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. INOUYE), 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	Voinovich
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

parts of cities or villages or in camps or columns of refugees or evacuees.

Every year, hundreds of civilians are killed and many more are injured due to unexploded cluster bombs. From the fields of Vietnam, Laos, and Cambodia, through the streets of Kosovo and Iraq, to the arid hills of Afghanistan and the playgrounds of Lebanon, these lethal relics of war continue to cripple life, hope, and peace.

Cluster munitions are large bombs, rockets, or artillery shells that contain up to hundreds of small submunitions or individual bomblets. They are intended for attacking enemy troop formations and armor, covering approximately a .6-mile radius. In other words, their swath is over one-half mile. Yet in practice they pose a real threat to the safety of civilians when used in populated areas because they leave hundreds of unexploded bombs over a very large area and they are often inaccurate. They end up in streets and cities where men and women go to work and do their shopping. They end up in groves of trees and fields where children play. They end up in homes where families live. And in some cases, up to 40 percent of cluster bombs fail to explode, posing a particular danger to civilians long after the conflict has ended.

This is particularly and sadly true of children because bomblets are no bigger than a D battery and in some cases resemble a tennis ball. Children outside with their friends and relatives come across these cluster bombs. They pick them up out of curiosity because they look like balls and they start playing with them and a terrible result follows.

On March 25, 2003, Abdallah Yaqoob, whose picture is behind me, was sleeping on his bed in his family's home in Basra, Iraq, when he was hit with shrapnel from a cluster munitions strike in his neighborhood. He lost his arm, and his abdomen was severely injured. Abdallah was hit by a British L20A1/M85 munition.

Falah Hassan, 13, was injured by an unexploded ground-launched submunition in Iraq on March 26, 2003. The explosion severed his right hand and spread shrapnel through his body. He lost his left index finger and soft tissue in his lower limbs.

This is a photo of an unexploded M42 cluster submunition found on a barbed-wire fence in southern Lebanon in August 2006. You can see the size of the bomblet. Right next to it is a small pinecone. So this is a small munition hanging on a piece of barbed wire.

These unexploded cluster bombs become, in essence, landmines. Instead of targeting troop formations and enemy armor, unexploded bomblets target innocent civilians, seriously maiming or killing their victims. This runs counter to our values, and I believe it also runs counter to the laws of war.

Make no mistake, the impact of unexploded cluster bombs on civilian populations has been devastating. This first came to my attention in Laos, many years ago. In Laos today, there are between 9 and 27 million unexploded cluster bombs, leftovers from our bombing campaigns in the 1960s and 1970s. Approximately 11,000 people, 30 percent of them children, have been killed or injured since the war ended.

In the first gulf war, 61,000 cluster bombs were used, containing 20 million bomblets. Since 1991, unexploded bomblets have killed 1,600 innocent men, women, and children and injured more than 2,500.

In Afghanistan in 2001, over 1,228 cluster bombs with almost a quarter of a million bomblets were used. Between October 2001 and November 2002, that year, 127 civilians were killed, 70 percent of them under the age of 18.

In Iraq in 2003, 13,000 cluster bombs with 2 million bomblets were used. Combining the first and second gulf war, the total number of unexploded bomblets in the region today is 1.2 million. How many people will die? Already, an estimated 1,220 Kuwaitis and 400 Iraqi civilians have been killed since 1991 because they innocently picked up one of these bomblets.

What gives rise in part to my amendment are recent developments in Lebanon over alleged use of cluster bombs. Throughout southern Lebanon, more than 405 cluster bomb sites containing approximately 100,000 unexploded bomblets have been discovered. Each site covers a radius of 220 yards. As Lebanese children and families return to their homes and begin to rebuild, they will be exposed to the danger of these unexploded bomblets lying in the rubble. Thirteen people, including three young children, have been killed so far, and 48 injured. One United Nations official estimates that the rate of unexploded bomblets is 40 percent. So far, more than 2,000 unexploded bomblets have been destroyed, but it will take 12 to 15 months to complete the effort.

Let me say that I join the United Nations Humanitarian Coordinator for Lebanon, David Shearer, in calling on Israel to provide information on where the cluster bombs were used. Such information is vital to speed up the cleanup process and save lives.

We have called the State Department. We have asked for information about the conditions for the sale of cluster munitions to Israel, and we have not been able to get that information. It seems to me that information should be readily available and transparent, particularly to the U.S. Senate and the House of Representatives.

