

THOMAS DRAKE: THE UNCLASSIFIED DOCUMENTS THE GOVERNMENT WANTS TO CLAIM WERE CLASSIFIED

Jane Mayer, who did such crucial work showing how the Bush Administration chose torture in preference to a more effective, legal interrogation approach, now does similar work explaining that a similar choice of an illegal and ineffective approach over a legal one lies behind the Thomas Drake leak.

As she describes—relying largely on interviews with Thomas Drake, former Congressional staffer Diane Roark, and others with ties to the issue—that Drake and others were targeted because they championed a program called ThinThread over the expensive and ineffective SAIC version, Trailblazer. Both were data mining programs, but ThinThread automatically encrypted US person data. Trailblazer did not, probably deliberately so. Between championing the wrong (but probably more effective) program, and submitting an Inspector General's complaint about Trailblazer in 2002, Drake, Roark, and the others were targeted as potential leakers of the warrantless wiretap program.

Ultimately, in an effort to pressure Drake to testify falsely against the others and using evidence collected ostensibly in search of leads on the warrantless wiretap case, they cobbled together a charge based on five documents of disputed classification.

For four months, Drake continued cooperating. He admitted that he had given Gorman information that he had cut and pasted from secret documents, but stressed that he had not included

anything classified. He acknowledged sending Gorman hundreds of e-mails. Then, in April, 2008, the F.B.I. told him that someone important wanted to meet with him, at a secure building in Calverton, Maryland. Drake agreed to the appointment. Soon after he showed up, he says, Steven Tyrrell, the prosecutor, walked in and told him, "You're screwed, Mr. Drake. We have enough evidence to put you away for most of the rest of your natural life."

Prosecutors informed Drake that they had found classified documents in the boxes in his basement—the indictment cites three—and discovered two more in his e-mail archive. They also accused him of shredding other documents, and of deleting e-mails in the months before he was raided, in an attempt to obstruct justice. Further, they said that he had lied when he told federal agents that he hadn't given Gorman classified information.

"They had made me into an enemy of the state just by saying I was," Drake says. **The boxes in his basement contained copies of some of the less sensitive material that he had procured for the Inspector General's Trailblazer investigation. The Inspector General's Web site directs complainants to keep copies. Drake says that if the boxes did, in fact, contain classified documents he didn't realize it. (The indictment emphasizes that he "willfully" retained documents.) The two documents that the government says it extracted from his e-mail archive were even less sensitive, Drake says. Both pertained to a successor to Trailblazer, code-named Turbulence. One document listed a schedule of meetings about Turbulence. It was marked "unclassified/for official use only" and**

posted on the N.S.A.'s internal Web site. The government has since argued that the schedule should have been classified, and that Drake should have known this. The other document, which touted the success of Turbulence, was officially declassified in July, 2010, three months after Drake was indicted.

In other words, after targeting Drake in the warrantless wiretap leak but not having any evidence to make a case, they charged him with espionage for having followed protocol on submitting an Inspector General complaint and keeping one email marked unclassified and another that has since been declassified. For that they want to send him to prison for 35 years.

As I laid out the other day, the government is claiming it can treat the parts of these five documents that even its expert has determined to be unclassified as they would treat classified information in CIPA.

In other words, it seems the defense planned to (and did not object to the evidence in the binder based on that plan) to cross-examine [the government's expert] on the substance of her decisions about what was and was not classified in the documents Drake is alleged to have illegally retained and copied. It goes to the heart of the case against Drake. But the government wants to hinder the defense efforts by making sure that even things Murray decided were unclassified can't be revealed in raw form to the jury.

And of course, as Drake points out in his interview with Mayer, the bigger thing the government is trying to hide is the cheaper, more effective program that preserved privacy rights they ignored in favor of the illegal wiretap program.

There's lots more in the story—including Michael Hayden explaining to Roark that the government chose not to protect Americans' privacy in the warrantless program because they "had the power" not to.

She asked Hayden why the N.S.A. had chosen not to include privacy protections for Americans. She says that he "kept not answering. Finally, he mumbled, and looked down, and said, 'We didn't need them. We had the power.' He didn't even look me in the eye. I was flabbergasted." She asked him directly if the government was getting warrants for domestic surveillance, and he admitted that it was not.

Go read the whole thing.