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)

REPLY TO DEFENDANT'S RESPONSE
TO PLAINTIFF'S SUPPLEMENTAL BRIEF

(ORAL ARGUMENT REQUESTED)

This case presents an important First Amendment legal challenge to the classification decisions of the defendants Defense Intelligence Agency ("DIA"), the Department of Defense ("DoD") and the Central Intelligence Agency ("CIA")(collectively referred to as "defendants") with respect to text redacted from the 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").

Plaintiff Anthony Shaffer's ("Shaffer") raised his concerns with this Court regarding his inability to respond to the defendants' Motion to Dismiss without access to an unredacted copy of his manuscript and a secure government computer, the purpose of which is to draft a sworn declaration that would address the specific redactions that dominate 225 pages of his book. The defendants have opposed these requests on the pretext that the protection of national security interests is their foremost concern. Yet their very own words that have been placed before this Court belie that notion and reveal this effort as a farce to masquerade the true purpose of securing a litigation advantage.

Nothing the defendants have argued should stand in the way of this Court exercising its own lawful authority to accommodate Shaffer's concerns and order the Government to comply.

ARGUMENT

At the outset, the defendants claim that Shaffer has requested of this Court an "extraordinary request [that] lacks legal support and, in any event, is both premature and unnecessary." Defendants' Response to Plaintiff's Supplemental Brief at 3 (filed October 28, 2011)("Defs' Memo").[1] Respectfully, Shaffer's concerns merit none of those characterizations. To the contrary, the defendants' arguments, primarily of a "shock and awe" nature, reflect an attempt to undermine the independent authority of the Judiciary when it comes to perceived national security matters and trample on the First Amendment rights of former employees who have publicly criticized and/or embarrassed the Executive Branch.[2]

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[1] The defendants argued that this Court should first rule upon their pending Motion to Dismiss for Lack of Jurisdiction before addressing Shaffer's substantive concerns or constitutional questions. Defs' Memo at 4-5. By Minute Order dated October 31, 2011, the Court directed Shaffer to submit an Opposition to the jurisdictional component of the defendants' Motion by on or before November 18, 2011, and it will be filed accordingly.

[2] There are numerous examples that can be cited, both past and present, and which should not be forgotten that demonstrate the abuses of the Executive Branch with respect to invocation of "national security". For example, former U.S. Solicitor General Erwin Griswold, who argued the government's case in the Pentagon Papers matter, later explained in a *Washington Post* editorial that "[i]t quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification, and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another." Erwin N. Griswold, *Secrets Not Worth Keeping: the Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25. Or when former Attorney General Herbert Brownell similarly complained in a 1953 letter to President Eisenhower that classification procedures were then "so broadly drawn and loosely administered as to make it possible for government officials to cover up their own mistakes and even their wrong-doing

Throughout their brief the defendants cite, to the extent any are provided for their arguments, various cases containing broad rhetorical pronouncements without any context of the situation in which they arose. Their relied upon cases primarily, for example, dealt with the invocation of the State Secrets Privilege, United States v. Reynolds, 345 U.S. 1 (1953), security clearance revocations, Dep't of the Navy v. Egan, 484 U.S. 518 (1988) and Freedom of Information Act ("FOIA") requests, Gardels v. CIA, 689 F.2d 1100 (D.C. Cir. 1982). There is very little precedent that applies to this matter, and for those few recent prepublication review cases where there is a factual resemblance Shaffer's undersigned counsel was the attorney-of-record and clarification of the defendants' mischaracterization of the proceedings is necessitated. See Declaration of Mark S. Zaid, Esq., at *passim* (dated November 7, 2011), attached at Exhibit "1".

