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March 29, 2011

Honorable Felicia C. Cannon
Clerk of Court
United States District Court
for the District of Maryland
101 West Lombard Street
Baltimore, Maryland 21201

Re: U.S. v. Thomas A. Drake; Case No. RDB-10-CR-181 (D.MD 2010)

Dear Ms. Cannon:

Enclosed please find to be filed in the above referenced matter two hard copies and a CD with PDF copies of:

(a) MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT THOMAS A. DRAKE;

(b) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT THOMAS A. DRAKE; and

(c) BRIEF OF GOVERNMENT ACCOUNTABILITY PROJECT, AS *AMICUS CURIAE,* IN SUPPORT OF DEFENDANT THOMAS A. DRAKE.

We are not a party to the case. The enclosed filings are submitted as *Amicus Curiae*, and concern a proceeding scheduled for Thursday, March, 31, 2011 before Judge Richard D. Bennett.

Sincerely,

Jesselyn A. Radack
Homeland Security and Human Rights Director
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JRadack@whistleblower.org

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division

UNITED STATES OF AMERICA,	)	
v.	)	**Case No. RDB-10-CR-181 (D.MD 2010)**
THOMAS A. DRAKE	)	

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT THOMAS A. DRAKE

The Government Accountability Project respectfully requests and hereby moves this Court for leave to file its *Amicus Curiae* Brief In Support of Defendant in the above-captioned matter. On behalf of the Government Accountability Project, as *amicus curiae*, we respectfully request leave to submit the attached brief addressing whistleblower law in relation to the government's *Motion in Limine to Preclude Evidence of Necessity, Justification, or Alleged "Whistleblowing"* and the responses thereto, scheduled for argument on March 31, 2011. This Motion and the accompanying brief are timely. Defendant Thomas A. Drake has given consent to the filing of this *pro bono amicus curiae* brief.

In support of this Motion, please see the attached Memorandum of Points and Authorities.

Respectfully submitted,

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UNITED STATES OF AMERICA,	)	
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	)	
THOMAS A. DRAKE	)	
	)	

PROPOSED ORDER

The Government Accountability Project's MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT THOMAS A. DRAKE is hereby GRANTED. The *amicus curiae* brief filed on March 29, 2011 in the above-captioned matter is accepted for consideration.

SO ORDERED this _____day of March, 2011.

_____

Richard B. Bennett

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division

UNITED STATES OF AMERICA,	)	
v.	)	**Case No. RDB-10-CR-181 (D.MD 2010)**
THOMAS A. DRAKE	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
IN SUPPORT OF DEFENDANT THOMAS A. DRAKE

The Government Accountability Project (GAP) is a non-profit organization that works to protect whistleblower rights and free speech rights within the workplace. GAP has provided legal representation, guidance and support to government whistleblowers since 1977. GAP is not part of Mr. Drake's criminal defense team; however, GAP represents Mr. Drake and has filed a whistleblower reprisal complaint with the Department of Defense Inspector General (DoD IG) on his behalf.

We recognize that non-parties have no right to file *amicus curiae* briefs and may do so only if they receive leave of court, and that district courts have inherent discretion to allow or deny the appearance of an *amicus* at the trial court level. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). We respectfully request that this *amicus curiae* brief be allowed because we believe that it "provides a helpful analysis of the law" and because the *amicus* has "a special interest in the subject matter of the suit." *Bryant v. Better Business Bureau of Greater Maryland, Inc.*, 923 F. Supp. 720, 728 (D.M.D. 1996). Additionally, GAP represents constituencies, specifically intelligence community whistleblowers, which have a special interest in the subject matter and outcome of this case.

Intelligence community whistleblowers are exceptionally vulnerable to retaliation, and have few legal protections. They often sacrifice their careers when they blow the whistle through proper channels. The outcome of this case could have a profound impact on whether or not intelligence community whistleblowers risk their freedom as well as their careers when they come forward to expose wrongdoing, and an immense chilling effect on intelligence community whistleblowers.

