

THOMAS DRAKE'S PUBLIC DOMAIN MOTION

There's something else that has been going on as the case against Thomas Drake has gotten narrowed because the government withdrew some of its exhibits. Drake's lawyers have been arguing that some of this information—and, I believe, some of the information that subsequently got withdrawn—has already been discussed by government officials.

I noted this filing the other day. It basically challenged the government's claim that this information was "closely held" by pointing out that NSA itself, the Director of National Intelligence, Congress, DOJ, and "the White House" had already introduced the information the government accuses Drake of leaking into the public domain.

In his memorandum, Mr. Drake submitted evidence that information found in the documents in his home and considered classified by the National Security Agency is not "closely held." Indeed, the evidence shows that the allegedly classified information has been officially released and discussed by numerous agencies and officials of the United States government, including NSA, the Director of National Intelligence, the United States Congress, the Department of Justice, and the White House. This "public domain" evidence was provided to the Court in response to the Court's request during the Section 6(c) hearing. During the hearing, counsel represented that the defense will introduce evidence that some of the allegedly classified information found in the documents charged in the Indictment can be found in the public domain.

But there's another key detail in this passage: it describes this information as "information found in the documents in his home and considered classified by the National Security Agency."

While this is quite vague, I think it may suggest that the information in question consisted of the three documents from the box in Drake's basement which he retained as part of his Inspector General complaint. I say that because the NSA no longer considers the emails he allegedly kept classified, and because the documents physically in Drake's home were the ones in the box in his basement.

And that's potentially significant because those appear to be the documents that Ellen Nakashima appears to confirm are the same ones the government has withdrawn in full or in part.

So if I'm right, it means the following happened:

June 2: Drake's team warns it will introduce that entities including the DNI and the White House introduced the charged information into the public domain already

June 2: On the same day Drake's team says it will show the information is already in the public domain, it also submits a sealed document with 8 exhibits

June 3: Judge Bennett rules that the government has to provide more explicit descriptions of the technology in question to allow Drake to defend himself

June 5: The Government announced it was withdrawing a series of documents, including (if I understand Nakashima correctly) two of the charged documents

June 7: Judge Bennett makes an additional ruling on admissibility of

classified information

June 7: Drake's team submits another sealed document

June 8: Government files response to June 2 sealed document with 8 exhibits

June 8: Drake's team modifies the June 7 sealed document

Now, obviously, we can't read anything into all this sealed discussion. Some of it may be a response to the government's withdrawal of several documents. Some of it may relate to entirely unrelated pre-trial issues (mixed in here is also a sealed Drake subpoena).

But I wonder whether Drake didn't submit exhibits proving his point—that the White House, DNI, and others had already discussed some of this information on June 2. And I'm wondering whether one of the government's concerns, here, is that Drake will show the extent to which this discussion already happened.

Recall that the reason the AIPAC trial got dismissed—which in the way it used the Espionage Act resembles this one—was because the defendants were going to subpoena people like Condi Rice to show they were already leaking the charged information. The only hint Drake might have subpoenaed one of these people is the sealed subpoena. But by focusing attention on the public statements of top officials (I suspect these would have occurred in the context of the FISA Amendments Act debate), Drake would not only do serious damage to the government's case, but also focus attention on precisely what the government claims is so secret.

Perhaps just as importantly, it would demonstrate the degree to which the government selectively prosecutes only some leakers.

In any case, if any of this is accurate (and it's very speculative at this point), it may suggest that one reason the government wanted to withdraw these documents was because it would

neutralize Drake's public domain arguments.