

DID THOMAS DRAKE GET IJUSTICE?

There's an interesting discussion at the end of Josh Gerstein's article on the Drake plea agreement. He points out that after Judge Bennett ruled that the government needed more descriptive substitutions for some of its exhibits, DOJ did not appeal the decision.

Experts said it was unlikely that Bennett's rulings accounted entirely for the government's sudden willingness to accept a sharply reduced charge. In a court filing Friday, prosecutors said "the government respectfully disagrees with the Court's rulings" regarding what information Drake was entitled to use in his defense.

"In light of the Court's ruling, which would mean that highly classified information would appear, without substitution, in exhibits made publicly available, the NSA has concluded that such disclosure would harm national security," prosecutors wrote.

In cases involving classified evidence, the government has the right to pursue a pre-trial appeal challenging a judge's rulings about what evidence the defense can present and any "substitutions" used to camouflage secret information.

Despite its disagreement with Bennett, who was appointed to the bench by Bush, the Justice Department did not challenge the judge's rulings and instead commenced jury selection for the trial.

He also describes Jesselyn Radack, who in her role at Government Accountability Project, had supported Drake in his whistleblower stance, saying,

Radack told reporters that when [prosecutor William] Welch initiated plea talks a week ago he said he was doing so at [DOJ Criminal Division head Lanny] Breuer's urging. She attributed the government's flexible stance in part to sympathetic media coverage Drake received in recent weeks from The New Yorker and "60 Minutes," among others.

Now, I have no idea whether Radack was close enough to the DOJ side of things to be able to judge their motivation. But I am struck that Lanny Breuer instructed Welch to seek a plea deal. And if Radack's timing is correct, then DOJ started seeking a plea deal on the same day that Bennett ruled on the CIPA substitutions, but before DOJ actually withdrew its exhibits.

Radack attributes DOJ's changed stance to reporters' coverage of Drake's case (ironically, in fact, to New Yorker and 60 Minutes pieces that almost certainly contained far more classified information in them than Drake was alleged to have kept).

But POGO's Danielle Brian recalls that she raised Drake's treatment with President Obama back in March.

I knew my topic was likely to be sensitive. I began by thanking the President for his strong support of whistleblower protections, and noted that it was not for lack of effort on the part of the White House that the legislation didn't pass at the end of the last Congress.

I noted, however, that the current aggressive prosecution of national security whistleblowers is undermining this legacy. That we need to create safe channels for disclosure of wrongdoing in national security agencies. That we need to work harder to shrink the amount of over-classified materials that

unnecessarily prompt leak prosecutions. The President shifted in his seat and leaned forward. He said he wanted to engage on this topic because this may be where we have some differences. He said he doesn't want to protect the people who leak to the media war plans that could impact the troops. He differentiated these leaks from those whistleblowers exposing a contractor getting paid for work they are not performing. I was careful not to interrupt the President, but waited until he was done. I pointed out that few, if any, in our community would disagree with his distinction—but that in reality the current prosecutions are not of those high-level officials who regularly leak to the press to advance their policy agendas. Instead, the Department of Justice (DOJ) is prosecuting exactly the kind of whistleblower he described, for example one from the National Security Agency.

The President then did something that I think was remarkable. He said this is an incredibly difficult area and he wants to work through how to do a better job in handling it.

And Brian also mentioned something I thought of, too: Thomas Drake's chance encounter with Eric Holder at the Apple store where he works.

Former National Security Agency (NSA) official Thomas Drake, who is being prosecuted under the Espionage Act for allegedly "retaining" allegedly "classified" information (deemed so AFTER the evidence was seized from his house and subject to a Forced Classification Review), was busy at work at the Apple Store. Attorney General Eric Holder was at the iPhone table.

Drake said,

Attorney General Holder [Holder looks up]—I'm Thomas Drake, the former National Security Agency official who's been in the news.

Holder looked directly at him. Drake then asked,

Do you know why they have come after me?

Holder answered,

Yes, I do.

Drake asked,

But do you know the rest of the story?

Holder looked away, and then just left the store with his small entourage, including his security detail.

That encounter appears to have happened in late May.

Mind you, it shouldn't take personal encounters like this for the Administration to realize it was going to look really stupid trying to convict a guy for keeping two unclassified documents in his email archive. But in the same way that it took PJ Crowley asking the President about Bradley Manning, did it take Thomas Drake asking Eric Holder about his own case to make that case to the Administration?