

IMPEACHABLE OFFENSE

By Michael Ventura

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On Dec. 16 The New York Times reported on page one that "President Bush secretly authorized the National Security Agency to eavesdrop on Americans ... without the court-approved warrants ordinarily required for domestic spying." That day Bush called the report "speculation"; the next day he admitted and defended his actions as "fully consistent with my constitutional responsibilities." On the 18th, Secretary of State Condoleezza Rice said Bush was justified because present laws were "too cumbersome." Vice-President Cheney declared warrantless spying on our own citizens is "the kind of capability if we'd had before 9/11 might have led us to be able to prevent 9/11."

On Dec. 19, Lt. Gen. Michael V. Hayden, our second-highest-ranking intelligence officer, said, "The whole key here is agility" in order to "detect and prevent." Attorney General Alberto Gonzales agreed. Both Gonzales and Hayden claimed the surveillance was "limited," and called the lawful process of obtaining warrants inadequate. On Dec. 21, Cheney claimed the president's secret authorization is "in accordance with the Constitution," adding, "this is not about violating civil liberties." Gonzales, Bush, and others repeatedly emphasized that only international calls were monitored and that purely domestic calls and e-mails were not included in the president's secret authorization.

However, in a page one story on Dec. 21, the Times reported that "it is sometimes difficult even for the NSA to determine whether someone is inside or outside the United States when making a cellphone call or sending an e-mail message." On Dec. 24, again on page one, the paper revealed that the number of wiretaps "without court-approved warrants is much larger than the White House has acknowledged. ... It was collected by tapping directly into some of the American telecommunication system's main arteries ... to obtain backdoor access to streams of domestic and international communications." The report quoted technical experts who said that in such an enormous sweep of surveillance it was impossible to screen out domestic calls. Even a Justice Department official admitted, "You're talking about access to such a vast amount of communications. ... How do you minimize something that's on a switch that's carrying such large volumes of traffic?"

Yet on Dec. 27 White House spokesman Trent Duffy was still claiming that "this is a limited program. This is not about monitoring phone calls designed to arrange Little League practice or what to bring to a potluck dinner. These [measures] are designed to monitor calls from very bad people to very bad people."

The president and his people have broken the law. And they have lied, repeatedly and knowingly, about the law they have broken.

To determine how and why, let's read the law, the Foreign Intelligence Surveillance Act.

As to cumbersomeness and speed, FISA's "Emergency Act" provides that "when the

Attorney General reasonably determines that 1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such can with due diligence be obtained; and 2) *the factual basis for issuance of an order ... to approve such surveillance exists* [my italics]; he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction ... is informed by the Attorney General ... [in] not more than 72 hours."

We see here that Bush, Cheney, Rice, Gonzales, and Hayden are lying about the law's "cumbersomeness" and "agility." The law is plenty agile. Wiretap anyone you want right this minute, but present your "factual basis" in 72 hours. The "factual basis" is what our rulers find cumbersome. They are claiming the power to wiretap anyone for any reason they see fit, to present no reasons for doing so, and to leave no legal record, not even a secret legal record.

Cheney's 9/11 claim is also false. Agile and flexible, FISA has been in place for more than two decades. It's been well documented that the FBI had solid leads on the 9/11 terrorists, but did not follow through on them. 9/11 didn't happen because of a lack of government power.

Back to the law: FISA allows "the president, through the Attorney General, [to] authorize surveillance without a court order ... to acquire foreign intelligence information *for periods up to a year* [my italics] if the Attorney General certifies in writing, under oath that ... there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party." "Very bad people," if they are foreigners, can be wiretapped without court order for a year, but not American citizens. For Americans, the Constitution requires a court order – though even Americans can be wiretapped without a court order for 72 hours. How agile can you get?

But the law also requires *accountability* – in the form of clear channels of authority, clear reasons for actions, and clear (if secret) records. This is not accountability to the public; this is accountability merely to the special FISA court. This court is composed of 10 judges whose deliberations are secret except for mandated reports to the House and Senate intelligence committees. According to UPI (Dec. 26), "in the first 22 years of the court's operation" the court "modified" only two warrants out of 13,102. That's one permissive court. UPI reported that "the judges have modified 179 of the 5,645 [Bush] requests for surveillance. ... the judges also rejected or deferred at least six warrants ... the first outright rejection of a wiretap in the court's history." Six. Because a mere six warrants were rejected, and another 179 (out of 5,645) were "modified," George W. Bush felt justified in breaking the law. What they are afraid of is this court's limited demands of accountability. Examination of the law proves all their stated reasons for breaking it are false. They broke the law as part of their "program" to create a White House that is a law unto itself, accountable to no one.

One member of the secret court, Judge James Robertson, has resigned in protest, and the presiding judge is demanding the Justice Department give concrete reasons why the government saw fit to ignore federal statutes – that is, why they broke the law. When a

supersecret court is up in arms about White House transgressions, it's high time to worry.

Again, back to the law: It requires that "the Attorney General shall assess compliance with [its] procedures and shall report such assessment" to the House and Senate intelligence committees. The law stipulates that all notifications be in writing – accountability again. Cheney gave vague verbal briefings to 12 members of Congress on the condition that they tell no one. That is not the law. The law requires that a few, a very few, representatives of the legislative and judiciary branches of government know what's going on. The law's process is effectively secret; since 1978 no FISA-gathered information is reported to have leaked.

The law requires that "on a semiannual basis the Attorney General shall *fully* [my italics] inform the [House and Senate Intelligence committees]. ... [*N*]othing [my italics] ... shall be deemed to limit the authority of each House of Congress to obtain such information as they may need to carry out their respective functions and duties." Nothing means nothing. That's the law. Clearly, Attorney General Gonzales and his superiors have broken the law.

They obviously have no patience with a law that also stipulates that "no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the First Amendment of the Constitution of the United States."

The law is agile. The law maintains secrecy. But the law insists on a "factual basis" for wiretaps, on (minimal) checks and balances, and on (an again minimal) respect for the First Amendment – all of which this White House cannot tolerate.

According to our Constitution, Congress and only Congress has the power to make laws. If a law is not appropriate to a situation, you present your case to Congress and Congress changes the law, or not, as it sees fit. Explicit in the Constitution is that the president cannot make his own laws. Explicit in the Constitution is that every citizen, including the president, is accountable to our laws. President Bush, Vice-President Cheney, and Attorney General Gonzales have broken the law. If they are not held accountable, we no longer live in a republic.

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