I. REQUIRING THE DEFENDANTS TO PROVIDE SHAFFER WITH ACCESS TO HIS OWN BOOK COMPORTS WITH THE LEGAL STANDARDS ARGUED BY THE GOVERNMENT AS APPLICABLE TO THIS CASE

The defendants' explicitly argue to this Court that in order for Shaffer to prevail he "must show that the information already has been publicly released through 'an official

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under the guise of protecting national security." Letter from Attorney General Herbert Brownell to President Dwight Eisenhower (June 15, 1953), quoted in Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* 145 (2001). Even in Reynolds v. CITE, avoidance of embarrassment — not preservation of state secrets — seems to have been the primary motivation of the Executive's invocation of the privilege. There the Court credited the government's assertion that "this accident occurred to a military plane which had gone aloft to test secret electronic equipment," and that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." 345 U.S. at 10. In 1996, however, the "secret" accident report involved in that case was declassified. A review of the report revealed, not "details of any secret project the plane was involved in," but "[i]nstead, … a horror story of incompetence, bungling, and tragic error." Garry Wills, *Why the Government Can Legally Lie*, 56 N.Y. Rev. of Books 32, 33 (2009). Courts today should be concerned that the Executive Branch is attempting to undermine judicial authority and forestall any concentration of unchecked power that would permit such abuses to continue.

and documented disclosure.'" Defs' Memo at 6, citing Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990)(FOIA case). Most importantly, this can only be accomplished through "evidence of *specific*, official disclosures". Id. (emphasis added). See also id. at 8 ("Plaintiff's burden is thus to identify specific, official public disclosures of the information at issue.").

In his opening response Shaffer articulated exactly why he requires access to an unredacted copy of his book, the merits of which the defendants danced around without directly addressing. Of course, based on the defendants' posture in this matter the redacted contents of the book are "classified", notwithstanding the fact that anyone with an Internet connection has access to the "classified" information, which makes for irony indeed. In any event, rather than specifically address Shaffer's practical concern the defendants simply countered with their general view that "[u]nder 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." Defs' Memo at 8. [3]

Yet 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. One can not escape, as noted in the opening

[3] The defendants take issue with Shaffer's discussion of Judge Sullivan's factual criticism of the defendants' actions a decade ago in Stillman given the D.C. Circuit reversed his decision. Defs' Memo at 5 fn. 1. Ironically, this did not stop the defendants from themselves citing to a vacated decision because the lower court ruling supported its argument. Id. at 7 (citing vacated Horn v. Huddle decision). In any event, that the Circuit reversed Stillman on the narrow basis that a constitutional question should not have been decided if avoidable did not impact Judge Sullivan's factual observations that the defendants in Stillman sought to misuse the system by relying on national security in order to secure a litigation advantage.

brief, that without access to the original manuscript there is absolutely no way that Shaffer can present the type of "pin-point citations" the Government – including one of the defendants in this case – successfully argued to Judge Sullivan in Boening, 579 F. Supp. 2d 166, 170 (D.D.C. 2008), was necessary in order for a First Amendment challenge to be made.

Moreover, Shaffer's premise is entirely consistent with the framework established by the D.C. Circuit in McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983), where the Court ruled: "unlike FOIA cases, in cases such as this both parties know the nature of the information in question. Courts should therefore strive to benefit from 'criticism and illumination by [the] party with the actual interest in forcing disclosure.'"[4]

II. REQUIRING THE GOVERNMENT TO PROVIDE SHAFFER WITH A SECURE COMPUTER PROTECTS THE NATIONAL SECURITY INTERESTS OF THE UNITED STATES

The notion that Shaffer requires access to his unredacted manuscript, which the defendants consider classified, goes hand and glove with the premise that a secure computer system is required to draft a sworn declaration that specifically identifies and discusses the concerned text. For the former to occur obviously necessitates the latter.

