Human Rights and Counterterrorism: A Tale of Two Districts

by Michael I. Krauss

The First Amendment gives more extensive protection to those who are not government employees, so any restriction on their freedom to publish information must be narrowly drawn and subject to "close judicial scrutiny."

Sometimes it seems that our country is composed of two contingents that have no common understanding of the crucial nexus between our ongoing war on Islamist terrorism and our need to protect the human rights that the Islamist terrorists wish to eradicate. Two federal district court rulings—one in Virginia and one in Michigan, rendered within days of each other in August 2006—are poster children for this division of our society. I believe that both decisions are incorrect. One is a careful literalist opinion that gives too short shrift, in my opinion, to fundamental individual rights; the other is a stunning piece of judicial activism that abstracts totally from the fact that our country is involved in a war against those who would obliterate these rights.

United States v. Rosen[1]: Espionage, or Exercise of the First Amendment?

This case involves two former employees of the American Israel Public Affairs Committee, a political action committee that exists to publicize to Congress and the American public the defense needs of the State of Israel and what it describes as a moral and historical affinity between our country and the Jewish state.[2] The two employees were charged with conspiring to communicate "information relating to the national defense" to a person "not entitled to receive it," in violation of Section 793 of the Espionage Act.[3] From the charge, one might imagine that the defendants snuck onto a secret military installation and took secret photographs, which they then proceeded to sell to a foreign nation. The defendants did nothing of the sort. They were charged with doing what lobbyists, reporters, researchers and authors do all the time: contacting government employees to elicit useful information.

The indictment lists many meetings between the lobbyists and an employee of the U.S. Department of Defense. Some meetings were by phone, and other meetings were at a baseball stadium and a train station, where the DOD employee allegedly gave classified information to lobbyists. The defendants allegedly turned over the information to their superiors at AIPAC and to a "senior fellow at a Washington, D.C. think tank." The lobbyists moved to dismiss the case, arguing that either Section 793 did not cover their behavior or was void as violative of their First Amendment rights to free speech and to petition the government.[4] The motion to dismiss was filed by a group of distinguished attorneys that included Viet Dinh, a former U.S. assistant attorney general for legal policy, who was largely responsible for the drafting of the Patriot Act.[5]

On August 9, 2006, in the Eastern District of Virginia, Judge T.S. Ellis III denied the defendants' motion to dismiss the case. The judge conceded that most defendants under the Espionage Act are government employees who have taken oaths of secrecy (such as the DOD employee, who had already pleaded guilty in a different proceeding). Government employees have diminished First Amendment rights, and may clearly be subjected to prosecution if they abuse their position of trust to disclose national security information to someone not entitled to receive it.[6] The judge concluded that the plain text of Section 793, which has remained "largely unchanged since the administration of William Howard Taft,"[7] applied to people outside government as well. He found this obligation allowed under the Constitution

both by "common sense" and by "the relevant precedent."[8] The First Amendment gives more extensive protection to those who are not government employees, so any restriction on their freedom to publish information must be narrowly drawn and subject to "close judicial scrutiny."[9] The judge's scrutiny was not, however, as close as the defendants wished. So long as the recipient knows that he or she is receiving national defense-related information that the provider of the information was not legally entitled to communicate, and so long as the information "could cause injury to the nation's security,"[10] the outside recipient who recommunicates the information is committing espionage. Ellis balanced the sweep of government's legitimate interest in protecting the national security against the fear that might be engendered in anyone who communicates with a government employee, and found that the law's "effect on First Amendment freedoms is neither real nor substantial as judged in relation to this legitimate sweep."[11]

The judge was troubled by his ruling, and he invited Congress to review and revise the statute.[12] The defendants were researching a national security issue (the Pentagon's attitude toward Israel, compared with its attitude toward Arab states) in order to do their job—to petition the federal government on behalf of American citizens favorable to Israel. They found a DOD employee so disgruntled about his employer's recent behavior that he was willing to leak it to these lobbyists. Similarly, any journalist or author looking into national security questions now risks indictment if his or her research results in the disclosure of classified material. In *Rosen* the details of what was disclosed by the AIPAC lobbyists remains unpublished; we know only that some of it pertained to "a foreign government's [Iran's?] covert actions in Iraq" and to "potential attacks upon United States forces in Iraq."[13] Presumably the information released by the press almost every day about secret prisons in Eastern Europe, or about mining of data from select international phone calls, or about tracking certain international money transactions, are even more obvious violations of the Espionage Act.

