UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

FRANZ BOENING, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, Defendant.	)	Civil Action No. 07-0430 (EGS)

DEFENDANT'S MOTION TO DISMISS UNDER RULE 12
AND MOTION FOR SUMMARY JUDGMENT UNDER RULE 56

Plaintiff Franz Boening, a former employee of the defendant Central Intelligence Agency ("CIA" or "Agency"), sought to publish a memorandum he authored while employed at the Agency. As he was required to do by a Secrecy Agreement he voluntarily signed, plaintiff submitted that memorandum to the CIA for prepublication review. After determining that the memorandum contained classified information, the Agency denied plaintiff permission to publish it as written. Plaintiff was instructed that, if he wished to publish the memorandum, he must delete classified material (or provide open-source, pinpoint citations for those assertions), remove the memorandum from its official-looking government format, and add a disclaimer stating that the views expressed were his own and did not represent the views of the Agency or the U.S. Government. Plaintiff refused to make the requested changes and, instead, filed this action alleging that the CIA violated the First Amendment of the United States Constitution and the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*

Defendant respectfully moves this Court, pursuant to Fed. R. Civ. P. 12, to dismiss plaintiff's two APA claims. Defendant also moves that this Court award summary judgment, pursuant to Fed.

R. Civ. P. 56, on plaintiff's First Amendment claim. For all the reasons set forth in the accompanying Memorandum of Points and Authorities in support of this motion, defendant requests that this court find that:

(1) plaintiff's claim that the CIA violated the APA by taking longer than 30 days to complete prepublication review of his memorandum is moot and, in any event, lacks merit;

(2) plaintiff lacks standing to allege that the CIA violated the APA when it determined that he was not an "authorized holder" of the classified information contained in his memorandum and, in any event, this claim lacks merit;

(3) plaintiff has no First Amendment right to publish classified information; and

(4) the CIA properly determined that, in its current form, plaintiff's memorandum contains classified information that, if disclosed, could cause serious damage to national security.

Dated: July 20, 2007

Respectfully submitted,

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INTRODUCTION

Plaintiff, a former employee of the Central Intelligence Agency ("CIA" or "Agency"), signed a Secrecy Agreement ("Agreement") when he accepted employment with the CIA. That Agreement obligates plaintiff to submit to the CIA for prepublication review "all information or materials . . . which contain any mention of intelligence data or activities, or contain data which may be based upon information classified pursuant to Executive Order." Declaration of Scott A. Koch ("Koch Decl.") ¶ 9 & Exh. A ¶ 5. The purpose of this prepublication review is to allow the CIA to determine whether prepublication submissions, authored by those with access to classified material, contain information whose disclosure could damage national security interests. *Id.* ¶ 17.

The present dispute concerns a memorandum authored by plaintiff while he was employed by the CIA. According to plaintiff's Complaint, that memorandum, dated May 10, 2001 ("May 10, 2001 Memorandum" or "Memorandum"), alleges that the CIA maintained a "special relationship with a foreign individual who committed unlawful human rights violations and criminal acts." Compl. ¶ 7. Plaintiff submitted this Memorandum to the CIA's Office of Inspector General ("OIG") as a whistleblower complaint. After being reviewed by other components of the CIA, the Memorandum was classified because of its contents. Plaintiff attempted to challenge the decision to classify his Memorandum by filing an official "classification challenge" with the CIA's Agency Release Panel ("ARP"), the entity tasked with adjudicating complaints that the Agency improperly classified official CIA documents. The ARP determined that such whistleblower complaints are personal writings, and not official Agency documents. Therefore, the ARP informed plaintiff that it had no authority to consider his challenge and that he should, instead, submit the Memorandum for prepublication review as a

"nonofficial" publication. Plaintiff unsuccessfully appealed the ARP's determination that it had no authority to consider his classification challenge.

Plaintiff then submitted that May 10, 2001 Memorandum for prepublication review.[1] After reaffirming that the Memorandum contained classified information, the CIA attempted to work with plaintiff to help him produce an unclassified version. The Agency requested that plaintiff (1) delete classified material from the May 10, 2001 Memorandum (or provide specific open-source citations for each of the pieces of classified information that plaintiff believed to be unclassified), (2) remove the Memorandum from its official-looking government format, and (3) add a disclaimer stating that the views expressed were his own and did not represent the views of the Agency or the U.S. Government. Plaintiff refused to make these changes. Instead, he filed the present action alleging that the CIA violated the First Amendment and the Administrative Procedures Act ("APA") by denying him permission to publish the Memorandum as written.

Plaintiff initially alleges that the CIA violated the First Amendment by denying him permission to provide the Memorandum to the National Security Archive, a public interest group. This claim must fail. The First Amendment does not give plaintiff the right to publish classified information. *See Snepp v. United States*, 444 U.S. 507, 510 n.3 (1980) (per curiam); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003); *McGehee v. Casey*, 718 F.2d 1137, 1143 (D.C. Cir.1983); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972). Plaintiff's Memorandum, as written, does indeed contain classified information. *See* Unclassified

[1] In November 2004, plaintiff sought permission to publish a total of three whistleblower complaints and an additional employment grievance. *See* Compl. ¶ 5. Two of those whistleblower complaints – one dated March 24, 2003, and another dated May 20, 2004 – were published prior to the filing of this case and were never at issue in this litigation. *Id.* The January 16, 2003 employment grievance, while mentioned in the Complaint, is no longer at issue in this litigation because the CIA determined that plaintiff is free to release it in full. *See* Koch Decl. ¶ 33 n.8.

Declaration of Ralph S. DiMaio ("Unclassified DiMaio Decl.") ¶ 5, 13-14; Classified *in camera, ex parte* Declaration of Ralph S. DiMaio ("Classified DiMaio Decl.").[2] Therefore, the CIA is entitled to summary judgment on this First Amendment claim.

Plaintiff also alleges two violations of the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq*. Because this Court lacks jurisdiction to consider either challenge – the first is moot, and plaintiff lacks standing to bring the second – it must dismiss them pursuant to Federal Rule of Civil Procedure 12(b)(1) without considering the merits of either claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

First, plaintiff contends that the CIA violated the APA by taking longer than 30 days to review his prepublication submission. Plaintiff lacks standing to bring this challenge because it is moot. This Court rejected an identical contention in *Stillman v. CIA*, finding that, because that plaintiff had already received his final determination from the Publication Review Board ("PRB"), there was no further relief this Court could order. *See Stillman v. CIA*, No. 01-1342, slip op. at 7 (D.D.C. Mar. 30, 2007). The same is true here. Moreover, even if this claim were not moot, it would fail because CIA regulations do not guarantee that the Agency will respond to all prepublication submissions within 30 days, and because the Agency did not unreasonably delay its review of plaintiff's Memorandum.

Second, plaintiff claims that the CIA violated the APA by concluding that he is not an "authorized holder" of the information contained in his Memorandum. This argument is a red herring. It falsely suggests that plaintiff's inability to bring a classification challenge resulted

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[2] This Classified *in camera*, *ex parte* DiMaio Declaration has been lodged for secure storage and transmission to the Court with the United States Department of Justice, Litigation Security Group. A Notice of Lodging of this Classified Declaration (providing contact information for the Litigation Security Group) is being filed along with this Motion.

solely from the CIA's determination that he was not an authorized holder of the information in his Memorandum when, in fact, that decision also resulted from the CIA's determination that whistleblower complaints represent an author's personal views and, therefore, must be submitted for prepublication review – the process used for "nonofficial" documents – instead of for official classification challenges. Thus, even if plaintiff were correct that he is an authorized holder of the classified information in his Memorandum, that would not entitle him to challenge the classified status of this unofficial document in front of the ARP. Put simply, plaintiff's claim that he was wrongly denied "authorized holder" status fails to allege any concrete injury remediable by this Court. Consequently, plaintiff lacks Article III standing to bring this claim (which would fail, in any event, because he does not meet the definition of an "authorized holder" of the classified information at issue in this case).

