challenges primarily emanates from two D.C. Circuit decisions. In McGehee, the Circuit ruled that "unlike FOIA cases, in cases such as this both parties know the nature of information in question. Courts should therefore strive to benefit from 'criticism and illumination by [the] party

[3] "[A]ny secrecy agreement which purports to prevent disclosure of unclassified information would contravene First Amendment rights." Stillman v. CIA et al., 517 F. Supp. 2d 32, 37 fn. 4 (D.D.C. 2007), citing Marchetti, 466 F.2d at 1317. Moreover, when the information at issue derives from public sources, the agent's special relationship of trust with the government is greatly diminished if not wholly vitiated." McGehee, 718 F.2d at 1141. Accord Snepp, 444 U.S. at 513 n.8 ("if in fact information is unclassified or in the public domain, neither the CIA nor foreign agencies would be concerned"); Stillman v. CIA et al., 319 F.3d 546, 548 (D.C. Cir. 2003)(if information not classified properly, manuscript can be published).

with the actual interest in forcing disclosure.'" 718 F.2d at 1149. Then twenty years later the Court refined in Stillman, in which the undersigned counsel was the attorney of record, 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.'" Id. at 548-49 (emphasis added).

These prepublication legal disputes are, of course, different than the normal lawsuit given a great deal is always shrouded in secrecy. **"**[I]n 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. Id., quoting McGehee, 718 F.2d at 1149. As the defendants' informed the Court:

> In support of these determinations, the Government is submitting both unclassified and classified declarations from various agencies. Through the unclassified submissions, 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). 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.").

Defs' SJ Memo at 2.[4]

[4] Thus, there is also very little Shaffer can do to respond in this Opposition to the defendants' Motion, which is why there are so few references to its legal memorandum or exhibits. The defendants' substantive arguments are hidden from not only the public's view but also from Shaffer and his counsel.

Nevertheless, it is the obligation of this Court in its judicial oversight capacity, especially because Shaffer is specifically prohibited from playing the role of a normal plaintiff, to ensure that the Executive defend its classification determinations with "reasonable specificity, demonstrate[e] a logical connection between the deleted information and the reasons for classification," McGehee, 718 F.2d at 1148-49.

The governing document concerning the defendants' classification decisions is Executive Order 13,526, 75 Fed. Reg. 707 (2010), which President Obama issued in December 2009 (amending President Bush's Executive Order 13,292 that dated back to 2003). Pursuant to § 1.4 of the Order, information shall not be considered for classification unless it concerns (noting in relevant part those provisions that have been raised in this particular case): foreign government information, intelligence activities (including special activities), intelligence sources or methods, or cryptology; and foreign relations or foreign activities of the United States, including confidential sources.

EO 13,526, contains four conditions for the classification of information: (1) the information must be classified by an "original classification authority"; (2) the information must be "owned by, produced by or for, or is under the control of" the government; (3) the information must fall within one of the authorized classification categories under section 1.4 of the 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." Id. at § 1.1.

B. The Governing Law Surrounding The Authority Of The Court To Order The Defendants To Provide The Plaintiff (And Even His Attorney) Access To Classified Information In Order To Challenge Classification Determinations

It is not only the propriety of the defendants' classification determinations that are at issue here but also the role of the Court in ensuring the interests of both parties are met. Therefore, the state of the law surrounding the Court's ability to render determinations regarding access to classified information is relevant to discuss.

This Court possesses absolute authority to control how information is accessed and presented to it. Judge Beryl Howell recently addressed the issue of the Court's authority when classified information is involved in De Sousa v. Dep't of State et al., 840 F. Supp. 2d 92, 104-05 (D.D.C. 2012)(the undersigned was counsel of record):