The defendants in *Rosen* did not republish any secret document or produce any tape or "smoking gun." They were given what Ellis called "intangible information"—they repeated what they were told about American defense operations. Judge Ellis held that when intangible information is disclosed, the government must prove that defendants had "reason to believe the disclosure could harm the United States or aid a foreign government"[14] in order to obtain a conviction under Section 793. Defendants must have either intended this harm/aid or been in reckless disregard of it.[15] This does not seem to immunize newspapers that publish, for example, information about secret prisons—even if their principal purpose is to inform the American public, the newspapers know or should know (and therefore are presumably at least recklessly indifferent to the fact) that the revelation of this classified information will help enemy states. Indeed, in *Rosen,* defendants' primary purpose was to do their job. To more effectively lobby the American government about its support of Israel, they needed to know as much Israel-related information as they could find.

What if the *New York Times* had been prosecuted instead of AIPAC? Would the former have received constitutional protection that has now been denied the latter, even though petitioning the government is explicitly protected by the First Amendment? It is highly significant that two individual lobbyists who did nothing more than receive and use classified information from a disgruntled defense employee are prosecuted for using it, while newspapers that routinely do exactly the same thing continue unmolested. The former, unlike the latter, can ill afford the legal fees that are required now that a full trial has been ordered. Will they be tempted to plea bargain to avoid a lengthy prison term? If they do, a travesty of individual rights may have occurred here. Ellis was clearly uncomfortable with these implications. But I submit he could have interpreted the First Amendment more extensively than he chose to do. He could have held that the plain meaning of Section 793 cannot withstand constitutional scrutiny in cases such as *Rosen.*

ACLU v NSA[16]: War on Terror? What War on Terror?

In a stunning ruling on August 17, 2006, Eastern District of Michigan Senior Judge Anna Diggs Taylor ruled that the warrantless surveillance of international phone calls between foreign Al Qaeda members located abroad and "U.S. persons" by the National Security Administration is an unconstitutional violation of the Fourth and First amendments. This decision—perhaps the most poorly reasoned federal court ruling this author has ever read—contrasts markedly with the carefully articulated view of Judge Ellis, who in my opinion nonetheless errs in favor of the government. Here, though, Judge Taylor has concocted an absurdity.

Taylor discusses at length "The History of Electronic Surveillance in America."[17] She gets this history all wrong, though. She averred that the *Katz* case in 1967[18] held that wiretaps "conducted without prior approval by a judge or magistrate were per se unreasonable"—but she omitted footnote 23 of *Katz*, which expressly exempted "national security" wiretaps from the entire holding.[19] She relies repeatedly on the 1972 *Keith* case[20] to support her ruling—but *Keith* required warrants only for *purely domestic* national security wiretaps, and expressly declined to rule on "the activities of foreign powers, within or without this country," or their "agents" inside the United States. In the 1990 *Verdugo* case, the Supreme Court held that the Fourth Amendment does not apply to "actions of the Federal Government against aliens outside the United States territory,"[21] which arguably immunizes the NSA program—all phone intercepts took place abroad. As no warrant was needed to listen in on Al Qaeda abroad, the fact that one party is located in the United States is purely collateral.[22]

Taylor outlandishly opined that the Fourth Amendment "requires prior warrants for any reasonable search, based on prior-

existing probable cause."[22] As my colleague Robert Turner of the University of Virginia has pointed out,[23] it is established that airport screenings are Fourth Amendment "searches," and firearms are found in only about 0.0004 percent of searches—hardly "probable cause." Judge Taylor's ruling would shut down the airline industry.

Taylor also held that the National Security Agency's electronic surveillance program also violates the *First* Amendment by abridging the freedom of speech of those who, inside the United States, communicate with Al Qaeda operatives abroad. Taylor claimed this conclusion followed from the *Bates* case, where the Supreme Court struck down an Arkansas requirement that the National Association for the Advancement of Colored People submit a list of its members to a government body.[25] *Bates* correctly found that the government may not frighten off potential members and contributors to the NAACP.[26] Judge Taylor seems here to believe that for this reason the government may not try to frighten off potential members and contributors to Al Qaeda. And, of course, the Little Rock publication requirement was overt while the NSA program was covert, so the entire basis of the *Bates* analogy is flawed.

Taylor invoked the Constitution's separation of powers to ground her argument, claiming that the president must "faithfully execute" all laws, including the Foreign Intelligence Surveillance Act (FISA), which establishes a mandatory procedure for national security wiretaps. Incredibly, Taylor declined to decide whether or not the FISA was unconstitutional to the extent it infringed on inherent presidential power, calling that question "irrelevant."[27] She failed to recall that:

- *Federalist 64*[28] left the president free "to manage the business of intelligence in such a manner as prudence may suggest."

- Upon enactment of the FISA, President Carter's Attorney General Griffin Bell insisted that the law would not deprive the president of his constitutional powers (as a Carter campaign worker and Carter judicial appointment, the judge might perhaps have remembered this).

- The FISA-established federal appeals panel noted in 2002 that, FISA notwithstanding, every court ever to consider the issue has found that "the president did have inherent authority to conduct warrantless searches to obtain foreign intelligence information."[29]

No governmental interest is stronger than national security.