BACKGROUND

I. PLAINTIFF'S SECRECY AGREEMENT AND CONTROLLING REGULATIONS

A. Plaintiff's Secrecy Agreement

Plaintiff Franz Boening joined the CIA in 1980. *See* Compl. ¶ 3; Koch Decl. ¶ 7. At that time, he executed a Secrecy Agreement that obligates him to protect classified information concerning the intelligence activities of the United States Government. *See* Koch Decl. ¶ 7 & Exh. A. This Agreement, which continues to bind plaintiff even though he no longer works for the CIA, prohibits plaintiff from disclosing information or material "obtained . . . in the course of . . . employment or other service with the Central Intelligence Agency" that (1) is classified, (2) he knows, or has reason to know, should be classified, or (3) identifies any person or organization who has or has had a relationship with the United States government that the government has taken affirmative measures to conceal. *Id.* ¶ 7-8. To ensure protection of

classified material, the Agreement requires plaintiff to submit for the CIA's review any materials that "contain any mention of intelligence data or activities, or contain data which may be based upon information classified pursuant to Executive Order." *Id.* ¶ 9 & Exh. A ¶ 5. Plaintiff may not take any additional steps toward publication of information subject to this Agreement "without written permission to do so from the [CIA]." *Id.*

B. Classification Challenges for Official Documents

Executive Order 12958, as amended,[3] allows an authorized holder of information to challenge the classification of documents that he "in good faith" believes to be improperly classified. Exec. Order 12958 § 1.8(a). A classification "challenge," which is defined as "a request in the individual's official, not personal, capacity and in furtherance of the interests of the United States," is to be directed to the CIA's Agency Release Panel ("ARP"). 32 C.F.R. §§ 1907.02(d), 1907.03. After considering the challenge, the ARP will report its decision to the authorized holder, the originator of the document, and other interested parties. *See* 32 C.F.R. §§ 1907.21 - .26. The ARP's decision may be appealed to the Interagency Security Classification Appeals Panel ("ISCAP"). *Id.* §§ 1907.26, 1907.31.

C. Prepublication Review Process

CIA prepublication review protects against disclosure of material that reasonably could be expected to cause damage to national security. *See* Koch Decl. ¶ 10. This process is governed by internal CIA regulation. Two different versions of that regulation are relevant to this case. In

[3] Executive Order 12958 was amended by Executive Order 13292, effective March 25, 2003. *See* Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). All citations to Exec. Order No. 12958 ("Executive Order") are to the Order as amended by Exec. Order No. 13292. *See* Exec. Order 12958, 3 C.F.R. § 333 (1996), reprinted as amended in 50 U.S.C.A. § 435 note at 180 (West Supp. 2006).

May 2001 and November 2004, when plaintiff submitted his Memorandum for review, that prepublication process was governed by a regulation that became effective on March 14, 1995 ("1995 Regulation"). *See* Koch Decl. ¶ 13 n.3 & Exh. B.[4] The 1995 Regulation required current CIA employees to submit "material intended for nonofficial publication" to the Agency "through their supervisory chain of command to their Deputy Director or Head of Independent Office." *Id.* ¶ 13 & Exh. B ¶ 2.d.(1).[5] Additionally, if an employee was unsure whether material required review by the PRB, he could "elect first to make submissions directly to the Chair of the PRB only for determining of the necessity for Agency review." *Id*.

Under that 1995 Regulation, the Agency could deny permission for nonofficial publication of any material obtained during the course of employment with the CIA that had not "been placed in the public domain by the U.S. Government and if disclosure reasonably could be expected to harm the national security interests of the United States." *Id.* ¶ 14 & Exh. B ¶ 2.i.(1). If an author believed "that information intended for nonofficial publication is unclassified because it has already appeared in public," the Agency could ask an author to "identify any open sources for information that, in the Agency's judgment, originates from classified sources" and require the author "to cite the source in a footnote." *Id.* Exh. B ¶ 2.c.(5); *see also id.* Exh. B ¶ 2.i.(3) ("The Board may give permission to publish contingent on the author's citation of open sources in a footnote."). An author's "refusal to identify such public sources or otherwise to

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[4] All relevant portions of the internal CIA regulations are attached to the Koch Declaration. Other portions of those regulations, containing protected CIA information not related to this case, have been redacted. *See* Koch Decl. ¶ 13 n.4.

[5] Former employees were required to submit materials directly to the Prepublication Review Board ("PRB" or "Board"). *See* Koch Decl., Exh. B ¶ 2.d.(4). This provision did not apply to plaintiff when he submitted his Memorandum in November 2004, because he still worked for the Agency at that time. *See* Compl. ¶ 3.

cooperate may result in refusal of authorization to publish the information in question." *Id.* Exh. B ¶¶ 2.c.(5), 2.i.(3). Finally, the Agency could not deny permission solely on the grounds that the material would be "embarrassing to or critical of the Agency." *Id.* ¶ 14 & Exh. B ¶ 2.i.(2).

The CIA amended the prepublication review regulation in July 2005 ("2005 Regulation"), after plaintiff submitted his Memorandum for prepublication review but before the Agency reached a final determination. *See id.* Exh. C. Like the 1995 version, the 2005 Regulation authorized the Agency to review materials to ensure that they contain no classified information, and prevented the Agency from denying permission to publish information "solely because the material may be embarrassing or critical of the Agency." *Id.* Exh. C ¶ 2.f.(2). Unlike the 1995 Regulation, however, an employee no longer needed to submit nonofficial materials through his supervisory chain of command. Instead, materials for both current and former employees were to be submitted directly to the PRB Chair. *Id.* ¶ 15 & Exh. C ¶ 2.f.(1). In addition, the PRB itself was re-structured. *See id.* ¶ 16 (describing change in PRB's membership).

The PRB attempts to prioritize short, time-sensitive submissions such as op-ed pieces, letters to the editor, or resumes. *See* Koch Decl. ¶ 18. Although the PRB attempts to review all submissions within 30 days, lengthy or complex submissions – especially those involving intelligence sources or methods – may require a substantially longer time period for review. *See id.* Neither the 1995 Regulation nor the 2005 Regulation guaranteed final adjudication of a prepublication review request within any set time period. *Id.* Exh. B (1995 regulation) ¶ 2.e.(4) ("The Agency will make every effort to complete the initial review within of submitted material and respond to authors within 30 days of receipt by the PRB or other reviewing official."); *id.* Exh. C (2005 regulation) ¶ 2.d.(4) ("As a general rule, the PRB will complete prepublication review for nonofficial publications within 30 days of receipt of the material . . . . Lengthy or

complex submissions may require a longer period of time for review, especially if they involve intelligence sources and methods issues.").

II. FACTUAL INFORMATION

This case concerns a 25-page memorandum dated May 10, 2001 that was addressed to "Office of Inspector General, Central Intelligence Agency," with copies to "the Director of Central Intelligence; the Executive Director of the CIA; the Office of Congressional Relations; the Deputy Director for Operations; the Chief, Latin America Division, Directorate of Operations; and the Counter-Narcotics Center," and is identified as coming from "Franz Boening, Central Intelligence Agency." Koch Decl. ¶ 19. This document purports to be a whistleblower complaint detailing, in plaintiff's words, "perceived violations of the law committed by the CIA" with regard to an alleged "special relationship with a foreign individual who committed unlawful human rights violations and criminal acts." Compl. ¶¶ 6-7. This document was accompanied by three "annexes," one of which purports to be a two-page "Classified Annex." Koch Decl. ¶ 19. It also contained a "Bibliography" listing some fifty-five sources, although generally speaking the document did not match these sources to specific allegations in the memorandum. *Id.* An unredacted copy of this memorandum (and its annexes) is attached to, and its contents are described in, the Classified DiMaio Declaration.

