

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 1:10-CR-181-RDB

THOMAS A. DRAKE,

Defendant.

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July 15, 2011

**Transcript of Proceedings  
SENTENCING**

**Before The Honorable RICHARD D. BENNETT  
United States District Judge**

APPEARANCES:

For the Plaintiff: William M. Welch  
John P. Pearson  
United States Department of Justice

For the Defendant: James Wyda  
Federal Public Defender  
  
Deborah L. Boardman  
Assistant Federal Public Defender

Proceedings recorded by mechanical stenography, transcript  
produced with computer-aided transcription.

## P R O C E E D I N G S

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THE COURT: Calling the case of United States versus Thomas Andrews Drake, criminal number RDB 10-0181, here for sentencing today. If counsel will identify themselves for the record, please.

MR. WELCH: Good afternoon, Your Honor. William Welch for the United States.

THE COURT: Good afternoon, Mr. Welch.

MR. PEARSON: Good afternoon, Your Honor. John Pearson for the United States.

THE COURT: Mr. Pearson, good afternoon.

MR. WYDA: Jim Wyda from the Federal Public Defender's Office.

MS. BOARDMAN: Good afternoon, Your Honor. Deborah Boardman, Assistant Federal Public Defender.

THE COURT: Mr. Wyda, Ms. Boardman, nice to see you again.

Good afternoon, Mr. Drake.

THE DEFENDANT: Good afternoon, Your Honor.

THE COURT: We are ready to proceed with the sentencing in this case, the defendant having pled guilty to a one count criminal information in this case, specifically exceeding authorized use of a government computer in violation of 18 United States Code, Section 1030, which is a misdemeanor.

1 I want to verify, Mr. Drake, that you've had an  
2 opportunity to review the presentence report with your  
3 attorneys, Federal Public Defender James Wyda and Assistant  
4 Federal Public Defender Deborah Boardman; is that correct?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Approximately how many times have you  
7 reviewed the presentence report with them?

8 THE DEFENDANT: At least twice, sir.

9 THE COURT: Are you satisfied you've had a  
10 sufficient amount of time to go over it with them?

11 THE DEFENDANT: Yes, I am, Your Honor.

12 THE COURT: There are no corrections or  
13 objections by the government, is that correct, Mr. Welch?

14 MR. WELCH: That is correct.

15 THE COURT: And with respect to objections or  
16 corrections by the defendant, they were noted in your letter  
17 of June 30, Miss Boardman, and have all those corrections  
18 been made?

19 MS. BOARDMAN: They have not, Your Honor, but the  
20 most substantive ones have.

21 THE COURT: Which ones still need to be  
22 addressed?

23 MS. BOARDMAN: I don't believe that anything on  
24 the first page has been incorporated. I believe it's because  
25 of the fact that this has been expedited and Miss Hall was on

1 vacation.

2 THE COURT: Sure, sure.

3 MS. BOARDMAN: And then the second page addresses  
4 financial issues. The last paragraph has been addressed by  
5 the presentence report, but everything else has not.

6 THE COURT: All right. We'll go over these and  
7 make these corrections. I do note that in paragraph 62 it's  
8 referred, in the presentence report there's reference to the  
9 mandatory special assessment being \$100. In fact, I believe  
10 it's \$25, correct, Miss Hall? If you'll make that change to  
11 paragraph 62. There's a mandatory \$25 special assessment  
12 because this is a misdemeanor.

13 And with that, Miss Boardman, why don't we just  
14 go through here and note those changes, and if there's any  
15 objection by the government we'll so note.

16 As to paragraph three, you note that there are no  
17 other offense characteristics or guideline factors or  
18 adjustments in dispute and your point is is that that would  
19 be corrected because either side is free to raise issues  
20 under 3553A of Title 18, correct?

21 MS. BOARDMAN: Yes, Your Honor.

22 THE COURT: Can you make that adjustment, Miss  
23 Hall?

24 PROBATION OFFICER: Yes, I will, Your Honor.

25 THE COURT: That would be corrected.

1                   And then the next paragraph would be paragraph 39  
2 with respect to adding a correction as to one of Mr. Drake's  
3 children with respect to his present employment status. Can  
4 you make that change, Miss Hall?

5                   PROBATION OFFICER: Yes, Your Honor, I will.

6                   THE COURT: Any objection to those two changes,  
7 Mr. Welch?

8                   MR. WELCH: No, Your Honor.

9                   THE COURT: And then paragraph 44 with respect to  
10 a prior hospitalization of Mr. Drake, that change can be made  
11 as well; correct, Mr. Welch?

12                  MR. WELCH: That's correct.

13                  THE COURT: Okay, Miss Hall, if you'll make that  
14 change, please.

15                  Then paragraph 56 there is additional information  
16 with respect to the employment history of Mr. Drake which can  
17 be made. No objection by the government, is there?

18                  MR. WELCH: No objection.

19                  THE COURT: And I think I missed paragraph 46 and  
20 that change can be made as well. So all those changes that  
21 you want in the first page of your letter can be made, Miss  
22 Boardman, and will be made by the U.S. Probation Officer.

23                  And then we're up to paragraphs 61 and 62. I  
24 think the defense counsel's correct, the maximum fine here  
25 would be \$100,000, not \$250,000, correct, Miss Hall?

1                   PROBATION OFFICER: Yes, Your Honor.

2                   THE COURT: All right. That change will be made.  
3 And I've already noted the change there with respect to  
4 paragraph 62 and it's a \$25 special assessment.

5                   As to paragraph 64 and some of the financial  
6 information, I think all this can be incorporated in  
7 paragraph 64 and be corrected. Any objection by the  
8 government?

9                   MR. WELCH: No, Your Honor.

10                  THE COURT: All right. Miss Hall, can you make  
11 those changes in paragraph 64?

12                  PROBATION OFFICER: Yes, Your Honor.

13                  THE COURT: Thank you very much. Is there  
14 anything further on this matter, Miss Boardman, as to changes  
15 that you wanted?

16                  MS. BOARDMAN: No, Your Honor. Thank you.

17                  THE COURT: Those changes will be made.

18                  There was no agreement as to this defendant's  
19 criminal history and he has none and has no prior criminal  
20 record of any kind, not even a parking ticket from what I can  
21 see.

22                  MR. WYDA: I wish I had his driving record, Your  
23 Honor.

24                  THE COURT: I was about to say, it's not often I  
25 have a defendant in front of me that has a better record than

1 I do. But that was my college days, not my professional  
2 days.

3 With respect to the process here in federal court  
4 as to sentencing, Mr. Drake, let me just explain to you as I  
5 think I tried to when you pled guilty on June 10, and  
6 sometimes this is a very lengthy process, I'll try not to be  
7 too lengthy, but it's important for you to understand the  
8 process here.

9 Within the last six and a half years the United  
10 States Supreme Court has issued two significant opinions with  
11 respect to the federal sentencing guidelines that we're going  
12 to be addressing and discussing in a moment as well as  
13 factors under Title 18 of the United States Code.

14 In the case of United States versus Booker, in  
15 January of 2005 the United States Supreme Court issued its  
16 opinion in United States versus Booker upholding the  
17 constitutionality of the federal sentencing guidelines, but  
18 doing so with the deletion of two particular sections of the  
19 guidelines which had previously rendered the guidelines  
20 mandatory.