GAP has substantial expertise concerning employee whistleblower protection and First Amendment rights, having assisted over five thousand whistleblowers since 1977. GAP attorneys have testified regularly before Congress on the effectiveness of existing statutory protections, filed numerous *amicus curiae* briefs concerning Constitutional and statutory issues relevant to whistleblowers, and led legislative campaigns for a broad range of relevant federal laws, including the Whistleblower Protection Act of 1989, P.L. No. 101-12, 103, Stat. 16 (April 10, 1989) and subsequent 1994 amendments. With its expertise and experience, GAP possesses a unique perspective not otherwise available to the Court that we believe will materially assist the Court in resolving the specific issues presented and aid the Court's decisional process. *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). *See also*, *Northern Securities Co. v. United States*, 191 U.S. 555, 556 (1903); *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000).

The tendered brief contains argument, citation to authority, and commentary on the law and facts that we believe the Court will find helpful. We respectfully ask for leave to file the enclosed brief as *amicus curiae.*

Respectfully Submitted:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division

UNITED STATES OF AMERICA,	)	
v.	)	**Case No. RDB-10-CR-181 (D.MD 2010)**
THOMAS A. DRAKE	)	

BRIEF OF GOVERNMENT ACCOUNTABILITY PROJECT, AS *AMICUS CURIAE*, IN SUPPORT OF DEFENDANT THOMAS A. DRAKE

We understand that this Court, in connection with a criminal proceeding against Thomas A. Drake, is addressing the issue of whether there exists a "whistleblower defense" and a First Amendment defense in the above-captioned matter. On behalf of the Government Accountability Project, as *amicus curiae*, we respectfully request leave to submit this brief to address whistleblower law in relation to the Government's *Motion in Limine to Preclude Evidence of Necessity, Justification, or Alleged "Whistleblowing"* (Doc. 53) and responses thereto, scheduled for argument on March 31, 2011.

The Government Accountability Project (GAP) is a non-profit organization that works to protect whistleblower rights and free speech rights within the workplace. GAP has provided representation, guidance and research in First Amendment and whistleblower litigation since 1977. GAP is not part of Mr. Drake's criminal defense team; however, GAP represents Mr. Drake *pro bono* on other matters and has filed a whistleblower reprisal complaint with the Department of Defense Inspector General (DoD IG) on his behalf. Mr. Drake gives his consent to file this *amicus curiae* brief.

We recognize that non-parties have no right to file *amicus curiae* briefs and may do so only if

they receive leave of court, and that district courts have inherent discretion to allow or deny the appearance of an *amicus* at the trial court level. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). We respectfully request that this *amicus* brief be allowed because we believe that it will materially assist the court in resolving the specific issues presented and will provide helpful analysis of the law. Moreover, we possess expertise and a unique perspective not otherwise available to the court that would materially aid the court's decisional process and have a special interest in the subject matter of the suit. *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1070). *See also*, *Northern Securities Co. v. United States*, 191 U.S. 555, 556 (1903); *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000).

As a whistleblower organization, we are concerned that the government's *Motion in Limine* does not cite relevant law, and other times cites law correctly but applies it to wholly irrelevant facts. This brief addresses three issues. First, Mr. Drake's complete whistleblower history is missing from public filings. Second, the First Amendment applies to this case. Third, statutory whistleblower protections *do* apply to National Security Agency (NSA) employees, and Mr. Drake followed proper internal channels for blowing the whistle.

As an initial matter, to the extent that that Mr. Drake's defense team is arguing that any alleged retention of documents by Mr. Drake was due to inadvertency, the points below do not conflict with this argument. **We are not positing that whistleblower protection laws or the First Amendment permit Mr. Drake to retain classified documents.** Rather, if Mr. Drake was in possession of certain documents (electronic or hard copy) *at all*, *in any place*, it is because he served as the primary witness for a Department of Defense Inspector General Hotline complaint about NSA, #85671, which prompted a 2½ year investigation that ultimately vindicated the complainants' and Mr. Drake's concerns. The

investigation resulted in a report, 05-INTEL-03, entitled "Requirements for the Trailblazer and ThinThread Systems" ("The Report.") The Report is listed as the third entry on DoD IG's website: http://www.dodig.mil/IR/05report.htm; however, it remains classified and has not been released publicly.