A. 2001 Review of the Memorandum

On May 10, 2001, plaintiff submitted a copy of his Memorandum to the CIA's Office of Inspector General ("OIG") for a determination of whether it presented an "urgent concern" that should be reported to Congress under Section 17(d)(5) of the CIA Act, 50 U.S.C. § 403q(d)(5).[6]

[6] "Urgent Concern" is defined to mean either (1) "[a] serious or flagrant problem, abuse, (continued...)

The OIG determined that the Memorandum did not constitute an "urgent concern." *See* Koch Decl. ¶ 21. The Information Review Officer of the Directorate of Information ("DO/IRO"), which was the CIA directorate whose equities were implicated by the Memorandum, was then asked to perform a classification review of that document prior to its dissemination outside the Agency. *Id.* ¶ 22. The DO/IRO, who held original classification authority, reviewed the document and placed brackets around the portions he deemed classified. *Id.*[7]

Plaintiff then indicated his intent to publish the May 10, 2001 Memorandum by providing it to the National Security Archive, a public interest group. *See* Koch Decl. ¶ 23. As portions of the document were now classified, plaintiff sought to challenge that classification under the procedures set forth in Executive Order 12958 and supporting CIA regulations. Thus, on July 2, 2001, plaintiff submitted the Memorandum to the Agency Release Panel for a formal classification challenge. *Id.* The ARP, in turn, referred the document to the Agency Classification Management Review Panel ("ACRMP") for consideration of whether the document was properly classified. *Id.* ¶ 24. On July 25, 2001, the ARCMP unanimously agreed that each paragraph marked classified (save one) was properly labeled as such. *Id.* The ACRMP met a second time on September 4, 2001, to consider specific issues raised in plaintiff's July 2,

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(...continued)
violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters"; (2) "[a] false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence activity"; or (3) [a]n action, including a personnel action . . . constituting reprisal or threat of reprisal prohibited . . . in response to an employee's reporting an urgent concern in accordance with this paragraph." 50 U.S.C. § 403q(d)(5)(G)(i).

[7] Subsequent to its review by the DO/IRO, the May 10, 2001 Memorandum was provided to the congressional oversight committees, who made no further inquiries regarding the matter. *See* Koch Decl. ¶ 22.

2001 challenge (submitted to the ARP), and again found that the Memorandum was appropriately classified. *Id.* On September 12, 2001, the ACRMP wrote to the Chair of the ARP, setting forth its decision with regard to plaintiff's classification challenge. *Id.* ¶ 25. After seeing that determination, plaintiff appealed the ACRMP's decision to the ARP. *Id.* Although informal efforts were made to work with plaintiff to revise the Memorandum in a way that it would express only his personal opinions and would not reveal classified information, those efforts were unsuccessful. The ARP then scheduled a formal appeal. *Id.*

Before that ARP appeal occurred, a new Executive Secretary was appointed to the ARP ("ES/ARP"). *Id.* ¶ 26. Considering the matter anew, the ES/ARP questioned whether whistleblower complaints under the Intelligence Community Whistleblowers Protection Act of 1998 are properly the subject of classification challenges under Exec. Order No. 12958. *Id.* The Agency determined that these sorts of complaints, because they express personal views, are not official Agency documents and thus fall outside the jurisdiction of the ARP. *Id.* ¶ 27. Instead, the ARP determined that they should be reviewed for nonofficial publication – *i.e.*, submitted for prepublication review. *Id.* To facilitate that process, the ARP forwarded the materials to the Information Review Officer for the directorate in which plaintiff worked, the Directorate of Science and Technology ("DS&T/IRO"). (As noted *supra*, the 1995 Regulation required CIA employees to submit nonofficial writings to their supervisory chain of command for prepublication review). *Id.* ¶ 28.

As part of the prepublication review of this Memorandum, the DS&T/IRO sought an advisory opinion from the Agency Release Panel. *Id.* ¶ 29. The ARP concluded that the document was properly classified at the SECRET level, and so informed the DS&T/ISO. *Id.* ¶ 30. The DS&T/IRO then reviewed the documents himself, in light of the ARP opinion, and

concluded that the May 10, 2001 memorandum was properly classified and could not be approved for nonofficial publication as written. *Id.* Plaintiff received notice of this decision on June 24, 2003. *Id.*

Disagreeing with the conclusion that this document was not properly subject to a classification challenge under Executive Order 12958, plaintiff submitted his Memorandum to the ISCAP, which (as noted *supra*) is the entity that hears appeals from classification challenges adjudicated by the ARP. *Id.* ¶ 31. J. William Leonard, the Executive Director of both the ISCAP and the National Archives and Records Administration's Information Security Oversight Office ("ISOO"), sent plaintiff a letter on February 4, 2004, informing plaintiff that he could not bring a classification challenge to the document because he was not an "authorized holder" of the information. *Id.* ¶ 32; *see also* Exec. Order 12958 (providing that only "authorized holders" may challenge the classification of a document).

Despite this conclusion that plaintiff was not an authorized holder, Mr. Leonard informed plaintiff that he nevertheless exercised his own independent authority to consider whether the Memorandum was properly classified:

> Notwithstanding my determination above, I did pursue your complaint pursuant to § 5.2(b)(6) of the [Executive] Order which charges me with the responsibility to "consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the program established under (the) Order." Specifically, I pursued your complaint that the CIA improperly classified information contrary to the provisions of the Order.
>
> I have determined that the information satisfies the standards set forth in § 1.1 of the Order. I further determined that the information concerned intelligence activities, sources and methods and thus satisfied the criteria set forth in § 1.4 of the order. Finally, based upon information made available to me, I have concluded that the CIA's classification decision in this instance was not in order to circumvent any of the prohibitions and limitations of § 1.7 of the Order. In view of the above, I have determined that the CIA's classification of the

> information in question is appropriate and find no merit in support of your complaint.

Id. ¶ 32 & Exh. D. Mr. Leonard also encouraged plaintiff to "continue working with" the CIA to "develop an unclassified version of [his] original complaint." *Id.*

B. 2004 Review of Plaintiff's Memorandum

After receiving notice that he could not bring a formal classification challenge – and that, in any event, such a challenge was meritless – plaintiff submitted the May 10, 2001 Memorandum directly to the PRB in November 2004 for prepublication review. *See* Koch Decl. ¶ 33. On August 13, 2005, plaintiff retired from the CIA. *Id.* Subsequently, on November 25, 2005, he contacted the new Chairman of the PRB to inquire into the status of the review of his Memorandum. *Id.* ¶ 34. The Chairman responded to plaintiff in a letter dated January 5, 2006, notifying plaintiff that if he wanted to publish his Memorandum, he must "rewrite [his] 'M Documents' outside of a government memo format" and "include specific, open source citations (author, title, source, date, page) for statements you wish to make." *Id.* ¶ 34 & Exh. E. The Chairman specified that these citations "must be placed in the body of the text linked to specific sentences and paragraphs." *Id.*

After plaintiff failed to make these requested changes, the PRB determined that the Memorandum could not be published in its current form, because it contained classified information. In a June 20, 2006 letter, the PRB provided plaintiff with a detailed list of redactions required before plaintiff could publish his document. *See* Koch Decl. ¶ 35 & Exh. F.