21 And in that opinion in January of 2005 the  
22 Supreme Court noted that federal judges, while not bound to  
23 apply the guidelines, must consult the guidelines and take  
24 them into account when imposing a sentence subject to review  
25 by courts of appeal for unreasonableness. And the Supreme

1 Court noted then that the guidelines were rendered  
2 effectively advisory and that federal judges should also look  
3 at factors under a particular section in Title 18 of the  
4 United States Code.

5 And then in the case of Gaul versus United  
6 States, I guess almost three years later, December of 2007,  
7 the Supreme Court specifically noted that the federal  
8 sentencing guidelines are not to be presumed to be  
9 reasonable, that they are a starting point in the analysis,  
10 and essentially it's a multistep process in federal court.  
11 Federal judges are to calculate the guideline range, then  
12 consider other factors apart from the guidelines, including  
13 factors under Title 18, and then impose a sentence. And if  
14 the sentence is outside of the advisory guideline range, then  
15 judges are to indicate the reasons for it being outside of  
16 the range. And I think I discussed that with you back on  
17 Friday, June 10, did I not?

18 THE DEFENDANT: Yes, you did, Your Honor.

19 THE COURT: We're ready to proceed with  
20 sentencing today on somewhat of an expedited basis.

21 Are you on any kind of medication today, sir?

22 THE DEFENDANT: I am not, Your Honor.

23 THE COURT: Mr. Wyda, Miss Boardman, are you  
24 satisfied that your client is competent to proceed to  
25 sentencing today?

1 MR. WYDA: Yes, Your Honor.

2 THE COURT: Now, another thing to go over, Mr.  
3 Drake, are the procedures required by -- I'm sorry, Mr. Welch  
4 and Mr. Pearson, you may sit down.

5 Under the Protect Act of 2003, which was actually  
6 recently reenacted, there are many provisions, and among  
7 those are provisions with respect to the imposition of  
8 sentencing, imposition of sentences in federal courts, and  
9 pursuant to the Protect Act, federal courts when imposing a  
10 sentence are required to submit certain documents to the U.S.  
11 Sentencing Commission in Washington. The act specifically  
12 requires that the chief judge of each district court insure  
13 that within 30 days of the imposition of sentence that  
14 certain documents go over to the U.S. Sentencing Commission  
15 in Washington. Those documents include the judgment and  
16 commitment order, which I'll be preparing this afternoon with  
17 the assistance of Mr. Thompson, the deputy clerk of court;  
18 the statement of reasons for the sentence imposed, which  
19 shall also include any reason for any departure from the  
20 otherwise applicable guideline range; the plea agreement in  
21 this case, which I believe is the letter of June 9 that was  
22 introduced as government exhibit 1 on Friday, June 10; the  
23 criminal information filed in this case; the presentence  
24 report prepared by Miss Eileen Hall, who is in court here  
25 today; and any other information the sentencing commission

1 finds appropriate. And the chief judge of this court did  
2 issue an administrative order back in 2003 insuring that  
3 there would be compliance with that law.

4 That means that these documents, in all criminal  
5 cases, are subject to some review and may be reviewed by  
6 other public officials over in Washington or by members of  
7 the public perhaps under the Freedom of Information Act  
8 request.

9 In light of the fact that in all criminal cases  
10 in this court part D of the presentence report contains  
11 confidential family information, routinely under normal  
12 process in all criminal cases part D of the presentence  
13 reports in this court is sealed. In your case, part D begins  
14 at paragraph 36, page six, and goes over to paragraph 60,  
15 page eight. And consistent with an administrative order of  
16 this court issued back in 2004, part D of the presentence  
17 report containing confidential family information will be  
18 sealed. It can only be reviewed by me or another judge of  
19 this court, or by members of the U.S. Sentencing Commission,  
20 but it's not reviewable by any other public official even or  
21 by members of the public. And that's consistent with normal  
22 process as to all criminal defendants in this court. To all  
23 other extents, the requirements of the Protect Act are  
24 complied with and all the other information will be  
25 available.

1           Now, the guideline calculation in this case is  
2 set forth on page four of the presentence report and it is as  
3 anticipated in the plea agreement of last month. It reflects  
4 that you have a base offense level of six for this offense,  
5 it's found in the advisory guideline tables in section 2B1.1.  
6 There is a two level upward adjustment because this offense  
7 involved a computer system used to maintain or operate a  
8 critical infrastructure, or was used for a government entity  
9 in furtherance in the administration of justice, national  
10 defense or national security. So because of that two levels  
11 are added pursuant to another section there of that advisory  
12 guideline section. There are no other upward adjustments.

13           There's a two level downward adjustment for your  
14 acceptance of responsibility in pleading guilty, so there is  
15 a total offense level of six for this offense, which is  
16 exactly as was anticipated in the plea agreement.

17           As I've noted earlier, you have absolutely no  
18 criminal record of any kind. There's nary a parking ticket  
19 reflected in this presentence report. So that you have total  
20 criminal history points of zero which means you have the  
21 lowest criminal history of Roman numeral one, that places you  
22 in an advisory guideline range in what is known as zone A, an  
23 advisory guideline range of zero to six months incarceration.  
24 It also makes you eligible for a probation sentence under the  
25 advisory guidelines. And as I said, this is the first step

1 in the process because we'll be considering other factors  
2 apart from the advisory guidelines.

3 There are no disputed matters for me to address,  
4 so unless there's anything the government wants me to address  
5 or the defense wants me to address with respect to the  
6 guideline calculation, I'll be glad to hear from the  
7 government, and then from the defense, and then, Mr. Drake,  
8 I'll give you an opportunity to address the court. So you  
9 may be seated for a moment.

10 Mr. Welch or Mr. Pearson.

11 MR. WELCH: Thank you, Your Honor.

12 The government's sentencing recommendation is as  
13 follows: One year's probation, 250 hours of community  
14 service, and an upward departure on the fine for an amount of  
15 \$50,000. And I'd like to explain to you why that is an  
16 appropriate sentence in this case.

17 THE COURT: All right. Let me just check  
18 something here. I thought that the -- yes, the advisory  
19 guideline range as to a fine here, the advisory guideline  
20 range is \$500 to \$5,000. The statutory maximum is a hundred  
21 thousand. And you're recommending a \$50,000 fine.

22 MR. WELCH: Correct.

23 So I want to address two primary factors. As  
24 this court knows, when imposing sentence there are three main  
25 principles behind the sentence: There's rehabilitation,

1 there's deterrence, and there's punishment.

2 Rehabilitation really isn't a factor in this  
3 case. Certainly from the government's perspective, I don't  
4 think that Mr. Drake would do this again; and secondly, he  
5 won't have the opportunity to do it again because I don't  
6 think he would ever get a job within the intelligence  
7 community again.

8 THE COURT: He'll never get a job with the  
9 federal government again.

10 MR. WELCH: That's right.

11 THE COURT: He was within five years of being  
12 entitled to a federal pension, correct?

13 MR. WELCH: That's right. So I want to focus on  
14 punishment and I want to focus on deterrence.

15 With respect to punishment, I'm not going to go  
16 on terribly long because you received a fairly lengthy  
17 sentencing memorandum from the defendant, you received a  
18 fairly lengthy memorandum from the government, and you've  
19 also been privy to many, many documents during the course of  
20 either CIPA hearings or motion hearings.