1. Full Whistleblower Background

In the December 2001 timeframe, the House Permanent Select Committee on Intelligence (HPSCI) Subcommittee on Terrorism and Homeland Security, chaired by Saxby Chambliss (R-GA), subpoenaed Mr. Drake as a material witness for its investigation into "Counterterrorism Intelligence Capabilities and Performance Prior to 9-11." This report was intended to be helpful to the broader Joint Inquiry that ensued, conducted by the Senate and House Intelligence Committees, into the intelligence community's (IC) activities before, during and since the terrorist attacks of September 11, 2001.

The Joint Inquiry subpoenaed Mr. Drake in the summer of 2002 as a material witness in its investigation, which eventually resulted in the "Final Report of the Joint Inquiry into the Terrorist Attacks of September 11, 2001." During the pendency of the Joint Inquiry, four individuals filed a Defense Hotline complaint on September 4, 2002, in which Mr. Drake was identified as the unnamed "DoD senior executive."

When contacted by the DoD IG in 2003, Mr. Drake immediately informed his supervisory chain, Dr. Nancy Welker and her deputy, Kelly Miller, and William Williams and Jerry Black of the NSA Inspector General (IG). They instructed Mr. Drake to cooperate with the investigation. (The government criticizes Mr. Drake for not "fil[ing] a complaint with the NSA Office of Inspector General, detailing his concerns about the two Classified Programs," Doc. 53 at 18, but there is nothing in the statutory scheme, described *infra*, which mandates that Mr. Drake choose that forum instead of the Department of Defense Inspector General (DoD IG)).

As part of Mr. Drake's cooperation with the DoD IG investigation, he made numerous protected disclosures, including but not limited to, violations of law and the public trust; fraud, waste and abuse in the use of public funds for certain programs; the lack of accountable and auditable management and financial controls; obstruction of mandatory reporting mechanisms and oversight requirements to the intelligence committees (and others) in Congress; and deliberate and willful intent not to employ critical intelligence assets in direct support of crucial national security requirements, particularly as they related to radicalized threats.

2. <u>The First Amendment applies to this case.</u>

The government argues that the First Amendment is unavailable to Mr. Drake because it does not apply to government employees carrying out official duties. Doc. 53 at 23 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

The government makes no attempt to apply *Garcetti* to the record here. That is understandable because *Garcetti* is clearly inapposite.[1] *Garcetti* concerned a municipal prosecutor's challenge that a personnel action was in retaliation for his actions on the job. In the instant case, the Constitution was

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1 Even if *Garcetti* were found to be applicable, Mr. Drake's speech was still "citizen speech" protected by the First Amendment under *Garcetti*. The government's three sentences on *Garcetti* correctly state its holding that "public employees making statements in the course of their official duties are not speaking as private citizens for First Amendment purposes." Doc. 53 at 23. But the government never has alleged that Mr. Drake's contact with the *Baltimore Sun* was pursuant to his official duties at NSA. In fact, the government has gone to great lengths to make clear that:

> At no time did NSA authorize defendant DRAKE . . . to disclose . . . information to unauthorized persons. Indictment at 4. [D]efendant Drake decided to contact Reporter A. *Id.* at 5. . . DRAKE volunteered to disclose information about NSA, but directed Reporter A to create a Hushmail account so that both of them could communicate securely thereafter. *Id.* at 6. . . Defendant Drake did so in part to conceal his relationship with Reporter A. *Id.* at 7.

Because Mr. Drake's communications with Reporter A were obviously not directed by NSA or made in the course of his official duties, his speech is protected by the First Amendment under a *Garcetti* analysis.

violated by a criminal prosecution grounded in an investigation that targeted Mr. Drake because of his activities with Congress, the DoD IG and the press, which are protected by the Constitution and good government statutes. Neither the contexts, nor the government's arguments, are analogous. To illustrate, *Garcetti*'s application does not extend beyond adverse personnel actions. *Burns v. Citarella*, 443 F.Supp.2d 464, 471 & n.1 (2006).

