Legal Opinion Letter

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ACLU v. NATIONAL SECURITY AGENCY: UNWARRANTED INTRUSION INTO WARTIME DECISION-MAKING

by
Andrew C. McCarthy

Several legal issues surrounding President Bush's Terrorist Surveillance Program – the executive authorization to the National Security Agency (NSA) to conduct warrantless surveillance of international enemy communications – will surely have to be resolved by the U.S. Supreme Court. While the high court's consideration will benefit from thoughtful ruminations from both lower courts and scholars on both sides of the civil-liberties/national-security divide, one contribution certain to be forgotten is the August 17 decision of federal district judge Anna Diggs Taylor (E.D.Mi) in *American Civil Liberties Union v. National Security Agency*, holding the program unconstitutional.

The ruling, which more than a legal opinion resembles a political diatribe against what Judge Taylor calls "the War on Terror of this [Bush] administration," is so poorly reasoned that even opponents of the eavesdropping program have evinced embarrassment. It is flagrantly wrong on some basic constitutional concepts. Perhaps worse, though, in declining even to acknowledge contrary legal authority, Judge Taylor runs roughshod over a rudimentary principle of forthright adjudication.

The civil suit was brought against the government by an amalgam of civil rights advocates, Muslim activists and journalists, who theorize that the president is without power to order national-security eavesdropping outside the parameters of the 1978 Foreign Intelligence Surveillance Act (FISA). Plainly, Judge Taylor was determined to invalidate the NSA program, but there were two barricades to reaching the merits that should have been insuperable.

First was standing. There were both constitutional and prudential grounds to dismiss the suit on this basis. Under settled doctrine, actions do not rise to Article III's "case or controversy" requirement absent an injury that is "distinct and palpable," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979), "concrete," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 166, 176-78 (1974), and "actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citation and internal quotation omitted). The claimants here did not allege (nor could they have, given the highly classified nature of the program) that their conversations had actually been intercepted. Instead, they claimed that the specter of possible interception had caused erstwhile interlocutors to shun them. This was patent conjecture – and unpersuasive since even if the U.S. were in strict compliance with FISA, it would still be widely known that U.S. intelligence agencies (as well as most foreign intelligence agencies) were

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attempting to penetrate al Qaeda's communications. In any event, the claims did not amount to a cognizable injury, and even if the matter were doubtful, the proper approach, as now-Chief Justice Roberts wrote in a 1993 academic article, is to "presume that federal courts lack jurisdiction 'unless the contrary appears affirmatively from the record.'" John G. Roberts, Jr., *Article III Limits on Statutory Standing*, DUKE L. J., Vol. 42, No. 6 (Apr. 1993) 1226 & n.46, quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991) (other citations omitted).

One aim of the standing doctrine, of course, is to bar courts from resolving issues in which all Americans have an equal stake. Such generalized concerns raise political questions that courts have wisely left to resolution by the political branches (which, it should be noted, are actively considering germane legislation). Judge Taylor ignored this prudential rule.

The second obstacle was the government's invocation of the state's secret privilege. Under this venerable rule, tracing back to *Totten v. United States*, 92 U.S. 105 (1875), and reaffirmed by a unanimous Supreme Court only a year ago in *Tenet v. Doe*, 544 U.S. 1 (2005), lawsuits may not go forward if they run an undue risk of impairing the national defense by publicly revealing the nation's intelligence gathering capabilities. Judge Taylor attempted to end-run this absolute bar, claiming the privilege was limited to situations involving spies and that the case could be decided based on information that was already public. These rationales, however, are wrong: the privilege relates to all intelligence gathering, not just espionage; and it remains highly relevant whether the claimants were actually intercepted, a matter the government refuses to divulge.

Upon reaching the merits, the court was equally shoddy. Judge Taylor found that the NSA violated the First Amendment – remarkably suggesting that there is a constitutional right to communicate freely with the enemy in wartime. Of course, the NSA program precludes no one's right to speak, and its existence causes no more "chill" to speech than does federal wiretap law's propensity to chill telephone use by drug traffickers.

The court's analysis of the Fourth Amendment, which was also found to be transgressed, was even more alarming. Judge Taylor flatly asserted that the Fourth Amendment "requires prior warrants for any reasonable search, based on probable cause[.]" This is preposterous. The amendment requires searches to be reasonable, and the cases are legion in which the Supreme Court has approved warrantless searches based on less than probable cause – including, for example, border searches to protect national security.

Judge Taylor further found that the President lacked inherent power to conduct warrantless national-security eavesdropping despite several decisions of higher federal courts which stand for the antithesis. These include *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), a case decided after FISA was enacted, albeit one involving pre-FISA facts) and, more significantly, *In re Sealed Case*, 310 F.3d 717, 744 (FIS Court of Review 2002), a case decided after a quarter-century of FISA. In the latter, the Foreign Intelligence Surveillance Court of Review – a tribunal with specialized expertise in FISA matters – stated: "The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information…. We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power." Judge Taylor's opinion fails even to mention, let alone distinguish, these and other decisions that undermine her analysis.

Finally, it is ironic that the court chose to chide the administration for violating separation-of-powers. Writing for the Supreme Court in *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), Justice Robert Jackson opined that matters of intelligence regarding foreign threats to public safety were "of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." Judge Taylor has done much to demonstrate Justice Jackson's wisdom.

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