[4] The defendants cite repeatedly throughout their brief to FOIA cases. But, as the D.C. Circuit made perfectly clear in McGehee, pre-publication review cases are not to be treated as FOIA cases. The very process that this Court must apply in determining the legitimacy of classification is fundamentally different. In that sense, the Ninth Circuit's rejection of a similar effort in a state secrets privilege case is apt. There the Court noted that it found "the government's resort to FOIA case law unpersuasive because the FOIA statutory framework takes for granted that 'classified' matters relating to national defense and foreign policy are, by virtue of being classified, categorically exempt from disclosures that would otherwise be required under the Act." Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 958 (9th Cir. 2009). There is no categorical exemption in pre-publication review challenges.

Shaffer agrees with the defendants that he must ultimately produce specific examples of official and documented disclosures, i.e., unclassified information, to counter any legitimate arguments proffered by the Government to justify its withholdings[5]. Yet the defendants also claim, without explaining the obvious hypocrisy, that Shaffer's "declaration therefore should be limited to this information, which by its very nature would be unclassified." Defs' Memo at 6. The defendants' logic is twisted in a circular manner that conveys a portrait of a dog perpetually chasing, and never catching, his own tail. Thus, their logic goes, "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." Id.

The ramifications of this argument are quite serious. Throughout its response the defendants remind Shaffer of his legal obligations pursuant to his "numerous nondisclosure and secrecy agreements" not to disclose classified information. Id. at 9. See also id. at 11 ("Plaintiff is not authorized to disclose classified information"). Yet the defendants invite Shaffer to prepare his declaration with "specific" citations to "classified" text on an unsecure computer, which would be connected to an open Internet connection, and simply submit it through the so-called classification review process prior to its public filing. Id. That process, of course, provides absolutely no protection for any classified information that might be even inadvertently contained within the document.

[5] This is, of course, Shaffer's burden following the defendants initial requirement that it submit to the Court its "explanations [to] justify censorship with reasonable specificity, [and] demonstrat[e] a logical connection between the deleted information and the reasons for classification. These should not rely on a 'presumption of regularity' if such rational explanations are missing." McGehee, 718 F.2d at 1149.

Amazingly, the defendants take no issue with the prospect that Shaffer would be committing a clear security violation by engaging in such conduct as "[t]he Government would otherwise redact any classified information and return the redacted document to Plaintiff for filing". Id. at 12.[6]

The defendants point to the Second Circuit's decision in Doe v. CIA, 576 F.3d 95 (2d Cir. 2009), a case litigated by Shaffer's counsel, as having presented the "very question" now being brought before this Court. Defs' Memo at 10. Indeed, the defendants posture that the Second Circuit's determination essentially answers the question posed here with its ruling that "there is no First Amendment right to access secure communications facilities or to access a classified document originally drafted by the very requestor." Id. citing Doe, 576 F.3d at 106-07. Respectfully, the defendants are disingenuous in selectively providing this Court with citations to the Second Circuit's rationale in an effort to bolster its unsupported argument.

The Doe case dealt with an invocation of the state secrets privilege and in a matter where, as a further distinguishing factor, the plaintiffs did "not contend that their claims rest on information that is already publicly available." Id. at 108. Shaffer, of course, fundamentally relies on the fact that the so-called "classified" information in his book is "publicly available" (and that is not even taking into consideration that the "classified"

[6] Even beyond the incredible notion that the defendants are protecting national security by allowing Shaffer to type a document that might contain classified information on an unsecure computer system is the assertion that even the very required open source citations that would be contained in his declaration may be deemed classified by the defendants. Defs' Memo at 12 fn. 9. Indeed, the CIA took this very action in the prepublication challenge lawsuit in Boening. Zaid Decl. at ¶15.

version of the book is available online across the world).[7] But even more importantly the Second Circuit itself concluded its decision by completely refuting the defendants' characterization of its ruling:

> Similarly, we have no occasion to address whether and to what extent the government could validly refuse to grant the plaintiffs the access they sought to discuss, view, or record classified information not properly covered by an assertion of the state-secrets privilege. *See, e.g., Mohamed, 563 F.3d at 1003* (rejecting government's argument that "state secrets form the subject matter of a lawsuit, and therefore require dismissal, any time a complaint contains allegations, the truth or falsity of which has been classified as secret by a government official"). We therefore reach, and intimate our views on, neither issue.

