EDITORIAL:
A Judicial Misfire

The first federal court opinion on warrantless NSA surveillance is full of sound and fury.

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THE NATION would benefit from a serious, scholarly and hard-hitting judicial examination of the National Security Agency's program of warrantless surveillance. The program exists on ever-more uncertain legal ground; it is at least in considerable tension with federal law and the Bill of Rights. Careful judicial scrutiny could serve both to hold the administration accountable and to provide firmer legal footing for such surveillance as may be necessary for national security.

Unfortunately, the decision yesterday by a federal district court in Detroit, striking down the NSA's program, is neither careful nor scholarly, and it is 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.

Judge Taylor's opinion is certainly long on throat-clearing sound bites. "There are no hereditary Kings in America and no powers not created by the Constitution," she thunders. She declares that "the public interest is clear, in this matter. It is the upholding of our Constitution." And she insists that Mr. Bush has "undisputedly" violated the First and Fourth Amendments, the constitutional separation of powers, and federal surveillance law.

But the administration does, in fact, vigorously dispute these conclusions. Nor is its dispute frivolous. The NSA's program, about which many facts are still undisclosed, exists at the nexus of inherent presidential powers, laws purporting to constrain those powers, the constitutional right of the people to be free from unreasonable surveillance, and a broad congressional authorization to use force against al-Qaeda. That authorization,
the administration argues, permits the wiretapping notwithstanding existing federal surveillance law; inherent presidential powers, it suggests, allow it to conduct foreign intelligence surveillance on its own authority. You don't have to accept either contention to acknowledge that these are complicated, difficult issues. Judge Taylor devotes a scant few pages to dismissing them, without even discussing key precedents.

The judge may well be correct in her bottom line that the program exceeds presidential authority, even during wartime. We harbor grave doubt both that Congress authorized warrantless surveillance as part of the war and that Mr. Bush has the constitutional power to act outside of normal surveillance statutes that purport to be the exclusive legal authorities for domestic spying. But her opinion, which as the first court venture into this territory will garner much attention, is unhelpful either in evaluating or in ensuring the program's legality. Fortunately, as this case moves forward on appeal and as other cases progress in other courts, it won't be the last word.