21 THE COURT: CIPA hearings being hearings under  
22 the Classified Information and Procedures Act.

23 MR. WELCH: That is correct. So I want to talk  
24 about punishment because I want to focus in on the theme that  
25 pervades the sentencing memorandum, that is, that Mr. Drake

1 is a man of honesty and integrity, and I want to focus in on  
2 that theme as it relates to this particular crime because  
3 that's what the court is addressing.

4 What he pled to is really theft. That's what he  
5 pled to. He stole information from NSA and he stole it off a  
6 computer. And honesty is disconsonant, it's not really a  
7 part of the concept of theft. And my point in making this  
8 argument is to impress upon the court that what he did was  
9 intentional. It wasn't an accident. It wasn't a mistake.  
10 By their own admission in the sentencing memorandum, the  
11 decision to begin to provide information to the reporter was  
12 not taken lightly; in other words, he thought about it a lot.

13 And the other point that I want to make is that  
14 what he decided to do with respect to the reporter and  
15 everybody else that he was sharing information to was not a  
16 episodic or a sudden moment of decision, but rather it was a  
17 progression of a series of steps and decisions he had been  
18 making for a number of years. And as we pointed out in our  
19 sentencing memorandum, this is something that he had been  
20 doing since approximately June of 2000. He had been doing it  
21 with different people in different venues.

22 THE COURT: None of whom were charged, correct?

23 MR. WELCH: That's correct.

24 THE COURT: Isn't he the only one who was charged  
25 in this case, Mr. Welch?

1 MR. WELCH: That's correct. But it doesn't  
2 change the fact that what he did, beginning in late 2005,  
3 2006, had been going on by him for five to six years at that  
4 point.

5 THE COURT: How does the court mesh that with the  
6 fact that other people involved with it are never charged?

7 MR. WELCH: In a couple of different ways.  
8 Number one, with respect to the other people, we didn't have  
9 the evidence of intent like we had with Mr. Drake. When Mr.  
10 Drake was interviewed, he admitted that he had taken this  
11 information off NSA computers and brought it home.

12 Secondly, these other individuals no longer  
13 worked at NSA by 2005, 2006. At least three of them had been  
14 retired as of the end of 2001, a fourth had been retired from  
15 the Hill in June of 2002. And that's what made their conduct  
16 distinguishable from his conduct.

17 In addition, on top of that, when he admitted to  
18 the conduct that he engaged in, both vis-a-vis the interviews  
19 and his guilty plea, at the time he was a senior executive at  
20 NSA. He was one of the top echelon of the managers there.  
21 He set the tone. He was to set the example of how other  
22 individuals were to conduct themselves within NSA. That's  
23 what makes him different than the other individuals.

24 THE COURT: I find it a little bit unique, Mr.  
25 Welch, given the great breadth with which the government

1 usually uses the conspiracy statute under 18 United States  
2 Code, Section 371, you and I both know full well that the  
3 government under the law could easily have charged other  
4 people as conspiring to commit the violations that he was  
5 originally charged with, so it isn't just a matter of proof,  
6 it's a matter of government selection, is it not? It's a  
7 prosecutorial decision.

8 MR. WELCH: But I think it was a matter of proof.  
9 In other words, let's remember what he was charged with. He  
10 was charged with retention, and that meant we had to have  
11 evidence of an agreement by others knowing that he was taking  
12 documents home and had them in his home. And at the end of  
13 the day, at least it was in the judgment of individuals who  
14 reviewed the case, including myself, that the evidence was  
15 deficient as it related to that agreement, those other  
16 individual's knowledge that he was retaining official NSA  
17 information within his home.

18 So with respect to punishment, the court ought to  
19 consider where he was at the time he made this decision to  
20 engage in the criminal conduct with which he pled. In other  
21 words, this is something that had been going on for four or  
22 five years.

23 My second point, and it touches on what makes his  
24 disparate from other individuals, is the idea of deterrence.  
25 And the reason I want to stress this particular point, Your

1 Honor, is because when you sentence Mr. Drake, you send a  
2 message. You send a message to him, but you send a message  
3 to others. And this courtroom is full of people, but there  
4 are many, many more people who listen to what your message  
5 will be.

6 And it's easy to isolate on Mr. Drake. It's easy  
7 to focus on the letters of support. It's easy to focus on  
8 the evidence that the government presents to counter or to  
9 offer what we believe to be a more robust view of what was  
10 going on. It's easy to focus on the documents at hand. What  
11 it's not easy to focus on is the silent, what I will call  
12 them, the silent majority of people who live by these  
13 non-disclosure agreements, by their obligations to adhere to  
14 protecting official NSA information, and they do it every  
15 single day.

16 There are thousands of employees, whether they're  
17 in NSA, CIA, DIA, who every single day go to work and they  
18 adhere to their obligations to protect official government  
19 information. They do it when they show up at eight o'clock,  
20 they do it when they leave at 6:00 p.m. There are some  
21 people who do not tell their families what they do for a  
22 living because they take this obligation so seriously. And  
23 that's what makes this defendant so dissonant with the  
24 silent majority, if you will. And they come from all walks  
25 of life; they are the janitors, they are the maintenance

1 people, they are the staff, they are the senior executives.  
2 And those are the people who will listen and look at your  
3 sentence to see what the message is. Does their obligation  
4 that they live every single day have meaning?

5 Put another way, does his violation of that  
6 obligation have any meaning.

7 THE COURT: What message is sent by the  
8 government, Mr. Welch -- there are messages sent not only by  
9 the court, but by the government. What kind of message is  
10 sent by the government when the government dismisses a ten  
11 count indictment a year after indictment, on the eve of  
12 trial, after days and days of hearings under the Classified  
13 Information and Procedures Act, and in what I find to be an  
14 extraordinary position taken by the government, probably  
15 unprecedented in this courthouse, for a case of this profile,  
16 literally on a Thursday afternoon before a Monday trial,  
17 subject to the government to be prepared as you will in a  
18 moment to dismiss the entire ten count indictment and allow  
19 the defendant to plead guilty to a misdemeanor? What message  
20 is sent by the government as to those people as to whom  
21 you're speaking?

22 MR. WELCH: I think the message being sent is in  
23 these sorts of cases, we are going to bring them and we are  
24 going to try hard, and if at the end of the day, for whatever  
25 reason, the government believes that the evidence is coming

1 up short, then we have to deal with what we have to deal  
2 with.

3 THE COURT: Just in terms of a housekeeping  
4 matter, government exhibit 155, government document 155 is  
5 now pending before me, the motion to dismiss the indictment,  
6 and you're now moving to dismiss the ten count indictment, is  
7 that correct?

8 MR. WELCH: That's right.

9 THE COURT: That motion will be granted and the  
10 indictment will be dismissed. But go ahead, Mr. Welch, I  
11 didn't mean to interrupt you.

12 MR. WELCH: You did not.

13 So with respect to deterrence, the sentence that  
14 you impose conveys a very important message, and an important  
15 message I know that the court will adhere to.

16 So the reason that we ask for the one year  
17 probation, the 250 hours of community service and the fine is  
18 because that does send a message. It's also a sentence  
19 consistent with a case of equal notoriety, profile, and that  
20 is the Berger case. That is the case involving the former  
21 national security advisor who in 2005 pled to a misdemeanor.

