

**For Immediate Release****October 26, 2006**

## **WLF URGES REVERSAL OF COURT RULING SUSPENDING ANTI-TERRORIST ELECTRONIC SURVEILLANCE PROGRAM**

*(ACLU v. National Security Agency)*

The Washington Legal Foundation (WLF) filed a brief yesterday in the U.S. Court of Appeals for the Sixth Circuit urging the court to reverse an unprecedented ruling this summer by U.S. District Court Judge Anna Diggs Taylor of the Eastern District of Michigan. Judge Taylor agreed with the American Civil Liberties Union (ACLU) who challenged the legality of the Terrorist Surveillance Program (TSP) initiated by the National Security Agency (NSA) shortly after the terrorist attack on September 11, 2001. TSP allows electronic surveillance without a court order of certain international communications where one of the parties to the communication is a suspected al Qaeda agent. The court ruled that TSP violates the First and Fourth Amendments, the Foreign Intelligence Surveillance Act (FISA), and the separation of powers.

In its appellate brief, WLF forcefully argued, as it did in the district court, that FISA 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. WLF cited numerous Supreme Court decisions and other authorities showing that the President has primacy in this area over the Congress.

Under FISA, the government must get court approval to conduct the surveillance. Judge Taylor noted that FISA does allow surveillance without an order in emergency situations as long as one is sought within 72 hours. However, what the court overlooked, as WLF noted in its brief, is that before *any* surveillance can be conducted, FISA requires a submission to the Attorney General showing there is probable cause that one of the persons to the communication is a suspected al Qaeda agent or other terrorist. If the NSA learns that a call will be made by an al Qaeda agent within a few minutes, it would impossible to prepare the submission to the Attorney General in time to intercept that call.

The Justice Department filed a brief asserting military and state secrets privilege, and arguing that it was wrong to even reach the merits since information necessary to adjudicate the case, such as how the TSP operates, is secret and cannot be divulged.

WLF's brief was drafted with the *pro bono* assistance of Bryan Cunningham of Morgan & Cunningham LLC in Denver, CO, who specializes in cybersecurity issues.

\* \* \*

For information, contact Paul Kamenar, WLF's Senior Executive Counsel, at 202-588-0302.  
A copy of WLF's brief is posted on its website at [www.wlf.org](http://www.wlf.org).