The PRB required plaintiff to include a disclaimer stating that the contents of the May 10, 2001 Memorandum represented his own views, and not those of the Agency. *Id.* ¶ 35 & Exh. F at 14.[8]

Plaintiff responded to the PRB by email on June 29, 2006, insisting that his May 10, 2001 Memorandum was based on overt sources, and challenging the PRB's conclusion that he may not mention the subject of his 2001 Memorandum by name. *See* Koch Decl. ¶ 36. In that same email plaintiff also inquired into the PRB's decision with respect to the "Classified Annex" which he submitted along with his May 10, 2001 Memorandum. *Id.* The following day, the PRB responded to plaintiff with an email informing him that he could still seek to publish his Memorandum if he would remove it from the official-looking format and attribute each assertion in the Memorandum to specific, open-source materials. *Id*. ¶ 37 & Exh. G. The PRB stressed that these citations were necessary because CIA employees with access to classified systems could obtain classified information on a wide range of subjects – including those subjects they do not work on for the Agency. *Id.* Again, plaintiff failed to delete the classified information or rewrite the Memorandum in a way that included sufficient citations to open sources. *See* Koch Decl. ¶ 36 (plaintiff "has not to date[] revised his memorandum to include specific open source citations linked to each sentence and paragraph as required by the CIA").

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[8] That required disclaimer read:

> "All statements of fact, opinion, or analysis expressed are those of the author and do not reflect the official positions or views of the CIA or any other U.S. Government agency. Nothing in the contents should be construed as asserting or implying U.S. Government authentication of information or Agency endorsement of the author's views. This material has been reviewed by the CIA to prevent the disclosure of classified information."

Koch Decl. ¶ 35 & Exh. F. As noted *infra*, this disclaimer is required by the prepublication review regulation. *Id.* Exh. C ¶ 2.b.(4).

On August 11, 2006, the PRB sent plaintiff a final letter in response to his question concerning the "Classified Annex." The PRB informed plaintiff that all of the material in that annex "is inappropriate for disclosure in the public domain (i.e., is considered to be classified information)." *Id.* ¶ 38 & Exh. H.

Plaintiff then filed this lawsuit, alleging that the Agency's refusal to grant permission to publish the May 10, 2001 Memorandum violated the First Amendment and the APA.

STANDARD OF REVIEW

Defendant moves this court to dismiss this action in part under Federal Rule of Civil Procedure 12(b), and to award summary judgment to defendant in part pursuant to Federal Rule of Civil Procedure 56.

In reviewing a motion to dismiss for lack of jurisdiction under Rule 12(b)(1), courts must "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citation and internal quotation marks omitted). "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Id.* (citation and internal quotation marks omitted); *see also Center For Biological Diversity v. Gutierrez*, 451 F. Supp. 2d 57, 64 (D.D.C. 2006) (party that seeks to invoke the federal court's jurisdiction "bears the burden of establishing by a preponderance of the evidence that the Court possesses jurisdiction"). When considering such a motion under Rule 12(b)(1), the court "may consider materials outside the pleadings" without converting that motion into a motion for Summary Judgment under Fed. R. Civ. P. 56. *Jerome Stevens Pharmaceuticals, Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005); *see also Borg-Warner Protective Serv. Corp. v. EEOC*, 81 F. Supp.2d 20, 23 (D.D.C. 2000) ("[A] court may consider such materials

outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction to hear the case."); *Federation for Am. Immigration Reform v. Reno*, 897 F. Supp. 595, 600 n.6 (D.D.C. 1995).

Federal Rule of Civil Procedure 56 mandates that summary judgment be entered for a party who shows that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 (1986). "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In deciding a motion for summary judgment in cases involving the government's classification decisions about national security information, district courts must give the government sufficient opportunity to present detailed *in camera* affidavits, and accord substantial weight to those affidavits concerning the classified nature of the information in question. *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's classification decisions); *Cf. Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) (court accorded substantial deference to the government's classification decisions in a FOIA case involving national security information). Because of the Executive Branch's unique expertise concerning the adverse effects of the disclosure of national security information, so long as the government's 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 its classification decisions. *McGehee*, 718 F.2d at 1148-49.

Applying these standards, this Court should grant defendants' Motion to Dismiss plaintiff's Administrative Procedure Act ("APA") claims. In addition, because there are no genuine issue of material fact, this Court should award summary judgment on plaintiff's First Amendment claim.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER PLAINTIFF'S APA CLAIMS

Plaintiff's Complaint alleges two causes of action under the Administrative Procedures Act ("APA"). The first claim contends that the CIA violated the APA by failing to adjudicate plaintiff's prepublication request within thirty (30) days. *See, e.g.*, Compl. ¶ 30-34. The second APA count alleges that the CIA acted arbitrarily and capriciously when it determined that plaintiff was not an "authorized holder" of the information whose classification he wished to challenge under Executive Order 12958. The court lacks jurisdiction over both these APA claims. The first – as this court noted in response to an identical allegation in the *Stillman* litigation – is moot. The second fails because plaintiff has no standing to bring it; he cannot meet either the injury or redressability prongs of Article III's standing analysis. Because mootness and standing are both jurisdictional concerns, this Court need not – indeed, cannot – consider the merits of plaintiff's APA claims. *See Steel Co.*, 523 U.S. at 94 ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)); *Public Citizen v. U.S. Dist. Court for Dist. of Columbia*, 486 F.3d 1342, 1349 (D.C. 2007) (courts must address jurisdiction – or a "non-merits threshold ground for dismissal" – before adjudicating a claim on its merits).

Therefore, both of plaintiff's APA claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

A. Plaintiff's First APA Claim (30 Day Requirement) is Moot

Plaintiff alleges that the CIA violated the APA by taking longer than 30 days to review his submission. *See* Compl. ¶¶ 31-34.[9] This claim must be dismissed for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) because it is moot. The mootness doctrine, derived from Article III's case or controversy requirement, limits federal courts "to deciding 'actual, ongoing controversies.'" *Clarke v. United States*, 915 F.2d 699, 700-01 (D.C. Cir. 1990) (en banc) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)); *accord Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (a federal court has no "power to render advisory opinions [or] . . . 'decide questions that cannot affect the rights of litigants in the case before them.'") (citation omitted). A court lacks subject matter jurisdiction over a case that has become moot. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

There is no doubt that Plaintiff's first APA claim is moot. As this court noted in rejecting an identical claim in *Stillman*, "[plaintiff]'s APA claim is moot because there is no further relief that this Court can provide as to that claim. [Plaintiff] has already received the final classification decision that he sought from the defendant agencies." *Stillman v. CIA*, No. 01-

[9] In addition to alleging that the CIA took longer than 30 days to process his request, plaintiff's first APA count also advances an unrelated assertion that the CIA lacked the authority to require plaintiff to insert a disclaimer stating that the opinions expressed in his Memorandum were his own, and not those of the Agency. Even if this Court interprets that passing assertion to be a separate claim under the APA (*i.e.*, a third APA count in the Complaint), it should dismiss that challenge under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. As noted *infra*, this contention fails as a matter of law because the regulations governing CIA prepublication review – regulations plaintiff voluntarily agreed to abide by when he executed his Secrecy Agreement – expressly require the *exact disclaimer language* plaintiff refused to insert in his Memorandum. That regulation, moreover, comports with the First Amendment.

1342, slip op. at 7 (D.D.C. Mar. 30, 2007) (dismissing APA claim for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1)). The same is true here as in *Stillman*: the PRB has already issued its final decision, and thus there is no further relief this Court could grant. *See* Koch Decl. ¶¶ 34, 37 & Exh. F. Nor, despite plaintiff's cursory allegation, does this case fall into the narrow exception to the mootness doctrine for cases that are capable of repetition yet evade review. *See* Compl. ¶ 34. That "capable of repetition" doctrine applies "only in exceptional situations, and generally only where the named plaintiffs can make a reasonable showing that [he or she] will again be subjected to the alleged illegality." *Alliance for Democracy v. Federal Election Comm'n*, 335 F. Supp. 2d 39, 44 (D.D.C. 2004) (Sullivan, J.) (quoting *Los Angeles v. Lyons*, 461 U.S. 95 (1983)). Plaintiff makes no allegation that he will be likely to suffer this harm again in the future; instead, he offers only a general assertion that "[t]he CIA routinely fails to abide by the 30 day deadline." *See* Compl. ¶ 34. This generalized grievance is plainly insufficient to meet the standard for invoking the "capable of repetition" exception to Article III's "case" or "controversy" requirement. Thus, this Court must dismiss this APA claim under Rule 12(b)(1) without considering the merits of plaintiff's allegation. *See Steel Co.*, 523 U.S. at 94.