The only way that *Garcetti* would be remotely relevant is to the extent that Mr. Drake's supervisors instructed him to cooperate with the DoD IG investigation. The courts have been clear, however, that generic "garden-variety" responsibilities of every government worker, such as cooperating with internal investigations or honoring the code of ethics, do not trigger the *Garcetti* exception for performance of specific, individually-defined duties. *Taylor v. Town of Freetown*, 479 F.Supp.2d 227, 237 (2007); *Kodrea v. City of Kokomo, Ind.*, 458 F.Supp.2d 857, 867-869 (2006). In particular, protection for participation in internal investigations is necessary due to the very realistic fear of retaliation. *Batt v. City of Oakland*, No. C 02-04975-MHP 2006 U.S. Dist. WL 1980401, at *4 (N.D. Cal. July 12, 2006). Otherwise, the First Amendment would no longer exist within the government. *Walters v. County of Maricopa*, No. CV 04-1920-PHX-NVW 2006 WL 2456173, at *14 (D.Ariz. Aug. 22, 2006).

A retaliatory investigation, opened because of activity protected by the First Amendment, violates the Constitution and can be enjoined. *See Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002); *see also Denney v. Drug Enforcement Administration*, 508 F.Supp.2d 815 (E.D. Cal. 2007); *cf. Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1302 (9th Cir. 1999) (finding that plaintiffs presented sufficient evidence establishing that defendant police officer's investigation violated plaintiffs' First Amendment rights). Here, the Department of Justice began investigating Mr.

Drake *specifically because of* his disclosures and associated activity as an IG witness. **Had Mr. Drake not cooperated with the DoD IG, he would not be facing prosecution.**

Mr. Drake can establish that all of his activities merited First Amendment protection. First Amendment protection for government employees first requires that speech cover a matter of public concern and, if so, balances the interests of the employee as a citizen with any corresponding prejudice to the government's interest, as an employer, in promoting the efficiency of its operations. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009) (holding that the government violated a public employee's First Amendment right to speak about a matter of public concern by retaliating against him for reaching out to, and providing information for, a *Baltimore Sun* reporter.)

Mr. Drake made extensive disclosures to and actively worked with the DoD IG, Congress and the media to challenge literally billions of dollars in waste and mismanagement of government funds, as well as illegal and unconstitutional domestic surveillance activities secretly violating the privacy of American citizens. His concerns were closely relied upon for oversight of the NSA, and were ultimately vindicated by the massive DoD IG investigation. His media communications led to a front-page article alerting the public to massive NSA waste and mismanagement.

The protected activities of Mr. Drake as both a whistleblower and government witness did not create any harm; in fact, they assisted substantially an Inspector General investigation. There can be no serious contention that Mr. Drake's communications to the DoD IG prejudiced government efficiency, because his supervisors instructed him to cooperate. The anti-retaliation provisions for witnesses and whistleblowers in Section 7 of the Inspector General Act of 1978, discussed *infra*, establish that, as a matter of public policy, Mr. Drake's activities as a whistleblower and witness prevail under the

balancing test.

Ordinarily, Mr. Drake's communications with Congress would be protected by the First Amendment right of the people "to petition the Government for a redress of grievances." U.S. CONST. amend. I. In this specific case, his communications with Congress were pursuant to congressional subpoenas and exercising his rights under the Intelligence Community Whistleblower Protection Act (ICWPA), 5 U.S.C. App. § 8H, discussed *infra*. The public policy imperative for a free flow of information to Congress is also codified in the Lloyd Lafollette Act, 5 U.S.C. § 7211, which is dispositive to establish the proper balancing test involving congressional communications. All his media communications were unclassified and the government has not explained how the ensuing news story caused any damage.

3. Statutory whistleblower protections apply to this case.

While the government argues that statutory whistleblower employment protections are not an affirmative defense to a criminal action, it does not contend that its prosecution can be based on violations of law. Nor does the government even mention the correct statute under which Mr. Drake's DoD IG disclosures fell: the Inspector General Act.

