

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ANTHONY SHAFFER
8613 Etta Drive
Springfield, Virginia 22152

Plaintiff,

v.

DEFENSE INTELLIGENCE AGENCY
Washington, D.C. 20340

and

DEPARTMENT OF DEFENSE
Washington, D.C. 20301

and

CENTRAL INTELLIGENCE AGENCY
Washington, D.C. 20505

Defendants.

* * * * *

Civil Action No: 10-2119 (RMU)

FIRST AMENDED COMPLAINT

Plaintiff Anthony Shaffer brings this action against defendants Defense Intelligence Agency, Department of Defense and Central Intelligence Agency for injunctive and declaratory relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and the First Amendment to the Constitution of the United States.

The defendants unlawfully imposed a prior restraint upon the plaintiff by obstructing and infringing on his right to publish unclassified information in his *New York Times* best selling 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 unlawfully required the redaction of information from approximately 250 out of 320 pages of the published book.

Shaffer, as the author and copyright owner, intends to have future versions of Operation Dark Heart published but the defendants continue to infringe his right to free speech under the First Amendment of the U.S. Constitution by preventing publication of the allegedly classified information. Additionally, defendants are obstructing his ability to demonstrate to this Court that the information is unclassified and therefore not subject to continuing governmental restraint.

JURISDICTION

1. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331.

VENUE

2. Venue is appropriate in the District under 5 U.S.C. § 703 and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Anthony Shaffer (“Shaffer”) is a highly experienced and decorated intelligence officer with more than 25 years of field experience. He was formerly employed by the defendant Defense Intelligence Agency from 1995 - 2006 and retired as a Lt. Col. in the U.S. Army Reserves in 2011. He is required by virtue of several secrecy agreements to submit all of his writings for prepublication review.¹ In 2001, just after the 9/11 attacks, he returned to active duty for a 30 month period and had two successful

¹ This Complaint was drafted entirely by legal counsel who is not subject at this time in this specific case to any prepublication review requirement. Nor has counsel ever reviewed an unredacted version of Shaffer’s book.

combat tours to Afghanistan during which he participated in the search for senior Al Qaeda leadership. In recognition of successful high risk/high gain operations he received the Bronze Star Medal for performance as an Operations Officer. Shaffer is currently a Fellow and Special Lecturer at the Center for Advanced Defense Studies in Washington, D.C. and appears regularly as an expert commentator on network and cable television and radio, particularly with respect to military matters. He is a citizen of the United States and resides in the Commonwealth of Virginia.

4. Defendant Defense Intelligence Agency (“DIA”) is an agency of the United States and subject to the jurisdiction of this Court. Its actions have prevented Shaffer from publishing portions of his book.

5. Defendant Department of Defense (“DoD”) is an agency is an agency of the United States and subject to the jurisdiction of this Court. Its actions have prevented Shaffer from publishing portions of his book. The DoD also has legal authority over the National Security Agency (“NSA”), U.S. Special Operations Command, Department of Army and DIA, all of which are operational components of DoD.

6. Defendant Central Intelligence Agency (“CIA”) is an agency of the United States and subject to the jurisdiction of this Court. Its actions have prevented Shaffer from publishing portions of his book.

FACTS

7. Shaffer was mobilized in support of Operation Enduring Freedom as an Army Reserve Officer from December 2001 to June 2004.

8. 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 unemotional examination of the events and decisions where mistakes were made in strategy. It recommends a detailed, alternate strategy 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.

9. In or around December 2008, Shaffer hired a then current *Washington Post* reporter and author, Jacqui Salmon, to serve as his ghost writer. Ms. Salmon conducted numerous 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.

10. 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. Paragraph 3 of the agreement is clear that Shaffer retains ownership of the copyright in the Work, and all rights not explicitly granted to the publisher. Conveyed to the publisher in paragraph 1 was simply the “right to print, publish, distribute and sell ... in the English language in book form....”. In fact, at some point in the future all rights surrounding the book will revert back to Shaffer. In any event, at all times Shaffer has maintained a legal and ownership interest in his book, and continues to do so to this day.

11. 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 then 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.

12. In April 2009, two highly qualified Army Reserve officers – a military attorney with the rank of Major whose civilian employment was with the U.S. Army Special Operations Command and a Colonel who worked as a civilian contractor for the Director of National Intelligence – were appointed to conduct the review of the book.

