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## **COURT STRIKES DOWN NSA TERRORIST SURVEILLANCE PROGRAM**

*(ACLU v. National Security Agency)*

Last week, the United States District Court for the Eastern District of Michigan agreed with the ACLU and struck down the National Security Agency's (NSA) electronic Terrorist Surveillance Program. (TSP) Under TSP, certain international electronic communications where one of the parties to the communication is a suspected al Qaeda agent or affiliate could be intercepted without a court order. In doing so, Judge Anna Diggs Taylor became the first and only federal judge to order a president to stop a wartime foreign intelligence gathering operation. The ruling, however, has been temporarily stayed by the court pending a hearing by Judge Taylor on the matter on September 7, 2006, while the case undergoes review by the U.S. Court of Appeals for the Sixth Circuit. The Washington Legal Foundation (WLF) was the only nonprofit public interest law and policy organization that filed a brief supporting the TSP. WLF intends to file another brief in the court of appeals.

In *ACLU v. NSA*, and the related case of *Center for Constitutional Rights v. Bush* pending in federal court in New York, several activist groups and journalists claim that the recently disclosed NSA surveillance program that intercepts certain international calls and emails involving suspected al Qaeda agents or other terrorists, violates the Foreign Intelligence Surveillance Act of 1978 (FISA). That law requires approval by a special FISA court confirming that there is probable cause to believe that the person targeted for electronic surveillance is an agent of a foreign power. However, after the terrorist attacks on the United States on September 11, 2001, the President authorized the collection without court approval of a very limited category of international communications between a person in the United States and a person overseas, where there is reasonable belief that one of the persons to the call is an al Qaeda agent or affiliated with al Qaeda or other terrorist organization.

The ACLU and CCR claim that the NSA program violates FISA, and thus, the separation of powers, by violating congressional commands regarding surveillance procedures. They also argue that the program violates their speech and privacy rights under the First and Fourth Amendments. In its briefs filed in both cases, WLF argued forcefully that it is FISA that violates the separation of powers to the extent it impairs the President's ability to carry out his constitutional responsibilities to defend the country from further attack and to collect foreign intelligence. The Department of Justice (DOJ)

filed briefs in both cases principally arguing that the courts cannot reach the merits of the case, because facts necessary to decide the case are protected from disclosure by the military and state secrets privilege.

In her 41-page opinion, Judge Taylor rejected the DOJ's assertion of military and state secrets privilege, ruling that enough of the specifics of the TSP has been publicly disclosed by NSA and DOJ to reach the merits of the claim without obtaining secret information about the program. She also ruled that the plaintiffs had standing to bring the lawsuit, finding that the ACLU attorneys and their overseas clients are fearful that their calls may be monitored by the NSA, which they claim violates their First Amendment rights by "chilling" their speech.

Judge Taylor ruled that the TSP violates the plaintiffs' First and Fourth Amendment rights, claiming, without citing any legal authority, that in all cases, warrants are required "for any reasonable search, based upon prior-existing probable cause." In doing so, she ignored numerous rulings that permit warrantless searches. Indeed, the Supreme Court stated in a 1972 decision regarding domestic wiretapping that it was *not* ruling on the scope of the President's surveillance power with respect to foreign powers and agents.

More importantly, Judge Taylor ruled that the TSP violates the FISA warrant requirement, and therefore, violates the constitutional separation of powers by violating a legislative enactment. In this regard, WLF argued in its brief that to the extent that FISA precludes the President from acting quickly to intercept *international* electronic communications from or to al Qaeda agents, it is FISA which violates the separation of powers by infringing on the President's power to collect foreign intelligence, particularly during wartime.

"Thankfully, Judge Taylor's dangerous and wrongly decided opinion has been stayed for the time being. We are confident that the court of appeals, and ultimately the U.S. Supreme Court, will uphold the constitutionality of NSA's electronic surveillance program to deter terrorism," said Paul Kamenar, WLF's Senior Executive Counsel.

WLF's brief was drafted with the *pro bono* assistance of Bryan Cunningham of Morgan & Cunningham LLC in Denver, CO, who specializes in cybersecurity and related issues. Prior to entering private practice, Mr. Cunningham was deputy legal adviser to the National Security Council on cybersecurity and homeland security matters.

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