Taylor blithely concluded that searches always require "probable cause" and "warrants." Her conclusion blissfully ignored Supreme Court decisions allowing many kinds of searches in the absence of one or both.[30] From health inspections to sobriety checkpoints to airport and border searches, inspections have been allowed. The *Von Raab* case itself quoted from a 1974 case in which the court held, "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property interest in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness."[31]

Finally, Taylor acknowledged that the "state secrets privilege" requires a judge to dismiss a case if the "very subject matter of the action" is a state secret.[32] But since the government admitted that the NSA program existed, the judge concluded it was no longer "secret," even though its details (who was being listened to, when, and how) remain classified. Time after time after time, the Supreme Court has indicated that in cases involving safety, the balance between governmental interests and individual privacy can justify warrantless searches.[33] No governmental interest is stronger than national security.

Judicial Watch has revealed[34] that, according to her 2003 and 2004 financial disclosure statements, Taylor served as secretary and trustee for the *Community Foundation for Southeast Michigan* (CFSM). She was reelected to both positions in 2005. CFSM made a recent grant of $45,000 to the American Civil Liberties Union of Michigan, a plaintiff in this case. According to CFSM's Web site, "The Foundation's trustees make all funding decisions at meetings held on a quarterly basis." [CFSM donated $180,000 in 2003 to the Arab Community Center for Social and Economic Service, a defendant in another case on Taylor's docket.[35]] There is no indication that the judge informed the parties of her connection here, which might well have prompted a recusal motion. This does not appear to explicitly violate canons of judicial ethics, but it does give the appearance of bias. Many judges probably either belong to the ACLU or have given it some support, but in this case Taylor, as an officer of an organization that is a major benefactor to the Michigan chapter, has presided over a lawsuit the Michigan chapter brought.

Conclusion

Within three weeks, one carefully reasoned district court opinion arguably gave too little weight to the First Amendment, while a second ruling from a different district court arguably gave no weight at all to precedent or to the president's constitutional role defending national security. Both cases are being appealed, and the

Michael I. Krauss is a professor of law at George Mason University School of Law; a member of the board of governors of the National Association of Scholars; and a fellow of the Foundation for the Defense of Democracy (DC), Manhattan Institute (NY), and Virginia Institute for Public Policy.

NSA case will surely be overturned. Thankfully, a circuit court panel quickly suspended its effect.[36] For now, the simultaneous publication of both decisions highlights the tremendous division in American politics and law—how to reconcile individual rights with an unprecedented war on terror. ⚖

Endnotes:

1 No. 1:05CR225, 2006 U.S. Dist. LEXIS 56443 (E.D. Va. Aug. 9, 2006).

2 American Israel Public Affairs Committee, Who We Are, http://www.aipac.org/whoWeAre.cfm (last visited Oct. 8, 2006).

3 18 U.S.C. § 793 (2000).

4 *Rosen*, 2006 U.S. Dist. LEXIS 56443, at *11-12, 22.

5 Pub. L. No. 107-56, 115 Stat. 272.

6 *Rosen*, 2005 U.S. Dist. LEIX 56443, at *90.

7 *Id.* at *121.

8 *Id.* at *94-95.

9 *Id.* at *82.

10 *Id.* at *112-13.

11 *Id.* at *113-14.

12 *Id.* at *121-22.

13 *Id.* at *8, 9.

14 *Id.* at *88.

15 *See id.* at *57.

16 438 F. Supp. 2d 754 (E.D. Mich. 2006).

17 *Id.* at 771-73.

18 *Katz v. United States*, 389 U.S. 347 (1967).

19 *Id.* at 358 n.23.

20 *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

21 *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

22 If a wiretap is legal, it may also record the statements of every person who communicates with the legally wiretapped individual, without showing any second "probable cause."

23 *ACLU*, 438 F. Supp. 2d at 775.

24 R. Turner, "Shaky Surveillance Ruling," *Washington Times*, August 27, 2006, p. A15.

25 *ACLU*, 438 F. Supp. 2d at 776 (referencing *Bates v. City of Little Rock*, 361 U.S. 516 (1960)).

26 *Bates*, 361 U.S. at 527.

27 *ACLU*, 438 F. Supp. 2d at 781.

28 THE FEDERALIST NO. 64 (John Jay).

29 *In re* Sealed Case, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

30 *E.g., Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

31 *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

32 *ACLU*, 438 F. Supp. 2d at 762 (citing *Kasza v. Browner*, 133 F.2d 1159, 1166 (9th Cir. 1998).

33 *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

34 **http://www.judicialwatch.org/5862.shtml**

35 Case 06-10968, Mich. E.D.

36 *ACLU v. NSA*, No. 06-2095, 2006 WL 2827166 (6th Cir. Oct. 4, 2006) (granting a stay of the district court's order pending appeal).