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Limits on the National Security Agency

A front-burner issue for all Americans is how far government should or can reach using national security as a justification for various activities.

A federal district court judge in Detroit, Anne Taylor Diggs, has shut down the National Security Agency's surreptitious surveillance program that allowed secret government monitoring of emails and phone calls in the Bush administration's battle on terror. Conservative authors have branded her as a political heretic, leaving the impression that she is a card-carrying liberal hell bent on handcuffing the forces of good in its battle with Al Qaeda. Whether you accept this position or believe that she is discharging the oath of office she took to uphold the constitution, Judge Diggs has succeeded in forcing the debate over the President's exercise of executive authority to eventually reach the level where true Constitutional discourse belongs, the Supreme Court.

President Bush and Attorney General Gonzalez have accused the judge of diluting the efforts to flush out terror operatives. Democratic leadership hailed the decision which ruled in favor of an action brought by the ACLU citing privacy and separation of powers issues.

Shortly after 9/11, America was prepared to accept any initiative by the Bush administration to combat the horror visited on New York. We blindly followed a President who appeared to emerge with strength and conviction as a true leader. With the debacle over WMD's and Bush's plummeting popularity and credibility, are we so quick now to accept the administration's claims that such unfettered powers are needed to allow immediate reaction to perceived terror threats? The ACLU argued successfully that the 1978 Foreign Intelligence Surveillance Act provided an immediate means to obtain secret search warrants to address suspected terrorist activity.

What particularly offended Judge Diggs was the chilling notion that counsel appointed to represent those suspected of terror ties, were, themselves, the objects of unregulated surreptitious surveillance. Her analysis exalts the Constitution framers' notion that a free, democratic society can only maintain itself if we honor the concept of the separation of powers. Her analysis does not criticize an agenda that advances the need to root out terror through any lawful means. She decries the right of an elected President to begin to exercise the type of unrestrained and unchecked authority that is the hallmark of despotism.

What Most Offended forces of the conservative right was the audacity of a mere judge noting, "There are no hereditary kings in America," and that all Presidential power derives from and therefore is subservient to the Constitution. Republicans have claimed the decision is partisan in its underbelly, pointing out that Taylor is a Carter appointee. News accounts that followed praised or derided the ruling, reflecting more the politics of the authors rather than a scholarly assessment of Judge Diggs' analysis.

How do we balance our time-tested devotion to the concept of individual liberty and the rights embodied within the First Amendment guarantees of free speech? The protection of the Fourth Amendment prohibiting warrantless searches extends to all manner of electronic surveillance. It was the concept that the King of England possessed such unfettered power that lead the Framers to add the Fourth Amendment to our Bill of Rights.

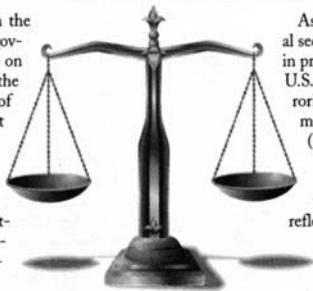
Law enforcement has adapted to the insistence of Congress and the courts that this constitutional mandate is a paramount civil liberty protecting our privacy from unwarranted government intrusion. Courts have carved out exceptions to the warrant requirement when there are clear exigencies involved. Police obtain search warrants at all hours, and never fail to find a judge to review and issue a warrant when immediately needed in an active investigation.

The foreign intelligence act goes even farther in permitting secret warrants, but the rub is this, there is an objective third party prior review of the demand for such a warrant, extending, even to this spy scenario the protection the Fourth Amendment has created. So, when those card carrying ACLU types said, "We just can't blindly follow you anymore, W." the judge listened.

Attacking Judge Diggs' scholarship doesn't help focus the debate. In a free and open society, a concept she clearly finds paramount, the question of whether the Constitution grants such untrammelled power to the President should be the subject of open debate. Let the President make his case to the proper authority, that his Constitutional grant of executive authority trumps the dictates of the Fourth Amendment. Throughout the last 50 years, the Supreme Court has attempted to define the limits of such authority in the many cases that have challenged the legality of warrantless searches and seizures. The limits on such searches have been constantly shifting as the composition of the Supreme Court changes with new appointments. As the case winds its way to the Supreme Court, remember that it was established by the Constitution to serve as a check & balance on the power of Congress and the President to act outside the law.

No, Judge Anne Taylor Diggs has not handed AL Qaeda a victory. What she has done is set the framework for a public debate, the cornerstone of a free, democratic society. After all, isn't that what the NSA is supposed to protect?