The State Department is currently looking into charges that the cluster bombs found in south Lebanon were American made—I do not know that they were—and that they were used in violation of agreements between the United States and Israel. I do not know that they were, but I think we should know, and I think we should not cloak ourselves with ignorance. I am hopeful that this inquiry will be completed as soon as possible and the findings reported to the Congress. If there are violations, there should be consequences.

Looking at these figures, it is clear that several countries are awash with unexploded bomblets—Laos, 7 to 27 million; Iraq, 1.2 million; and then Lebanon, 100,000.

Some say: Why should we be doing this? I have always believed that this country stands for justice, it stands for right, and it has a moral compass. I believe the use of these weapons in civilian areas should be stopped.

I also know that there is a dud rate—in other words, a rate at which point these bomblets do not explode. I ask this question: How are we supposed to win the hearts and minds of civilians in those countries where we leave behind such deadly weapons that indiscriminately kill young children? How are we supposed to speed up reconstruction efforts—building homes, schools, hospitals, clinics, ensuring electricity and water supplies—when populated areas are littered with these bombs? They remind innocent civilians that it was America that launched these weapons in populated areas; that it was America that failed to take the necessary steps to protect them from unexploded bombs by demanding a low failure rate; and it was America that failed to remove, expeditiously, unexploded bombs.

Simply put, unexploded cluster bombs fuel anger and resentment and make security stabilization and reconstruction efforts that much harder.

It is not just a humanitarian problem, it is also a military problem.

By showering targets with cluster bombs, we ensure that our own personnel will face thousands of unexploded bombs as they move forward. This forces them to change course. It slows the mission.

During the Iraq war, U.S. troops fired 6 rockets containing 4,000 bomblets to eliminate 1 artillery piece in a civilian neighborhood. With a 16-percent failure rate, approximately 640 unexploded bomblets were left behind. That is 1 artillery piece—6 rockets, 4,000 bomblets, and today 640 unexploded bomblets on the streets.

As an August 2003 Wall Street Journal article noted, ''Unexploded bomblets render significant swaths of battlefield off-limits to advancing U.S. troops.''

In fact, during the first gulf war, unexploded cluster munitions killed 22 of our own military. That was 6 percent of the total U.S. fatalities, and it injured 58. Former Secretary of Defense Bill Cohen recognized the threat cluster bombs pose to civilians as well as our troops. He issued a memorandum which became known as the Cohen policy.

It stated that beginning in fiscal year 2005, all new cluster bomblets would have a failure rate of less than 1 percent.

This was an important step forward, but we must remember that we still

have 5.5 million cluster bombs containing 728.5 million bomblets. That means we are still prepared to use an enormous number of cluster bombs that have significant failure rates—some estimate as high as 40 percent.

Out of the 728.5 million cluster submunitions, only 30,900 have self-destruct devices that would ensure a less than 1 percent so-called dud or unexploded failure rate. Those submunitions account for only 0.00004 percent of the U.S. total.

The Pentagon has stated that cluster bomblets with failure rates of more than 1 percent ''will remain in the Department's inventory until used or until they have reached their extended life and are demilitarized.''

That is pretty clear information that we are going to continue to use them. I think that is wrong.

In fact, by fiscal year 2011, the United States will still possess 480 million old cluster munitions with significant failure rates.

The latest Pentagon study on cluster bombs cite failure rates of 2 to 6 percent for the entire U.S. arsenal. Other studies, however, including one by the GAO, found failure rates as high as 16 percent. U.S. marines in Karbala, Iraq, in 2003 believe the failure rate in some places was as high as 40 percent.

But even if you accept the conservative estimate of the Pentagon report, if the United States used its entire arsenal of cluster bombs, we would leave 27 million unexploded bomblets somewhere in the world. And a 16-percent failure rate would equal 117 million unexploded bomblets, and a 40-percent failure rate would equal 300 million unexploded bomblets.

Where am I going with all this? Think about it. Three hundred million unexploded bomblets spread from Laos, Cambodia, Vietnam, Afghanistan, Iraq, southern Lebanon, wherever it may be, and those bomblets remain there decade after decade until somebody picks them up. And then that somebody is either killed or maimed for life.

I ask you: Is this the legacy we want to leave behind in Iraq and Afghanistan? Is this the legacy Israel wants to leave behind in Lebanon? Or is this the legacy anyone that manufactures and sells these munitions want to leave behind?

