

DICTATES

By Michael Ventura

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December 6. Attorney General John Ashcroft's defense of the Bush Administration's anti-Constitutional dictates before a Senate committee: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists." Broadcast comment ranged from tepidly critical (the networks) to rabidly supportive (Fox News), but the press didn't back off. During the following days, newspapers large and small lambasted Ashcroft for his half-truths, outright falsehoods, fright tactics, and the hypocrisy of ordering the FBI not to examine gun records of suspected terrorists merely to please the NRA (a move that police organizations also criticized). Ashcroft's testimony was a trial balloon. If it had been accepted at face value, no doubt Zacarias Moussaoui (believed to be the 20th man in the September 11 attacks) would have been tried by military tribunal. Instead, the administration announced on December 11 that Moussaoui would be prosecuted in open court, constitutionally. The White House probably had its own polls in hand, agreeing with *The New York Times*/CBS poll published December 12:

"Fifty-one percent said it was not a good idea to try foreigners accused of terrorism in secret military proceedings." Eighty percent said "they believed the president should make changes in the criminal justice system in consultation with Congress, not by executive order, as he has done recently," though "64% said that in wartime it was a good idea for the president to have the authority to change rights usually guaranteed by the Constitution." A mixed bag of numbers, showing a citizenry in flux and confused but also demonstrating an abiding concern for the Constitution. "Nearly two-thirds of the public said they were not willing to give the government the right to 'monitor the telephone and e-mail of ordinary Americans to reduce the threat of terrorism.'" Bush's approval rating was 86%; 91% approved of how he was handling the war; 61% even approved of his steering of the economy; but 73% still said it was OK to criticize him on domestic issues. "When it comes to trying suspected terrorists, 50% said they preferred using open criminal courts -- with jury, a civilian judge, and a unanimous verdict ... 40% said they favored military tribunals." With the public split and the press against him, Bush decided to prosecute Moussaoui constitutionally. It was too politically risky to do otherwise.

There's no better evidence of the value of expressing individual opinion in a constitutional republic -- for that's what it took to back Bush off his proffered course. *The New York Times* reported that White House insiders admitted that criticism of military tribunals "helped to shape the decision" on Moussaoui's trial. In short, the American Way was working.

But Bush kept up his attack on the Constitution. On December 13, *in an issue having nothing to do with national security*, Bush claimed executive privilege to block Congress from investigating the misuse of FBI Mafia informants in Boston. It is an extraordinary and dangerous move: the White House forbidding Congress to assess the actions of a Congressionally mandated institution (the FBI). "At issue here," the conservative William Safire wrote in protest some days later, "is Congress' responsibility and authority to examine the misdeeds of the executive branch in a thorough manner." Again Bush is setting a dangerous precedent. The question is: Why? Why doesn't this

president want Congress to investigate a serious misuse of power by the FBI? What is Bush planning, what is he anticipating, that would require such a drastic move on an issue that (it can't be overemphasized) has nothing to do with national security? If we don't track and protest these moves, we will wake up to Bush's reasons only when it's too late.

By December 20, John Walker, the American Taliban, had been in U.S. custody for two weeks without access to counsel. Whatever else Walker may be, he's an American citizen with the rights of any American citizen. Which makes the administration's statements of December 22 among the most extraordinary of our era. Bush, *The New York Times* reported, "said *he* had not decided on specific charges to be filed against Mr. Walker" [my italics]. The president has no constitutional rights to "decide" on charges against any American citizen. "I have no answer on Walker yet," Bush said, "because I want the process to be able to address all the different circumstances that may arise, and *then we'll brief the country* [my italics] on how we're going to deal with those people." Sorry, but these are not presidential powers. The president doesn't get to "brief" the country on such things; the president gets to abide by the Constitution like the rest of us. He doesn't get to decide what his powers are. His powers are proscribed by law.

The word "dictator" comes from the verb "to dictate." In my dictionary "dictate" means "1: to speak or read for a person to transcribe or for a machine to record. 2: command, order." A dictator is one who dictates, and that dictation, politically, becomes law. "We'll brief the country" is, at the very least, a dictatorial assumption. Walker is an American citizen subject to a body of law over which an American president has no constitutional control. It is not for our president to "brief" us on such things. It's for him to follow our law.

Bush went on: "We've told his lawyer that *at the appropriate time we'll let everybody know*, including his family, how we're going to proceed with Walker" [my italics]. Our Constitution determines "how we're going to proceed with Walker." The president doesn't get to decide what's "appropriate" about that. This president, on this day, in this instance, assumed dictatorial power.

Walker's case is murky. The Fifth Amendment provides for exceptions to usual procedure "for a capital, or otherwise infamous, crime ... in time of war or public danger," but Walker wasn't apprehended committing a specific crime; he certainly didn't present the direct threat, tantamount to an emergency, that this Fifth Amendment clause envisions. The Sixth Amendment provides that "in *all* criminal prosecutions" the accused has the right "to have the assistance of counsel." Add to all this the incalculably prejudicial statements made by the president and the attorney general, and once again you have the executive branch unconstitutionally usurping and subverting the constitutional duties of the judiciary.

On December 28, the administration released "draft regulations for trying people accused of terrorism" that significantly backed off from Bush's initial proposals: In these newly drafted regulations the accused would be presumed innocent, in public trials, with lawyers of their own choosing. Score one for a free press and a democratic people. It can't be emphasized too strongly: This was the Bush administration's tacit admission that it wasn't going to get away with its original intentions without muzzling newspapers and risking the ire of the 51% who think secret military trials are "not a good idea." Again Bush said something unworthy of an American president: "One thing is certain -- that whatever the procedures are for the military tribunals, our system will be more fair than

the system of bin Laden and the Taliban." We already have a "system," a constitution, to assure us of that and then some. Bin Laden and the Taliban seem to be Bush's benchmark for our justice system; it is only necessary to be more just than fanatics and tyrants. According to our Constitution, that is far from good enough.

Then Enron really hit the fan. Bush's closest friends and hugest financial supporters -- running a company that's paid no income taxes in four of the past five years -- were revealed to have rigged the numbers so that they walked away with hundreds of millions in personal profit while thousands of their employees lost their life savings. Ashcroft finally had to shut up (recuse himself) because he, too, had accepted significant Enron money. As the White House focused on damage control for the next two weeks, its dictatorial impulses were put on hold. Then on January 15, with John Walker still not allowed a lawyer or a visit from his family, Bush announced that he'd be tried in a civilian court, constitutionally. The "briefing" was over. Bush ran for cover behind the very Constitution he'd been flouting. The political climate was suddenly too hot to invite further criticism.

On September 11, in the skies over Pennsylvania, a gay Republican named Mark Bingham, a married businessman named Todd Beamer, and others on Flight 93, *voted* on their course of action. Faced with the starkest conceivable danger, in the most urgent imaginable circumstances, these Americans decided to vote, and abide by that vote, even unto death. *That's* a healthy democracy. They deserve, we deserve, a president with at least as much integrity ... a president who will trust such a people by employing their democracy, their constitution, in the face of Hell. No matter what. As they did. "Let's roll," the man said. Democratically. Constitutionally. With no dodges and no outs. With justice for all. All.

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