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**VIA CM/ECF**

May 31, 2011

Honorable Richard D. Bennett  
United States District Court  
for the District of Maryland  
101 West Lombard Street  
Chambers 5D  
Baltimore, Maryland 21201

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

Dear Judge Bennett:

We submit this brief response to the government's letter filed today (Docket No. 124) in response to our May 30, 2011 letter regarding the government's substitutions. In light of the prejudice to Mr. Drake and the government's unfounded attack on counsel's integrity, we respectfully bring the following portions of the Section 6(c) transcript to the Court's attention.

The government quoted a passage that is substantively incomplete. After Mr. Welch's statement, "We don't know how we're going to rewrite an email." The following transpired:

THE COURT: I think that's correct.

MR. WELCH: Okay.

THE COURT: We're going to be as seamless as possible, but we can't – all right  
...

May 4, 2011, CIPA-II-310.

Earlier in the hearing, the following exchange laid the foundation for the Court's ruling that substitutions must be seamless.

THE COURT: All right. We're on Page 41a, the first page. The language on the actual document reads . . . The government is now proposing that it be . . . and your point is that, for that sentence to be change from . . . to . . . represents prejudice to your client, Mr. Wyda?

MR. WYDA: Because the jury will see that something's been removed. If the jury is not going to see that something's been removed or changes, then I would agree that there is no prejudice. My understanding is —

THE COURT: Wait a minute. Hold on a second. This seems to be tilting at windmills. What possible concern can the jury have with a sentence saying . . . Is there any reason the jury has to know that language has been changed?

MR. WELCH: Is there any reason why?

THE COURT: I mean, this is just no an issue. To suggest that twelve people are going to be affected, Mr. Wyda, by not seeing . . . instead seeing the language . . . is a stretch, to put it mildly.

MR. WYDA: And can I —

THE COURT: And so your point is that, because it's substituted, that it appears to be prejudicial because there will be some indication of substitution.

MR. WYDA: That's my point.

THE COURT: And does it have to indicate that there is a substitution, Mr. Welch?

MR. WELCH: What do you mean by that?

THE COURT: The document. Does the document have to have a red box and say, "Substitution?" Can't the document somehow reflect . . . ?

MR. WELCH: Well, one thing that we could do is to retype this page and just insert, you know, whatever the phrase is that NSA is going to be okay with so it looks seamless.

THE COURT: Well, that's fine. I mean, if the concern is that it's not seamless, then that is fine. I can't imagine — I'm making a finding. There is absolutely no prejudice to this defendant, nor is there any way that this defendant is put in an unfair position because . . . is replaced with . . . If I can't understand what it means, and it's no moment to have . . . and it means something to the Government in terms of for security reasons, and I don't see any prejudice to the Defense. If your point is just a matter of it being seamless, Mr. Wyda, we can address that. We'll make it seamless.

MR. WYDA: Two things, Your Honor. Again, Your Honor, national security is not an issue for today. It's about leaving Mr. Drake after –

THE COURT: Well, I'm finding, without question – I'm not going to waste time on this kind of thing, Mr. Wyda. If you want the record to reflect that you think your client is prejudiced because the phrase . . . is replaced with the wording . . . you put that on the record. I find no basis for it, and the issue is a matter of it being seamless. We'll make it seamless.

MR. WYDA: Okay. Your Honor, my objection primarily is to it not being seamless. So, if it is seamless, Your Honor, I guess we will take a look at the document and see whether it's seamless. At that point, I'll make the record.

May 4, 2011 Hr'g Tr. CIPA-II-222-24.

On the same day, the Court ruled that relevant, unclassified information, considered “protected” by the government, could be redacted:

THE COURT: That's fine. I'm ruling on it now, because it seems to me that I think the cases probably stand for the proposition that the Governemtn cited, and they make perfectly good sense to me. I don't find at this hearing that I'm constrained at this 6(c) hearing to just be dealing with – I'm dealing with classified information under the Classified Information Procedures Act, but, to the extent that there is a matter of protected material - and I don't find any prejudice to your client whatsoever in light of the fact that we're going to making sure this is seamless and the jury can't see the replaced language from replacing that first phrase on Government Exhibit 41 with the substitution.

May 4, 2011 Hr'g Tr. CIPA-II-226.

Later in the afternoon, the following exchange occurred:

THE COURT: Mr. Welch has acknowledged, and I'll be sure that this process, so the Government understands, is going to be seamless in that the document that the jury is going to see is not going to have this big red bracket as if it's red lights are going off and it's been changed. They're just going to see the changed language, the substitution language, and Mr. Welch has agreed as to that on behalf of the government.

MR. WYDA: Thank you, Your Honor.

THE COURT: So we're going to make it seamless at your request, Mr. Wyda, and your point is well taken in that regard . . .

Another exchange:

MR. WELCH: – technically they're now crossing all of that out. So my point is, from a practical perspective, if the seized document with the substitutions that we just went over, we have to sort of recreate that –

THE COURT: Yes.

MR. WELCH: – we're essentially going to be writing a summary of the seized document as I envision it.

THE COURT: You say you're not?

MR. WELCH: No, we are.

THE COURT: Okay. So it becomes seamless is the point.

MR. WELCH: Correct.

THE COURT: Okay.

MR. WELCH: Then we're going to have to take a copy of that, and then we're going to have to put all of these markings back on it.

THE COURT: Yes. You agree with that, Mr. Wyda? That's how it would work. I'm essentially saying these handwritten notes are not going to be deleted. At least we're going to go page by page here, and you're free to have cross-examination on these.

MR. WYDA: That seems right for now, Your Honor.

THE COURT: Yeah. I think that's –

MR. WYDA: Thank you.

We appreciate the Court's consideration, and we respectfully request a hearing on this matter.

Very truly yours,

/s/

Deborah L. Boardman  
Assistant Federal Public Defender