A TRUE AMERICAN HERO - FEDERAL DISTRICT COURT JUDGE ANNA DIGGS TAYLOR

By Evan Gutman CPA, JD (2013)

"The President of the United States, a creature of the same Constitution which gave us these Amendments, has undisputably violated the Fourth in failing to procure judicial orders as required by FISA, and accordingly has violated the First Amendment Rights of these Plaintiffs as well." [211]

> ACLU v National Security Agency, **Opinion of U.S. District Court Judge Anna Diggs Taylor**, Case No. 06-CV-10204 (August 17, 2006)

"The district court - asserting a heretofore unprecedented, absolute rule that the Fourth Amendment "requires prior warrants for any reasonable search," . . . agreed and granted the plaintiffs' motion . . . on this theory. . . .

However, the Supreme Court has made clear that Fourth Amendment rights are "personal rights" which, unlike First Amendment rights, may not be asserted vicariously. . . .
. . .
. . . As acknowledged by plaintiff's counsel at oral argument, it would be unprecedented for this court to find standing for plaintiffs to litigate a Fourth Amendment cause of action without any evidence that the plaintiffs themselves have been subjected to an illegal search or seizure." [212]

> ACLU v National Security Agency, U.S. Court of Appeals Majority Opinion, Reversing District Court Judge Anna Diggs Taylor (July 6, 2007)
> Case #06-2095

"**Without expressing an opinion concerning the analysis of the district court**, I would affirm its judgment. . . ." [213]

> ACLU v National Security Agency, U.S. Court of Appeals Dissenting Opinion, Case #06-2095

"no law is of any value unless it is followed." [214]

> U.S. Supreme Court Justice Samual A. Alito Jr. - Keynote speech to graduating class of Essex County College Police Academy as published by Associated Press, 8/16/06

Federal District Court Judge Anna Diggs Taylor. This is one great woman. Okay, so pretty much the entire Judiciary branch of government bailed out on her. Even the Dissenting opinion at the Court of Appeals, which reversed her didn't support her spectacular Opinion at all. Okay, so the woman took an incredibly brave stand against the President of the United States, who positively was violating the Fourth Amendment, as well as FISA, and in the end nobody really went to bat for her. She exemplifies how it is much tougher to be a brave and courageous Judge, than it is to be one of those wimpy Star Chamber magistrates characteristic of our Judiciary. But, there are still some very good, upstanding Judges. And Judge Taylor ranks amongst the best. These are the people who are willing to stand alone to do what is right, instead of caving in to political pressure.

Here are the facts of the case. After the tragedy of 9/11/01, President Bush authorized the National Security Agency (NSA) to begin a counter-terrorism operation known as the Terrorist Surveillance Program (TSP). Pursuant to the program, the NSA intercepted **without warrants** telephone and e-mail communications where one party is outside the U.S. and the NSA has a reasonable basis to conclude one party is affiliated with Al Qaeda. The Plaintiffs in this case were journalists and lawyers who regularly communicated with individuals located overseas who they believe the NSA suspects of being terrorists.

Before continuing, it is important to note that it is my position the NSA should positively be wiretapping these individuals. No rational person can contest that. BUT, the NSA positively should not be wiretapping them without a warrant. Because that's the law. The issue in this case isn't the legal legitimacy of wiretapping these people. They positively should be wiretapped both as a matter of law and morality. The issue is whether the wiretapping should be accomplished without a judicial warrant and whether the President violated a Congressional statute (FISA), as well as the Fourth Amendment by allowing for wiretapping without a warrant. He positively did. That is the crux of Judge Taylor's opinion.

Judge Taylor in her opinion issued an Injunction against warrantless wiretaps of telephone and internet communications in contravention of the Foreign Intelligence Surveillance Act (FISA). She also held the TSP violates the Separation of Powers doctrine and the First and Fourth Amendments to the Constitution.

