

absent from the FBI's opposition is any discussion of the fact that the FBI's own review confirmed that at least 90 percent of the manuscript is based on public domain information. Given the complete absence of controverting evidence, the record is now clear, in regard to the manuscript and as well as Plaintiffs' other submissions, that Plaintiffs' First Amendment rights have been violated. Summary judgment in favor of Plaintiffs' should be granted now.¹

II. SA Wright Is Entitled to Summary Judgment As the Vast Majority of the *Fatal Betrayals* Manuscript Is In the Public Domain.

As discussed in Plaintiffs' renewed cross motion for summary judgment, the record is now clear that, at a minimum, the overwhelming majority of the SA Wright's manuscript is based on public sources. In response, the FBI essentially ignores the elephant in room, never addressing the significance of its own review of the manuscript. The FBI argues that it is actually Plaintiffs that have "failed to demonstrate that the FBI is withholding information in the public domain." Defs.' Opp. at 3. This argument is entirely misplaced.

As an initial matter, the FBI mistakenly states that Plaintiffs "make no attempt" to address the proper allocations of the burden of proof. Defs.' Opp. at 4. As is readily apparent in their memorandum (p. 10), however, Plaintiffs discuss *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983), and how it holds that an initial burden rests with the agency to "justify censorship with reasonable specificity," and only then does the burden shift to an employee to demonstrate that

¹ The FBI makes numerous misstatements regarding whether Plaintiffs responded to specific arguments and other alleged omissions. Among these is the FBI's erroneous statement in its "Response to Plaintiffs' Rule 7(h) Supplemental Statement of Material Facts Not in Dispute" that Plaintiffs' did not submit a response to the FBI's supplemental statement of facts. A more careful review of the docket by the FBI (Wright Dkt. No. 88; Vincent Dkt. No. 69) would have revealed Plaintiffs' properly filed oppositions to the FBI's supplemental statement of facts.

the material is in the public domain. *Id.* at 10 (citing *McGehee* at 1148-49). Inexplicably, the FBI asks the Court to ignore *McGehee* (and this Court's July 31, 2006 opinion in this case) and create new law, in effect liberating the agency from its duty to justify its actions with reasonable specificity.

The FBI undoubtedly seeks to escape this duty under *McGehee* because it has not done what this Court ordered and what was required to by its own internal regulations – a detailed review of all Plaintiffs' submissions, by line and paragraph, justifying the need for censorship.² Despite numerous opportunities, the FBI has not produced any detailed affidavits explaining with "reasonable specificity" the "logical connection" between the deleted information and the reasons for censorship of any of Plaintiffs' submissions. *McGehee*, 718 F.2d at 1148-49. In fact, the only evidence submitted by the FBI after this Court's July 31, 2006 Order, the "Declaration of David Hardy," confirms SA Wright's attestation that the manuscript is based on material in the public domain. Likewise, the FBI has provided no evidence to support its contention that Plaintiffs' *New York Times* interview answers or other submissions are not in the public domain. Mem Op. at 21 ("Again, although the Government contests that the information it censored was in the public domain, it provides little support for its argument.")³ This complete absence of controverting evidence more than justifies entry of summary judgment against the FBI. *Sweats*

² It clearly is not beyond the capabilities of the FBI to do a detailed review by line and paragraph, as just such a review was done in 2001 when the FBI approved 82 percent of the manuscript for publication.

³ Notably, the FBI does not attempt to rebut Plaintiffs' point that the Bainbridge and Ferguson letters, submitted *in camera* in support of the FBI's initial summary judgment motion, are not proper evidence as they are unsworn. Interestingly, the FBI did not seek to remedy this by having these officials execute affidavits or otherwise provide evidence upon which the Court might rely.

Fashions, Inc. v. Pannill Knitting Co, Inc., 833 F.2d 1560, 1563 (Fed. Cir. 1987) (“The burden on the moving party may be discharged by ‘showing’ – that is pointing out to the [Court] – that there is an absence of evidence to support the non-moving party’s case.”) (quoting *Celotex Corp.*, 477 U.S. 317).

In regard to the remaining 80 endnotes, as explained in Plaintiffs’ cross-motion, the only evidence in the record – the sworn declaration of SA Wright – attests that public sources exist for these endnotes. The FBI’s failure to establish a “nexus” for the 80 endnotes – and its obstinate refusal to even agree to review public source documentation offered by SA Wright⁴ – means that no information is in record indicating anything other than that the 80 endnotes are based on public sources.

III. The FBI’s Contention That Even Public Domain Information May Be Censored Must Be Rejected.

In light of its own finding that at least the vast majority of the manuscript is in the public domain, the FBI asserts that even information in the public domain may be censored if it somehow relates to grand jury information, ongoing investigations, sensitive law enforcement techniques, or even the local rules of the Northern District of Illinois. Defs.’ Renewed Opp. at 7-9.