Id. at 108. There is simply no mistaking the limited and narrow scope of the Second Circuit's ruling and the inapplicability of it to this case.

III. THIS COURT HAS THE LEGAL AUTHORITY TO ORDER THE DEFENDANTS TO COMPLY WITH SHAFFER'S REQUESTS AS A MATTER OF JUDICIAL DISCRETION WITHOUT CONFRONTING CONSTITUTIONAL QUESTIONS

The defendants, as is customary, love to hold out to courts the notion that even allowing one additional person access to allegedly classified information, or, as in this case, the prospect of having Shaffer provide an *in camera* sworn declaration to the Court that could conceivably contain classified information for the purposes of demonstrating the fact it is actually not classified, would create unacceptable risks.

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[7] Thus, this Court will at some point be confronted by aspects of the situation faced in United States v. Rosen, 445 F. Supp. 2d 602, 621 (E.D.V.A. 2006) where it was considered the extent to which the confirmation of publicly available information relating to classified information will constitute a disclosure of that specific information. As the Fourth Circuit noted, "one may imagine situations in which information has been so widely circulated and is so generally believed to be true, that confirmation by one in a position to know would add nothing to its weight." Knopf, 509 F.2d at 1370-71. Meaning, no harm will befall the United States by the publication, or confirmation, of the information in question.

> 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 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).

Of course, when thrusting this dicta to modern courts the defendants never complete the original Fourth Circuit quote which explained why the Court was so concerned: "In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have." Id. It is not the 1970s any longer. Back then courts were not familiar or comfortable with handling classified information. It is, especially in this district, a routine matter nowadays. See e.g., Doe v. Rumsfeld, 2011 U.S. Dist. LEXIS 85014 (D.D.C. August 2, 2011)("courts regularly handle sensitive information"). See also Al Odah et al. v. United States, 346 F. Supp. 2d 1 (D.D.C. 2004)(creating procedures in civil habeas cases for counsel's access to classified information).

Furthermore, the D.C. Circuit in Halkins was faced with a completely different situation than presented by Shaffer to this Court, particularly because it was adjudicating an invocation of the state secrets privilege.

> A ranking of the various privileges recognized in our courts would be a delicate undertaking at best, but it is quite clear that the privilege to protect state secrets must head the list. The state secrets privilege is absolute. However helpful to the court the informed advocacy of the plaintiffs' counsel may be, we must be especially careful not to order any dissemination of information asserted to be privileged state secrets.

Halkin, 598 F.2d at 15. Cf. McGehee, 718 F.2d at 1149 ("Courts should therefore strive to benefit from 'criticism and illumination by [the] party with the actual interest in forcing disclosure'").

There should be no mistake that this Court possesses absolute authority to control how information is accessed and presented to it, and that includes ordering the defendants to permit Shaffer to use a secure computer system and review his unredacted manuscript to draft a sworn declaration that the Government would consider to be classified. This is not necessarily a constitutional issue. It can, instead, be treated as a function of discretionary authority exercised by this Court as to how routine briefing procedures before it are handled. See In re Sealed Case, 494 F.3d 139, 154 (D.C. Cir. 2007)("nothing in this opinion forecloses a determination by the district court that some of the protective measures in CIPA, 18 U.S.C. app. III, which applies in criminal cases, would be appropriate … so that his case could proceed")(State Secrets case). See also Webster v. Doe, 486 U.S. 592 (1988)("District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof that would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission").

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

clearly evidencing the Court's role in those determinations. See In Re: Guantanamo Bay Detainee Litigation, 577 F. Supp. 2d 143 (D.D.C. 2008).

CONCLUSION

Based on the foregoing, this Court should respectfully grant Shaffer's requested relief.

Dated: November 7, 2011.

Respectfully submitted,

/s/

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