22 THE COURT: This same misdemeanor?

23 MR. WELCH: He pled to a different misdemeanor.  
24 But again, it was --

25 THE COURT: What was the sentence imposed in that

1 case?

2 MR. WELCH: The sentence imposed was two years  
3 probation, it was a hundred hours of community service, and  
4 it was a \$50,000 fine. And in that particular case, the  
5 timeframe over which Mr. Berger was removing -- in his  
6 particular case it was classified information -- was one  
7 month, meaning from September 2 to, I believe, October 2 of  
8 whatever the pertinent year was. And then on top of that, he  
9 was only charged and he only pled to removing five documents.

10 THE COURT: What was the fine in that case?

11 MR. WELCH: \$50,000.

12 THE COURT: His financial circumstances were  
13 clearly different than Mr. Drake, were they not?

14 MR. WELCH: I don't know what his financial  
15 circumstances were. I would say that Mr. Drake has the ready  
16 cash at hand. He has a net worth of approximately \$600,000.  
17 And with respect to the fine, the way I would ask the court  
18 to impose it would be an initial lump sum of \$25,000 and then  
19 a payment schedule as required by the probation service.

20 But the reason that the court must impose an  
21 upward departure on the fine is because the advisory  
22 guideline range is \$5,000, and as the defendant noted in his  
23 sentencing memorandum, he received a \$10,000 prize for having  
24 been a whistle-blower.

25 THE COURT: He's also spent almost a hundred

1 thousand dollars on private legal fees, did he not?

2 MR. WELCH: He did.

3 THE COURT: I think that was the figure admitted,  
4 \$82,000.

5 MR. WELCH: And there are not many defendants who  
6 walk into a federal court in a white collar or similar sort  
7 of case who also spend a lot of money on court fees who also  
8 receive considerable fines.

9 THE COURT: How many of those defendants do you  
10 think wait two and a half years after their home is searched  
11 before an indictment is returned?

12 MR. WELCH: I couldn't even guess or estimate.

13 THE COURT: I'll estimate for you. Not many.  
14 Based on my career experience, having occupied both chairs in  
15 the courtroom, I know very few situations where a person's  
16 home is searched and two and a half years later they're  
17 indicted. That's an extraordinary delay in which when the  
18 government chooses to search someone's home, there's some  
19 delay perhaps in reviewing it, but I find a two and a half  
20 year period after your home is searched to wait and see if  
21 you're going to be indicted is an extraordinary period of  
22 delay, Mr. Welch.

23 MR. WELCH: Well, I can tell the court that the  
24 case was assigned to me in November of 2009, I met with Mr.  
25 Drake's private counsel to talk about a resolution, and by

1 May of 2000 it was indicted.

2 THE COURT: And I'm not criticizing you  
3 personally. The record should reflect both you and Mr.  
4 Pearson have handled yourself with total professionalism in  
5 my court and it's been a pleasure to having you both here.  
6 But it certainly leaves a question, when you talk about the  
7 fine to be imposed and the costs, apparently from November of  
8 2007 after the man's home was searched until November of 2009  
9 when you came in the case, it was floating somewhere in terms  
10 of exactly who was going to make a decision somewhere up the  
11 chain as to what was going to be done about the case, in  
12 light of the fact that none of the other people with whom he  
13 was alleged to have been acting were ever charged. Do you  
14 have an explanation for the two year delay then from November  
15 of 2007 to November of 2009?

16 MR. WELCH: I do not.

17 THE COURT: Do you think the average American  
18 citizen is entitled to an explanation?

19 MR. WELCH: I think the average American is.

20 THE COURT: I think the average American is  
21 entitled to know when their home is searched after a month,  
22 two months, three months, six months, hire a lawyer. I think  
23 at some point in time that the average citizen when their  
24 home is searched, which is a pretty, as you and I both know,  
25 Mr. Welch, is a pretty extreme experience for those who have

1 experienced it, to have someone arrive at the crack of dawn  
2 and knock on the door and come through and inventory all the  
3 items in your home. I would think the average American after  
4 two years is entitled to know what the status of the case is.

5 THE DEFENDANT: And I know, as I indicated to  
6 you, that I met with Mr. Drake's counsel in March of 2010. I  
7 thought that another prosecutor met with Mr. Drake's counsel I  
8 think approximately a year before that. So I would assume,  
9 though I wasn't there, that some explanation was provided  
10 with respect to where they were at that point in the  
11 investigation.

12 But at the end of the day, the reason I focus on  
13 the upward departure and the fine is because he shouldn't  
14 walk away in the sense of a comparison between the fine and  
15 this award with any semblance of a notion that he's profited  
16 in any way from his conduct. At a minimum, the fine ought to  
17 be \$10,000, but I would urge the court to impose the \$50,000,  
18 the one that was also imposed in the Berger case.

19 So ultimately, that is the sentence that I  
20 recommend with respect to the court and, again, we would  
21 formally move to dismiss the indictment noting that the court  
22 has already issued that order.

23 THE COURT: A few other questions, Mr. Welch.  
24 The indictment will be dismissed, Mr. Clerk, and the  
25 appropriate order will be prepared.

1           I wanted to focus if I could there, Mr. Welch, as  
2 I mentioned on the matter of the execution of the search  
3 warrant because when you talk about the matter of profit  
4 being made, and the court considers profit, from my review of  
5 the information in this case, it doesn't appear to be  
6 disputed, that not only do you have a two and a half year  
7 delay between the search of the home and the indictment, and  
8 you basically have explained six months of it, and you as an  
9 officer of the court have not been able to explain the other  
10 two years, I don't hold you at fault for that, nobody from  
11 the U.S. government is explaining that to me here today. You  
12 have a situation where essentially he is, was within five  
13 years of having a federal service to be eligible for his  
14 pension and he's lost that. It appears to be undisputed that  
15 within a matter of a few weeks after being indicted he lost  
16 his job at the university. In terms of the financial cost, I  
17 think anyone would recognize that he has clearly already  
18 suffered a financial cost, and that's a factor that I should  
19 consider when I consider any fine, should I not?

20           MR. WELCH: You should.

21           THE COURT: Sandy Berger, who is an advisor to  
22 the President of the United States and travels in those  
23 circles and may or may not write books, certainly is able to  
24 bounce back from this kind of situation far more quickly than  
25 someone who winds up having to work at the Apple Computer

1 Store, correct?

2 MR. WELCH: Correct. I also noted in a defense  
3 submission that Mr. Drake, if I read it correctly, was  
4 studying for his Ph.D. and hoped to get a teaching position  
5 somewhere. So it is not impossible; in fact, it happens  
6 often that people do bounce back.

7 THE COURT: Well, there's no way he can bounce  
8 back with respect to his federal pension, that's for sure,  
9 isn't it?

10 MR. WELCH: I think there's a serious question  
11 whether he would have even qualified for it had NSA known in  
12 August of 2001 that he was not adhering to the obligations  
13 that he had back then before he became a senior executive  
14 with NSA.

15 THE COURT: All right. Just one last thing, Mr.  
16 Welch and, again, I do appreciate the courtesies that you've  
17 extended to the court, but I really do need to follow up on a  
18 matter here with respect to your motion to dismiss the  
19 indictment and my earlier noting in these proceedings today  
20 what I find to be extraordinary chronology of this case, and  
21 I want to give you an opportunity to respond.