13. A copy of Shaffer's draft manuscript was first submitted in June 2009 to his Army Reserve chain-of-command. Upon information and belief, this satisfied Shaffer's prepublication review requirement, particularly because the Army Reserve was the entity that last issued Shaffer's security clearance, and it was the responsibility of the Army Reserve to ensure the manuscript was properly reviewed by any agency determined to have equities in the document.

14. 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.

15. 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.

16. 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 undertake for a classification review of his manuscript, an assertion that Shaffer also relied upon in good faith. In fact, as noted, 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.

17. 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. A publishing date was then scheduled for August 31, 2010.

18. 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.

19. DIA claims to have first learned of Operation Dark Heart on or about May 27, 2010. Upon information and belief, numerous DIA officials knew of Shaffer's memoir months before this date.

20. On June 18, 2010, Shaffer received a phone call from his commanding general at the 94th Division and was informed that DIA was demanding access to the already cleared manuscript. He was told that the Division had decided not to share it with DIA based on its prior retaliatory activities against Shaffer, 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 insert itself into the process. The Army Reserve believed that the book had been properly reviewed and approved and was free of any classified information.

21. 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, at no time did any DIA official ever request 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.

22. 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.

23. On July 11, 2010, Shaffer was notified by his Army Reserve leadership that the Department of the Army had decided to provide a copy of Operation Dark Heart to DIA

but that Army Reserve continued to stand by its approval for the book for publication. 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...”

24. 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, 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.

25. On July 22, 2010, a DIA public affairs official called Shaffer and informed him that DIA had read the manuscript and claimed 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*.

26. 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.

27. On or about August 6, 2010, the Department of Army rescinded the Army Reserves’ favorable approval for the publication of Operation Dark Heart.

28. 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.”

29. 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 to be published in less than three weeks.

30. 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, in consultation with Shaffer, agreed to temporarily delay publication to allow discussions between the defendants and Shaffer to take place.

31. Notwithstanding the decision of the publisher and Shaffer 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 copies, 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.

32. On August 16, 2010, DoD and DIA officials, to include its General Counsel George Peirce, met with representatives of the publisher in New York City to express their continuing concerns regarding publication of Operation Dark Heart.

33. On August 16, 2010, Shaffer's counsel 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.

34. Although Shaffer's attorney informed defendant DoD that he 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 counsel access to the first edition of Operation Dark Heart. DoD did, however, allow the publisher's attorney to participate in classified conversations regarding the contents of the book. Upon information and belief, the defendants refused to allow Shafer's attorney access to or participation in any substantive conversations concerning the alleged "classified information" in order to gain a litigation advantage should the matter later proceed to court.

35. 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. In order

to be permitted to discuss the alleged “classified” information in the book the defendants reactivated or granted a temporary security clearance to Shaffer.

36. Shaffer fully cooperated with the defendants over the course of several meetings in August and September 2010 in order to negotiate away any classification concerns. Contrary to the initial statements by the defendants as to the need for only “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 ghostwriter. 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.

37. Eventually, approximately 250 pages out of 320 pages of Operation Dark Heart were required to contain redactions in order to allegedly prevent the disclosure of classified information. Little to none of this information, however, is actually classified.

38. 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. This version of the book was accepted for publication.

39. On September 9, 2010, the publisher notified DoD that the book was considered complete and the pages were being sent to the printer. Notwithstanding this fact, defendant DoD continued to attempt to have Shaffer modify or delete text.

40. In or around late September 2010, defendant DoD paid nearly \$50,000 to the publisher to destroy 9,500 copies of the first printing of Operation Dark Heart on the basis that publication threatened national security.

41. The publisher printed a second edition of Operation Dark Heart of approximately 50,000 copies with redactions and it was published on September 24, 2010.s

42. The *New York Times* 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 at <http://www.nytimes.com/2010/09/10/us/10books.html>.

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

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

45. On or about September 29, 2010, The Federation of American Scientists posted on its website at http://www.fas.org/blog/secrecy/2010/09/behind_the_censor.html comparison copies of pages from the un-redacted 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. un-redacted index of the book was posted on October 5, 2010, at <http://www.fas.org/sgp/news/2010/09/dark-index.pdf>.

46. On September 29, 2010, the *HuffingtonPost.com* posted an article at http://www.huffingtonpost.com/2010/09/29/operation-dark-heart-comp_n_744123.html 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].”