> Upon review of the most pertinent authorities, the Court believes that it has the discretion to order disclosure of classified information to the Court in a civil case where the information is material to the resolution of disputed legal issues and where alternatives to reliance upon classified information are inadequate to satisfy the interests of justice. See In re Sealed Case, 494 F.3d 139, 154, 377 U.S. App. D.C. 307 (D.C. Cir. 2007) (noting in a civil case that "nothing in this opinion forecloses a determination by the district court that some of the protective measures in [the Classified Information Procedures Act ('CIPA')], 18 U.S.C. app. III, which applies in criminal cases, would be appropriate, as [plaintiff] urges, so that his case could proceed."); see also Webster v. Doe, 486 U.S. 592, 604, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988)("[T]he District Court has the latitude to control any discovery process . . . so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."); 28 C.F.R. § 17.17 (Department of Justice regulation stating that "[i]n judicial proceedings other than Federal criminal cases where CIPA is used, the Department, through its attorneys, shall seek appropriate security safeguards to protect classified information from unauthorized disclosure, including. . . [a] determination by the court of the relevance and materiality of the classified information in question" and listing other potential safeguards); cf. Al Odah v. United States, 559 F.3d 539, 544, 547, 385 U.S. App. D.C. 110 (D.C. Cir. 2009)("[B]efore the district court may compel the disclosure of classified information, it must determine that the information is both relevant and material . . . [B]efore ordering

> disclosure of classified material to counsel, the court must determine that alternatives to disclosure would not effectively substitute for unredacted access.")(emphasis in original).

This is not necessarily a constitutional issue. Instead it is a function of discretionary authority exercised by this Court as to how routine briefing procedures before it are handled. See also Nixon v. Sirica, 487 F.2d 700, 713 (D.C. Cir. 1973)(century of legal experience has taught that "courts have broad authority to inquire into national security matters so long as proper safeguards are applied to avoid unwarranted disclosure").

Additionally, this Court can rely upon the All Writs Act, which states that the courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. § 1651(a), for this purpose as well. The Court's decision to grant an order under the All Writs Act is "within the sound discretion of the court." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943). This Act served as part of the basis that led to this District's creation of procedures, not dissimilar to what Shaffer is seeking now, for the handling of classified information including the accessing, drafting and filing of such information with the Court, as well as clearly evidencing the Court's role in those determinations. See In Re: Guantanamo Bay Detainee Litigation, 577 F. Supp. 2d 143 (D.D.C. 2008).

C. Shaffer Was Unconstitutionally Deprived Of His First Amendment Rights To Have Access To His Unredacted Manuscript For Purposes Of Drafting His Declaration To Challenge The Defendants' Classification Determinations

The defendants' assert that the "Plaintiff's claim concerning a declaration already has been resolved by the Court." Defs' SJ Memo at 38. This is completely untrue as the issue has never been substantively addressed beyond the Court offering the defendants the opportunity to consider accommodating Shaffer's request for access to a secure computer. In their Status Report of February 27, 2013, the defendants refused thereby

setting up this dispute for resolution. Nor is the issue "moot", as the defendants claim, id., for the reasons set forth below.

In preparing his initial thirty-three page declaration, which was submitted to the defendants in March 2013 at a severe disadvantage, Shaffer was not permitted an opportunity to review his own manuscript. Shaffer Decl. at ¶4. Yet on at least four occasions when it suited the defendants' interests in 2010 and 2012 Shaffer was permitted access during meetings to discuss the classification of the text. Id. at ¶¶5, 39-40, 56-57. Conveniently now when such access would unquestionably assist his legal ability to challenge the classification determinations the defendants have prohibited the exact same access.

Yet there is no other way for Shaffer to identify and challenge any of the specific text passages purported to be classified, much less present a complete argument to the Court, if he does not have access to the original book. Id. at ¶80. The defendants' explicitly argue to this Court that in order for Shaffer to prevail he "must show that the information already has been publicly released through 'an official and documented disclosure.'" Defs' SJ Memo at 27, citing Afshar v. Dep't of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983).

There is absolutely no way that Shaffer can lawfully present the type of "pin-point citations" the Government – including one of the defendants in this case – successfully argued to Judge Sullivan in Boening v. CIA, 579 F. Supp. 2d 166, 170 (D.D.C. 2008)(the undersigned was counsel of record in that matter), was necessary in order for a First Amendment pre-publication review challenge to be successful. See also McGehee,

718 F.2d at 1141 n. 9. ("[a]n ex-agent should demonstrate, however, at an appropriate time during the prepublication review, that such information is in the public domain").

The impediment this has caused is not based on speculation. It completely manifested itself into reality during the administrative process and into this litigation. Following the 2012 meetings between the defendants and Shaffer and the submission of open source information, by letter dated December 19, 2012, DoD wrote that "[b]y providing a list of publications without identifying specific information in those publications your submission is too general and does not allow the pertinent agencies to conduct a meaningful review of the submitted material. We therefore ask that you supplement the submission with pinpoint citations, including specific reference to the relevant page numbers." Shaffer Decl. at ¶59. This, however, was impossible to do without further access to the manuscript and, in fact, was contrary to the discussions held and the agreements made during the meetings. Id. at ¶60.

