

A REPUBLIC ON PAPER

By Michael Ventura

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Last month the world learned that President Bush authorized the National Security Agency to wiretap the calls and e-mails of American citizens at will and without warrants, though by law the NSA is forbidden to spy on Americans. Bush claimed that the Federal Intelligence Surveillance Act wasn't fast enough, though FISA allows surveillance of a foreigner without a warrant for one year, and of an American citizen for 72 hours, before presenting probable cause to the secret FISA court. In its first 22 years of existence, the FISA court refused only two of more than 13,000 requests, and there is no instance of the FISA process leaking secrets. Therefore, Bush lies when he claims FISA's speed, permissiveness, and secrecy were insufficient. But FISA also requires regular surveillance reports be given in person and in writing to congressional intelligence committees. What Bush really objects to is FISA's demand of accountability. Bush wants no lawful oversight as to whom the NSA spies on or why.

Bush doesn't deny breaking our surveillance laws; instead, he says it's his right to do so under the Constitution, while Vice-President Cheney claims Bush "was granted authority by the Congress to use all means necessary to take on the terrorists."

The record shows this was not the intent of any congressional resolution. In a Washington Post op-ed on Dec. 23, 2005 (p.21), Tom Daschle, Senate minority leader at the time of the resolution, documents that "the White House proposed that Congress authorize the use of military force to 'deter and pre-empt any future acts of terrorism and/or aggression against the United States.'" Congress thought that language was too permissive. Instead, Congress authorized Bush only to use "all necessary and appropriate force against those nations, organizations, or persons [the president] determines planned, authorized, committed, or aided" the 9/11 attacks. The resolution was specifically designed to retaliate for 9/11; a blank check for future actions was specifically denied.

Daschle writes: "Literally minutes before the Senate cast its vote, the administration sought to add the words 'in the United States and' after 'appropriate force' in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas – where we all understood he wanted authority to act – but right here in the United States, potentially against American citizens." Congress refused. Bush, Daschle observes, "now argues those powers were inherently contained in the resolution adopted by Congress – but at the time, the administration clearly felt they weren't or it wouldn't have tried to insert the additional language."

If Bush's actions are, as he claims, "fully consistent with my constitutional responsibilities and authorities" (The New York Times, Dec. 18, 2005, p.1), then it wouldn't have been necessary to enact FISA or the PATRIOT Act in the first place. But what Bush claims is absurd. A brief reading of the Constitution proves him a liar and a lawbreaker.

"Article 1/Section 1: All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives." "Legislative powers" means the power to make laws. "All" means all. The president has no authority to make or change any law of any kind. He certainly has no authority to break laws.

Bush has claimed the right to embark on war, detain "enemy combatants," hold them without trial, and even torture them. But Article I/Section 7-11 of the Constitution states that only Congress may "declare war ... and make rules concerning capture on land and water." Congress has shamed itself for decades by refusing to insist on its war prerogative and rubber-stamping presidents who go to war on their own. And, in all the controversy about enemy combatants, Congress, the courts, and the press all seem to have forgotten that only Congress is empowered to "make rules concerning capture."

Article I/Section 7-14 assigns to Congress the right "to make rules for the government and regulation of the land and naval forces." The president is commander-in-chief, but Congress makes the rules by which he commands. The Constitution does not allow the president to make those rules.

Article I/Section 7-18 entitles Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." [My italics.] "All" means all and "any" means ... well ... any! The Framers knew very well that the word "any" is all-inclusive. "Any department" means just that. Which in turn means that only Congress – not the president – can determine the powers of the National Security Agency. An act of Congress created the NSA, and that act expressly forbade the NSA from spying on Americans. It is against the law for the president to create new powers for the National Security Agency.

Article II/Section 1-1: "The executive power shall be vested in a President of the United States." In this instance the meaning of "executive" is "administrative." The president administers laws enacted by Congress. That's why we call the presidency and its staff "the administration." Under the Constitution the president has few additional domestic powers [Article II/Section 2-1] except that "the President shall be commander-in-chief of the Army and Navy of the United States and of the militia of the several States." Or course, modern usages have accommodated the Constitution to contemporary times. It could be said that here is a gray area. Are intelligence services included in the military or are they amongst the "any" agencies of Article I/Section 7-18 above? The answer could reasonably go either way. But the point is: Under the Constitution, that's not for the president to decide. That's for Congress and/or the courts. In any case, to reiterate Article I/Section 7-14 (above): It is for Congress "to make the rules" under which the commander-in-chief commands. Any way you look at it, the president has broken the law.

He has taken it upon himself to wiretap citizens without warrants, detain without counsel, condemn without trial – though the Constitution clearly states (Article III/Section 2-3) that "the trial of all crimes, except in cases of impeachment, shall be by jury." [My italics.] "All" doesn't mean "sometimes." "All" means every damn time.

Article IV/Section 2: "This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the law of the land." To act contrary to the Constitution, and to the laws enacted by its powers, is to break the law of the land. President Bush, former Attorney General John Ashcroft, Attorney General Alberto Gonzales, and any who have followed their orders, have broken and are breaking the law by authorizing warrantless and apparently indefinite NSA wiretaps of American citizens.

This would be true even if the Constitution did not include the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." If this amendment no longer suits our era, only Congress has the right to enact an alternative. The president has no rights in this matter.

The law has been broken, but as of this writing nothing is being investigated but who leaked the fact that the law has been broken – an investigation ordered by the lawbreakers themselves while they brazenly continue their lawlessness.

Many argue that the United States stopped being a functional republic years ago, and that we are now a republic only on paper. Paper, however, is an enduring object. Our republic on paper has not yet been erased. Which means it can yet be enacted – but not if the people are silent.

Only Congress has the constitutional power to police the presidency. It is difficult to imagine this Congress taking that responsibility. But we, too, have a responsibility. The Constitution is not finally dead until it dies in us. Silence is not an option, if the Constitution is ever again to rise from the paper on which it was written.