IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF

Defendants Department of Defense, Defense Intelligence Agency, and Central Intelligence Agency, through undersigned counsel, hereby respond to Plaintiff's Response to Court's Minute Order of September 22, 2011, filed on October 5, 2011, at ECF No. 26.

Background

Plaintiff's brief sets forth a nine-page "factual summary" which merely recites, almost entirely verbatim, the allegations contained in Plaintiff's complaint and his February motion to expedite the proceedings. *Compare* Pl.'s Br. 2-12 *with* Compl. ¶¶ 3, 8-49; Pl.'s Mot. for Expedited Proceedings 2-11. Those allegations stretch far beyond the single claim that Plaintiff makes: that Defendants violated his First Amendment rights by refusing to allow him to publish certain information in *Operation Dark Heart: Spycraft and Special Ops on the Frontlines of Afghanistan and the Path to Victory* (St. Martin's Press, 2010).

The relevant factual background is straightforward. Plaintiff wrote a book based in large part on information he obtained through his active-duty service in Afghanistan, where as an intelligence officer assigned to the Defense Intelligence Agency, he participated in various

clandestine operations. Compl. 1, ¶¶ 3, 8. Plaintiff "is required by virtue of a secrecy agreement to submit all of his writings for prepublication review." *Id.* ¶ 3. Plaintiff contends that, after he transferred to his publisher "full legal control" over publication of the manuscript, *id.* ¶ 17, the United States determined that a substantial amount of information in the manuscript was classified, *id.* ¶ 38. On September 24, 2010, the publisher proceeded with publication of the book with redactions of the information at issue. *Id.* ¶¶ 40, 42. Nearly three months later, on December 14, 2010, Plaintiff brought this suit, which presents a narrow legal question. Plaintiff seeks an order requiring Defendants to allow the publication of an unredacted version of the book, and while he accepts that he has no right to publish classified information, he challenges the Government's determination that the redacted information is classified.

On May 16, 2011, Defendants filed a motion to dismiss or, in the alternative, for summary judgment. *See* Defs.' Mot. [ECF 18]. Defendants first argued that Plaintiff lacks standing to pursue his claim. Because Plaintiff himself says that he transferred "full legal control" of the manuscript to the publisher, by his own allegation only the publisher had a legal interest in the contents of the published book, and Plaintiff thus failed to allege an injury in fact. Defendants alternatively argued for summary judgment on the ground that the information at issue is properly classified. In support of that argument, Defendants submitted both classified and unclassified materials. The classified materials, which were submitted *ex parte* for the Court's *in camera* review, include a classified table collecting all the information redacted from the book, as well as three classified declarations providing detailed justifications of the Government's classification decisions.

Plaintiff has not yet responded to Defendants' motion. He sought additional time on June 3, 2011, and the parties jointly sought extensions of Plaintiff's deadline on June 21, 2011, and

July 6, 2011. On July 22, 2011, the parties filed a joint status report setting forth their respective proposals on how the case should proceed. On September 22, 2011, the Court issued a minute order requiring "supplemental briefing regarding the procedures by which the parties and the court shall prepare and review the filings in this matter." Specifically, the Court required briefing discussing "(1) the propriety of *ex parte* filings; (2) methods by which the plaintiff may prepare his filings; and (3) methods by which the parties may reach areas of agreement on how to proceed." Plaintiff filed his brief on October 5, 2011.

Discussion

Plaintiff asks this Court to compel the Government to provide him with classified information and a secure government computer as part of this civil litigation, so that he may file a classified declaration and supplemental exhibits setting forth his opinion as to why the redacted information is not properly classified. Plaintiff's extraordinary request lacks legal support and, in any event, is both premature and unnecessary. Even assuming that the First Amendment governs the procedures by which Plaintiff may challenge the Government's redactions – something that need not be decided until after the Court rules on Defendants' jurisdictional objection and then, if necessary, attempts to resolve the classification dispute *ex parte* – Plaintiff can make all material arguments without the extraordinary relief he now seeks. The Court can and should resolve this case on the basis of Defendants' motion for summary judgment and any response from Plaintiff addressing standing and identifying any unclassified, official open source materials. The Court therefore should deny the relief now requested by Plaintiff.