Clearly the only reason why the defendants do not wish for access to occur is to maintain a litigation advantage so that Shaffer cannot fully respond to their summary judgment motion. See Stillman v. DoD et al., 209 F. Supp. 2d 185, 224 fn. 26 (D.D.C. 2002)(only conclusion possible for CIA decision to deny plaintiff and his counsel's access to classified document is solely to "gain advantage in litigation"). See also EEOC V. EMC Corp., 2000 U.S. App. LEXIS 1941, *50 (6th Cir. Feb. 8, 2000)("The courts should not tolerate blatant disregard for, and/or manipulation of, the law, designed to secure an unlawful litigation advantage by a representative of the United States government who was entrusted with the just and even-handed prosecution of a citizen's complaint").

There is no legitimate, articulable reason why the defendants should not be required to provide Shaffer with access, in an secure environment, to the unredacted copy of his own book in order to provide this Court with a comprehensible argument countering the relevant classification determinations.

1. Shaffer's Counsel Should Also Be Permitted Authorized Access To His Manuscript

Not only have the defendants blocked Shaffer's access to his manuscript as part of his legal challenge, but they have argued against Shaffer's counsel being permitted access to any classified information. Defs' SJ Memo at 38-40. Their argument primarily relies on the D.C. Circuit's decision in Stillman, a case in which Shaffer's counsel was also the attorney of record for the plaintiff. Consistent with Stillman, this case is a perfect opportunity and set of ideal factual circumstances to allow counsel access to specific classified information.

Allowing Shaffer and his counsel to access the unredacted manuscript would have absolutely no adverse impact on national security. The defendants should be required to specifically articulate what harm to national security would exist were access permitted. In fact, it is a requirement by law that they do so. Section 1.1 of Executive Order 13,526 requires that the defendants must be "able to identify or describe the damage" that would occur were Shaffer and/or his counsel to have temporary and secure access to the manuscript.

One of the unique facts of this case is that at any given time Shaffer's counsel can access an unredacted "classified" first edition of Operation Dark Heart. The undersigned knows numerous people who possess one of the many copies that were disseminated by the publisher prior to entering into an agreement with the defendants to forgo publication.

FAC at ¶¶31, 42-43, 45. Individuals have already agreed to provide a copy upon request. Rule 56(f) Declaration of Mark S. Zaid, Esq. at ¶6 (dated August 12, 2013)("Zaid 56(f) Decl."), attached at Exhibit "1". Indeed, Shaffer's counsel could have submitted the "classified" copy as an open public exhibit as part of this litigation if he wished. Or quoted extensively from the contents. Id. at ¶7. Unredacted pages are already publicly available online for anyone to review. Id.

Instead, Shaffer and his counsel are playing by the rules.[5] Id. Shaffer should not be unduly penalized when the granting of his request has no national security interests at stake. What "damage" could actually occur by the defendants providing authorized access for purposes of this litigation? See Wright v. FBI, 2006 U.S. Dist. LEXIS 52389, *28 (D.D.C. July 31, 2006)("Defendants' argument, even if accurate, does not explain how, regardless of how or when Wright learned of certain information, the Government could have any interest whatsoever in censoring it if it is already in the public domain").

Consistent with Stillman, 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 [Shaffer]", 319 F.3d at 548-49, and then order the defendants to allow access to the manuscript for purposes of submitting a supplemental filing. "[W]hile the [Executive Branch]'s tasks include the protection of the national security and the maintenance of the secrecy of sensitive information, the judiciary's tasks include the protection of individual rights". McGehee, 718 F.2d at 1149.

[5] Because Shaffer and his counsel continue to play by the rules, the undersigned – whose Secret clearance remains valid through October 2013 – is willing to execute a secrecy, non-disclosure agreement if access is permitted. Zaid 56(f) Decl. at ¶¶2, 10.

Given the unique facts of this case, the defendants' foreclosure of Shaffer's counsel from meaningfully participating in this litigation violates Shaffer's constitutional rights. See Strickland v. Washington, 466 U.S. 668, 692 (1984)("Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance"); U.S. v. Cronic, 466 U.S. 648, 659, n.25 (1983)(Court "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding")(citation omitted). Therefore, Shaffer's counsel should also be permitted to access the unredacted version of Operation Dark Heart.