The Sixth Circuit Court of Appeals reversed her decision. They did so on the ostensible ground that the Plaintiffs lacked Standing. Whereas, Judge Taylor's opinion is well-written and easily understandable, the Sixth Circuit's opinion is a convoluted and confusing mess of indiscernible illiteracy and

semantic manipulation. The appellate court knew the result they wanted to attain. They just had to figure out a way to get there, no matter how little sense it made. Thus, rather than upholding the law, they relied on contorted logic to justify their disrespect for the rule of law. They gave an immense degree of judicial support to the premise that a person can successfully violate the law, if they've got a Judge willing to write an irrational opinion interpreting it to mean something other than it is.

Setting aside most of the sophistical arguments concocted by the appellate opinion (which regrettably I did waste time reading) on issues of Standing, Redressability, Causation, Injury in Fact, Separation of Powers, Inherent Powers, and all the other legal bullshit, the bottom line is that the President of the United States broke the law and got away with it. He got away with it because Sixth Circuit Justices wanted him to. They used the Standing issue to bail out from doing their job. It's simple as that. Judge Taylor was completely and totally correct on the critical issue.

The Sixth Circuit's conclusion that the plaintiffs in this case lacked Standing is the equivalent of a Jew in Nazi Germany going to Court to contest the legitimacy of Hitler's Enabling Act and being told that since he only has an "unsupported belief" Hitler is going to persecute him, he lacks Standing.

Notably, the NSA's arguments stressing National Defense, Inherent Powers and Emergency Powers to support President Bush's alleged authority to wiretap without warrants are scarily reminiscent of Hitler's "Defense of the State," and "Emergency Powers" arguments. They were used by Hitler to nullify rights that had been included in the German Constitution prior to Hitler's assumption of power. These arguments used by the NSA were the same theoretical legal linchpins Hitler used. They are also the same arguments President's Bush's lawyers presented to the Court. That is a fact.

Judge Taylor wrote in her incredibly brave and courageous opinion, which I quote at length, as follows (emphasis added):

> "Since the Court's decision of Katz v U.S. 389 U.S. 347 (1967), it has been understood that the search and seizure of private telephone conversations without physical trespass required prior judicial sanction, pursuant to the Fourth Amendment. Justice Stewart there wrote for the Court that searches conducted without prior approval by a Judge or magistrate were per se unreasonable, under the Fourth Amendment. . . .
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> . . .
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> In 1976 the Congressional "Church Committee" disclosed that every President since 1946 had engaged in warrantless wiretaps in the name of national security, and that there had been numerous political abuses, and in 1978 Congress enacted the FISA.

> Title III . . . was later amended to state that "**the FISA of 1978 shall be the exclusive means by which electronic surveillance of foreign intelligence communications may be conducted.**
> . . .
>
> The FISA defines a "United States person" to include each of Plaintiffs herein and **requires a prior warrant for any domestic international interception of their communications.** For various exigencies, exceptions are made. . . .
> . . .
>
> A FISA judicial warrant, moreover, requires a finding of probable cause. . . .
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> The FISA was essentially enacted to create a secure framework by which the Executive branch may conduct legitimate electronic surveillance for foreign intelligence while meeting our national commitment to the Fourth Amendment. . . ." [215]

Judge Taylor then notes the historical danger, which has accompanied Presidential attempts to exempt the Executive Branch of government from the law, writing as follows:

> "The Constitution . . . provides that "the executive Power shall be vested in a President . . . And that " . . . he shall take care that the laws be faithfully executed. . . ."
>
> Our constitution was drafted by founders and ratified by a people who still held a vivid memory of the image of King George III and his General Warrants. . . .
> . . .
> The seminal American case in this area . . . is that of Youngstown Sheet & Tube v Sawyer, 343 U.S. 579 (1952). . . .
> . . .
> Justice Jackson's concurring opinion in that case has become historic. He wrote that . . . "when the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for he can rely only upon his own Constitutional powers minus any Constitutional powers of Congress over the matter. . . .
> . . .
> After analyzing the more recent experiences of Weimar, Germany, the French Republic and Great Britain, he wrote that:
>
> . . . emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. . . .
> . . .