I. "The propriety of *ex parte* filings"

Preliminarily, Plaintiff does not intend to present *ex parte* submissions and does not seek access to those filed by Defendants, so the Court need not consider this issue. *See* Pl.'s Suppl. Br. 15. Not only does Plaintiff not seek to file *ex parte*, but he recognizes his obligation to

submit his declaration to Defendants for classification review, and he agrees that Defendants will have access to any filing he makes with the Court. Additionally, Plaintiff would not be able to access Defendants' *ex parte* filings because in prepublication review cases, national security concerns require *ex parte*, *in camera* review of the Government's classified declarations. *See Stillman v. CIA*, 319 F.3d 546, 549 (D.C. Cir. 2003).

II. "Methods by which Plaintiff may prepare his filings"

Plaintiff argues that, by rejecting his extraordinary demands for access to a secure government computer and a copy of the classified information redacted from the manuscript, the Government has "violate[d] his ability to exercise his First Amendment rights to challenge the classification decisions." Pl.'s Suppl. Br. 2. Consideration of Plaintiff's request, however, would be premature at this time, given Defendants' pending motion to dismiss for lack of jurisdiction. Requiring Plaintiff to respond to that motion will not present the constitutional question of whether Plaintiff has a First Amendment right to receive or submit classified material as part of the Court's review of the Government's classification decision. If that motion is denied, the Court then should attempt to resolve the classification dispute *ex parte*. Only if the Court determines after that review that additional inquiry is necessary would it be forced to consider the constitutional questions raised by Plaintiff.

A. It is premature to consider Plaintiff's request given Defendants' pending motion to dismiss for lack of jurisdiction

"A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). The D.C. Circuit applied this principle in the context of prepublication review cases in *Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003), holding that the district court abused its discretion by unnecessarily deciding whether

an author had a First Amendment right for his attorney to receive access to classified information in order to assist the court in resolving the author's challenge to redactions. *Id.* at 548. *Stillman* makes clear that the district court should avoid reaching constitutional questions if it can resolve the case without doing so.[1] Here, Plaintiff has ignored that Defendants have moved for dismissal under Rule 12(b)(1). Defendants' motion showed that Plaintiff lacks standing to bring his claim because he has not alleged an injury in fact. If the Court so holds, it would not (and cannot) reach the merits of Plaintiff's claim, and thus would not need to consider the constitutional question regarding his role in the Court's review of that claim.

Defendants' jurisdictional argument is based on Plaintiff's assertion that he transferred "full legal control" of the book to the publisher, *see* Compl. ¶ 17, an act which deprives Plaintiff of any First Amendment interest in the book's publication. Because that argument focuses on Plaintiff's and his publisher's legal control of the book, Plaintiff cannot present any reason why he would require the use of classified information or a secure computer to respond. The Court therefore should not yet reach the constitutional question of how to protect the supposed First Amendment right of Plaintiff to access classified information and make classified submissions. The Court instead should require him to respond to the pending motion to dismiss.

[1] Plaintiff quotes several times in his brief from the district court's underlying decision in *Stillman*. That decision was reversed by the D.C. Circuit on the points on which Plaintiff relies (*i.e.*, the district court's incorrect ruling requiring the government to provide classified information upon the plaintiff's request). *See Stillman v. Dep't of Defense*, 209 F. Supp. 2d 185 (D.D.C.), *rev'd sub nom. Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003). Plaintiff's reliance on a reversed opinion discussing the Government's actions nearly a decade ago is wholly misplaced. Specifically, Plaintiff quotes from that opinion's dicta, issued in response to entirely different facts, in an attempt to show that the Government here is acting to secure a "litigation advantage." That is plainly false. The United States' determinations in both cases are driven by the Executive's duty to protect classified information, as the Government does not disclose such information to individuals not authorized to receive it.

B. The relief requested by Plaintiff is improper and unnecessary to allow him to respond to Defendants' motion for summary judgment

If the Court looks past Defendants' jurisdictional argument, it should deny Plaintiff's request for access to classified information and a secure government computer because requiring the Government to accommodate those requests is both unsupported by law and unnecessary to allow Plaintiff to respond to Defendants' motion.