D. Shaffer And His Counsel Will Need Access To A Secure Computer System To Draft Any Supplemental Declarations

Throughout its brief the defendants argue that Shaffer has failed to justify why certain information is unclassified. That is partially because of his lack of access to his own book, but that said if a supplemental declaration is authorized he will need to be able to utilize a secure computer on which to draft the document. Shaffer cannot address the specifics of why certain information is unclassified without at least touching upon the classified information in the process. Based on the defendants' posture in this matter the redacted contents of the book are "classified", notwithstanding the fact that anyone with an Internet connection has access to the "classified" information. Indeed, a quick review of Shaffer's declaration that was submitted as part of this proceeding reveals numerous instances where the defendants redacted information as "classified".

Shaffer's request is entirely consistent with the framework established by the D.C. Circuit in McGehee, 718 F.2d at 1149, where the Court ruled: "unlike FOIA cases, in

cases such as this both parties know the nature of the information in question. Courts should therefore strive to benefit from 'criticism and illumination by [the] party with the actual interest in forcing disclosure.'" The defendants cannot point to any case, law or regulation that prohibits a plaintiff, especially in a prepublication review case, from presenting information to the Court that the Executive Branch considers classified.

The defendants would rather place Shaffer in the untenable and inappropriate position to prepare his declaration with "specific" citations to "classified" text on an unsecure computer, which would be connected to an open Internet connection, and simply submit it through the so-called classification review process prior to its public filing. That process, of course, provides absolutely no protection for any classified information that might be even inadvertently contained within the document, and such a practice should not be condoned by this Court.

III. SHAFFER HAS SUBMITTED SUFFICIENT EVIDENCE TO DEMONSTRATE AT LEAST SOME OF THE INFORMATION ASSERTED BY THE DEFENDANTS TO BE CLASSIFIED IS ACTUALLY UNCLASSIFIED

To be clear, Shaffer is not arguing that information that has been unofficially released into the public domain, regardless of the manner or method, results in the declassification of the protected information. That is so as a matter of law even if the very document in dispute is publically available, as absurd as that fact might be to some.

As noted, Shaffer submitted a thirty-three page sworn declaration for this Court's consideration and the document speaks for itself. Because neither Shaffer nor his undersigned counsel have had access to the defendants' classified substantive declarations, or even Shaffer's own "classified" manuscript, there is little that can be argued in this filing because there is nothing to argue against. Nevertheless, one example

serves as a shining bright light to question the defendants' assertions as to the proper classification of information within Operation Dark Heart.

The New York Times reported that in Operation Dark Heart the defendants redacted from the book's glossary the definition for the term "SIGINT". *http://www.nytimes.com/2010/09/18/us/18book.html*; FAC at ¶44. The Federation of American Scientists posted the unredacted page on its website. *http://www.fas.org/sgp/news/2010/09/dark-contrast.pdf*; FAC at ¶45. Of course, "SIGINT" means "signals intelligence". It is a term frequently and publicly utilized by just about everyone, and was even long before Edward Snowden's disclosures became the recent story of the day.

Thus it is not surprising that numerous senior level Executive Branch Officials have publicly disclosed the term as part of their everyday discussions, and more importantly in court cases and congressional testimony. See Wilner v. NSA, 592 F.3d 60, 74-75 (2d. Cir. 2009)(NSA filed public declaration of Joseph Brand, Associate Director, Community Integration, Policy and Records, describing SIGINT); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1222 (D. Or. 2006)(John D. Negroponte, Director, Office of National Intelligence, defines SIGINT as "signals intelligence"); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1339 (S.D. Fla. 2005)(Louis F. Giles, Director of Policy, NSA, asserts "signals intelligence is one of the Agency's primary functions"); Statement For The Record By Lieutenant General Michael V. Hayden, Director, National Security Agency, Before The Joint Inquiry Of The Senate Select Committee On Intelligence And The House Permanent Select Committee On Intelligence, 17 October 2002, at *https://www.fas.org/irp/congress/2002_hr/101702hayden.html* (identifying SIGINT as "signals intelligence"); Statement by

Director of Central Intelligence George J. Tenet Before the House Permanent Select Committee on Intelligence, 12 April 2000, at *https://www.cia.gov/news-information/speeches-testimony/2000/dci_speech_041200.html* (testifying about "signals intelligence—or SIGINT").