NSA whistleblowers and witnesses are covered by Section 7(a) of the Inspector General Act of 1978, as amended, which is not mentioned by the government with respect to Mr. Drake's whistleblowing. Under this law, the DoD IG is given broad authority to investigate complaints by Defense Department employees "concerning the possible existence of an activity constituting a violation of law, rules or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety." 5 U.S.C. App. § 7(a). Section 7(b) prohibits disclosure of their identity without prior consent unless "unavoidable during the course of the

investigation." *Id.* at § 7(b). Section 7(c) prohibits actual or threatened reprisals for making a complaint or acting as a witness. *Id.* at § 7(c).

The prosecution of Mr. Drake appears from public filings to be based on numerous violations of the Inspector General Act. He was a marathon witness who participated over a two year span in dozens of formal interviews and dedicated question-and-answer sessions, numerous phone calls and several hundred e-mails (including extensive electronic attachments of key relevance to the investigation) with DoD IG investigators, as well as delivering to them at least 2,500 pages of hard-copy documents via authorized courier and transmittal means approved of, and received by, the DoD IG. He provided large amounts of requested data and highly-detailed information to the investigators in support of their efforts. DoD IG also asked him to review and comment on substantial amounts of material that came into DoD IG's possession from other sources and interviews during the course of their investigation, as well as numerous sections and one of the earlier drafts of the Report.

The government tries to cast aspersions on Mr. Drake for having served as a material witness rather than a complainant in the DoD IG investigation. *See* Doc. 53 at 4 ("Notably, however, the defendant did not sign the complaint letter sent to the DoD IG") and 18 ("[T]he defendant could have signed the complaint letter filed with the DoD IG, instead of merely providing information to the DoD IG auditors."). The government's criticism that Mr. Drake acted as a confidential witness rather than a public complainant is irrelevant. The Inspector General Act protects both complainants and witnesses who participate in DoD IG investigations, and Section 7(b) explicitly protects the identity of confidential witnesses. 5 U.S.C. App. § 7(b). Moreover, the complainants were all retired, which provided them an added level of protection compared to Mr. Drake, who tellingly lost his job as a result of his cooperation.

If there was any retention of documents, those documents *existed* only because of Mr.

Drake's cooperation with, and disclosures to, the DoD IG. This prosecution would not be possible were it not for Mr. Drake serving as a key cooperating witness to assist the government, specifically the DoD IG, with its investigation. It is proceeding despite numerous violations of the Inspector General Act. In violation of Section 7(b), the DoD IG referred Mr. Drake's and the complainants' identities to the Department of Justice in the fishing expedition for an ancillary leak investigation into the sources for a Pulitzer Prize-winning article in the *New York Times* revealing President Bush's warrantless wiretapping program. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. There can be no credible claim that this was required on the government's part, since the DoD IG did not even attempt to obtain Mr. Drake's consent.[2]

The breach of confidence led to almost automatic retaliation, as the Department of Justice made Mr. Drake and the complainants targets of the unrelated leak investigation specifically because of the information DoD IG shared on their whistleblowing. As a result, the investigation itself violated the Inspector General Act as a "threatened" action. Legislative history interpreting an analogous provision in the Whistleblower Protection Act illustrates why this is necessary. The prosecution is simply wrong when it states that "the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b)(8) . . . does not apply to criminal prosecutions." Doc. 53 at 21. The legislative history for the 1994 amendments to the WPA highlights "*retaliatory investigations, threat of or referral for prosecution*, de-funding, reductions in

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2 "Consistent with the requirements of the *Inspector General Act of 1978*, as amended, it is Defense Hotline policy that Hotline personnel will not disclose the identity of an individual providing a complaint or information to the Defense Hotline unless: a) The *individual consents to such a disclosure*, or b) The Director, Defense Hotline, has determined that such disclosure is otherwise unavoidable *in order to address the complaint or information*." *See* http://www.dodig.mil/hotline/fwacompl.htm (emphasis added) (last visited Dec. 8, 2010). Neither of those circumstances pertained here.