Plaintiff seeks to challenge the Government's classification decisions on the ground that the information is "supported by open source material," Compl. ¶ 56, but, as he must recognize, his own classification opinions are immaterial to the Court's inquiry. Instead, he must show that the information already has been publicly released through "an official and documented disclosure." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). Only evidence of specific, official disclosures is material to that question. Plaintiff's declaration therefore should be limited to this information, which by its very nature would be unclassified. Such a declaration can be prepared and submitted to the Court without entry of the extraordinary relief Plaintiff requests.

Furthermore, the Executive Branch has the authority and responsibility to control classified information, *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988), and may not be compelled to provide classified information to an individual who is not authorized to receive it.[2] Moreover, because Plaintiff's declaration should be limited to unclassified information, and because he agrees that he must submit the declaration to the Government for classification review prior to its filing, he does not need a secure government computer to prepare it. Instead, the Government will review the document before it is provided to Plaintiff's counsel or the Court

[2] Although Plaintiff had a security clearance during the time periods covered in the book, his clearance was revoked in 2005. *See Shaffer v. Defense Intelligence Agency*, 601 F. Supp. 2d 16, 21 (D.D.C. 2009) (citing Shaffer's admission that, prior to September 2005, "the DIA revoked Plaintiff Shaffer's security clearance" on the grounds that "he had engaged in criminal conduct and that he was not credible").

to ensure that it contains no classified information. The Court may then rule on Defendants' motion based on the Government's submission together with any unclassified material submitted by Plaintiff.

Defendants' proposal has been the consistent practice in prepublication review cases, as it minimizes the risk of inadvertent disclosure of classified information. In a prepublication review case like this, "*in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm" with the "appropriate degree of deference" given to the Executive Branch concerning its classification decisions. *Stillman*, 319 F.3d at 548-49. Because of the Executive Branch's inherent and unique expertise concerning the adverse effects of the disclosure of national security information, so long as the declarations are submitted in good faith and contain "reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification," the judiciary "cannot second-guess [the Government's] judgments" with respect to classification decisions. *McGehee v. Casey*, 718 F.2d 1137, 1148-49 (D.C. Cir. 1983). "In other words, … prepublication review cases can and should begin with *ex parte* and *in camera* consideration." *Boening v. CIA*, 579 F. Supp. 2d 166, 174 (D.D.C. 2008) (citing *Stillman*).

The district court has referred to this *ex parte* and *in camera* inquiry as "stage one of the *Stillman* framework." *See Horn v. Huddle*, 647 F. Supp. 2d 55, 61, 64 (D.D.C. 2009), *vacated on other grounds*, 699 F. Supp. 2d 236 (2010). And the Court has followed the framework's first stage consistently in cases since *Stillman*, limiting *in camera* reviews to the Government's *ex parte* submissions. *See Stillman v. CIA*, 517 F. Supp. 2d 32, 38-39 (D.D.C. 2007) (on remand, after an initial review of those documents submitted by the government *ex parte*, which included open source information the author had previously provided to the government, Judge Sullivan

concluded that the Government had properly classified the disputed passages); *see also Berntsen v. CIA*, 618 F. Supp. 2d 27 (D.D.C. 2009) (after reviewing an agency declaration with item-by-item justifications, Judge Kollar-Kotelly concluded that the government had properly classified the disputed items in plaintiff's manuscript); *Boening*, 579 F. Supp. 2d at 166 (after reviewing the classified documents at issue, Judge Sullivan dismissed without prejudice).[3]

Under *Stillman* and its progeny, Plaintiff has only a limited role to play in the Court's current review, and the only material information that he could provide for the Court to consider at this stage would necessarily have to be unclassified. To demonstrate that the redacted information was "supported by open source material," Compl. ¶ 56, he must show that the information already has been publicly released through "an official and documented disclosure." *Fitzgibbon*, 911 F.2d at 765.[4] Plaintiff's burden is thus to identify specific, official public disclosures of the information at issue.[5]

[3] *See also McGehee*, 718 F.2d at 1149. In this seminal pre-*Stillman* decision, the D.C. Circuit determined that based on the Government's *ex parte* affidavits, the information at issue was properly classified.

[4] In addition to showing an official disclosure, he must also show that the information publicly disclosed is as specific as the information at issue here, and that the disputed information exactly matches the information publicly disclosed. *See Fitzgibbon*, 911 F.2d at 765.