Yet notwithstanding the most recent classification review that was completed in January 2013, as part of this lawsuit we are all supposed to ignore the fact that we know the definition of SIGINT per authorized official disclosures. In light of this example of the defendants' blatant misuse of the classification system, the entirety of its assertions should be held as suspect and scrutinized further before summary judgment is awarded.[6]

[6] There are also numerous examples of past abuses of the Executive Branch with respect to classification that should be taken into account when this Court considers the defendants' *ex parte* "classified" arguments. For example, former U.S. Solicitor General Erwin Griswold, who argued for the government in the Pentagon Papers case, later explained in a Washington Post editorial that "[i]t quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification, and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another." Erwin N. Griswold, Secrets Not Worth Keeping: the Courts and Classified Information, Wash. Post, Feb. 15, 1989, at A25. In fact, Justice Stewart recognized in his *Pentagon Papers* concurrence that the national security classification system can all too easily "be manipulated by those intent on self-protection and self promotion." New York Times v. United States, 403 U.S. 713, 729 (1971)(Stewart, J., concurring). Or when former Attorney General Herbert Brownell similarly complained in a 1953 letter to President Eisenhower that classification procedures were then "so broadly drawn and loosely administered as to make it possible for government officials to cover up their own mistakes and even their wrong-doing under the guise of protecting national security." Letter from Attorney General Herbert Brownell to President Dwight Eisenhower (June 15, 1953), quoted in Kenneth R. Mayer, With the Stroke of a Pen: Executive Orders and Presidential Power 145 (2001). Even in U.S. v. Reynolds, 345 U.S. 1 (1952), avoidance of embarrassment — not preservation of state secrets – seems to have been the primary motivation of the Executive's invocation of the privilege. There the Court credited the government's assertion that "this accident occurred to a military plane which had gone aloft to test secret electronic equipment," and that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." 345 U.S. at 10. In 1996, however, the

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IV. DISCOVERY IS APPROPRIATE TO CHALLENGE SPECIFIC ASSERTIONS OF CLASSIFICATION AS WELL DUE TO THE BAD FAITH AND IMPROPER CLASSIFICATION DECISIONS THAT WERE ISSUED TO VIOLATE SHAFFER'S FIRST AMENDMENT RIGHTS

A. Material Facts Exist Precluding Summary Judgment And Justifying Limited Discovery

One of the key points of contention is whether the information surrounding Shaffer's Bronze Star Medal is classified. Defs' SJ Memo at 31-34. Shaffer asserts the document was awarded to him by DIA/DoD as unclassified. Shaffer Decl. at ¶¶65-67, 72-73. He should be permitted to seek discovery from DIA regarding the origins of the document and the process that led to its classification (but not the substantive reasoning underlying the classification which would obviously touch upon the alleged classified information).

It is also Shaffer's contention that certain information is unclassified because it was contained in "DoD Cleared Testimony that I delivered to Congress in February of 2006." Id. at ¶71. His declaration argues that "[a]ll of the information I put in Chapter 14 is contained in my written and public (open) testimony that was cleared by DoD back in February 2006." Id. The defendants claim not to have any record the testimony was cleared for release. Defs' SJ Memo at 35. That could very well be the fault of the defendants' own recordkeeping and should not be permitted to serve as the final disposition of this issue. This should be a simple factual matter to address and resolve.

The defendants also claim that Shaffer's argument with respect to his February 2006 Congressional testimony "is at odds with positions he has taken in prior litigation, where

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"secret" accident report involved in that case was declassified. A review of the report revealed no "details of any secret project the plane was involved in," but "[i]nstead, … a horror story of incompetence, bungling, and tragic error." Garry Wills, Why the Government Can Legally Lie, 56 N.Y. Rev. of Books 32, 33 (2009).

he has expressly alleged that the Department refused to authorize his testimony." Defs' SJ Memo at 35. This is completely inaccurate as the defendants are confusing two separate events. In September 2005, the DIA refused to authorize Shaffer's testimony before the Senate Judiciary Committee and his undersigned counsel appeared instead. Zaid 56(f) Decl. at ¶5. In February 2006, however, Shaffer testified before the House Committee on Armed Services. His testimony was both authorized and reviewed for classification purposes before it occurred. Shafer Decl. at ¶71. Discovery will prove this to be the case, and in doing so a substantial amount of redacted information from Shaffer's book may be required to be released as unclassified.