22 When we had the hearings under the Classified  
23 Information Procedures Act, we clearly then had the  
24 classified hearings, aptly assessed by Miss Christine  
25 Gunning, the court security officer who has worked on many of

1 these cases with other judges around the country, and certain  
2 rulings were made, some in favor of the government, some not,  
3 some in favor of the defendant and some not, the government  
4 made its determination that the disclosure of remaining  
5 classified information would harm national security and ergo  
6 the dismissal of the indictment.

7 Clearly, under Section 7 of that act, Mr. Welch,  
8 the government could appeal any decision I made with the  
9 appellate court, correct?

10 MR. WELCH: That's correct.

11 THE COURT: And unless a jury had been empanelled  
12 in this case and a trial had started, the appellate court  
13 could take as long as it chose and the whole matter would be  
14 frozen in time, nothing would happen until the appellate  
15 court ruled upon the government's appeal of any rulings I  
16 made with which the government was not pleased, correct?

17 MR. WELCH: That's correct.

18 THE COURT: So that, again, I find the chronology  
19 of this, it's impossible to hear from the government and read  
20 the government's sentencing memorandum, and I certainly have  
21 taken to heart what you've said, and under 3553A6 of Title 18  
22 I have to consider the matter of disparity of sentencing, and  
23 it's been educational for me to hear what the sentencing was  
24 of Mr. Berger.

25 But having said that, and reading through the

1 defendant's sentencing memorandum, I must tell you that much  
2 of it was a regurgitation of the facts that were contained in  
3 the indictment. And the counts in the indictment, the first  
4 five counts were willful retention of national defense  
5 information, but count six was obstruction of justice  
6 alleging that he destroyed a document improperly and that's  
7 referenced in your sentencing memorandum. And counts seven,  
8 eight, nine and ten were making a false statement, which are  
9 essentially referred to.

10 And your oral presentation has been very helpful  
11 to me, but with respect to the written submission, it's just  
12 a summary of the indictment that the government chose not to  
13 proceed with. And some of these counts had nothing to do  
14 with some of the rulings that I made and weren't affected at  
15 all by some of the rulings. So I must say, I take a little  
16 bit of exception to summarizing some of these allegations.

17 He denied the allegations. The government had a  
18 year to get ready for trial to prove the allegations. And I  
19 really don't think it's appropriate to then summarize all the  
20 allegations again against a man who's finally finished his  
21 process and walked out. I don't think it's appropriate. And  
22 I think that's why we have trials.

23 And quite frankly, if the government felt that  
24 strongly about it, the government should go to trial. That's  
25 what we do here. I'll give you an opportunity to respond

1 because, quite frankly, I went through all of this and  
2 finally after reading through it I felt like saying why don't  
3 I reread the indictment because the government chose to drop  
4 the entire case. And as I tell you, as I say to you, Mr.  
5 Welch, I find it extraordinary. I even talked to one of my  
6 colleagues about it, his career background is similar to  
7 mine, I find it extraordinary in this case for an  
8 individual's home to be searched in November of 2007, for the  
9 government to have no explanation for a two year delay, not a  
10 two and a half year delay, for him to then be indicted in  
11 April of 2010, and then over a year later, on the eve of  
12 trial, in June of 2011, the government says, whoops, we  
13 dropped the whole case. And that's a factor I have to  
14 consider when the government talks about deterrence.

15 I can assure you that any person in their right  
16 mind would be deterred as to the pattern of conduct of Mr.  
17 Drake looking at what has happened to him in his life in  
18 terms of that pattern, and that's a factor I have to consider  
19 because the chronology here, the chronology here is not good,  
20 and it is not encouraging. And I think the chronology here  
21 would cause many citizens, Mr. Welch, regardless of their  
22 philosophy and their viewpoints on these matters, I think the  
23 average American citizen would take great caution to say,  
24 okay, let me get this straight, my home is searched, and  
25 three years later I'm finally indicted, and then a year after

1 that the government drops the whole case. That's four years  
2 of hell that a citizen goes through. And I think the  
3 government has an obligation, when these kinds of cases are  
4 brought I think the government has an obligation to stick  
5 with it or make amends very, very quickly. And there's a  
6 long time coming in terms of the decisions made.

7 And, again, I'm not criticizing you personally  
8 because I have a strong sense that you didn't make all of  
9 decisions in this case either at the beginning or the end,  
10 and you've conducted yourself very properly as an officer of  
11 the court here and I commend you for that, but I am very  
12 troubled, very troubled by the chronology of this case, and I  
13 think it would trouble anyone in my position. But I'll give  
14 you an opportunity to respond to that.

15 MR. WELCH: With respect to the first point which  
16 is that the government sentencing memorandum may be just a  
17 regurgitation of the allegations of the indictment, what I  
18 would do is point the court to the footnote that we placed in  
19 the sentencing memorandum where we advised the court that all  
20 the information contained in our sentencing memorandum,  
21 except where we explicitly noted, came from the interview  
22 with this defendant.

23 THE COURT: I understand.

24 MR. WELCH: In other words, these are his words.  
25 These are his statements. They're not something that we

1       allege based on some other source of evidence. This is what  
2       he said.

3               THE COURT: Back in 2007 and 2008.

4               MR. WELCH: That's right. There was never a  
5       motion to suppress. There was never a challenge to the  
6       voluntariness of the statements. And so as a result, as we  
7       sit here today or stand here today, we accept those  
8       statements as true. Do we have any reason to believe that  
9       they're not?

10              THE COURT: My question isn't as to the accuracy  
11       of the information. Your point is well taken. I'm  
12       questioning the timeframe.

13              MR. WELCH: With respect to the timeframe, you  
14       know, I can't explain that to the court. I can tell the  
15       court what my personal practice is. I can tell the court the  
16       way I view or how cases should proceed. But I cannot speak  
17       to what happened two years prior to me getting on the case.

18              THE COURT: Who from the U.S. government does?

19              MR. WELCH: I wouldn't know back in November of  
20       2007 who was monitoring it back then.

21              THE COURT: Well, Mr. Welch, my only response on  
22       that is is that if the executive branch of government doesn't  
23       provide an explanation, at least it's up to the judicial  
24       branch to note the impropriety of it. It was not proper. It  
25       doesn't pass the smell test.

1 Thank you very much, Mr. Welch.

2 MR. WELCH: Thank you, Your Honor.

3 THE COURT: Mr. Wyda, I'd be glad to hear from  
4 you, or Miss Boardman. I've read the sentencing memorandum,  
5 some portions of which have been sealed, so I usually make  
6 reference to the various letters that I've read and I've  
7 tried to make notes of what was sealed or not sealed, so I  
8 want those members of the family or other friends to know I  
9 have read all the letters, but I'm a little bit nervous in  
10 terms of summarizing whose letters I've read and whose  
11 letters I've not because I was comparing the sealed portion  
12 with the unsealed portion. I've read the military  
13 transcripts and I'm very familiar with this.

14 MR. WYDA: Again, I don't intend to go into a  
15 great amount of detail and, frankly, my presentation was  
16 shrinking during the course of the afternoon as the  
17 conversation went on.