47. On October 4, 2010, the *Army Times* published an article at <http://www.armytimes.com/news/2010/10/army-book-100410w/> entitled “Censored book masks sensitive operations” in which it undertook a before and after analysis of the information redacted from the revised edition of Operation Dark Heart.

48. As of December 31, 2011, over two billion people around the world have Internet access and can read the “classified” text of Operation Dark Heart that has been posted online. See <http://www.internetworldstats.com/stats.htm> (accessed February 13, 2012).

49. St. Martin’s Press published a paperback edition of Operation Dark Heart in October 2011 that similarly contained all the redactions in the hard cover version therefore continuing to infringe upon Shaffer’s First Amendment rights. Shaffer desires to have published a future edition of his book where the redacted text is revealed to the public.

50. Upon information and belief, defendant DIA’s efforts, in particular, are part of a continuing bad faith retaliatory campaign against Shaffer that dates back to 2004 when DIA initiated a frivolous action against him to revoke his security clearance. The Army Reserve discounted the allegations and in the midst and with full knowledge of DIA’s efforts nevertheless promoted Shaffer to Lt. Col. In 2005, Shaffer became a national security whistleblower when he publicly claimed that a covert Pentagon task force called “ABLE DANGER”, of which he was a part, had identified Mohamed Atta, the lead hijacker in the September 11th attacks, before the assaults on New York and the Pentagon.

51. This case was originally filed in December 2010. On May 16, 2011, the defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. The substantive information presented in support of their Motion was “classified” and filed *in camera* and *ex-parte*.

52. On June 7, 2011, in order to properly respond to the defendants’ Motion, the undersigned counsel requested the opportunity for Shaffer to use a secure computer to

draft a sworn declaration to challenge the classification determinations that led to the redactions in his book.

53. The declaration would detail the classification discussions Shaffer had with officials employed by the defendants when he voluntarily participated in an effort to address their concerns in August/September 2010. This would include producing to the Court the unclassified source materials that he submitted to the defendants at that time.

54. While Shaffer contends his declaration will ultimately be determined by the Court to be unclassified, it will necessarily be construed as classified at the time of creation. The mere quoting of the actual redacted text of Shaffer's book involves referencing information alleged by the defendants to be currently classified. Additionally, the defendants have claimed that even the unclassified source materials submitted by Shaffer may be deemed classified when tied to specific portions of the book, which is what Shaffer is required to do for purposes of his First Amendment classification challenge.

55. Additionally, a request was made for access, in a secure setting, to an un-redacted version of the manuscript created by Shaffer so that the specific portions of the book alleged to be classified could be directly addressed in his declaration. The defendants claimed that Shaffer did not possess a valid security clearance that would enable him to review the very text that he authored, even though the defendants self-servingly granted him a clearance to do just that in August 2010. There is no other way for Shaffer to identify and challenge any of the specific text purported to be classified, much less present an argument to the Court, if he does not have access to the original copy of his book. It would be unreasonable to believe he has memorized every single redaction that is contained on 250 of the 320 pages of Operation Dark Heart.

56. Ultimately, the defendants denied Shaffer's requests for access to a secure computer as well as an un-redacted copy of his book.

57. At the time of the initial filing of this lawsuit in December 2010, the Department of Army had underway an internal 15-6 investigation into Shaffer and the publication of his book. In July 2011, the U.S. Army Reserves retired Shaffer at the rank of Lt. Colonel and the results, if any, of the 15-6 investigation have never been revealed.

58. On February 9, 2012, Shaffer's counsel notified the defendants' counsel that they could obtain an un-redacted copy of the "classified" version of Operation Dark Heart at anytime from multiple non-governmental sources. Because both of Shaffer's counsels hold active Secret security clearances, although not for this specific case, they have particularly refrained from obtaining a copy of the un-redacted version and using it for purposes of responding to the defendants' classification claims.

59. This situation is similar to that faced by Habeas counsel in the Guantanamo cases, to include but not limited to Paracha et al. v. Obama et al., Civil Action No. 04-CV-2022 (D.D.C.)(PLF), with respect to accessing and using "classified" documents posted online for the world to review by Wikileaks. In order to deal with the situation of Habeas counsel in a civil lawsuit accessing and using allegedly classified information that is publicly available the U.S. Government issued guidance to accommodate counsel under certain controlled conditions.

60. Shaffer's counsel has formally requested of the defendants to provide similar accommodation so that they can, independent of Shaffer, submit to the Court their own legal and factual challenges to the defendants' classification determinations.