There are steps we can take to ensure a failure rate of less than 1 percent. And the Pentagon isn't going to do it. But at a cost of between $8 and $15, a self-destruct device can be added to cluster submunitions that destroy these munitions if, in fact, they survive intact.

The Pentagon has argued that adding this device is cost prohibitive. And it may well be.

The amendment of Senator LEAHY and myself does not address this issue.

I would like simply to end by reading the amendment.

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.

Is that too much to ask? That if you are going to use a cluster munition which spews bomblets for a half mile that you be certain these are not going to be used in a civilian area? I think the answer is clearly is no.

I hope the Senate will see fit to agree to this amendment.

I thank the Chair. I yield the floor and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DURBIN. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DURBIN. Mr. President, I ask unanimous consent to speak in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

CHICAGO TRIBUNE REPORTER PAUL SALOPEK

Mr. DURBIN. Mr. President, during the August break, I took some time off with my wife. As we were traveling, we were contacted by Jim O'Shea, who works with the Chicago Tribune, in the city of Chicago, which I represent.

He told me about a terrible situation. A writer for the Chicago Tribune, Paul Salopek, who was on assignment for National Geographic in Africa, was arrested and detained in the Sudan.

For 9 days, our embassy was not notified. When they learned of this and found him, he was in a confinement or jail cell in El Fasher in Sudan. He is being charged with visa and other violations for crossing over into Sudan and most notably he is being charged with the crime of espionage.

I come to the Senate today to let the American people know about his plight but also to speak to the Sudanese Government and their embassy in Washington. Many times when we come to the Senate to speak about foreign policy issues, we discuss the fate of hundreds of thousands, sometimes even millions of people. This relates to the fate of one man. Paul Salopek is not just another journalist, not just another correspondent. He is a Pulitzer Prize winner.

I first started reading his work in the Chicago Tribune. As soon as I would finish a piece he had written, I would rush to the byline to see who wrote this. He is truly a gifted writer. He has written some things which I have saved and clipped out, that I hang onto. They are dog-eared and yellowed from age, he is just that good.

When I went to the Congo, the Democratic Republic of the Congo, this last December with Senator BROWNBACK, we were touring an area where, sadly, 5,000 people a day die in this region of Africa. Very few people in the West are aware of it. In preparation for that journey, we looked at the National Geographic special on Africa and particularly the section on the Democratic Republic of the Congo. It was, once again, one of those pieces of writing that stops you cold. And you think: I wish I had the gift to come up with the words of this writer. The writer, once again, was Paul Salopek.

On August 6, Paul Salopek was arrested in the Sudan while on freelance assignment for the National Geographic, along with his driver and interpreter. He has been charged, as I said, with espionage and with writing ''false news,'' along with an immigration violation.

When you look at his assignment, it was not even close to being politically sensitive. National Geographic had sent him to this region to write about the history and culture of the Sahel region of Africa. I know that he undertook this assignment with the same commitment and passion as he has in all of his work.

When we visited the Congo, one of the women there, who had worked with Paul while he was in that region, said she could not remember another writer who became so immersed in his work, spending the entire day with the Pygmy people of the Congo, and then at night he would be off to his tent and, by just a dim light, working on his computer writing all night to bring together all of his thoughts.

His subject, in this case for the National Geographic, has been the geography, history, culture, environment, wildlife, natural resources, religion, landscape, and populace of the Sahel, a wide swath of land running from the Atlantic Ocean to the Horn of Africa. I know when the piece is finally written it will be well worth reading.

The name ''Sahel'' comes from the Arabic word for ''border'' or ''margin.'' And for many Americans, the Sahel is undoubtedly on the margins of their awareness. Paul Salopek's article would have helped change that. Now he awaits trial in El Fasher, in the North Darfur region of Sudan.

I have been in close contact with the U.S. Embassy in Sudan and understand he is being treated well while he awaits trial. Mr. Bishop, who works for our embassy in Khartoum, has been in frequent contact, visiting him almost on a daily basis, providing him with water and food and the basics of life and making certain he is being taken care of. And I am glad to report that is happening. I appreciate that fact and all the efforts the State Department and others have undertaken on his behalf.

Assistant Secretary of State Jendayi Frazer urged Sudanese President al-Bashir to release him. And many of us in Congress have been working to try to help effect his release.

Let me make it clear: Those of us who know of the work of Paul Salopek know one thing for certain, Paul