



Jon Kyl, Chairman

347 Russell Senate Office Building  
Washington, DC 20510  
202-224-2946  
<http://rpc.senate.gov>

September 6, 2006

## Legal Experts Ridicule Court Opinion Striking Down Terrorist Surveillance Program

On August 17, 2006, federal district court Judge Anna Diggs Taylor of Detroit held unconstitutional the National Security Agency's Terrorist Surveillance Program, a program the NSA uses to intercept *international* communications of those suspected of involvement in terrorist activities. Judge Taylor (appointed by President Carter in 1979) ruled that the program violates the First and Fourth Amendments to the Constitution, the Administrative Procedures Act, and the Separation of Powers doctrine, and then she permanently enjoined the government from continuing this surveillance. The Department of Justice immediately filed a notice of appeal to the U.S. Court of Appeals for the 6<sup>th</sup> Circuit, but the appellate court will not rule on that appeal for several months. On September 7, the government will ask the district court to enter a stay of the injunction until the 6<sup>th</sup> Circuit resolves the appeal.<sup>1</sup>

Judge Taylor's decision and its reasoning came under immediate fire. Questions were raised about whether the judge rushed her opinion in order to be the first court to rule.<sup>2</sup> Still other questions were been raised about the judge's service as a trustee for a non-profit organization that gave \$125,000 to the ACLU (a plaintiff in the case).<sup>3</sup> Most important, however, was how legal experts — including those such as Laurence Tribe who believe the program to be unconstitutional — almost universally panned the decision as poorly reasoned, unpersuasive, and the product of results-oriented judging.

The following are excerpts from the reactions of those legal scholars that have reviewed Judge Taylor's decision:

**"It's hard to exaggerate how bad it is."** — *John R. Schmidt, former Associate Attorney General for Clinton Administration.*<sup>4</sup>

---

<sup>1</sup> The parties already had agreed to a stay until September 7.

<sup>2</sup> "Some scholars speculated that Judge Taylor, of the Federal District Court in Detroit, may have rushed her decision lest the case be consolidated with several others now pending in federal court in San Francisco or moved to a specialized court in Washington as contemplated by pending legislation." Adam Liptak, *Experts fault reasoning in surveillance decision*, NEW YORK TIMES, Aug. 19, 2006.

<sup>3</sup> See Editorial, NEW YORK TIMES, Aug. 24, 2006 ("the judge clearly erred in not disclosing this involvement").

<sup>4</sup> Liptak, NEW YORK TIMES, Aug. 19, 2006.

**“It does appear that folks on all sides of the spectrum, both those who support it and those who oppose it, say the decision is not strongly grounded in legal authority.”** — Howard Bashman, appellate attorney and editor of *How Appealing* legal blog, <http://howappealing.law.com/>.<sup>5</sup>

**“It is an appallingly bad opinion, both from a philosophical and technical perspective, manifesting strong bias.”** — David B. Rivkin, former Justice Department official in Reagan and George H.W. Bush administrations and current member of U.N. Sub-Commission on the Protection and Promotion of Human Rights.<sup>6</sup>

**“If last week’s decision in *ACLU v. NSA* is left standing, America may have to decide to shut down its commercial passenger airline industry or leave passengers totally at the mercy of terrorists armed with guns, knives, and liquid explosives. For Judge Anna Diggs Taylor has declared the Fourth Amendment ‘requires prior warrants for any reasonable search, based upon prior-existing probable cause.’ It is established that airport screenings constitute Fourth Amendment ‘searches,’ and in 1989 the Supreme Court noted firearms were only detected in 0.0004 percent of airport searches — hardly the ‘probable cause’ needed for a warrant. ... One could spend hundreds of pages addressing the errors in the decision....”** — Professor Robert F. Turner, University of Virginia Law School’s Center for National Security Law.<sup>7</sup>

**“I’m truly shocked. It’s like the feeling you have when you’re grading blue books and you realize this one’s going to get an F. ... That’s not analysis. That’s a petulant refusal to take the task of judging seriously.”** — Professor Ann Althouse, University of Wisconsin Law School.<sup>8</sup>

**“For those who approve of the outcome, the judge’s opinion is counterproductive. It will be harder to defend upon appeal than a more careful decision. It suggests that there are no good legal arguments against the program, just petulance and outrage and antipathy toward President Bush. It helps those who have been arguing for years about result-oriented, activist judges.”** — Professor Ann Althouse, University of Wisconsin Law School.<sup>9</sup>

---

<sup>5</sup> Liptak, NEW YORK TIMES, Aug. 19, 2006.

