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May 30, 2011

Honorable Richard D. Bennett
United States District Court
for the District of Maryland
101 W. Lombard Street
Baltimore, Maryland 21201

Re: *United States v. Thomas Drake*
Crim. No. RDB-10-0181

Dear Judge Bennett:

On Friday, May 27, we received the government's proposed order on the Court's rulings on substitutions and the government's classified exhibits, which were supposed to reflect those rulings. Among the Court's rulings was an order that the substitutions and redactions were to appear "seamless" so that the jury would not know -- and Mr. Drake would not be prejudiced by the fact -- that the documents had been altered at the government's request to protect certain information from public disclosure. The Court was explicit:

MS. BOARDMAN: Your Honor, with our objections that we noted previously, this seems to be fine. It seems to be consistent with Your Honor's rulings yesterday.

THE COURT: All right. And then we're going now to the next page of Exhibit 42a.

MR. PEARSON: So, in the final version, should we put the red boxes back?

THE COURT: No.

MR. PEARSON: Okay.

THE COURT: No. There aren't going to be any red boxes in the final version.

MR. PEARSON: For the protected information?

THE COURT: There is not going to be any red boxes on the final version, Mr. Pearson. We've mentioned that we're going to try to have this be seamless.

MR. PEARSON: All right. I think -- all right. We hear you on that, Judge. We may ask to come back and revisit this issue in terms of how we're going to be presenting information, but I understand you.

THE COURT: If you recall yesterday, we said this is going to be seamless. We're putting in different words, substitution language. That's why we're doing the substituted language, so it would be seamless.

MR. PEARSON: All right. Thank you, Judge.

May 5, 2011 Hr'g, CIPA-III-385-86.

As we reviewed the government's exhibits over the weekend, we were alarmed to see that they are anything but seamless. They bear the obvious markings of redactions and substitutions. On page after page of nearly every exhibit, the government has redacted classified and unclassified information by inserting blank boxes. Inside the boxes, the government has typed the substitution language. When there is not enough room in the box for the substitution, arrows direct the reader to the margin or a nearby blank space where the substituted language has been typed. The boxes, arrows, and substitution language are in bright red ink.

The only exhibits whose substitutions appear "seamless" are the three documents found in Mr. Drake's basement that are charged in Counts 3, 4, and 5 of the Indictment. The government retyped those documents to include the redactions and substitutions, and on their face, they do not look altered. Standing in stark contrast, however, are the next exhibits, which are the same three documents -- as they were found in Mr. Drake's basement -- but with Catherine Murray's handwritten classification review. The Murray-reviewed documents (which includes Exhibit 42a, the document that spurred the above exchange with the Court) are replete with arrows, boxes, and substitution language -- the same language that appears seamlessly in the Indictment

documents, which she is supposed to have reviewed. By comparing Ms. Murray's version of the document with the "seamless" version, the jury will know that changes were made and which changes were made. 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.

The Murray-reviewed documents are just one example of the prejudice and confusion these exhibits will cause. The exhibits include other documents found in Mr. Drake's basement that the government claims are classified and will seek to introduce to rebut an inadvertence defense. They are riddled with arrows, boxes, and substitution language. Other prejudicial exhibits include the "source documents" -- various NSA emails and documents -- from which the basement documents were created. At trial, the government will introduce evidence that Mr. Drake created the allegedly classified documents found in his basement by copying portions of NSA emails and NSA documents and pasting them into Word documents, which he printed at NSA and took home. Parts of these "source documents" match parts of the basement documents verbatim. But in the government's exhibits binder, language in the source document that matches language in the basement documents has been boxed out and substitutions have been inserted. A comparison of the source documents with the "seamless" basement documents will inform the jury that the basement documents were altered and contain substitutions. From that fact, they will infer, or even conclude, that the information in Mr. Drake's basement must have been damaging to national security.

Making matters worse, many of the alterations that will be obvious to the jury were made to information that Ms. Murray concluded was unclassified but the government now claims is "protected." The defense cannot effectively cross-examine Ms. Murray about her classification opinions regarding a document when unclassified parts of the document have been altered or redacted. This problem is exacerbated by the fact that the jury will see that the unclassified language has been changed and left to wonder why they cannot see information the government's expert deems unclassified. The jurors will be completely and hopelessly confused.¹

¹ 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.

The government's decision to produce exhibits that defy the Court's ruling has cause tremendous prejudice to Mr. Drake's defense. Two weeks before trial, Mr. Drake and his counsel still do not know what evidence the jury will see. The prejudice from the uncertainty mounts with each passing day as trial nears. In cases like this one, Congress requires that the accused have "substantially the same ability to defend" himself as he would if the case did not involve classified information. Under the current situation, Mr. Drake's ability to defend himself is in jeopardy.

We respectfully request an immediate hearing on this matter.

Very truly yours,

/s/

Deborah L. Boardman
Assistant Federal Public Defender