[5] Any other type of open source material is outside the scope of judicial review, as it must first be presented to Defendants during the administrative prepublication review of the book in question. For example, in *Boening*, the court held that plaintiff could submit citations to the agency, and if the agency then issued an adverse decision he could seek reconsideration in the district court. 579 F. Supp. 2d at 171-72. Here, Plaintiff acknowledged this obligation when he stated: "'An ex-agent should demonstrate[,] at an appropriate time during prepublication review, that such information is in the public domain.'" Pl.'s Suppl. Br. 16-17 (quoting *McGehee*, 718 F.2d at 1141 n.9). Plaintiff did not, however, submit such citations or materials from the public domain to the Government when the manuscript was originally under review. After publication of the redacted book, he then chose to bring suit without notifying Defendants that he wished to publish an unredacted version of the book, and without submitting to Defendants a new request for prepublication clearance or open source material to support his claim.

Plaintiff recognizes that he has no further role in disputing the substance of the Government's classification determinations. In light of the Government's inherent authority to make such determinations, he "admittedly has no authority to determine what is or is not classified." Pl.'s Suppl. Br. 18. For that reason, courts have repeatedly, and necessarily, rejected the views of plaintiffs on the question of whether a particular disclosure may harm national security, even when the individual plaintiff is experienced in issues of national security. *See, e.g.*, *Snepp v. United States*, 444 U.S. 507, 512 (1980) ("When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA – with its broader understanding . . . could have identified as harmful."); *ACLU v. U.S. Dep't of Justice*, 548 F. Supp. 219, 223 (D.D.C. 1982) ("Nor does the Court perceive any way in which adversary proceedings in connection with plaintiff's participation in the in camera review could assist [the court], even if adequate security precautions could be arranged."). Views rejected by courts include those of former intelligence analysts and case officers. *See Snepp*, 444 U.S. at 512; *Gardels v. CIA*, 689 F.2d 1100, 1106 & n.5 (D.C. Cir. 1982) (former agent's "own views as to the lack of harm which would follow the disclosure requested by plaintiff" is insufficient to justify further inquiry beyond the Agency's "plausible and reasonable" informed position). Plaintiffs' own views about the information at issue, and the substance of any alleged conversations he had about the information, thus cannot be material to the Court's analysis.[6]

[6] Plaintiff also is prohibited from disclosing classified information without authorization from the Government, even to the Court, by virtue of his numerous nondisclosure and secrecy agreements with the United States. *See, e.g.*, Pl.'s Secrecy Agreements (Ex. 1 to Defs.' Mot. for Summ. J. [ECF 18]), Ex. A, ¶ 3. The obligations Plaintiff undertook do not change merely because he filed a lawsuit. While Plaintiff may have a First Amendment right to challenge the Government's refusal to allow him to disclose *unclassified* information, he does not explain how that confers upon him a right to disclose *classified* information to anyone, including the Court.

Because Plaintiff's declaration is necessarily limited to unclassified information, there is no need to consider his requests that the Government provide him with a secure computer or classified information. Those requests are without legal support, as they run counter to the longstanding authority of the Executive Branch to control and protect classified information. *See Egan*, 484 U.S. at 527 ("The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (recognizing "the primacy of the Executive in controlling and exercising responsibility" over classified information and the Executive's "'compelling interest' in withholding national security information from unauthorized persons in the course of executive business") (internal citation omitted).

With respect to a secure computer, Plaintiff provides no authority for the contention that the Government must provide him access to its secure facilities. There is certainly no accepted practice of providing such facilities upon request, even if the requestor is subject to a secrecy agreement or has access to classified information. When this very question was presented in another case, the Second Circuit held that there is no First Amendment right to access secure communications facilities or to access a classified document originally drafted by the very requestor. *See Doe v. CIA*, 576 F.3d 95, 106-07 (2d Cir. 2009). That is no less true in prepublication review cases, as authors routinely prepare declarations and exhibits without requiring the Government to provide its facilities.[7]

