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The Warrant's Out On Judges

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Within hours of her decision to hold the National Security Agency's domestic surveillance program unconstitutional, Judge Anna Diggs Taylor was subjected to relentless personal criticism. Even in the mainstream press, she has been accused of "pos[ing] for the cameras" (the Wall Street Journal), charged with "blithely ignoring [her] own obligations" (The New York Times) and dismissed as having produced merely unscholarly "angry rhetoric" (The Washington Post). Such deeply personal invective directed at Judge Taylor drowned out commentary either applauding or disputing the merits of the decision.

The attack on Judge Taylor is not an isolated incident, but stands at the confluence of two different trends. First, it is the latest ad hominem, partisan attack on judges for the substance of their decisions. Second, it is a further step in a perilous flirtation with the idea that we are better off without independent judges to ensure the rule of law applies, not only to average citizens, but equally to those in power.

The first trend—assailing individual judges for their rulings—is most visible in America's state courts. Take by way of example a ballot initiative campaign in South Dakota known as "JAIL4Judges" which would remove judges' immunity from prosecution based on the substance of their decisions. The idea is so absurd that South Dakota's entire legislature voted unanimously to oppose the initiative. Yet, substantial damage is done whenever extremists dictate the terms of debate by even placing this issue on the ballot. Similarly, in Alabama, recent primaries for the state's Supreme Court featured a sitting justice who literally took to the opinion pages and television airwaves to chastise his colleagues on the bench for expressly following binding United States Supreme Court precedent. At least since the desegregation of Little Rock in 1957, it has been abundantly clear that following the law meant following the decisions of the nation's High Court. Even when such attacks fail—as they generally have to date—they still damage the national dialogue. The result? Public debate about difficult legal questions is routinely reduced to a grossly simplified and misleading binary: liberal or conservative. If only the intersections between executive powers and individual liberties were so simple.

This trend is not confined to state courts. Even U.S. Supreme Court justices are subjected to a barrage of increasingly ad hominem attacks. After a controversial 2005 Supreme Court decision involving an unexceptional interpretation of the Takings Clause, property rights advocates, sensing a rallying moment, went on the offensive. A member of the Court's majority, Justice David Souter suddenly found his New Hampshire home under attack by property rights advocates, seeking to seize it and build the "Lost Liberty Hotel." Whatever the merits of the Court's decision, it provided an ironic flashpoint for unsophisticated hostility toward a member of the Court's majority—as the decision rested heavily on deference to democratic, legislative judgments.

The Weekly Standard's Fred Barnes contends that "[b]esides national security, the issue that most energizes conservatives and Republicans is judges." On the religious right, for example, Focus on the Family's Dr. James Dobson's April 2004 newsletter described Supreme Court Justice Anthony Kennedy as "the most dangerous man in America." The good news is that if Dobson is correct, we're much safer than previously thought; the bad news is that while such hyperbolic comments may serve the short-term interests of particular groups, in the long-term they hurt us all. Perhaps that is why, in 2005, then-Chief Justice William Rehnquist—hardly a "liberal" by any definition—wrote of the "mounting criticism of judges" and the need for courts "to survive basic attacks on the judicial independence that has made our judicial system a model for much of the world."

The second trend—an increasing ambivalence toward the rule of law—finds its most recent champion in Chicago federal circuit court Judge Richard Posner. Last week, Judge Posner wrote an op-ed in the Wall Street Journal about Judge Taylor's decision. As an initial matter, it is generally thought improper for judges to comment on pending cases. And while Judge Taylor's decision could not be appealed to Judge Posner's tribunal, it is not impossible that cases raising the same questions could come before him (for example, if a convicted criminal defendant in Judge Posner's jurisdiction challenged the propriety of evidence gathered as a result of an NSA warrantless search). Judge Posner disclaimed any view of the merits of Judge Taylor's decision, but ended his article by stating that: "Monitoring … need not be conducted under a warrant." It requires creative hermeneutics of the kind usually condemned by conservatives to make this commentary out to be something other than a view of the merits of the case.

But more striking was Judge Posner's view of the proper role of the courts in an age of terrorist threats. He noted the "strangeness" of assigning decisions related to national security to one of the hundreds of federal district court judges in the country, and the "further strangeness" that the Foreign Intelligence Surveillance Court, which is tasked solely with hearing warrant applications, did not hear the case. At heart, Judge Posner took issue with the idea that surveillance had anything to do with either judges or the Constitution at all. Judges, he argued, "have no expertise in national security," and the "18th-Century Constitution … needs to be revived" rather than rigidly applied by a "bare majority" of the Supreme Court.

Judge Posner is hardly alone in tolling the bell for judicial competence—former Justice Department lawyer and author of the infamous August 2002 torture memo John Yoo makes a similar argument about the "institutional disadvantage" of courts when it comes to security matters. The Yoo/Posner notion that courts have no proper role when government seeks to infringe on human liberties in the name of national security is an extravagantly dangerous one.

Start with Judge Posner's idea that national security decisions ought to be made by a cadre of seasoned officials with substantial security experience. Any honest assessment of the past five years casts much doubt on the ability of the executive to assess wisely the balance of fundamental individual liberties and security. From the ongoing detention of dozens of innocent men in Guantánamo and Abu Ghraib to a Middle East grand strategy that has principally served to empower Iran, the record is marked by serial incompetence.

There is good reason to be skeptical about decisions made by small groups of so-called experts. At high levels, national security decision-making in Administrations of both parties has been often driven by partisan concerns. As Judge Taylor's decision noted, every Administration since FDR's has employed the nation's intelligence services and surveillance powers to improper, often partisan, ends.

Nor are decisions made by small groups of experts necessarily better than decisions exposed to the disinfectant of independent scrutiny. Some of the most serious factual errors in national security—such as the mistaken belief that Iraq either had WMDs or supported al-Qaida—flowed from closed-group deliberations, unchecked by broader debate. As Judge Posner's colleague at the Chicago Law School Cass Sunstein has shown, members of small groups, operating in a bubble, become sounding boards for their own prejudices, drowning out doubts, and reinforcing errors.

As a practical matter, there is no reason why the political branches alone, and not judges, should see the classified information needed to assess a national security power. Courts have mechanisms—often as secure as those available to Congress—to view classified information. And when was the last time a federal judge leaked a piece of classified information? We know of no such example.

Federal judges must constantly decide technical matters that they are not specialists in: from the nature and effect of tobacco advertising, to complex securities and energy market manipulations, to the monopolistic effects of bundling software products. National security matters are likewise susceptible to rational review to ensure compliance with our Constitution. Indeed, if America's traditionally strong and independent judiciary has one core competence, it is guaranteeing that the enduring American values distilled into the Bill of Rights are not relegated to the dustbin of history by transient political majorities caught in the panic of the day.

The task of the judge is simple to state, but difficult to execute: It is to follow the rules laid down. In particular, it is to make sure that officials vested with the awesome powers of the federal government also follow the rules laid down, that they do not carelessly sacrifice privacy and liberty for the sake of ideological hobbyhorses or partial gain. Today, no less than in 1789, it's a task that needs doing.