

IN THOMAS DRAKE CASE, PROTECTED DOESN'T MEAN PROTECTED

Earlier today, we learned that (thanks to Antonin Scalia) the word “suspicion” no longer means what it used to mean.

Now we learn that “protected” doesn’t mean what it used to mean.

As Josh Gerstein reports, the judge in the Thomas Drake case has agreed to let the government protect unclassified information using the Classified Information Procedures Act. But as Drake’s lawyers make clear, the process of substitution is making unclassified information look classified.

Defense lawyers contend the prosecutions proposed substitutions would be obvious to jurors, despite Bennett’s ruling that they they should be “seamless.”

Prosecutors say some of the changes will be seamless but others cannot be because they pertain to handwritten notes that can’t be modified without jurors noticing.

Defense lawyers also say that if jurors are aware of the changes, they’ll conclude that the information Drake is accused of mishandling is worthy of being treated as national secrets. “This will signal to the jury that the Court and the government believe information in the document was so potentially damaging to national security that it had to be withheld from the public – the very fact they must decide,” defense attorney Deborah Boardman wrote in a filing Monday.

Most interesting, though, is the Defense observation that one of the documents the government will introduce at trial defines “protected” differently than the government is defining it to claim it must be substituted under CIPA.

The defense has briefed its position on the Court’s decision to impose substitutions for relevant, unclassified information that the government deems “protected,” and we will not reiterate our arguments here. However, we thought the Court should be aware of the fact that NSA, in its employee Security Agreements, defines the term “protected information” in the following manner: “information obtained as a result of my relationship with NSA which is classified or in the process of a classification determination pursuant to the standards of the Executive Order 12958.” Thus, according to an NSA document, which will be a government exhibit in this case, “protected information” is “classified” information. However, the government has led the Court to believe that “protected information” is unclassified information that NSA claims deserves protection. NSA cannot have it both ways. [my emphasis]

That might make sense if language worked the way it’s supposed to. But it appears we’ve entered that stage of late Empire where words don’t mean what they used to mean anymore.