

hard-hitting only in the sense that a bludgeon is hard-hitting. The angry rhetoric of U.S. District Judge Anna Diggs Taylor will no doubt grab headlines. But as a piece of judicial work—that is, as a guide to what the law requires and how it either restrains or permits the NSA's program—her opinion will not be helpful.

Legal scholars have also criticized Judge Diggs Taylor's opinion. Let me give you just a few of these criticisms. David B. Rivkin, a former Justice Department official in Reagan's and George H.W. Bush's administrations, noted in a New York Times op-ed on August 18 that “[i]t is an appallingly bad opinion, both from a philosophical and technical perspective, manifesting strong bias.”

Harvard Law Professor Laurence Tribe has written “[i]t's altogether too easy to make disparaging remarks about the quality of the Taylor opinion, which seems almost to have been written more to poke a finger in the President's eye than to please the legal commentariat or even, alas, to impress an appellate panel”

Howard Bashman, an appellate attorney and editor of the How Appealing legal blog, wrote in the New York Times on August 19 that “[i]t does appear that folks on all sides of the spectrum, both those who support it and those who oppose it, say the decision is not strongly grounded in legal authority.”

UCLA Law Professor Eugene Volokh wrote on his widely read blog: “the judge's opinion . . . seems not just ill-reasoned, but rhetorically ill-conceived. . . . [B]y writing an opinion that was too much feeling and too little careful argument, the judge in this case made it less likely that the legal approach she feels so strongly about will ultimately become law.”

In contrast to Judge Anna Diggs Taylor, both of President Bush's nominees to the Supreme Court, Justices Roberts and Alito, understand that it is not the role of the judicial branch to make policy. During his confirmation hearings last year, Supreme Court Chief Justice John Roberts said, “I don't think you want judges who will decide cases before them under the law on what they think is good, simply good policy for America.” He also noted, “[T]he Court has to appreciate that the reason they have that authority is because they're interpreting the law, they're not making policy, and to the extent they go beyond their confined limits and make policy or execute the law, they lose their legitimacy, and I think that calls into question the authority they will need when it's necessary to act in the face of unconstitutional action.”

Similarly, Justice Samuel Alito remarked during his confirmation hearing that “results-oriented jurisprudence is never justified because it is not our job to try to produce particular results. We are not policy makers and we shouldn't be implementing any sort of policy agenda or policy preferences that we have.”

Yes, Justices Roberts and Alito have it right. It is not the role of a judge to seek to replace the legislature, or the President, State legislatures, and the Governors, township supervisors, county councils with his or her own views. It is the role of a judge to apply the law and to do justice based on the facts in solving the dispute that has been presented.

A court is not a place for zealous advocates to impose their will upon the American public. It is not a place for people who believe their views as judges are superior to the views of the democratically elected officials in this country—better put, that their views are better than the people's views because we are, in fact, accountable to the people we represent. It is and should continue to be a place for those public servants who seek to do justice under the law and facts of each case and a place to interpret the law, rather than make law.

The PRESIDING OFFICER. Under the previous order, the question is, Will the Senate advise and consent to the nomination of Kimberly Ann Moore, of Virginia, to be United States Circuit Judge for the Federal Circuit?

Mr. THOMAS. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. McCONNELL. The following Senators were necessarily absent: the Senator from Florida (Mr. MARTINEZ) and the Senator from Pennsylvania (Mr. SANTORUM).

Mr. DURBIN. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from Hawaii (Mr. INOUE), the Senator from New Jersey (Mr. LAUTENBERG), the Senator from Connecticut (Mr. LIEBERMAN), the Senator from New Jersey (Mr. MENENDEZ), and the Senator from Illinois (Mr. OBAMA) are necessarily absent.

The PRESIDING OFFICER (Mr. CHAMBLISS). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 92, nays 0, as follows:

[Rollcall Vote No. 231 Ex.]

YEAS—92

Akaka	Cochran	Grassley
Alexander	Coleman	Gregg
Allard	Collins	Hagel
Allen	Conrad	Harkin
Baucus	Cornyn	Hatch
Bayh	Craig	Hutchison
Bennett	Crapo	Inhofe
Bingaman	Dayton	Isakson
Bond	DeMint	Jeffords
Boxer	DeWine	Johnson
Brownback	Dodd	Kennedy
Bunning	Dole	Kerry
Burns	Domenici	Kohl
Burr	Dorgan	Kyl
Byrd	Durbin	Landrieu
Cantwell	Ensign	Leahy
Carper	Enzi	Levin
Chafee	Feingold	Lincoln
Chambliss	Feinstein	Lott
Clinton	Frist	Lugar
Coburn	Graham	McCain

McConnell	Rockefeller	Stevens
Mikulski	Salazar	Sununu
Murkowski	Sarbanes	Talent
Murray	Schumer	Thomas
Nelson (FL)	Sessions	Thune
Nelson (NE)	Shelby	Vitter
Pryor	Smith	Voivovich
Reed	Snowe	Warner
Reid	Specter	Wyden
Roberts	Stabenow	

NOT VOTING—8

Biden	Lieberman	Obama
Inouye	Martinez	Santorum
Lautenberg	Menendez	

The nomination was confirmed.

LEGISLATIVE SESSION

The PRESIDING OFFICER. The President will be immediately notified of the Senate's action and the Senate will now resume legislative session.

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2007—Continued

The PRESIDING OFFICER. The Senator from California.

AMENDMENT NO. 4882

Mrs. FEINSTEIN. Mr. President, I call up amendment No. 4882.

The PRESIDING OFFICER. Without objection, the pending amendment is laid aside. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from California [Mrs. FEINSTEIN], for herself and Mr. LEAHY, proposes an amendment numbered 4882.

The amendment is as follows:

(Purpose: To protect civilian lives from unexploded cluster munitions)

At the end of title VIII, add the following: SEC. 8109. No funds appropriated or otherwise made available by this Act may be obligated or expended to acquire, utilize, sell, or transfer any cluster munition unless the rules of engagement applicable to the cluster munition ensure that the cluster munition will not be used in or near any concentrated population of civilians, whether permanent or temporary, including inhabited parts of cities or villages, camps or columns of refugees or evacuees, or camps or groups of nomads.

Mrs. FEINSTEIN. Mr. President, on behalf of the Senator from Vermont and myself, I offer an amendment to the Defense appropriations bill to address a humanitarian issue that I have actually thought a great deal about over a long period of time; that is, the use of the cluster bomb. The human death toll and injury from these weapons is felt every day, going back decades. Innocent children think they are picking up a play toy in the field and suddenly their arm is blown off.

I believe we need to take a look at our policies and adjust them. Specifically, our amendment would prevent any funds from being spent to purchase, use, or transfer cluster munitions until the rules of engagement have been adopted by the Department of Defense to ensure that such munitions will not be used in or near any concentration of civilians, be it permanent or temporary, such as inhabited