[7] Plaintiff is incorrect in his argument that this case is analogous to *De Sousa v. CIA*, Civ. No. 09-00896 (D.D.C.). Plaintiff contends that the court ordered the Government "to allow the undersigned counsel to use a secure Government computer to draft an opposition brief." Pl.'s Suppl. Br. 21 n.10. That is wrong. The court's order required the United States to provide "logistical support" that would "minimize the risk of inadvertent disclosure of classified information," and recognized that such support *may* include a secure computer. *De Sousa*, Order of May 26, 2011 [ECF 40] at 2. The Government has not provided a secure computer in that

In *Doe v. CIA*, after reviewing *in camera* the Government's *ex parte* filings, and despite the absence of counter-submissions by plaintiffs, the district court concluded that the information at issue was properly classified and dismissed the case. *Id.* at 100. The Second Circuit held that plaintiffs had no right to use classified information, even though they already knew it, to oppose the Government's classification decision in district court. *Id.* at 97, 106. And even if the Government prevented plaintiffs, as they claimed, from filing a response by refusing them access to a secure computer, the appellate court found that those actions did not violate plaintiffs' rights. *Id.* at 97.

Moreover, as discussed above, use of a secure computer is simply unnecessary in this case. Firstly, Plaintiff is not authorized to disclose classified information, and secondly, there is a process in place to ensure that Plaintiff's proposed submissions undergo classification review prior to their filing.[8] *See* Compl. ¶ 2; Defs.' Mot. for Summ. J. [ECF 18] 4. If, after reviewing

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case, given its determination that use of a computer is unnecessary to protect the information at issue, and the plaintiff's counsel continues to prepare his submissions on his own computer. Here, the Government is also proposing an approach that minimizes the risk of inadvertent disclosure of classified information by ensuring that Plaintiff's declaration can be reviewed for classified information prior to its filing. Plaintiff's contention that the Government's position in one case confers a "litigation advantage" in another is puzzling, given that the cases involve different plaintiffs bringing unrelated claims, but what is clear is that the Government has acted consistently in these cases to protect classified information from disclosure to, or by, unauthorized parties.

[8] Pursuant to his secrecy agreements, Plaintiff may not provide his proposed submissions to his counsel, who lacks the required security clearance, unless and until the Government determines that the submissions do not contain classified information and may be filed in the public record. Plaintiff appears to recognize that in his filing, yet cryptically says that he will not share "the 'classified' content of Shaffer's sworn declaration" with his counsel. Pl.'s Suppl. Br. 13 n.2. Of course, as he acknowledges, Plaintiff "has no authority to determine what is or is not classified." *Id.* at 18. Given the obligations he undertook in signing numerous non-disclosure agreements, and the content he intends to include in his declaration, no part of the declaration may be shared with counsel (or any other individual not authorized access to the classified information) until the document has undergone a classification review and the Government has identified the unclassified information that can be released publicly.

Plaintiff's declaration, the Government determines that it contains no classified information, then it may be filed on the public record. The Government would otherwise redact any classified information and return the redacted document to Plaintiff for filing.[9] (While it would be wholly inappropriate to require submission of the classified information, even *in camera*, that really is an issue that the Court need not reach unless and until it is determined that the proposed submissions actually contain classified information.)

The Court should also not direct the Government to provide Plaintiff with the classified information at issue (specifically, the unredacted manuscript). The Executive exercises control over the information, and its decisions regarding such information (including how best to protect the information from inadvertent disclosure) are entitled to the utmost deference. *Holy Land Found.*, 333 F.3d at 164 (recognizing that disclosure of classified information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect") (quoting *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001)); *In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656 at * 9 (Fed. Cir. Apr. 19, 1993) (finding that, under separation of powers principles, "the access decisions of the Executive may not be countermanded by either coordinate Branch").

It is essential to recognize that every additional disclosure of classified information increases the risk to national security, irrespective of the trustworthiness of any particular individual: "It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure

[9] Because the disclosure of particular open source citations could reveal the redacted material itself, the Government may determine that Plaintiff's open source information cannot be filed on the public record, as the association of that open source information with the book's redactions may make the declaration classified. In that case, the Government would still provide that information to the Court. Defendants oppose, however, Plaintiff providing any classified information to the Court.

carries with it serious risk that highly sensitive information may be compromised." *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (quoting *Alfred A. Knopf v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975). Indeed, the Supreme Court has acknowledged that even disclosures to a court *in camera* and *ex parte* could pose such risks. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 10 (1953) ("[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.").