Finally, even if this claim were not moot, this court should dismiss it pursuant to Rule 12(b)(6), or in the alternative award summary judgment to the CIA, because there is no regulation requiring the CIA to adjudicate all prepublication requests within 30 days, and because the CIA did not unreasonably delay action on plaintiff's submission. Neither the regulation in effect at the time plaintiff first submitted his Memorandum, nor the revised 2005 Regulation, guarantees that prepublication review will be completed within a set time frame. Instead, these regulations provide an aspirational goal for processing of such prepublication requests. *See* Koch Decl., Exh. B (1995 regulation) ¶ 2.e.(4) ("The Agency will *make every effort* to complete the

initial review within of submitted material and respond to authors within 30 days of receipt by the PRB or other reviewing official.") (emphasis added); *id.* Exh. C (2005 regulation) ¶ 2.d.(4) ("As a general rule, the PRB will complete prepublication review for nonofficial publications within 30 days of receipt of the material. . . . Lengthy or complex submissions *may require a longer period of time for review*, especially if they involve intelligence sources and methods issues.") (emphasis added). Moreover, as described at length *supra*, the CIA did not unreasonably delay the processing of plaintiff's request. On the contrary, the length and complexity of the process was due to the fact that plaintiff first submitted the Memorandum for a classification challenge (rather than prepublication review), requiring the ARP to address the threshold questions of whether a whistleblower complaint is a personal (as opposed to official) document, and whether plaintiff was an "authorized holder" of the information in that Memorandum. Additionally, even after plaintiff resubmitted the Memorandum for prepublication review, the Board engaged in negotiations attempting to convince plaintiff to make changes that would allow publication of the Memorandum. Only after it became clear that plaintiff refused to make those changes did the PRB issue its final decision. *See, e.g.*, Koch Decl. ¶¶ 34-37.

B. Plaintiff Lacks Standing to Bring His Second APA Claim (Authorized Holder)

Plaintiff's second APA claim alleges that the CIA acted arbitrarily and capriciously when it determined that he was not an "authorized holder" of the information in his Memorandum. *See* Compl. ¶¶ 39-42. According to plaintiff, this allegedly erroneous conclusion denied him "standing to challenge the CIA's classification decisions regarding the documents/information at issue." Compl. ¶ 41. This argument is a red herring, for it falsely implies that plaintiff's lack of

"authorized holder" status was the sole reason for the ARP's (and ISCAP's) refusal to entertain his classification challenge. In fact, that refusal to entertain plaintiff's classification challenge also rested on a determination that the May 10, 2001 Memorandum was a document purporting to express plaintiff's personal views – as opposed to being an official Agency document – and was therefore not properly the subject of an official classification challenge. *See* Koch Decl. ¶ 27 ("[T]he CIA concluded that [plaintiff]'s complaint was a 'personal record' created in his personal capacity, and the CIA could not, therefore, review it pursuant to the classification challenge provisions of [the Executive Order]."); 32 C.F.R. § 1907.02(d) (classification challenges may only be brought "in the individual's official, *not personal*, capacity and in furtherance of the interests of the United States" (emphasis added)). Put another way, "authorized holder" status is a necessary, but not sufficient, prerequisite for bringing an official classification challenge.

Plaintiff's Complaint does not challenge the CIA's determination that he drafted this document in his personal capacity – on the contrary, it concedes that the materials in question constitute "personal documents." Compl. ¶ 26; *see also id.* ¶ 8 (claiming that Memorandum contained plaintiff's "personal assessment of this individual"); Koch Decl. ¶ 26 ("Because a whistleblower complaint was, by its nature, a personal communication between a federal employee, the IG, and/or Congress, it represented the employee's personal views, not official agency views."). Therefore, even if he were correct that he was an authorized holder (which he is not, for reasons explained *infra*), plaintiff still would not be entitled to challenge the classification of the document under the procedures set out in the Executive Order. Thus, plaintiff has failed to allege any concrete injury following from the allegedly erroneous determination that he is not an "authorized holder." Because mere allegations of error, untethered from any substantive harm, are insufficient to satisfy Article III, plaintiff lacks

standing to pursue this APA claim. *See Center for Law and Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1160 (D.C. Cir. 2005) ("Appellants have failed to show that the alleged procedural violation caused actual injury to Appellants' concrete interests such that they satisfy Article III's requirement of standing."); *Dimond v. Dist. of Columbia*, 792 F.2d 179, 191 (D.C. Cir. 1986) ("We can divine no causal connection between the procedural violation and the injury flowing from the substantive provisions of the 1982 No-Fault Insurance Act. We conclude, therefore, that the District Court properly dismissed this pendent claim for lack of Article III standing.").

Moreover, even if being denied "authorized holder" status were a concrete injury, that injury is not redressable because there is no meaningful relief that plaintiff could obtain from this Court. If this Court were to agree that plaintiff was an "authorized holder" of the information in his memorandum – which he clearly is not, for the reasons noted *infra* – the proper remedy would be to remand so that the Agency Release Panel could adjudicate the merits of the classification challenge. *See Lynom v. Widnall*, 222 F. Supp. 2d 1, 5 (D.D.C. 2002) ("In a civil action brought pursuant to the APA, remand to the administrative agency is commonly the only available or appropriate remedy."). But, as noted, the ARP already opined that the Memorandum was properly classified. *See* Koch Decl. ¶ 29. Similarly, the Executive Director of the ISCAP – the entity to which ARP determinations may be appealed – also concluded that the Memorandum is properly classified. *See* Koch Decl. ¶ 32 & Exh. D.[10] Hence, any such remand would be a

[10] When notifying plaintiff that he could not bring an official classification challenge because he was not an authorized holder of the classified information in his Memorandum, J. William Leonard (Executive Director of both ISOO and ISCAP) nonetheless exercised his independent authority under § 5.2(b)(6) of the Executive Order to "consider and take action on complaints from persons within or outside the Government with respect to the administration of the program established under (the) Order." Koch Decl., Exh. D. As part of that independent review, he determined that the Memorandum was properly classified by the CIA. *Id.*

hollow, meaningless exercise. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969) ("To remand would be an idle and useless formality . . . . There is not the slightest uncertainty as to the outcome of a proceeding before the Board . . . . It would be meaningless to remand."). And where there is no meaningful relief to be afforded, courts lack jurisdiction to consider the claims. *See Cruz v. American Airlines*, 150 F. Supp. 2d 103, 119 (D.D.C. 2001) ("[E]ven if the Court were to issue the requested declaratory and injunctive order, the Cruz Plaintiffs would receive no meaningful relief . . . . Because they have failed to demonstrate how the requested relief redresses this injury, Plaintiffs lack standing to bring this claim."). Because it therefore lacks jurisdiction, this Court must dismiss this APA claim under Rule 12(b)(1) without considering the merits of plaintiff's allegation. *See Steel Co.*, 523 U.S. at 94.

Finally, even if this court did have jurisdiction to consider this APA (Authorized Holder) claim, it should dismiss plaintiff's contention under Rule 12(b)(6), or in the alternative award summary judgment to the CIA, because the Agency did not err in determining that plaintiff is not an authorized holder of the classified information in his Memorandum. An "authorized holder" is defined as "any individual, including an individual external to the agency, who has been granted access to *specific classified information*." 32 C.F.R. § 2001.14 (emphasis added); *see also* 32 C.F.R. § 1907.01(b) (authorized holder is one who "holds a security clearance from or has been authorized by the Central Intelligence Agency to possess and use on official business classified information."). Executive Order 12958, as amended, requires that three prerequisites must be met before a person may access specific classified information. "A person may have access to classified information provided that: (1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee; (2) the person has signed an approved nondisclosure agreement; and (3) the person has a need-to-know the information."