61. The defendants have not yet provided a response to Shaffer's counsel's request.

FIRST CAUSE OF ACTION
(FIRST AMENDMENT/DECLARATORY JUDGMENT
- RIGHT TO PUBLISH - CLASSIFICATION CHALLENGE)

62. Shaffer repeats and realleges the allegations contained in paragraphs 1 through 61 above, inclusive.

63. Shaffer, as the legal owner of the information contained in Operation Dark Heart, properly submitted to the U.S. Army Reserve, pursuant to one or more secrecy agreements, his draft manuscript for prepublication review.

64. The defendants are legally prohibited from precluding Shaffer from publishing anything other than classified information.

65. The defendants claim to have identified classified information within Operation Dark Heart and prevented Shaffer from publishing those portions regarding which agreement could not be reached as to modification or deletion.

66. The defendants have classified a substantial amount of previously approved text, as well as forbid the publication of information supported by open source material. The consequence of this action is to threaten Shaffer that if he publishes or disseminates any information identified as classified, whether it is or not, he will be subject to legal action, which can include civil and/or criminal penalties and, in particular, the attachment of any royalties Shaffer has or will receive from sales of the book.

67. The defendants have failed to show that Shaffer's First Amendment right to publish is outweighed by the government's interest in efficiently carrying out its mission by minimizing harms that are real, not merely conjecture.

68. The defendants have failed to demonstrate the existence of substantial governmental interests that enable them to prohibit the publication of unclassified information within Shaffer's book.

69. The defendants' restrictions imposed upon Shaffer have been unduly vague and were not narrowly confined to avoid infringement of his First Amendment rights. They have unnecessarily restricted unclassified speech that does not serve to protect any substantial government interest.

70. Most importantly, the defendants have failed to provide explanations with reasonable specificity that demonstrates a logical connection between the information to be deleted and any reason for classification. Nor are the claimed reasons for classification either rational or plausible. In fact, many of the asserted redactions are objectively absurd. Thus, they cannot support the defendants' attempt to censor text within Shaffer's book.

71. Because the defendants have impermissibly infringed upon Shaffer's right to publish unclassified information in Operation Dark Heart, and continue to infringe on his rights for any planned future editions, they have violated Shaffer's First Amendment rights.

72. The publisher released a paperback version of Operation Dark Heart in October 2011 and was forced to include the same redactions as the original version because of the defendants' infringement of Shaffer's First Amendment rights. Shaffer would like to arrange for publication, which is his legal right as the copyright owner of the book, of future editions with the full text available to the public. Due to the ongoing unlawful actions of the defendants to suppress Shaffer's First Amendment rights and prohibit the

publication of unclassified information, he could suffer civil and/or criminal penalties if the redacted text is revealed in any forthcoming edition.

73. Shaffer desires to include only unclassified information in any forthcoming edition of Operation Dark Heart and the defendants are impermissibly preventing him from doing so. Additionally, they have prevented him from providing relevant information to this Court through a declaration he would create on a secure computer system following his review of his “classified” book. This information is material to the resolution of disputed legal issues and no alternatives are adequate to satisfy the interests of justice.

74. Thus, Shaffer has suffered or may suffer actual adverse and harmful effects, including, but not limited to, possible civil and/or criminal penalties, a delay in being able to timely comment on information of public interest, and/or lost or jeopardized present or future financial opportunities, which impairs his ability to serve the public.

SECOND CAUSE OF ACTION
(FIRST AMENDMENT/DECLARATORY JUDGMENT
- RIGHT TO PUBLISH - INFRINGEMENT ON
ABILITY TO SUBMIT CLASSIFICATION CHALLENGE AND USE
SECURE GOVERNMENT COMPUTER SYSTEM)

75. Shaffer repeats and realleges the allegations contained in paragraphs 1 through 61 above, inclusive.

76. Shaffer has a First Amendment right to use a secure Government computer in order to fulfill his legal obligations to the defendants to protect classified information, as well as meet the standard adopted in a stream of prepublication review cases that requires the plaintiff to present a declaration that provides specific citations to the portions of his book he argues have been improperly classified.

77. Shaffer also has a First Amendment right to create a sworn declaration to challenge the defendants' classification decisions, even if the defendants classify all or portions of the document.

78. The refusal by the defendants to allow Shaffer to use a secure Government computer to draft a responsive declaration violates his First Amendment rights.