Here, Plaintiff has no current security clearance authorizing him access to any classified information, *see supra* note 2, and there is no justification for directing the Government to disclose the classified information at issue. Plaintiff's contention that he once knew the information does not affect the Executive's control. *See Pfeiffer v. CIA*, 60 F.3d 861, 864 (D.C. Cir. 1995) (copies of classified document authored by plaintiff, a former employee who no longer had authorized access to classified information, were "indisputably the property of the Government"). That Plaintiff wrote the manuscript outside the scope of his duties does not change the fundamental facts that he no longer has the document, that the Government controls the information, and that he is not authorized to access it.

In the context of prepublication review cases, the Court properly rejected a request identical to Plaintiff's in *Boening*, 579 F. Supp. 2d at 166, a case on which Plaintiff relies. The claim there was, as here, that the plaintiff's writings were compiled entirely from open source materials and thus were not properly classified. The court denied the plaintiff's motion to compel the Government to provide him access to the classified version of the document, stating that "prepublication review cases can and should begin with *ex parte* and *in camera* consideration." *Id.* at 174. The court determined that plaintiff had not met his burden to show

that the document was compiled from open source material, so the court did not need to consider plaintiff's request to access classified materials.

In addition to *Boening*, Defendants' proposed approach is consistent with the D.C. Circuit's decision and the subsequent proceedings on remand before the district court in *Stillman*. At issue in the appeal was the district court's order requiring the CIA to grant Stillman's attorney access to classified information in the author's manuscript. *Stillman*, 319 F.3d at 547-48. The D.C. Circuit held, as noted above, that the district court erred in deciding a constitutional issue (whether Stillman had a First Amendment right for his attorney to receive access to classified information) when it first should have determined whether the case could be resolved on other grounds. *Id.* The D.C. Circuit set forth specific steps to be followed on remand:

> The district court should first inspect the manuscript and consider any pleadings and declarations filed by the Government, as well as any materials filed by Stillman, who describes himself an "expert in classification and declassification." The court should then determine whether it can, consistent with the protection of Stillman'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. If not, then the court should consider whether its need for such assistance outweighs the concomitant intrusion upon the Government's interest in national security. Only then should it decide whether to enter an order granting Mr. Zaid access to the manuscript and, if similarly necessary, to the Government's classified pleadings and affidavits.

Id. at 548-49 (emphasis added). The D.C. Circuit expressly stated that the remand was for the district court "to determine first whether it can resolve the classification ex parte." *Id.* at 548.

The D.C. Circuit in *Stillman* thus contemplated a several-step process in which the district court would look first to the materials provided by the Government and the plaintiff, and only if those were insufficient for its review could it consider whether other materials were necessary. On remand, the district court granted summary judgment for the government on the basis of classified affidavits reviewed *in camera* and *ex parte*. *Stillman v. CIA*, 517 F. Supp. 2d

32, 38 (D.D.C. 2007). There, the author made no classified filing, but instead the Government provided the Court with the open source documentation that he had previously submitted to the agency.

The Government's proposal follows *Stillman* by asking the Court first to consider the Government's submissions along with any filing by Plaintiff identifying unclassified open source information. Only if those submissions are insufficient for the Court to rule on Defendants' motion would it be necessary to consider allowing Plaintiff to submit any classified materials.

III. "Methods by which the parties may reach areas of agreement on how to proceed"

Defendants do not foresee a compromise that will provide Plaintiff with access to classified information or a secure government computer so that he may prepare a declaration disclosing classified information. Such an extraordinary request runs directly counter to the Executive's constitutional responsibility to control classified information. Defendants wish to make clear, however, that the Court need not, at least at this time, reach the constitutional issues raised in Plaintiff's brief. Not only can Defendants' motion to dismiss for lack of jurisdiction be considered without implicating questions of access to classified information, but the Court can also consider Defendants' *ex parte, in camera* submissions and determine that they set forth ample support for the Government's classification determinations. It could also consider unclassified submissions made by Plaintiff (following pre-filing review by Defendants) as part of that review. As in *Stillman*, only if those procedures are inadequate to resolve the classification issue would the Court need to consider whether the reasons provided for Plaintiff's demands here outweigh the Government's interests in national security.

Dated: October 28, 2011.

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