Additionally, some of the contents of Operation Dark Heart did not even originate with Shaffer. His ghostwriter, Jacqueline L. Salmon, conducted some of her own independent research, which included several interviews of third parties, and added that content into the book as well. See Declaration of Jacqueline L. Salmon at *passim* (dated August 10, 2013), attached at Exhibit "2". Yet to identify that text given the Government's position would be to reveal "classified" information. Ms. Salmon is willing to specifically identify the relevant text if the Court authorizes the proper security protections.

Discovery in prepublication review cases is appropriate under the right circumstances. See Wright, 2006 U.S. Dist. LEXIS 52389, * 27-9 (D.D.C. 2006)(finding existence of dispute concerning genuine issue of material fact where both former and current FBI Special Agent utilized newspaper accounts and various open source materials to draft manuscript criticizing FBI counterterrorism efforts and FBI claimed the information was not derived solely from open source materials but obtained by virtue of

plaintiff's position within the FBI). See also Alfred A. Knopf, Inc., v. Casey, 509 F.2d 1362, 1365 (4th Cir. 1975)(CIA required to produce witnesses); Marchetti, 466 F.2d at 1312 (trial on merits held); United States v. Snepp, 456 F.Supp. 176, 179-180 (E.D.V.A. 1978)(extensive discovery conducted; Court also heard testimony from CIA officials including former CIA Director Bill Colby and then-current CIA Director Admiral Stansfield Turner).

B. The Defendants Have "Unclean Hands" Denying Them Of Summary Judgment And Justifying Limited Discovery

The defendants have argued that Shaffer has failed to demonstrate that the redacted information in his book is unclassified. Defs' SJ Memo at 25-29. They have made it clear, through both the administrative process and now in this litigation, that without "specific pincites to portions of the document, neither Defendants nor the Court can reasonably be expected to consider the impact of the document on the classification determinations in this case." Id. at 30-31 fn. 10, citing Boening, 579 F. Supp. 2d at 171-72.

The Boening ruling, issued by Judge Emmet Sullivan (and in which Shaffer's counsel also served as counsel), is the only prepublication decision to suggest that specific pinpoint cites are necessary. To the extent this Court wishes to adopt Judge Sullivan's reasoning, Shaffer's alleged failure to provide such cites is explicitly due to the defendants' own unclean hands in refusing to allow him access to the contents of his own book, as well as the ability to address the specific "classified" text through use of a secure computer system.

"The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a

self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith." Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945)(internal citations and quotations omitted). "Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance." Id. at 815.

Courts have discretion to deny equitable relief to a party who has not acted fairly and without fraud or deceit as to the controversy at issue. The equitable doctrine of unclean hands can apply where there is misconduct by the party seeking relief in the same transaction that is the subject of the underlying claim. The non-movant party bears the burden of showing that unclean hand bars equitable relief. That burden is satisfied by a showing of truly unconscionable and brazen behavior. See Saint-Jean v. District of Columbia, 846 F. Supp. 2d 247, 258 (D.D.C. 2012)(internal citations and quotations omitted); see also Cochran v. Burdick, 89 F.2d 831, 834 (D.C. Cir. 1937)(citing fraudulent behavior as conduct constituting unclean hands). The misconduct, however, does not need to have been of such a nature as to be punishable as a crime or even to justify legal proceedings. Precision Instrument Mfg. Co., 324 U.S. at 815.

In the instant matter we have at least two examples where the defendants come to this Court asking for equitable relief in the form of summary judgment with unclean hands:

- The defendants demonstrated brazen behavior by prohibiting Shaffer (and his counsel) from having access to his own manuscript – notwithstanding he knows the contents, the public knows the contents and when it suited their interests access was provided – simply to gain a litigation advantage;

- Classification representatives of the defendants admitted to Shaffer that at least some of the original classification 2010 determinations had no basis in fact or law.