force and denial [of] workers compensation benefits" to illustrate "threatened" personnel actions, because they are a prelude to, or create a precondition of, more conventional reprisals. 140 CONG. REC. 29,353 (1994) (statement of Rep. McCloskey); *see also* H.R. REP. NO. 103-769, at 15. This is exactly what happened in Mr. Drake's case. On November 28, 2007, the FBI raided Mr. Drake's house and NSA put him on administrative leave. The following day, NSA rescinded the security clearance he had held for almost 20 years. The primary criterion for a prohibited threat is that alleged harassment "is discriminatory, or could have a chilling effect on merit system duties and responsibilities." *Id.* This is consistent with the Supreme Court ruling that any actions that create a chilling effect on protected activity will violate anti-discrimination laws. *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

Finally, while the government is correct that the Intelligence Community Whistleblower Protection Act (ICWPA), 5 U.S.C. App. § 8H, allows "NSA employees to disclose classified information to Congress, in an effort to expose government wrongdoing," Doc. 53 at 23, it is wrong when it states that "[Mr. Drake's] conduct evinces little intent on his part to follow the protocol laid out in the ICWPA." Doc. 53 at 24. The "protocol" to which the government is apparently referring applies only "[i]f the Inspector General does not find credible . . . a complaint." 5 U.S.C. App. § 8H(d)(1)-(2). In this case, 1) the Inspector General *did* find the Hotline Complaint credible, as evidenced by its years-long investigation and Report substantiating the complainants' and Mr. Drake's concerns, and 2) Mr. Drake did not "contact the intelligence committees directly," *id.* at § 8H(d)(2); rather, he was subpoenaed by them. IC employees with "an urgent concern *may* report the complaint or information to the Inspector General of the Department of Defense," *id.* at § 8H(a)(1)(a)(emphasis added)—a permissive, not mandatory, provision—which is exactly what the four DoD IG complainants did. When called as a

witness in the ensuing investigation, Mr. Drake cooperated as instructed by his supervisors and as required by law.

4. Conclusion

The government tries to minimize the significance of Mr. Drake's whistleblowing because it bears directly on his state of mind with regard to the elements of the offense, and is thus directly relevant to whether Mr. Drake violated each element required to convict him of the charged violations of § 793(e).

The government incorrectly asserts that it is only required to prove that Mr. Drake had actual knowledge of his possession of the documents in question. To the contrary, the statute punishes only those who violate it "willfully." This requires the government to prove that Mr. Drake knowingly engaged in the prohibited conduct with the specific intent to disobey or disregard the law. Thus, the government must prove that he acted knowingly or with disregard with respect to each element of the offense, including whether the documents were "related to the national defense" and whether his possession of the documents was "unauthorized."

The documents provided to the DoD IG are likely to show the documents in the form in which Mr. Drake accessed them, thus making the documents received by the DoD IG relevant to whether Mr. Drake knew or showed culpable disregard for whether the documents were "related to the national defense." Further, his cooperation with the DoD IG and with Congress is necessary to understand whether Mr. Drake's access to the documents was "unauthorized," and whether he knew or showed culpable disregard for whether his access was "unauthorized." Similarly, his cooperation with the DoD IG investigation and with Congress is necessary to understand when his possession was authorized and when he was knowledgeable of his possession. An understanding of this timing is necessary, as the time

at which Mr. Drake was knowledgeable of each element of the offense must overlap in order to convict him of the offenses with which he is charged, and the details regarding his alleged contact with a reporter alone will provide a misleading, incomplete set of facts from which to ascertain this timing. Finally, an understanding of Mr. Drake's state of mind is necessary to determine whether his retention of the documents demonstrated the culpable level of disregard of national security needed to justify the restraint on core First Amendment expression imposed by the prosecution under the statute.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Motion, Memorandum In Support, and enclosed brief of *amicus curiae*, was served, this 29th day of March, 2011, upon the following:

By Hand Delivery
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