79. This Court has the discretion, as well as the authority, to order disclosure of classified information 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. There is no rule or law that prevents a United States federal judge from exercising judicial authority to allow a party to provide the court with classified information as part of a civil action even when opposed by the Executive Branch.

80. The specific information Shaffer desires to provide to this Court is directly relevant and material to the dispute at hand.

81. Thus, Shaffer has suffered or may suffer actual adverse and harmful effects, including, but not limited to, possible civil or criminal penalties, a delay in being able to timely comment on information of public interest, and/or lost or jeopardized present or future financial opportunities, which impairs his ability to serve the public.

THIRD CAUSE OF ACTION
(FIRST AMENDMENT/DECLARATORY JUDGMENT
- RIGHT TO PUBLISH – COUNSEL'S USE OF UNREDACTED BOOK)

82. Shaffer repeats and realleges the allegations contained in paragraphs 1 through 61 above, inclusive.

83. Shaffer's counsel in this action has not been permitted to access any of the classified information at issue in Operation Dark Heart, although both hold valid and current Secret security clearances.

84. Un-redacted copies of Operation Dark Heart containing the alleged classified information are available from non-governmental sources. Numerous pages from the unpublished first edition are also publicly available on the Internet and can be compared with the specific text redacted from the redacted first edition so as to ascertain what information the defendants claim to be classified.

85. Shaffer has a First Amendment right to counsel and to be able to present all publicly available information to the Court for its consideration. His constitutional rights extend to his counsel and the use thereof as a representative.

86. Shaffer's counsel should be permitted to, given they are under no legal obligation with respect to or privity with the defendants in protecting the information alleged to be classified in Operation Dark Heart, provide their independent legal and factual analysis to the Court, separate and apart from Shaffer's rights or involvement.

87. On February 9, 2012, Shaffer's counsel requested from the defendants that they accommodate their use of an un-redacted copy of the "classified" version of Operation Dark Heart that would be obtained from non-governmental sources in a manner similar to that utilized in the civil Habeas Guantanamo cases, to include but not limited to Paracha et al. v. Obama et al., Civil Action No. 04-CV-2022 (D.D.C.)(PLF). This would allow Shaffer's counsel to present independent factual and legal arguments under certain controlled conditions in order to challenge the defendants' classification determinations.

88. As the information in question is already publicly available, no cognizable harm to national security or to the defendants is possible by any further disclosure. Any response that the defendants provide can be, in light of the unusual circumstances, submitted to the Court *in camera* and, if necessary, *ex parte* so as to protect the potential classified nature of their explanations.

89. The defendants have not yet provided a response to Shaffer's counsel's request.

90. Because the defendants have a history of threatening counsels' security clearances, this Court should exercise its judicial authority to explicitly authorize counsels' use of publicly available information taken from Operation Dark Heart.

WHEREFORE, plaintiff Anthony Shaffer requests that the Court award him the following relief:

(1) Permanently enjoin the defendants from restraining the publication of any portion of unclassified text within future editions of Shaffer's book Operation Dark Heart;

(2) Permanently enjoin the defendants from initiating civil or criminal proceedings against Shaffer for past publication of any text within editions of Operation Dark Heart, or for any future publication of unclassified text;

(3) Declare that Shaffer possesses a First Amendment right to publish any unclassified information that was redacted from Operation Dark Heart;

(4) Declare and find that the redacted text from Operation Dark Heart is unclassified;

(5) Order the defendants to allow Shaffer to use a secure government computer system and be granted access to an un-redacted copy of Operation Dark Heart in order to draft a declaration to provide to the Court to challenge the defendants' classification determinations;

(6) Declare that Shaffer's counsel – but not Shaffer – may, and are authorized to, review an un-redacted copy of or pages therefrom Operation Dark Heart that are available from non-governmental sources, and can rely upon any such information in public filings before this Court;

(7) Award Shaffer the costs of the action and reasonable attorney fees under the Equal Access to Justice Act or any other applicable law;

(8) Award any appropriate compensation to Shaffer for any losses suffered or expenses incurred due to the defendants' actions; and

(9) grant such other relief as the Court may deem just and proper.

Date: February 13, 2012

Respectfully submitted,

/s/

Mark S. Zaid, Esq.
D.C. Bar #440532
Bradley P. Moss, Esq.
D.C. Bar #975905
Mark S. Zaid, P.C.
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 454-2809
(202) 330-5610 fax
Mark@MarkZaid.com

Attorney for Plaintiff