18 I do want to focus briefly on the charge that Mr.  
19 Drake pled guilty to and Mr. Drake's character as we're  
20 supposed to do under 18 U.S.C. 3553.

21 THE COURT: Just to the people who have written  
22 all these letters, I have read all those letters. I can  
23 assure all the people I have read all those letters from his  
24 mother and father and his family members and wife and  
25 ex-wife, I've read all the letters from family and friends,

1 but, again, some of them were sealed because of the material  
2 in them and some were not. I really can't go into any more  
3 detail on that.

4 MR. WYDA: Again, Your Honor, I'll try to be  
5 brief, but on June 10 Mr. Drake pled guilty to the  
6 misdemeanor of exceeding the authorized use of a government  
7 computer. The offense does not involve mishandling  
8 classified evidence, which is what Mr. Berger pled guilty to,  
9 or any intent to harm the United States. Mr. Drake did not  
10 do those things.

11 The parties, who throughout this litigation have  
12 agreed on very little, are both recommending a sentence of  
13 one year probation.

14 I want to address three topics. Very briefly,  
15 Mr. Drake's remarkable personal history. I think it suggests  
16 how aberrational it is, as Your Honor has noted earlier, that  
17 Mr. Drake would be here at counsel table as a defendant in a  
18 federal criminal prosecution. I also want to very, very  
19 briefly mention the circumstances of the crime, and I'd like  
20 to address what Mr. Welch brought up regarding the purposes  
21 of a sentence like this.

22 Miss Boardman and I do this a lot. It's our  
23 profession. We do an awful lot of federal sentencing, and  
24 it's not unusual for us to discuss our client's life history.  
25 We represent a diverse array of people. We're fascinated by

1 their lives. We have a great deal of empathy for most of  
2 them. Many we respect, some we admire.

3 I'm not sure I've ever represented someone with a  
4 life as unique as I think Tom Drake's is. It's a life well  
5 lived. It's a self made life. I think it's even fair to say  
6 that certainly at times it's been a heroic life.

7 In childhood he grew up to a rural farm in  
8 Vermont. Tom Drake wasn't given much in terms of material  
9 things. I know Your Honor has read the letter from his  
10 mother. He was given one magnificent thing, the remarkable  
11 love of a remarkable mother. But it was a difficult, violent  
12 and turbulent childhood. He was forced to grow up too early,  
13 and he did everything he could to protect his mother,  
14 including at one point placing himself in harm's way to  
15 protect her.

16 At the age of 19, Mr. Drake did something similar  
17 for another young woman who was in harm's way and he again  
18 stepped up, protected her, protected her son.

19 THE COURT: When he moved from Vermont to  
20 Arizona.

21 MR. WYDA: Correct, Your Honor. And he married  
22 that woman and adopted her child. They have three more boys  
23 together and built a life.

24 Mr. Drake at the age of 22 joined the Air Force.  
25 Again, Your Honor knows this world frankly better than I do.

1 You served in the Army and served in the Reserves for many  
2 years. But Mr. Drake's military record is outstanding. He  
3 performed dangerous important air missions over Europe. He  
4 was highly decorated. He received several merit awards  
5 recognizing his courage, his proficiency and performance  
6 including five air medals, an Air Force commendation medal,  
7 an Air Force achievement medal, two Air Force outstanding  
8 unit awards.

9 Miss Boardman and I are not experts in this area.  
10 We did consult with some folks who we thought might know this  
11 world better than us, and at least one suggested that we told  
12 him that you were Army and he wanted us to make sure that we  
13 impressed upon you that this wasn't some Air Force guy who  
14 never got into harm's way. This was, that Mr. Drake, Mr.  
15 Drake was in harm's way.

16 THE COURT: Well, I was an Army JAG officer and I  
17 can assure you I never got in harm's way unless a law book  
18 was about to fall upon me.

19 MR. WYDA: I think I was in the same service,  
20 Your Honor.

21 But, again, one of the admirable things that Mr.  
22 Drake did during this time was, while supporting a family  
23 with four boys, he obtained his education kind of in an  
24 old-fashioned way, he used the military to get that. He  
25 obtained his associate's degree, his bachelor's degree and a

1 master's degree. He served his country bravely and with  
2 distinction for nine and a half years. After that he served  
3 five years in the Naval Reserves.

4 I want to touch very, very briefly upon Mr.  
5 Drake's employment history. We shared a bunch of letters  
6 with Your Honor about Mr. Drake's various employment stops.  
7 Throughout those letters people mentioned Mr. Drake's work  
8 ethic, his integrity and his patriotism.

9 I want to mention the one that you alluded to  
10 earlier that at least for some reason stuck out in my mind as  
11 sort of the most remarkable. This case was incredibly  
12 stressful. We had many emotional meetings with Mr. Drake.  
13 This was exhausting for Mr. Drake and for his family. And as  
14 Your Honor pointed out, he had lost his job and government  
15 service, a senior executive position, as Mr. Welch has  
16 pointed out, he was a college professor at a university  
17 level, and in order to support his family he had to find a  
18 job at the Apple Store in retail making an hourly wage.

19 For some, working in retail after being a senior  
20 executive at NSA and a college professor might be a  
21 humiliating fall from grace. Not Tom Drake. Tom worked, and  
22 he worked hard. We shared a bunch of letters from colleagues  
23 there who commented on what a great worker and what a great  
24 colleague Mr. Drake was.

25 During the frenzy of the last couple weeks of the

1 case, Miss Boardman and I went and met Mr. Drake sometimes at  
2 his workplace. It was one of our favorite moments of the  
3 case. We got to see Mr. Drake exuberantly working at the  
4 Apple Store helping his colleagues, helping customers, no  
5 ego, no arrogance, a humble man working as hard as he could  
6 in a job that he was given. I'd hope I'd be that strong.  
7 I'm not so sure. It was impressive, if I can, and again, I'm  
8 going to try to move on.

9 The crime in this case, the circumstances. Mr.  
10 Drake pled guilty to the crime of exceeding the authorized  
11 use of a government computer. As Your Honor's pointed out,  
12 there is no criminal history in this man's background of any  
13 type currently. He acknowledged the facts on the basis of  
14 this plea since that search at his home. He acknowledged  
15 that he shared unclassified information that did not harm the  
16 United States with a reporter. Since then, he has struggled  
17 through this process, and I guess the way I will leave it,  
18 Your Honor, is we're happy we're here with this resolution at  
19 this point.

20 I guess I'll move on just briefly, Your Honor, to  
21 address --

22 THE COURT: Take your time.

23 MR. WYDA: -- the more philosophical issues  
24 raised by the government's argument.

25 3553 suggests that we consider a just punishment,

1 sort of retribution or deterrence as Mr. Welch has suggested.

2 Tom Drake has been punished profoundly for that  
3 decision to share unclassified information with a reporter.  
4 As Your Honor has noted, he's lost a career in government  
5 service that he loved. He suffered grave financial damage,  
6 the loss of the job, the loss of the pension, the attorney's  
7 fees, having to live with the fact that he may not be able to  
8 send his son to college, the damage that he did to all the  
9 people around him. He and his family have suffered great  
10 physical and emotional stress for years. There has been a  
11 serious amount of punishment inflicted up to this point.