Attorney Richard T. Meehan, Jr. is a past president of the Greater Bridgeport Bar Association. He has lectured frequently to the Connecticut Trial Lawyers Association-People's Law School, Greater Bridgeport Bar Association, and Fairfield County Detectives School, and has held appointments as an Adjunct Associate Professor in the Legal Studies Program at Sacred Heart University, and as an Adjunct Professor of Law at Quinnipiac College School of Law, where he taught an advanced criminal trial practice course. Meehan was the lead defense counsel for former Bridgeport Mayor Joseph Ganim's corruption trial. He has obtained multi-million dollar verdicts and settlements in complex medical and dental malpractice and personal injury litigation. Meehan is a frequent legal analyst on CourtTV's "The Best defense with Jami Floyd," and "Courtside with Ashleigh Banfield and Jack Ford."



Each edition of The Justice Journal takes a point/counterpoint look at an aspect of our system of justice. The vigorous and healthy debate that feeds our democracy will be a hallmark of The Justice Journal.

As CEO of Strang Hayes /Investigative Management Group, a leading international security consulting company, I have witnessed the growing concern our country faces in protecting our families, co-workers and property from harm. I have worked with the U.S. Justice Department for over ten years, co-headed the New York State Anti-Terrorist Commission, and currently serve as a co-chair with New York State Assemblyman James Tedisco of the task force Unified Against the Challenges of Terrorism (U.A.C.T.).

The recent decision by Federal Judge Anne Taylor Diggs reflects the difficulty in balancing individual rights and allowing our government the means to protect and maintain those democratic liberties that keep us safe. Her decision reflects the checks and balances in our system of government and demonstrates that it is the responsibility of the judicial branch to interpret the law and adhere to the Constitution. The 4th amendment protects our civil liberties from unwarranted government intrusion. Our judicial system has interpreted this protection to allow certain exceptions when our civil liberties are curtailed. In addition, Congress has also created laws to allow for specific instances when government can intrude our privacy. Although the current issue, focuses on the legality of the current administration's surveillance program. The big picture should evaluate the success of our efforts on the war on terror and we should focus on solutions that allow our government the means to continue to protect and thwart forces that would seek to do us harm. Our government has conceived a strategy that focuses on three factors: intelligence, enforcement, and physical security.

Intelligence is built in relevant information that is gained through wiretaps, email intercepts; interviews, infiltration and surveillance. This must be accomplished domestically and abroad. In addition, this administration has sought methods to ensure that this information is shared from local police department to law enforcement agencies at the federal level - from top to bottom.

Enforcement acts in conjunction with and based on relevant intelligence. In order to achieve better enforcement we have increased the investigative powers of law enforcement agencies through the Patriot Act. In addition, various government bureaucracies responsible for security and military functions were reorganized. The Department of Homeland Security (DHS) was created to coordinate "homeland security" efforts in the largest reorganization of the U.S. federal government since the consolidation of the armed forces into the Department of Defense. These statutory and administrative steps were achieved by the legislative and executive branches working together.

The third prong is security. Security has been strengthened through the consolidation and creation of DHS. We are attempting ways to monitor and control access to our borders. And we will continue on solutions for port security and transportation.

This is a crucial time and crossroad in our country's history. The current administration has developed a counterterrorist strategy that focuses on intelligence, enforcement, and security, and this strategy has safeguarded our interests and foiled many recent attempts designed to terrorize our country. Our

government will continue to be pro-active and focus on the means to protect us from harm. What is crucial - is that if the means are judged to be unconstitutional, then our legislative branch to needs to pass laws that will enable our law enforcement the "means" to continue their work. Our goal - whether you are democratic, republican or whatever your religious persuasion - is the same, that is protect our democratic principles and protect our families.

Robert Strang is one of the world's leading corporate investigative specialists serving major financial institutions, Fortune 500 companies, large law firms and high net-worth individuals and families. Strang joined the FBI in 1979. From 1980 to 1989, he was a Special Agent with the Drug Enforcement Administration. In 1989, he and fellow DEA agent Ann Hayes formed Strang Hayes. In 2001, they sold the firm was sold to SPX Corporation. In 2003, they founded Investigative Management Group. Strang has served as a consultant to the New York State Senate Investigative Committee and recently co-chaired the New York Senate Anti-Terrorism Task Force. He now co-chairs the U.A.C.T. Task Force (Unified Against the Challenges of Terrorism), an independent entity established by the Minority Leader of the New York State Assembly to analyze security issues and preparedness in New York. Strang appears regularly on national and cable news programs providing expert analysis on terrorism, security and investigative matters. He is also often quoted in The New York Times, Forbes, USA Today and other business publications.

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