Exec. Order 12958 § 4.1(a). In other words, the person must have been determined eligible for access, must have signed a secrecy agreement (like the one plaintiff executed), and must have a "need-to-know" the specific information in question.

It is this last element that defeats plaintiff's contention that he was an authorized holder of the classified information in his Memorandum. The Agency determined that plaintiff did not have a "need-to-know" this particular classified information. *See* Classified DiMaio Decl. ¶ 8; Koch Decl. ¶ 32 n.7; *id.* Exh. D (letter from J. William Leonard) ("[T]he CIA has represented that any access to classified information you gained and which you included in your original complaint was not granted in accordance with your duties at the CIA. They have further represented that you did not have a need-to-know . . . the specific classified information accessed in preparation of your original complaint.").[11] Hence, pursuant to the Executive Order, plaintiff was not authorized to access that classified information, and therefore the CIA correctly determined he was not an authorized holder of that information.

C. Plaintiff's Allegation That the CIA Lacked Authority to Require Him to Include a Disclaimer Lacks Merit

Finally, as noted *supra*, plaintiff's first APA claim (30 Day Requirement) makes a passing allegation that the CIA was powerless to require him to include a disclaimer in his

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[11] Plaintiff argues that the CIA's determination that he was not an "authorized holder" of the information in his Memorandum is tantamount to a concession that this information is not classified. *See* Compl. ¶ 18. This is not so. Employees with access to classified systems can obtain classified information on a wide variety of subjects – even those they do not work on for the Agency. Koch Decl. ¶ 37 & Exh. G. Indeed, the contention that the information in plaintiff's possession cannot be classified is exceedingly strange because he attached to his Memorandum a document that he styled a "Classified Annex." The CIA determined that this document did, indeed, contain classified information. *See* Koch Decl. ¶ 37 & Exh. H. The fact that plaintiff was not an "authorized holder" of that classified information does not negate the fact that the information is in fact classified.

Memorandum indicating that the views expressed therein were his own and not the Agency's. If the Court construes this as an independent APA claim (distinct from the rest of that APA Count contending that the CIA failed to abide by the alleged 30-day requirement), it should dismiss this claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. As noted *supra*, Plaintiff signed a Secrecy Agreement that requires him to submit his nonofficial writings to the Agency for prepublication review. The regulation governing that prepublication review process clearly requires plaintiff to include the *exact disclaimer* that the PRB instructed plaintiff to insert. It states:

> Authors are required, unless waived in writing by the PRB, to publish the following disclaimer:
>
> > All statements of fact, opinion, or analysis expressed are those of the author and do not reflect the official positions or views of the Central Intelligence Agency (CIA) or any other U.S. Government agency. Nothing in the contents should be construed as asserting or implying U.S. Government authentication of information or Agency endorsement of the author's views. This material has been reviewed by the CIA to prevent the disclosure of classified information.

See Koch Decl. Exh C, ¶ 2.b.(4). Yet plaintiff refused. *See id.* ¶ 35.

Moreover, plaintiff's challenge to the disclaimer would fail as a matter of law even if the CIA regulation did not expressly require it. Such disclaimers are less restrictive of First Amendment rights than prepublication review requirements themselves. *See Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1453-54 (D.C. Cir. 1996) (Wald, J., dissenting) (requirement that authors insert "a specific statement to the effect that the opinions and views expressed are the employee's own and not necessarily those of the agency" is a less restrictive alternative to a scheme of prepublication review). Because prepublication review of the writings of current and

former CIA employees is clearly constitutional, *see, e.g.*, *Snepp*, 444 U.S. at 510 n.3, *a fortiori*, a less-restrictive disclaimer requirement must also pass constitutional muster.

Finally, even if such a disclaimer could violate the First Amendment in certain contexts, It would still be constitutional in the context of the CIA's prepublication review process. The Supreme Court has noted that the CIA, in order to protect national security interests, retains latitude to impose requirements that might otherwise violate the First Amendment. "[E]ven in the absence of an express [secrecy] agreement" the CIA could "protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Id.* The need to ensure that current and former CIA employees who have or had access to sensitive national security information do not publish personal documents appearing to be official Agency records (which carry in the imprimatur of the U.S. Government), certainly qualifies as a "substantial government interest[]." And it is an interest that is directly implicated in this case. As noted, plaintiff's Memorandum is styled as a document from "Franz Boening, Central Intelligence Agency," and was distributed to various senior agency officials. *See* Koch Decl. ¶ 19. Plaintiff himself describes the Memorandum as being "drafted for the consumption of the Director, CIA, and numerous senior CIA officials." Compl. ¶ 6. Hence, a reader might easily mistake the Memorandum as having been created as part of official Agency business. Indeed, even the CIA's Agency Release Panel initially assumed, because plaintiff submitted the Memorandum "in an official looking format . . . apparently in his capacity as a CIA employee," that it constituted an official document that could be subject to a classification challenge under the Executive Order. Koch Decl. ¶ 23. In light of that ambiguity, the CIA's request that plaintiff remove the Memorandum from its current format

and include an explicit disclaimer was reasonable and, therefore, not in violation of the First Amendment or APA.[12]

II. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S FIRST AMENDMENT CLAIMS

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

Plaintiff's First Amendment claim fails for the simple reason that his Memorandum contains properly classified information. Plaintiff is bound by a Secrecy Agreement designed to prevent the unlawful disclosure of classified information relating to the government's foreign relations and intelligence activities, sources, and methods. *See* Koch Decl., ¶ 7-10 & Exh. A. That Agreement – which he signed knowingly and voluntarily – requires plaintiff to submit any nonofficial (*i.e.*, personal) writings to the CIA for review prior to publication. *Id.* It is well-settled that this prepublication review requirement passes constitutional muster. *See, e.g., Snepp,* 444 U.S. at 510 n.3 (prepublication review requirement imposed upon government employees with access to classified information is not an unconstitutional prior restraint); *McGehee*, 718 F.2d at 1146 (upholding against First Amendment challenge the CIA's prepublication review scheme). The cases upholding this sort of prepublication review recognize that "[t]he 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*

[12] Moreover, contrary to plaintiff's suggestion, *see* Compl. ¶ 19, the CIA's request that plaintiff include this disclaimer and remove the Memorandum from its official-looking format is not inconsistent with the conclusion that whistleblower memoranda are nonofficial (*i.e.*, personal) documents. On the contrary, the CIA's reasonable request that plaintiff eliminate any suggestion that the Memorandum is an official Agency document follows *directly from* the conclusion that whistleblower complaints are personal, rather than official, documents.

Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) (government has a compelling interest in protecting the confidentiality of secret information). And it is equally well-settled that, even in the absence of such a Secrecy Agreement, plaintiff would have no First Amendment right to publish properly classified information. *See Stillman*, 319 F.3d at 548 ("If the Government classified the information properly, then [plaintiff] simply has no first amendment right to publish it"); *see also Snepp*, 444 U.S. at 510 n. 3 ("[E]ven in the absence of an express [secrecy] agreement – the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment"); *McGehee*, 718 F.2d at 1143 ("[T]he 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"); *Stillman*, slip op. at 11 (D.D.C. 2007) ("Courts 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.").

Because plaintiff has no First Amendment right to publish classified information, the only relevant question presented by plaintiff's First Amendment claim is whether the information contained in his Memorandum is properly classified. As demonstrated herein and in the Classified DiMaio Declaration, plaintiff's Memorandum contains properly classified information. Therefore, his First Amendment claim must fail.

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

The Executive Branch's classification decisions are entitled to substantial deference. *See, e.g.*, *Salisbury*, 690 F.2d at 973 (The classification of information "is a matter as to which the

agency has a large measure of discretion"). This judicial deference is rooted in three well-established principles.