12 The government mentions, and it's appropriate,  
13 you know, the importance of deterrence, especially in high  
14 profile cases, I think it's natural to go there. Frankly, as  
15 a defense attorney, it always makes me nervous. It feels a  
16 little bit cruel to suggest that Tom Drake should get  
17 punished more severely because of people that might hear this  
18 result out there. But setting that aside, rightly or  
19 wrongly, a strong deterrence message, as Your Honor has  
20 suggested already, I believe, has already been sent to  
21 individuals in Mr. Drake's position. No one, and again, I  
22 believe Mr. Welch has made this point as well, the government  
23 comes hard after folks like Mr. Drake. They came back --

24 THE COURT: Not quickly apparently.

25 MR. WYDA: Not quickly. And frankly, according

1 to the defense, maybe too hard. But, again, no one would  
2 want to switch places with Tom Drake during the painful  
3 process that he and his family have endured.

4 The analogy to Mr. Berger is not apt. The  
5 misdemeanor is different. The circumstances, certainly the  
6 financial circumstances, the resiliency, the financial  
7 resiliency of Sandy Berger are far different than Tom Drake  
8 who, knowing Tom, he might be at the Apple Store tonight. My  
9 guess is he will for sure be there tomorrow trying to pay his  
10 bills, trying to rebuild his family's future. And, again, he  
11 will not be consulting with large law firms in Washington,  
12 D.C., which I think Mr. Berger knew he was going to be able  
13 to do.

14 A fine is not appropriate, Your Honor. We  
15 embraced in our sentencing memo the idea of community  
16 service. Tom loves to serve the community. That's a big  
17 part of his identity. If the court's comfortable with that,  
18 community service would be appropriate. We don't think,  
19 frankly, the number that the government mentioned, but 50 or  
20 a hundred hours of community service to allow Tom to teach.  
21 Again, in those letters, no surprise to Miss Boardman and I,  
22 it's clear that Tom is a remarkable teacher. He's good with  
23 young people. And if there's a chance, if that's something  
24 that the court deems is appropriate, we could live with that.

25 Your Honor, I guess the final point I want to

1 make, and again, maybe I can end on a nice note, the case has  
2 been intensely litigated. The government has been  
3 extraordinarily well represented, as Your Honor has noted, by  
4 Mr. Pearson and Mr. Welch. They are extraordinarily skilled  
5 adversaries. We've agreed on almost nothing during the  
6 course of this case. We agree that a sentence of one year  
7 probation is a just result for Tom Drake for the crime of  
8 exceeding the authorized use of a computer. I'd ask that the  
9 court impose that sentence, a period of community service.  
10 And, again, Your Honor, I don't think under the financial  
11 circumstances for Mr. Drake that a fine makes sense. The  
12 analogy, in fact the government made the analogy to Mr.  
13 Berger on occasion in our efforts to resolve this case, but  
14 frankly their financial pictures I think are far different.

15 THE COURT: Thank you, Mr. Wyda.

16 Mr. Drake, if you'll please stand, I now  
17 personally address you and determine if you wish to make a  
18 statement and give you an opportunity to speak on your own  
19 behalf. Do you wish to make a statement, sir?

20 THE DEFENDANT: Only to say, Your Honor, it's  
21 been an extraordinarily difficult ordeal for me, a tremendous  
22 pain on my family and friends and colleagues, and I simply  
23 stand before the mercy of the court, Your Honor.

24 THE COURT: All right. Thank you, Mr. Drake.

25 The court has determined the advisory guidelines

1 in this case, and there's not any dispute about the advisory  
2 guideline range. It's a total offense level of six, a  
3 criminal history category of one. It results in an advisory  
4 guideline range of zero to six month's incarceration. It  
5 also is in zone A of the advisory guidelines which allows for  
6 a probation sentence in this case. Both the government and  
7 the defense have recommended a one year period of probation.  
8 There is a variance as to their other recommendations.

9 The court considers that advisory guideline range  
10 as well as other factors under 3553A of Title 18. As to some  
11 of those factors, first of all, as to the personal history  
12 and characteristics and nature and circumstances of this  
13 offense, I will note as to the nature and circumstances of  
14 the offense, Mr. Drake, that the overall scenario here is  
15 troubling. The fact that I have clearly been critical of the  
16 government and the lack of explanation for the time period  
17 and the fact that you're the only one charged, it certainly  
18 takes away from the gravitas of the case. It doesn't mean  
19 that I don't recognize the nature and circumstances of the  
20 offense, which are to be considered. And I am going to order  
21 community service. And I've already, in fact, talked to  
22 military personnel about it and I'll explain in a moment what  
23 your community service will be.

24 So the implications on any kind of classified  
25 information involving issues of national security are very,

1 very important and should not be ignored. From the smallest  
2 case to the most severe case, it is a very, very delicate  
3 matter. And you of all people are clearly aware of that in  
4 terms of your personal history and your military service to  
5 this country, a total of 15 years both active duty and  
6 reserve, as well as eight years at the National Security  
7 Agency. So you're very well aware of the sensitivity of all  
8 of this, so anything involving classified material, anything  
9 involving protected material, anything involving material  
10 that we dealt with over days and days with the secured  
11 hearings that were classified here in the closed courtroom  
12 were obviously very, very significant and weigh on the  
13 thoughts of the court.

14 Having said that, your personal history and  
15 characteristics are commendable. You've served in the U.S.  
16 Air Force. You've served in the Navy Reserves. You've  
17 served your country in a very significant way in terms of  
18 working for the NSA, a very important agency in the lives of  
19 our country, particularly since September 11, and you have  
20 served well. So this whole matter is really a tragedy and  
21 you definitely did exercise very poor judgment.

22 But having said that, when I look at the matter  
23 of whether it's necessary to protect the public from further  
24 crimes of you, that's obviously not the case, and Mr. Welch  
25 hasn't tried to argue that it is. But in terms of

1       deterrence, what you have gone through in and of itself would  
2       deter anyone who thinks they can lightly take information  
3       from a government computer and in any way set out on their  
4       own path. The irony here is is that you set out on the  
5       correct path initially and followed the protocols and  
6       contacted the appropriate congressional committees. The  
7       public needs to understand that there are ways that whistle  
8       blowers from government agencies can proceed, including with  
9       classified information and going to the House Permanent  
10      Select Committee on Intelligence and other matters.

11                 One of the members of Congress from Maryland is a  
12      member of that committee and the ranking minority member,  
13      Congressman Dutch Ruppersberger. There are ways to approach  
14      that, and you knew that and approached in that fashion, then  
15      you were careless and went beyond that. And that is  
16      regrettable. And I do believe that there is deterrence that  
17      results from this sentence.

18                 But as I've clearly already indicated, I don't  
19      think that deterrence should include an American citizen  
20      waiting two and a half years after their home is searched to  
21      find out if they're going to be indicted or not. I find that  
22      unconscionable. Unconscionable. It is at the very root of  
23      what this country was founded on against general warrants of  
24      the British. It was one of the most fundamental things in  
25      the Bill of Rights that this country was not to be exposed to

1 people knocking on the door with government authority and  
2 coming into their homes. And when it happens, it should be  
3 resolved pretty quickly, and it sure as heck shouldn't take  
4 two and a half years before someone's charged after that  
5 event. And that weighs heavily, obviously, upon this  
6 particular judge.

