

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

ANTHONY SHAFFER

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Plaintiff,

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v.

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Civil Action No: 10-2119 (RMC)

DEFENSE INTELLIGENCE AGENCY  
et al.

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Defendants.

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**OPPOSITION TO DEFENDANTS’ MOTION TO  
CONTINUE STATUS CONFERENCE AND SET BRIEFING SCHEDULE**

The parties last appeared before the Court on January 30, 2013 at which time there began a discussion of substantive issues associated with the Joint Rule 16 Report (filed January 23, 2013). In light of the arguments raised specifically by the defendants, as well as due to scheduling issues for the Court, the parties were unable to conclude their discussion and a follow-up Status Conference was scheduled for February 8, 2013. The defendants now seek to vacate or reschedule that Status Conference without resolution and/or clarification of the issues. The plaintiff opposes the request to vacate or reschedule the Status Conference and respectfully requests that the Court maintain the current calendar so that further discussion can occur and a complete briefing schedule can be set at that time.

The parties agree that there are serious and sensitive Constitutional matters at issue, which is all the more reason that the parties and the Court are clear on what will be addressed. The Defendants now claim they “are being asked to respond to requests that the Plaintiff has not fully explained. For example, the Plaintiff has indicated that ‘it is necessary to seek specific relief from the Court to permit his counsel . . . to utilize and analyze publicly available information relating to the manuscript,’ see Dkt. 50 at 2, but he does not explain what that ‘specific relief’ would entail.” Defendants’ Motion to

Continue Status Conference and Set Briefing Schedule at 2 (filed February 4, 2013)(“Defs’ Mot.”). Yet this very issue was the subject of discussion at the last Status Conference and, indeed, the Court itself engaged in an explanatory colloquy with defendant’s counsel on exactly the relief sought by the Plaintiff on this specific matter. Nevertheless, if there remains confusion on the part of the defendants the answer is not further delay but that open court discussion should occur to ensure clarification is obtained.

Additionally, the defendants now seek to delay its briefing on Summary Judgment during the pendency of the Court’s consideration of the procedural issues. *Id.* at 3 fn.3. The impact of the procedural briefing is solely on the plaintiff and his counsel’s ability to respond to the Defendants’ forthcoming Motion. It will have no impact on the defendant’s ability to file its Motion for Summary Judgment and the Government’s original proposed date should be adopted.

The defendants request a “continuance of the scheduling conference to allow additional time for counsel to consult with the client agencies and others potentially affected by a ruling on these matters.” *Id.* at 4. Respectfully, this case has been pending for a long time. It was filed in December 2010 and addresses one of the most important Constitutional rights we have in this country: the First Amendment (hence, obviously the reason why the Founding Framers placed it first). These issues, as admitted by the defendants, are not new to the Government as aspects were actually previously briefed. *Id.* at 2 fn. 1. Additionally, the parties spent *weeks* negotiating and discussing the contents of the Joint Rule 16 Report, which was then followed by the Status Conference on January 30, 2013. There have been no surprises. There has to come a time when the Government is finally required to decide on what it wants to do so that the plaintiff and his First Amendment rights are no longer trampled. The time should be now.

It is well settled by courts throughout the United States that expedited attention should be given to cases involving First Amendment interests. *See e.g.*,

Action for Children's Television v. FCC, 59 F.3d 1249, 1259 (D.C. Cir. 1995) (finding that "possibility that the agency's actions might similarly run afoul of the first amendment demands prompt judicial scrutiny") cert. denied, 116 S.Ct. 773 (1996); Bernard v. Gulf Oil Co., 619 F.2d 495, 470 (5th Cir. 1980)("Fragile First Amendments rights are often lost or prejudiced by delay....Court have therefore been commendably willing to expedite proceedings involving First Amendment right."), aff'd, 452 U.S. 89 (1981); National Student Ass'n v. Hershey, 412 F.2d 1103, 1115 (D.C. Cir. 1969)(recognizing "urgency of prompt protection for frail First Amendment interests"); Potwora v. Dillon, 386 F.2d 7, 76 (2d Cir. 1967)(hearing case on expedited basis "[i]n light of plaintiffs' representation that the order deprived them of important First Amendment rights").<sup>1</sup>

Courts have shown little to no tolerance for any attempt to inhibit free expression that does not permit a prompt administrative and/or judicial review of the efforts to repress speech. Indeed, the Supreme Court has held that there exists a "constitutional need to avoid 'undue delay result[ing] in the unconstitutional suppression of protected speech.'" City of Littleton v. Z. J. Gifts D-4, L.L.C., 541 U.S. 774, 782 (2004), quoting FW/PBS, Inc. v. Dallas, 493 U.S. 215, 228 (1990). See also Freedman v. State of Maryland, 380 U.S. 51, 59-60 (1965)(providing mechanism for prompt review is necessary to avoid offending constitutional protections); Collin v. Smith, 578 F.2d 1197, 1209 (7th Cir. 1978)("We have endeavored to expedite decision, because to delay the exercise of First Amendment rights in itself burdens them and may risk their destruction."); Quarter Action Group v. Hickel, 421 F.2d 1111, 1116 (D.C. Cir. 1969)(noting "any delay in the

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<sup>1</sup> See also Auvil v. CBS "60 Minutes", 800 F. Supp. 928, 937 (E.D. Wash. 1992)("The public interest is best served by expeditious disposition of cases raising First Amendment issues."); Collin v. Smith, 447 F. Supp. 676, 680 (N.D. Ill. 1978)(ordering "trial on an expedited schedule in view of the compelling national interest in prompt resolution of cases implicating First Amendment freedoms"); American Camping Ass'n v. Whalen, 465 F. Supp. 327, 330 (S.D.N.Y. 1978)(finding a "prompt trial on the merits is required" with First Amendment rights at stake).

exercise of First Amendment rights constitutes an irreparable injury to those seeking such exercise”)(citation omitted).

The plaintiff wishes to exercise his First Amendment rights and do so in a timely manner. That has been an accepted legal right for over 200 years. Therefore, the plaintiff respectfully requests the Status Conference be held as presently scheduled to allow for the resolution and/or clarification of the pending issues and to set a formal briefing schedule.

Date: February 4, 2013

Respectfully submitted,

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