First, the primacy of the Executive Branch in matters of national security and foreign relations is enshrined in the Constitution and in judicial precedent:

> In 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 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) (internal quotations marks omitted); *see also Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[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"). Accordingly, courts have recognized that the Executive Branch's ability to maintain secrecy is essential. *See Curtiss-Wright Export Corp.*, 299 U.S. at 320. Moreover, the Executive Branch's familiarity with matters of foreign relations and national security means that it has accumulated an expertise on the impact of the disclosure of particular classified information. *See 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"); *Salisbury*, 690 F.2d at 970 ("'[e]xecutive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record'" (quoting S. Rep. No. 1200, 93rd Cong., 2d Sess. 12 (1974)).

Second, in contrast to the Executive Branch's experience, courts have recognized that judges are in no position to second-guess the national security and foreign relations concerns articulated by the Executive Branch. As the D.C. Circuit recently 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.

Center for Nat'l Sec. Studies, et al. v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003). The Fourth Circuit reached a similar conclusion when it explained that:

> [t]he significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

Marchetti, 466 F.2d at 1318; *see also 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" about the harm that disclosure could cause to national security); *Krikorian v. Dep't of State*, 984 F.2d 461, 464 (D.C. Cir. 1993) ("'Judges, moreover, lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case.'" (citation omitted)); *McGehee*, 718 F.2d at 1149 ("[J]udicial review of CIA classification decisions, by reasonable necessity, cannot second-guess CIA judgments on matters in which the judiciary lacks expertise").

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 v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978) (quoting *Marchetti*, 466 F.2d at 1318); *see also McGehee*, 718 F.2d at 1148-49 ("Due 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." (internal quotations and citations omitted)). In short, it is the nation's intelligence experts who are in a position to determine what particular fact or bit of information may compromise national security in a particular context. If there is no reason to question the credibility of the experts, a court should hesitate to substitute its judgment of the sensitivity of the information for that of the government. Third, judicial deference to executive classification decisions is especially important because of the severity of the consequences that may result from the disclosure of classified information. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). Consequently, the Executive Branch has a "compelling interest in withholding national security information from unauthorized persons in the course of executive business," *Egan*, 484 U.S. at 527 (citing cases), as well as

preserving the confidentiality essential to the effective operation of our foreign relations and foreign intelligence. *See CIA v. Sims*, 471 U.S. 159, 175 (1985); *see also Snepp*, 444 U.S. at 512 n.7 ("[T]he CIA . . . is an agency thought by every President since Franklin D. Roosevelt to be essential to the security of the United States and – in a sense – the free world. It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence."); *Center for Nat'l Sec. Studies*, 331 F.3d at 929 ("'Things that did not make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources and methods'" (citation omitted)).

C. The Information In Plaintiff's Memorandum Is Properly Classified

Applying the proper amount of deference to the declarations submitted by CIA to explain its classification determinations with respect to plaintiff's Memorandum, it is clear that the Agency's decision satisfies the Executive Order's standards for classification.

Executive Order 12958, as amended, 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." Exec. Order No. 12958, as amended by Exec. Order 13292, § 1.1, 68 Fed. Reg. 15315 (2003). All four requirements have been met here.

1. Original Classification Authority

CIA officials with original classification authority have reviewed plaintiff's Memorandum and determined that it is properly classified. The Executive Order defines "Original Classification Authority" as those individuals "authorized in writing . . . by agency heads or other officials designated by the President, to classify information in the first instance." *Id.*, § 6.1(cc). Ralph S. DiMaio, the Information Review Officer for the CIA's National Clandestine Service, possesses this original classification authority. *See* Unclassified DiMaio Decl. ¶ 3. He has determined that the information in plaintiff's memorandum is properly classified at the SECRET level. *Id.* ¶ 5, 13; *see also* Classified DiMaio Decl. ¶ 10. Moreover, the DO/IRO, who initially reviewed the Memorandum and determined that it was classified, possessed original classification authority. *See* Koch Decl. ¶ 22.

2. Under the Control of the Government

The information at issue in plaintiff's Memorandum is information within the "control of the government." The Executive Order defines "control" as "the authority of the agency that originates information . . . to regulate access to information." Exec. Order 12958, as amended, § 6.1(s). Here, plaintiff voluntarily signed a Secrecy Agreement in which he agreed not to disclose classified government information that he was given access to or obtained during the course of his affiliation with the CIA. *See* Koch Decl., Exh A. That agreement remains binding on plaintiff even after the termination of his relationship with the U.S. Government. *See* Koch Decl. ¶ 7 & Exh. A. Plaintiff was also required under his Secrecy Agreement to submit any writings that he had prepared for public disclosure to the government for prepublication review. *Id.* Thus, the portions of the plaintiff's Memorandum either describing the government's intelligence activities, sources and methods or impacting foreign relations fall within the purview of his

Secrecy Agreement's prepublication review requirements, and are therefore under the "control" of the government, thereby satisfying the second condition of the Executive Order. *See* Unclassified DiMaio Decl. ¶10.

Plaintiff's passing assertions that he did not have access to the classified information in his Memorandum while employed at the CIA, *see* Compl. ¶ 8, are insufficient to defeat the Agency's control over that information. As the Fourth Circuit stated in *Knopf v. Colby*, 509 F.2d 1362, 1371 (4th Cir. 1975), *cert. denied* 421 U.S. 992 (1975), former government employees should not "be heard to say that he did not learn of information during the course of employment if the information was in the Agency and he had access to it." Indeed, even if plaintiff could prove that he never accessed the information contained in his Memorandum, that fact still would not negate the Agency's control. The Fourth Circuit made this point in no uncertain terms in a follow-up case to the *Knopf* litigation, holding that former CIA employees bound by secrecy agreements "cannot disclose classified information to which they had access during their public service, *even though they may have acquired such information elsewhere.*" *Colby v. Halperin*, 656 F.2d 70, 72 (4th Cir. 1981) (emphasis added).

3. Within A Classification Category of Section 1.4

The information in plaintiff's Memorandum falls squarely within one or more of the classification categories under § 1.4 of the Executive Order. Under § 1.4 of the Order, 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 special activities), 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, which includes defense against transnational terrorism;
> (f) United States Government programs for safeguarding nuclear materials or facilities;
> (g) vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security, which includes defense against transnational terrorism; or
> (h) weapons of mass destruction.

Exec. Order 12958, as amended, § 1.4. As described more fully in the Agency's declarations, the information at issue in plaintiff's Memorandum, which, in his words, "include[s] the name and country of origin that was the subject of [plaintiff]'s memorandum," Compl. ¶ 11, is either (1) foreign government information (falling under § 1.4(b) of the Executive Order); (2) information concerning intelligence activities, sources, or methods (falling under § 1.4(c)); or (3) information concerning foreign relations or foreign activities of the United States, including confidential sources (falling under § 1.4(d)). *See* Unclassified DiMaio Decl. ¶ 11, 14.

4. Identifiable Harm To National Security

Finally, as explained in both the classified and unclassified declarations submitted in this case, disclosure of the information contained in plaintiff's Memorandum could reasonably be expected to cause serious damage to national security.[13] *See* Unclassified DiMaio Decl. ¶ 12; Classified DiMaio Decl. ¶ 10.

The government's judgment that the publication of information contained in plaintiff's Memorandum could cause serious harm to our national security is neither vague nor speculative.

[13] The information at issue in plaintiff's Memorandum is information classified at the "Secret" level. *See* Unclassified DiMaio Decl. ¶ 5, 13. Executive Order 12958, as amended, 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 that the original classification authority is able to identify or describe." Exec. Order 12958, as amended, § 1.2(a)(2).

Contra Compl. ¶ 25. 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 noted:

> 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 in a national security FOIA case.