7 I look at factors under 3553A6, as I mentioned to  
8 Mr. Welch, as to the matter of disparity of sentencing. The  
9 sentencing imposed upon Mr. Berger, former advisor to  
10 President Clinton, is instructive to the court, but it's  
11 distinguishable in terms of first of all his ability to  
12 bounce back from that event and, second of all, the nature of  
13 the documents that he was found to have. But it is  
14 instructive for me.

15 When I consider all that, I then first consider  
16 the matter of the sentence. This is not a sentence of  
17 incarceration. There's absolutely no way I'd put you in jail  
18 with respect to this offense, and the government and the  
19 defense both agree that a period of one year probation is  
20 appropriate. The statute would provide up to five years, but  
21 you're going to be placed on probation for one year.

22 With respect to community service, your lawyers  
23 have argued for community service, the government has argued  
24 for community service as well. I have spoken with Miss  
25 Stephanie Schultz, Chief Army Community Services Coordinator

1 at Fort Detrick, Maryland in Frederick, Maryland. I spoke  
2 with her this morning, and she's ready and waiting for you in  
3 terms of community service there at Fort Detrick in  
4 Frederick, Maryland. I'm going to require 240 hours of  
5 community service, Mr. Drake. I'm going to require an  
6 average of 20 hours of community service a month. You can  
7 structure that in whatever way you work it out with Miss  
8 Schultz for the one year period. 240 hours of community  
9 service as a condition of the one year period of probation.

10 With respect to the matter of the fine, I have  
11 given careful consideration to the matter of a fine, even  
12 prior to the government indicating its position, and I'm not  
13 going to impose a fine in this case. I'm not going to impose  
14 a fine for a variety of reasons. One, in terms of your net  
15 worth statement in which you are or not worth, an equity that  
16 you do or don't have in a house. A matter of equity in a  
17 home is a questionable feature in our society today. I'm  
18 well aware of not only the 80,000 plus dollars you've  
19 expended on a lawyer. I've even factored in the \$10,000  
20 award that you've received with respect to a certain  
21 foundation. There is no question at all that you have taken  
22 an enormous financial hit in this case.

23 You essentially, you need five more years of  
24 federal service to be eligible for a federal pension and  
25 you're not going to ever get it. You didn't get your 20 year

1 letter from the military, either active or reserve, so you  
2 stand before me as an individual who through all the events  
3 of your life gets absolutely no federal pension that I can  
4 see of any kind. And I have no doubt about the financial  
5 devastation that's been wrought upon you. And I've read the  
6 figures, the sealed figures, I believe they're sealed with  
7 respect to what your income was when you were with NSA and  
8 what your income is now working as a salesperson at a  
9 computer store in the Washington suburbs.

10 So for the government to suggest that a fine  
11 needs to be imposed to send a message, there has been  
12 financial devastation wrought upon this defendant that far  
13 exceeds any fine that can be imposed by me. And I'm not  
14 going to add to that in any way. And it's very obvious to me  
15 in terms of some of the irritation I've expressed in more  
16 than slight figure is not only my concern over the delay in  
17 this case, Mr. Welch is an honorable officer of the court,  
18 his inability to explain himself the delay in this case. And  
19 I think that somebody somewhere in the U.S. government has to  
20 say to somebody, the Department of Justice, that the American  
21 public deserves better than this.

22 We're in a very difficult time in our country and  
23 national security is very high, but that does not take away  
24 from the fact that when extraordinary steps are taken by the  
25 government, somebody has to make decisions ahead of time.

1 And it does not suffice, it does not suffice to have to be an  
2 unexplained period of two years where a defendant waits to  
3 find out what some anonymous figure in Washington, buried in  
4 the bowels of the Justice Department, is or is not going to  
5 do. That doesn't cut it. Maybe the executive branch can't  
6 provide an answer, but I certainly as a member of the  
7 judicial branch intending a voice on behalf of that branch of  
8 government, the lack of satisfaction. I'm fairly confident  
9 that I would speak for almost all federal judges in this  
10 country that would say that that doesn't cut it, that kind of  
11 delay over that period of time. So that's more than a small  
12 factor in my comment that there's not going to be any fine in  
13 this case.

14 So I've conducted the analysis under the  
15 guidelines, I've considered factors under 3553A, and that is  
16 the sentence of the court: One year probation, 240 hours of  
17 community service at Fort Detrick, Maryland, in Frederick,  
18 Maryland. No fine will be imposed. There will be a special  
19 assessment of \$25 which is mandatory. And Mr. Wyda, if you  
20 can see that that special assessment is paid by Monday  
21 morning to the clerk's office and that is a mandatory special  
22 assessment required by statute.

23 Let me advise you of your appeal rights, Mr.  
24 Drake. Both you and the government essentially waived rights  
25 of appeal of this sentence in paragraph 11 of the plea

1 agreement, but I want to note to you that if you wanted to  
2 note an appeal, you should do so within 14 days of the entry  
3 of this judgment and commitment order pursuant to Rule 4B of  
4 the Federal Rules of Appellate Procedure. If you could not  
5 afford an attorney to represent you on appeal, an attorney  
6 could be appointed once again to represent you.

7 And Mr. Wyda and Miss Boardman, you do not need  
8 to notify the court, but if you would please make a note in  
9 your file that you've discussed the matter of an appeal or  
10 lack thereof within the next 14 days.

11 I have a few other matters I want to add here but  
12 I'm trying to make sure I don't miss anything. Is there  
13 anything further from the point of view of the government,  
14 Mr. Welch?

15 MR. WELCH: No, I think you've covered all the  
16 points, Your Honor.

17 THE COURT: Anything from the point of view of  
18 the defendant, Mr. Wyda.

19 MR. WYDA: No, Your Honor.

20 THE COURT: I have one more matter to address,  
21 and Mr. Welch, I know I asked some tough questions of you,  
22 I've had some tough comments for the executive branch of  
23 government today, but I want the record to reflect that both  
24 you and Mr. Pearson have conducted yourself with the height  
25 of professionalism before me in any and all matters, and you

1 weren't known to the court before you arrived and I'm not  
2 sure if you'll be back in this court because you're from  
3 other jury jurisdiction, but I want to commend you for your  
4 level of professionalism in all matters before the court,  
5 both in public matters and some of the classified hearings  
6 and I commend you for your professionalism. Sometimes it's  
7 tough to be the messenger, Mr. Welch, when you have to try to  
8 answer for the entire U.S. government. I wasn't casting  
9 anything personally upon you, it was more directed at the  
10 executive branch, and I commend you and Mr. Pearson for your  
11 professionalism in this case.

12 MR. WELCH: Thank you, Your Honor. It was a  
13 pleasure to appear before you and I assure you I have broad  
14 shoulders and I have no problem being the messenger.

15 THE COURT: Thank you very much.

16 MR. PEARSON: Thank you, Judge.

17 THE COURT: And Mr. Wyda and Miss Boardman, the  
18 U.S. Attorney's Office in Maryland has a rich tradition here  
19 with respect to national cases and a national reputation.  
20 What has been known in this court for a long time is the  
21 quality of the Public Defender's Office in this district,  
22 which is equal to the outstanding quality of the U.S.  
23 Attorney's Office, and your representation of your client has  
24 been at the highest levels of professionalism and at the  
25 highest levels of legal competence.