The FBI ignores the “salient” question, however, as to how the Court can overlook that “[t]here is no case, from the Supreme Court or our Circuit, not has the Government cited any,

⁴ The “offer” in the FBI’s brief to review source documentation regarding 80 remaining endnotes comes four and one half months after SA Wright himself made such an offer. The FBI’s refusal to even respond to SA Wright’s proposal was another transparent attempt at delay and should not be countenanced by the Court.

holding that information in the public domain may be censored.” Mem. Op. at 19 (citations omitted). Even if the government could somehow censor information already in the public domain, it would still have to justify with “reasonable specificity” the specific facts which, if disclosed, would cause harm. Here, the FBI has submitted no “detailed affidavits” regarding, for example, what information relating to specific law enforcement techniques is in the public domain but still cannot be discussed by Plaintiffs or simply redacted from the submissions. Similarly, the FBI has not demonstrated how any specific material in Plaintiffs’ submissions may cause a “serious and imminent threat” to the fairness of an adjudicative process under the local rules of the Northern District of Illinois. Defs.’ Opp. at 8.

Instead, the FBI continues to rely solely on conclusory and unsworn allegations (as it did in its prior summary judgment motion) that some grand jury or investigative or other non-specific – and public domain – information might be revealed and cause unspecified harm. It is precisely this kind of blanket censorship that the controlling case law, the FBI’s own regulations, and the First Amendment, prohibit.

Finally, the FBI offers a novel argument that Plaintiffs can only release public domain information if it was the “product of an official government release of information.” Defs.’ Opp. at 8. Without offering any basis for how this alleged requirement can possibly be relevant to these cases, it is clear that such a rule, if it existed, would essentially foreclose any government employee from speaking in public unless the employee is reading an approved script provided by the government. Again, the FBI’s own arguments reveal that its intent is to squelch its employees’ right to speak.

IV. The FBI's Request for a Stay Is A Transparent Attempt At Further Delay and Should Be Denied.

Despite the end of the *Marzook* trial, the FBI clings to its request that these cases be stayed. The FBI speculates – but offers no evidence – that, even though the trial is complete, some post-trial or appellate proceedings may yet be affected by publication of the manuscript. The FBI fails to note, however, that there will be no appellate proceedings or any new trial on the primary terrorism-related count (RICO), as the defendants in the case were acquitted on these charges.⁵ Hence, the possibility that publication of the manuscript could yet “potentially impact the fairness of a significant anti-terrorism criminal trial” (Defs. Renewed Mot. at 15) is virtually nil. In any event, the FBI submitted no evidence demonstrating with “reasonable specificity” that any particular fact, in the public domain or otherwise, conceivably could impact any remaining proceedings in the criminal case. Accordingly, the FBI’s motion for a stay must be rejected.

V. Plaintiffs Are Entitled to Judgments Regarding the Previously-Approved Portions of Their Submissions.

On top of the FBI’s stunning admission, after nearly five years of litigation that the vast majority of SA Wright’s manuscript is based on information in the public domain, is the FBI’s undisputed and inexcusable series of reversals and delays in their handling of Plaintiffs’ submissions. Plaintiffs’ ask that summary judgment be entered in their favor regarding this clear violation of their First Amendment rights.

⁵ Defendants were convicted on an obstruction of justice charge based on their answers to interrogatories in a civil case. *See Chicago Tribune*, “Two Found Not Guilty of Supporting Hamas,” February 2, 2007; most recent docket entries (3 pages); Copy of Defendant Salah’s Post-Trial Motions, filed March 5, 2007).

In response, the FBI makes the specious argument that this Court now lacks jurisdiction to rule on previously-approved portions of Plaintiffs' submissions. Whether or not Plaintiffs' claims for injunctive relief arguably are moot, Plaintiffs' claims for a declaratory judgment and an award of attorneys' fees maintains these cases as live controversies. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env'tl. Services, Inc.*, 528 U.S. 167, 174 (2000) (“[a] defendant’s voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case.”); *see also Boag v. MacDougall*, 454 U.S. 364, 364 (1982) (transfer to another prison did not moot prisoner’s damages claim arising from his allegedly being placed in solitary confinement without notice or hearing); *Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35, 41 (3d Cir. 1985) (“The availability of damages or other monetary relief almost always avoids mootness. . . .”).

The test for mootness comprises two requirements: (1) there is “no reasonable expectation . . . that the alleged violation will recur,” and (2) “interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *County of Los Angeles v. Davis*, 440 U.S. 625, 632 (1979). In this case, the FBI has offered no evidence to establish a “reasonable expectation” that it will not employ the same tactics of reversals and delay in the future. Secondly, the FBI has not “completely and irrevocably eradicated the effects” of its violation of Plaintiffs’ rights. The FBI has subjected Plaintiffs to a maddening series of reversals and delays regarding all portions of their submissions, and there is no evidence that this brazen behavior will not continue. Certainly, the FBI’s continuing refusal to grant permission to publish the other portions of the manuscript – which it even admits are in the public domain – strongly indicates that the same violation may recur as it is ongoing now. Accordingly,

Plaintiffs' are entitled to a declaratory judgment that their First Amendment rights have been violated and an award of attorneys' fees.

CONCLUSION

For the reasons set forth above, and those set forth in Plaintiffs' prior cross motions for summary judgment, Plaintiffs respectfully request that their renewed cross motions for summary judgment be granted.

Respectfully submitted,

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