Halperin v. CIA, 629 F2d 144, 149 (D.C. Cir. 1980); *see also Earth Pledge Foundation v. CIA*, 988 F. Supp. 623, 628 (D.D.C. 1996), *aff'd* 128 F.3d 788 (D.C. Cir. 1997) (citing *Halperin*); *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 our 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.").

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 relating to intelligence activities, sources and methods, and foreign relations of the United States at issue in plaintiff's Memorandum. The declarations submitted in this case do precisely that, and they explain that disclosure of the information identified in the Memorandum could reasonably be expected to seriously damage national security by undermining that confidentiality.

As noted, plaintiff contends that the material redacted from his memorandum concerns, *inter alia*, "the name and country of origin" of the individual with whom plaintiff alleges the CIA "maintained a special relationship." Compl. ¶¶ 7, 11. This type of information clearly implicates the United States' concerns surrounding the protection of intelligence sources and methods, as well as information relating to foreign relations or foreign activities. Courts have repeatedly recognized that disclosing such information can result in substantial harms to the United States' interests. *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 . . ."); *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 GLOMAR explorer 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 know the dates on which secret actions took place"); *Curtiss-Wright Export Corp.*, 299 U.S. at 320-321 ("'[t]he nature of foreign discussions 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 discussions, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.'" (citation omitted)); *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 information at issue).

D. The Classified Information In The Plaintiff's Memorandum Has Not Been Officially Released By The Government Into The Public Domain

Plaintiff alleges that he has a First Amendment right to publish the classified material in his Memorandum because that information "was supported by open source material." Compl. ¶ 23. The implication of this argument is that, so long as some of the information contained in the Memorandum has been publicly discussed, it cannot properly be deemed classified. This allegation misunderstands the law; information is not considered to be "in the public domain *unless there had been official disclosure of it.*" *Knopf*, 509 F.2d at 1370 (emphasis added). "Official disclosure" does not simply mean public discussion of the information by overt sources. On the contrary, the D.C. Circuit applies a three-part test to determine whether information has entered 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, *e.g.*, it must involve the same time period or same operation; and (3) the information sought to be released must already have been publicly released through "an official and documented disclosure." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983)). Moreover, the plaintiff, not the government, bears the burden of proving that each of these three elements has been met. *See Afshar*, 702 F.2d at 1130.

This official public disclosure requirement has been applied consistently and stringently by this Circuit 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). Indeed, even in instances where the government has revealed some classified information about a topic, the D.C. Circuit has consistently held that the government

may not be compelled to release other, still-classified information about that very same subject. *See Ctr. for Nat'l Security Studies*, 331 F.3d at 930-31 ("The disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on its investigation."); *Salisbury*, 690 F.2d at 971 ("The fact of disclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case."); *Military Audit Project*, 656 F.2d at 752-53 (rejecting the suggestion that "because the government has revealed some documents it previously considered too sensitive to release, it now must reveal all").

This distinction "between official and unofficial disclosures" is "critical." *Fitzgibbon*, 911 F.2d at 765. Courts will find official disclosures only where the government itself has released the information in question. *See* Exec. Order 12958, as amended, § 1.1(b) ("Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information."). Disclosure by media reports, or even in books written by former intelligence officers, has been deemed insufficient to constitute public disclosure. *See Knopf*, 509 F.2d at 1370 (unofficial revelations and/or speculation in the press does not constitute official disclosure); *Military Audit Project*, 656 F.2d at 743 (same); *Afshar*, 702 F.2d at 1133 (information contained in books written by former government officials in their personal capacities are not official and documented disclosures by an agency for purposes of determining whether information has been publicly disclosed by the government); *Phillippi v. CIA*, 655 F.2d 1325, 1330-31 (D.C. Cir. 1981) (same).

Indeed, if anything, the fact that plaintiff is a former CIA employee only heightens the need for CIA to insist that any personal writings cite to specific, open-source materials. As the Fourth Circuit explained:

> 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; *see also id.* ("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."). For this reason, as noted *supra*, CIA regulations specifically provide that the PRB can demand that employees provide open source citations for classified information that they maintain is in the public domain, and that failure to provide such citations is by itself grounds to deny permission to publish. *See, e.g.*, Koch Decl., Exh. B ¶¶ 2.c.(5), 2.i.(3).

In the present case, plaintiff cannot demonstrate that the information contained in his Memorandum has been officially released to the public. Defendant can not provide further detail in this public brief because the public disclosure arguments themselves risk disclosing the information that the government must protect. *See Hayden v. National Security Council, et al.*, 608 F.2d 1381, 1384 (D.C. Cir. 1979). However, as described in the Classified DiMaio Declaration, the material in question remains properly classified by the CIA. *See* Classified DiMaio Decl. ¶ 10.

In light of the fact that the information in plaintiff's Memorandum is properly classified and has not been officially released into the public domain, the CIA did not run afoul of the First Amendment when it denied plaintiff the right to publish his Memorandum. On the contrary, it

acted reasonably and attempted to find a way to accommodate plaintiff's desire to publish his Memorandum, while at the same time protecting the properly classified information. The Agency provided plaintiff a clear path toward publication of that Memorandum, stating that he could do so as long as he would (1) either delete, or provide specific open-source pinpoint citations for, each piece of classified information in his Memorandum, (2) remove the memorandum from its official-looking government format (*i.e.*, the fact that it was styled as being written by a CIA employee and sent to various senior CIA officials), and (3) include a disclaimer stating that the opinions expressed therein were his own personal views and not those of the Agency itself. *See* Koch Decl. ¶¶ 34-37 & Exh. F. Plaintiff refused to make those changes, however. *See* Koch Decl. ¶ 36 (plaintiff "has not to date[] revised his memorandum to include the specific open source citations linked to each sentence and paragraph as required by the CIA"). Plaintiff left the CIA with two stark choices: permit him to publish the Memorandum as written, which contains classified information, or deny him permission to publish it. Because the CIA properly chose the latter approach over the former, defendant is entitled to summary judgment on plaintiff's First Amendment claim.

III. PLAINTIFF'S COUNSEL IS NOT ENTITLED TO SEE THE CLASSIFIED MATERIALS AT ISSUE IN THIS CASE

Almost as an aside, plaintiff asserts that his counsel must be allowed access to "certain documents asserted to be classified by the CIA." *See* Compl. ¶ 43. This request should be refused. The D.C. Circuit in *Stillman* outlined the procedures to be used in prepublication cases such as the present dispute. This court must "inspect the [materials submitted for prepublication review] and consider any pleadings and declarations filed by the Government, as well as any materials filed by [plaintiff]" in order to determine "whether it can, consistent with the protection

of [plaintiff]'s first amendment rights to speak and to publish, and with the appropriate degree of deference owed to the Executive Branch concerning classification decisions, resolve the classification issue without the assistance of plaintiff's counsel." *Stillman*, 319 F.3d 546, 548-49 (D.C. Cir. 2003). The D.C. Circuit made clear that principles of constitutional avoidance require this Court to attempt to resolve the classification issues in this *ex parte* manner before addressing the question of whether plaintiff has a constitutional right for his counsel to assist the court in making that determination. *Id.* As the defendant's affidavits provide the Court with sufficient information to determine that plaintiff's Memorandum is properly classified in its current form, *see supra*, this court need not reach the constitutional question the D.C. Circuit reserved in *Stillman*.[14]

CONCLUSION

For all the foregoing reasons, this Court should dismiss plaintiff's APA claims, and should award summary judgment to the defendant on plaintiff's First Amendment claim.

Dated: July 20, 2007

Respectfully Submitted,

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[14] If the court were to reach the merits of that constitutional question, defendant requests the right to submit additional briefing on that narrow point.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July 2007, I caused the foregoing Defendant's Motion to Dismiss Under Rule 12 and Motion for Summary Judgment Under Rule 56 to be served on plaintiff's counsel of record electronically by means of the Court's ECF system.

/s/ Michael P. Abate