> In this case, the President has acted, undisputably, as FISA forbids. FISA is the expressed statutory policy of our Congress. The presidential power, therefore, was exercised at its lowest ebb and cannot be sustained." [216]

The Sixth Circuit in reversing Judge Taylor placed emphasis on one phrase in her opinion, where she stated that the Fourth Amendment:

> "requires prior warrants for any reasonable search," [217]

The appellate Court apparently had two objections to the foregoing statement. The first was that it asserted Judge Taylor was incorrectly asserting the existence of an absolute rule regarding the Fourth Amendment's warrant requirement. That however, is a misleading statement by the appellate Justices. The reason is that the appellate Court conveniently failed to disclose in its opinion when making the assertion that Judge Taylor's use of the foregoing phrase was preceded by her citation to the case of U.S. v Karo, 468 U.S. 705 (1984). Her opinion noted that in Karo, Justice White wrote for the U.S. Supreme Court that warrantless searches of a private residence are presumptively unreasonable, absent exigencies. Judge Taylor specifically included the phrase "absent exigencies" when citing the Karo passage. Thus, it is clear she properly recognized that exceptions existed to the warrant requirement of the Fourth Amendment in "exigent" situations.

Similarly, Judge Taylor also noted in her opinion that Karo was consistent with Katz v U.S., 389 U.S. 347 (1967) where Justice Stewart wrote for the Court that searches conducted without prior approval by a Judge or magistrate were per se unreasonable "subject only to a few specifically established and well-delineated exceptions." Once again, she specifically noted there were exceptions to the general rule. Accordingly, the appellate court's assertion that she was incorrectly asserting the existence of an absolute rule was false.

It seems apparent that the Sixth Circuit Court of Appeals intentionally misconstrued Judge Taylor's phrase "requires prior warrants for any reasonable search," by failing to disclose that she noted in prior passages there were exceptions to the rule and certain exigencies. Rather than openly and honestly assessing Judge Taylor's opinion, the appellate Court preferred to place an undue irrational emphasis upon one phrase in Judge Taylor's opinion. They did this to justify their own glossing over the irrefutable fact that the President was

violating the law on a systemic basis. What the appellate Court did was to isolate one passage of Judge Taylor's opinion, in order to create a misleading impression of her opinion. Even the most rudimentary opinions on statutory construction uniformly adopt the principle that words should not be taken out of context, but instead should be interpreted in light of other passages concurrently written to ascertain the proper meaning. This basic premise of law was ignored by the Sixth Circuit Court of Appeals.

In regards to the Standing issue both Judge Taylor and the Dissenting opinion of Justice Ronald Lee Gilman of the Sixth Circuit determined that the Plaintiffs had Standing. Substantively, that makes the vote 2 - 2 on the Standing issue because there were only three Justices on the appellate panel. One wrote the Court's opinion, a second Justice concurred, and the third Justice dissented. It seems to me if the Standing issue is that close, and the case involves the President violating a Congressional statute on a wide-scale basis, the Court should at least have the courage to decide the key legal issue. Instead, it used the issue of Standing as an escape hatch to avoid a real decision on the merits. It did so by relying on a convoluted, incomprehensible analysis of Standing.

Lastly, I note that the Sixth Circuit's opinion also held the Plaintiffs did not assert a viable FISA cause of action. Their justification of this conclusion defies belief. They rejected Plaintiffs' contention that the NSA was even engaging in "electronic surveillance." This was notwithstanding the fact that the government admitted it intercepts telephone and e-mail communications. The Court adopted the ridiculous position that the interception of telephone and e-mail communications using electronic media does not necessarily constitute "electronic surveillance." The Court predicated this irrationality based on the complex nature of definitions set forth in FISA, which it construed as rendering possible the interception of telephone and e-mail communications involving electronic media, without such constituting "electronic surveillance." That's nuts. Such a contention ranks right up there with Bill Clinton's assertion that getting a Blowjob wasn't Sex. And as I recall, Clinton relied on a definition of "Sex" formally adopted by a Federal Judge.

Judges can only do so much with wordplay, semantic games, definitions, sophistry and manipulative logic. FISA says what it says. The President violated the law. It's simple as that. If you want citizens to comply with the law, then the President and Judges should do the same. Like U.S. Supreme Court Justice Samuel Alito said, "no law is of any value unless it is followed." Judge Anna Diggs Taylor knew that. She did her job. And she will forever be recognized as a True American Hero for doing so. Which is a lot more than can be said for the Sixth Circuit Court of Appeals Chickenshit approach.