As the defendants themselves note, "good faith" is a requirement with respect to their officials' classification decisions. Defs' SJ Memo at 9. The defendants acknowledge that in 2010 they identified 433 particular passages for redaction based on alleged classification. Id. at 6. Not even three years later, nearly half of the redacted passages no longer merited classification. What, if anything, changed in less than three years? Discovery would not be utilized to explore the substantive decisions that underlay the substantive classification decisions, but would pertain to the comments made to Shaffer during his 2010 and 2012 meetings with classification officials that would lead a reasonable person to believe there were malicious motivations underlying the inappropriate 2010 classification decisions by certain officials of the defendants in order to cause harm to Shaffer.[7] See Executive 13,526, § 1.7(a)(2),(4)("In no case shall

[7] The Court should also be aware that as a result of Shaffer's attempt to utilize proper security protocols, given that the defendants refused to allow him to use a secure computer system, the defendants retaliated against Shaffer. As this Court is aware, Shaffer previously notified it that arrangements were made, some of which actually did not occur due to logistical complications outside of his control, to utilize secure computers and transmission protocols of the Federal Reserve Bank with respect to his declaration. Shaffer at the time had a contract with the Bank. When the defendants learned of Shaffer's actions and the Bank's involvement, they initiated steps to have at least one individual who assisted Shaffer to be terminated from his position and also

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information be classified, continue to be maintained as classified, or fail to be declassified in order to … prevent embarrassment to a person, organization, or agency … or prevent or delay the release of information that does not require protection in the interest of the national security").

For example:

- In 2010, the DIA claimed that there were at least the covert names of four operatives in Operation Dark Heart; an assertion Shaffer knew to be false. As Shaffer notes in his declaration: "When I confronted in, August 2010 (during the second review), Mr. Ridlon on this issue and the fact that there were no 'operative names' in the book, he admitted 'yeah - we just made that up as an excuse to stop publication'."

Shaffer Decl. at ¶33.

- During this working session [of October 17, 2012] we reviewed the book line by line. There were several instances in which the DIA security officer specifically asked me "do you know why Mr. Ridlon said this was classified?" My answer was invariably "no" and that I had tried at the time (Aug 2010) to argue the point. Ms. Beth Fitzgibbons, the DoD officer who had been present for the August 2010 sessions said several times during the October 2010 [sic] meeting that she felt that most of the items being "cleared" in the October 2012 session were "never" classified and she did not understand why Mr. Ridlon had made the claim that they were classified in the first place. Ms. Fitzgibbons stated directly during the October 2012 review session that she had "disagreed" with many of Mr. Ridlon's claims, in August 2010, regarding many items that Ridlon was saying were "classified". She went on to say she did not understand why Mr. Ridlon had forced them (the DoD team) to ignore the unclassified documents that I had provided in August 2010. Indeed, it was made very clear to me during our October 17, 2012 session that the vast majority of the original redactions had nothing to do with security.

Shaffer Decl. at ¶57.

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canceled a cyber operations contract Shaffer was scheduled to work on which was worth $5,000.00 per month. This was nothing but pure retaliation and further demonstrates the defendants' brazen unconscionable behavior when it comes to prosecuting this case. Discovery should be permitted to identify the specific officials of the defendants who took action and their alleged justification.

These are serious allegations of deliberate abuses of the classification system that should not go unaddressed by the defendants, particularly as it calls into question the fundamental good faith and legality of the entire administrative process. Until that time summary judgment should not be an entitlement.

C. This Court Should Appoint An Independent Expert To Assess The Appropriateness Of The Defendants' Classification Determinations

Since this Court is not supposed to "second guess" the defendants, Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003), but yet at the same time recognize the likelihood that the defendants are improperly overclassifying the information, it should consider appointing an independent expert to provide guidance as to the legitimacy of the classification determinations. Judge Kessler noted in a prepublication review case that "the FBI, by its very nature, is not an open institution, and very few people are knowledgeable about its inner operations. For that very reason, the views of knowledgeable, informed, experienced 'insiders' are of particular utility." Wright v. FBI, 2006 U.S. Dist. LEXIS 52389, *23 (D.D.C. July 31, 2006). See also Colby et al. v. Halperin et al., 656 F.2d 70, 72 (4th Cir. 1981)(expert witness provided access to classified portions in preparation of trial testimony). The defendants in this case, which are intelligence agencies, are obviously even more closed than that of the FBI.

This would be a perfect case to level the playing field yet still fully protect the national security interests of the United States.

CONCLUSION

For the foregoing reasons, the defendants' Second Motion for Summary Judgment should be denied without prejudice. Shaffer and his counsel should be permitted an

opportunity to review his unredacted manuscript, utilize a secure government computer to draft a supplemental declaration and limited discovery should be authorized.

Date: August 12, 2013

Respectfully submitted,

/s/

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