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The Obama Administration's aggressive war on whistleblowers suffered a humiliating setback on June 9 when former NSA official [Thomas Drake accepted](#) a misdemeanor plea agreement for exceeding his authorized use of a government computer.

The Department of Justice had been pursuing Drake for alleged violations of the Espionage Act that might have sent him to prison for up to 35 years. But the [government withdrew](#) the evidence supporting several of the central charges after a judge ruled Drake would not be able to defend himself unless the government revealed details about one of the National Security Agency's telecommunications collection programs. On two other counts, documents the government had claimed were classified have either been shown to be labeled unclassified when Drake accessed them or have since been declassified. Faced with the prospect of trying to convict a man for leaking unclassified information, the government frantically crafted a plea deal in the last days before the case was due to go to trial.

The collapse of the case against Drake may have repercussions beyond just this one case.

This is the third time the government's attempt to use the Espionage Act to criminalize ordinary leaking has failed in spectacular fashion. The first such example—against Pentagon Papers

leaker Daniel Ellsberg—got dismissed when the government’s own spying on Ellsberg was exposed.

More recently, the Bush Administration tried to punish two AIPAC employees for sharing classified information on Iran. But when the AIPAC employees moved to subpoena top officials like Condoleezza Rice to testify about leaking the same information, the government dropped the case.

And now there’s the Drake case. Aside from the problems the government had with classified evidence, it faced a real challenge proving Drake believed the information would cause the US harm, as the Espionage Act requires. He gathered several of the charged documents in support of an Inspector General complaint for which [he argued](#) the NSA spent \$1 billion outsourcing a program it could have done better in-house for \$3 million. Long before the case crumbled, the government tried to prevent Drake from explaining his Inspector General complaint to the jury, but the judge ruled against the government.

The government will face some of the same challenges when it next tries to use the Espionage Act to punish a leaker in a case against former CIA officer Jeffrey Sterling. DOJ alleges Sterling served as a source for the chapter of James Risen’s book, *State of War*, that describes a CIA operation to deal faulty nuclear blueprints to Iran. Like Drake, Sterling had warned Congressional staffers about the operation before he went to the press. The [government claims](#) that Sterling’s alleged efforts to expose the program by going to the press was “more pernicious than the typical espionage case.”

Sterling’s case bears another important similarity with Drake’s: both have been prosecuted by DOJ lawyer William Welch. Welch is best known for heading the DOJ team whose corruption case against Ted Stevens got thrown out for prosecutorial misconduct. Since 2009, he has been the Obama Administration’s point person on pursuing whistleblowers. Welch seems to be exercising the same poor judgment he did on the Stevens case, as when he withheld evidence for ten months that one of the purportedly classified documents Drake was accused of keeping had been marked as unclassified. Perhaps the embarrassing outcome in the Drake case will lead DOJ to rethink Welch’s role in these controversial cases.

So, too, this embarrassment should convince DOJ to rethink its use of the Espionage Act to prosecute things that aren’t really spying. In addition to the Sterling case, DOJ is controversially

treating its expanding investigation of WikiLeaks as an espionage investigation. Bradley Manning allegedly leaked information to WikiLeaks in response to being asked to help Iraq crack down on legal dissidents; the WikiLeaks cables exposed US complicity in torture and other crimes. But now, DOJ is considering prosecuting not the leaker (Manning is being court martialed by the military), but the media outlet that published classified information itself.

All of these whistleblowers at least claim to have been exposing corruption, waste, and abuse. After DOJ has spent over four years investigating Thomas Drake and over a year trying to prosecute him, in part, for possession of two unclassified documents, DOJ should probably worry more about people reporting on its own waste and abuse than using the Espionage Act to criminalize whistleblowing.