<sup>6</sup> Adam Liptak and Eric Lichtblau, *Judge finds wiretap actions violate law*, NEW YORK TIMES, Aug. 18, 2006.

<sup>7</sup> Robert F. Turner, *Shaky surveillance ruling*, WASHINGTON TIMES, Aug. 27, 2006.

<sup>8</sup> Posted at [www.althouse.blogspot.com](http://www.althouse.blogspot.com), Aug. 19, 2006.

<sup>9</sup> Ann Althouse, *A law unto herself*, NEW YORK TIMES, Aug. 23, 2006.

**“[T]he judge’s opinion in today’s NSA eavesdropping case seems not just ill-reasoned, but rhetorically ill-conceived. ... [B]y writing an opinion that was too much feeling and too little careful argument, the judge in this case made it less likely that the legal approach she feels so strongly about will ultimately become law.”** — *Professor Eugene Volokh, UCLA Law School.*<sup>10</sup>

**“It’s just a few pages of general ruminations about the Fourth Amendment, much of it incomplete and some of it simply incorrect.”** — *Professor Orin S. Kerr, George Washington University Law School.*<sup>11</sup>

**“Anyone who knows what legal analysis and legal argument look like — anyone who knows the requisites of legal reasoning — must look on the handiwork of Judge Anna Diggs Taylor in the NSA case in amazement. It is a pathetic piece of work. If it had been submitted by a student in my second year legal writing class at the University of St. Thomas Law School, it would have earned a failing grade.”** — *Scott W. Johnson, Fellow at the Claremont Institute.*<sup>12</sup>

**“It’s altogether too easy to make disparaging remarks about the quality of the Taylor opinion, which seems almost to have been written more to poke a finger in the President’s eye than to please the legal commentariat or even, alas, to impress an appellate panel ... .”** — *Professor Laurence Tribe, Harvard Law School.*<sup>13</sup>

**“I know this is a hard issue, but this is one of the least persuasive opinions I’ve ever seen on this question. ... The plaintiffs threw the proverbial kitchen sink at the program and the judge accepted all of the arguments without any serious analysis and contented herself with chiding the President on trying to be king-like. ... The program might indeed be illegal at the end of the day, but Judge Taylor’s rather sloppy opinion is not going to persuade many people.”** — *Professor Julian Ku, Hofstra University School of Law.*<sup>14</sup>

**“[W]e cannot accept the stunningly amateurish piece of, I hesitate to call it legal work, by which she purports to make our government go deaf and dumb to those who would murder us en masse. ... I wouldn’t accept this utterly unsupported, constitutionally and logically bankrupt collection from a first-year student, much less a new lawyer at my firm. ... Judge Taylor has been on the bench since 1979. She is decidedly not an amateur. So, how to explain her first-year failing grade? Regrettably, the only plausible explanation is that she wanted the result she wanted and was willing to**

---

<sup>10</sup> Posted at [www.volokh.com](http://www.volokh.com), Aug. 17, 2006.

<sup>11</sup> Liptak, *NEW YORK TIMES*, Aug. 19, 2006.

<sup>12</sup> Posted at [www.powerlineblog.com](http://www.powerlineblog.com), Aug. 18, 2006.

<sup>13</sup> Posted at [www.balkin.blogspot.com](http://www.balkin.blogspot.com), Aug. 19, 2006.

<sup>14</sup> Posted at [www.opiniojuris.org](http://www.opiniojuris.org), Aug. 17, 2006.

**ignore and misread vast portions of constitutional law to get there, gambling the lives and security of her fellow Americans in the bargain.”** — *Bryan Cunningham, formerly of the Department of Justice and CIA.*<sup>15</sup>

Also weighing in was the *Washington Post*, which editorialized:

**“Unfortunately, the decision issued yesterday by a federal district court in Detroit, striking down the NSA’s program, is neither careful nor scholarly, and it is hard-hitting only in the sense that a bludgeon is hard-hitting. The angry rhetoric of U.S. District Judge Anna Diggs Taylor will no doubt grab headlines. But as a piece of judicial work — that is, as a guide to what the law requires and how it either restrains or permits the NSA’s program — her opinion will not be helpful.”** — Editorial, *Washington Post*, August 18, 2006.

The Senate will soon consider legislation that will prevent individual district court judges from interfering with the government’s efforts to prevent terrorist attacks and bring international terrorists to justice, instead focusing constitutional challenges in the Foreign Intelligence Surveillance Court of Review whenever national security is at stake. Court opinions such as the one released by Judge Taylor demonstrate the need to pass such legislation as soon as possible.

---

<sup>15</sup> Bryan Cunningham, *Amateur Hour?*, NATIONAL REVIEW ONLINE, Aug. 18, 2006.