

Silencing Whistleblowers: First Amendment Right of Former Intelligence Officer to Publish Afghan War Memoir, DoJ Asks Judge to End Lawsuit

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The Justice Department has asked a federal judge to conclude that a former Defense Intelligence Agency officer “has no First Amendment right to publish the information at issue” in a memoir he penned at on his service in the war in Afghanistan. They maintain information the officer wants to publish is “properly classified” and the government is “entitled to substantial deference” that its publication would result in harm from disclosure.

*The case involves Lt. Col. Anthony Shaffer, an officer with twenty-five years of field experience, who wrote *Operation Dark Heart: Spycraft and Special Ops on the Frontlines of Afghanistan and the Path to Victory*.*

✘ Shaffer describes the book in a 33-page unclassified affidavit as a “direct, detailed, eyewitness account of the 2003 ‘tipping-point’ of the war in Afghanistan.” The book “provides an unemotional examination of the events and decisions where mistakes were made in strategy,” and recommends an alternative to the failed strategy of counterinsurgency. It also “details protected disclosures” Shaffer “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.”

The Pentagon spent \$50,000 in late September 2010 to buy and destroy 9,500 copies of the first edition of his book from Shaffer’s publisher, St. Martin’s Press on the basis it would “threaten” national security. On September 24, the publisher went ahead with publishing a second edition with redactions from Defense Department meetings. “Approximately 250 pages out of 320 pages of *Operation Dark Heart*,” according to Shaffer, “were required to contain redactions in order to allegedly prevent the disclosure of classified information.”

Sales of the book “suffered greatly from the heavy handed government redactions” of information, which Shaffer maintains was not and is still not classified.

In fact, it is important to note that on December 26, 2009, a staff judge advocate in his division at the US Army Reserve Center in Fort Lee, Virginia, reviewed his memoir and stated it was “his understanding” Shaffer had only used “unclassified information and open sources” in his memoir.

He has been attempting to have his book published in unredacted form and in foreign languages ever since. However, the Defense Department has been fighting him on publication, which is why in February 2012 he filed a lawsuit alleging the Central Intelligence Agency, Defense Intelligence Agency and Defense Department had unlawfully required him

to redact information from his book. He also complained that he intended 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.” He added the agencies were interfering with his ability to demonstrate to the Court that the information was unclassified.

Shaffer drafted the affidavit to challenge the agencies’ classification determinations, but notes a key dilemma that the agencies have created to make it difficult to challenge their determinations:

...While the defendants will assert that I need to be specific with unclassified pinpoint citations when I address every sentence or even a single word that has been held by the government to be classified, it has refused to permit me access to an unredacted copy of my own book. Therefore, there will be many instances where I simply cannot be specific because I have absolutely no recollection of what might be redacted from, for example, page 192, line four. I will do my best under the circumstances but clearly this is designed to hamper my ability to present the Court with as much information as possible to enable an informed decision...

Previously, he has been granted access to an unredacted copy of his book four times, but now that the Court needs details he asserts the agencies are denying him “full and unfettered access” to a copy of his book that has not been censored.

According to a letter he sent the Defense Department on disputes he is having in pre-publication review on January 18, 2013, the Defense Department continues to maintain the censorship of his book in August 2010 was necessary and acceptable. The Department also contends a “primary reference and foundation” for his book, his Bronze Star Medal award and nomination narrative, should be subject to censorship, which he argues is a violation of his First Amendment rights since the document is unclassified.

“The government now contends, nearly ten years after the fact,” that the award is “classified.” He adds that an unclassified letter shows he was attached to a certain Task Force but against his will they are making him change it to Task Force 1099.

The agencies also will not allow him to use Defense Department cleared testimony, which he “delivered to Congress in February 2006 that is public information” that he wishes to include in the book’s chapter on ABLE DANGER.

Shaffer also received a memo from the Defense Department on January 18, 2013, that read:

To avoid public disclosure of classified information, we remind you that all paper and electronic copies of classified documents that might be in your possession, such as the unredacted manuscript, the Bronze Star Medal narrative and your deployment orders to Afghanistan, must be destroyed.

In response, Shaffer writes, “Once provided to me as an unclassified document by DIA authorities, I used them as the starting point of my book. In my judgment, the defendant now is trying to ‘change the rules’ to benefit them and their efforts to continue their retaliation against me and prevent me from telling the complete story of my experiences and successes in Afghanistan.”

He sums up what he has been experiencing:

For whatever relevance it is worth, it is my belief that DIA engaged in a deliberate effort in 2010 to render my book *Operation Dark Heart* unreadable through abuse of the classification system. This was part of a continuing retaliatory behavior that started in 2005 when I first made protected disclosures to the DoD Office of Inspector General and Congressional oversight committees concerning DIA and its leadership's failures to act on pre-9/11 intelligence regarding the al Qaeda hijackers.

On November 2, 2012, US District Judge Rosemary M. Collyer ruled that Shaffer had "standing to seek relief" because he has a "First Amendment interest in his book." The agencies had argued he did not have the rights to publishing editions of his book in different languages in countries around the world because of a contract he had entered into with St. Martin's Press but that was a baseless argument aimed at getting the lawsuit thrown out.

The judge concluded Shaffer had "professed" an "intent to publish an unredacted version of his book beyond the confines of his publishing contracts." He would like to publish the book as "originally approved by the Army. There is no doubt that the Defendant Agencies are preventing him from doing so," Collyer noted.

Similar to [prior instances of disputes](#) with prepublication review boards, it is clear Shaffer is experiencing retaliation for the information he wants to share. The FBI fought the publication of FBI whistleblower Sibel Edmonds' book, *Classified Woman*, for well over a year, even though they were supposed to approve or disapprove of the book in 30 days or less. (It was finally published a few months after.)

Another example of the government using prepublication review to [suppress embarrassing information](#) is the case of former CIA officer Kevin M. Shipp. He wanted to publish a memoir on Camp Stanley, "an Army weapons depot just north of San Antonio where the drinking water was polluted with toxic chemicals." He sued in 2001 and the CIA invoked the "state secrets privilege." The judge sealed the case. The family and their lawyers were ordered to not discuss the lawsuit and it was dismissed. His memoir, after review, was returned to him with "blacked out swaths of information" that included "accounts of his children's nosebleeds, strange rashes, vomiting, severe asthma and memory loss."

In 2007, the CIA [refused](#) in to let Valerie Plame publish information from an "unclassified letter to Ms. Wilson" that had been published in the congressional record in her memoir. In March 2006, the CIA [deleted sections](#) of CIA officer TJ Waters' memoir after initially approving it, a move that he considered a violation of his First Amendment rights.

Peter Van Buren, former State Department employee, wrote a book critical of the State Department's reconstruction effort in Iraq. The book, *We Meant Well: How I Helped Lose the Battle for the Hearts and Minds of the Iraqi People*, was published in 2011 after the State Department cleared Van Buren's book. Though it had not technically issued a review, it had been nearly a year since a 30-day deadline had expired.

According to the Government Accountability Project's Jesselyn Radack, the State Department [proceeded](#) to "actively monitor" Van Buren's "blogs, tweets and Facebook updates" that he was posting "during his private time on his personal home computer." They began to review his blogs and live media appearances, which were done on his

personal time, in order to punish him for publishing the book.

Shaffer's lawsuit is an effort to challenge the national security state's efforts to silence whistleblowers. Prevailing would not only affirm First Amendment protections for government employees, who wish to share their experiences in government with the public. It would also check the power of national security agencies to retaliate against truth-tellers.

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