Subject: Re: Bobbing And Weaving---Gonzales
Posted by Leland Crooks on Mon, 06 Feb 2006 23:05:36 GMT
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I like that. Read this. Brilliant analysis by an attorney I came across. I was not familiar with "in pari materia" O.K., now that the Super Bowl is over, it's time to confront reality again. I'm an attorney, and this is a long, lawyerly piece that most DUers won't read, but here goes anyway. Just so you know, I'm not a constitutional lawyer, but, like most attorneys, I studied constitutional law in law school ... and, yes, I did stay at a Holiday Inn Express last night.The Senate Judiciary Committee will begin hearings today on the right claimed by President Bush to conduct warrantless electronic surveillance. Bush's Republican henchmen have thrown a lot of spurious arguments up against the wall to see if anything will stick. All of them are wrong from the standpoint of constitutional law and statutory construction, but the media doesn't understand what is legal and what is not. All that matters to them is who turns the catchiest phrases and yells the loudest and longest.Nevertheless, when these hearings are over, if Congress, the media and the rest of the country roll over and allow the warrantless searches and seizures to stand, I fear that one of the most important checks and balances in the U.S. Constitution will have been eliminated. Bush would appear to be on the verge of sending a high-powered public-relations projectile through Article II, Section 2, blasting a hole through the Constitution that obliterates the Fourth and Fifth Amendments and effectively eviscerates the Bill of Rights. Once these civil liberties are gone, it is a virtual certainty that we will never get them back.To set the stage for this discussion, it is important to realize that the framers of the Constitution did not want a king. They also did not want Congress to be able to make the laws, enforce them and sit as a judicial body because this, too, would place complete power in the hands of a single entity. Consequently, they drafted a document that divided power three ways--between a Congress that would enact the laws, a President that would execute them and a judiciary that would interpret them. It was adopted in 1787 and became the U.S. Constitution. Fearing that the executive branch might attempt to trample civil liberties if they were not expressly stated in the Constitution, they came back a mere four years later and adopted ten amendments that became known as the “Bill of Rights.”The adoption of the Fourth and Fifth Amendments as part of the Bill of Rights in 1791 essentially revoked any power Congress or the President may have had to conduct or authorize warrantless searches. When the Constitution is viewed in this light, it is impossible to concede to President Bush and his successors the completely unchecked, inherent power to conduct warrantless searches of telephone conversations and email messages that he claims. Please bear with me, I will attempt to explain this position in some detail.There is a rule of legal construction that is highly germane on the subject of presidential power to conduct warrantless searches and seizures. It says that laws that are “in pari materia,” i.e., that deal with “equal material” or the same subject matter, should be interpreted so as to give effect to all portions of each law. In other words, it requires the U.S. Constitution to be interpreted as an organic whole.The rule of construction in pari materia applies to all laws of “equal dignity,” i.e., to all laws adopted at the same level of government. It presumes that the citizenry (in the case of constitutional provisions), legislature (in the case of statutes), county or municipal government (in the case of ordinances) or administrative agency (in the case of rules and regulations), as the case may be, is fully aware of every law that it has adopted and that it intends to create a consistent and harmonious system of laws “governed by one spirit and policy.” Each individual law is presumed to have been created intentionally and not by accident and with full knowledge of all other relevant laws. It assumes that the entity adopting a new law, being fully

cognizant of all existing laws on the same subject matter, intended for both the new law and the old ones to be effective. Otherwise, it would have written the new law differently or expressly repealed any inconsistent previously-existing laws.This rule requiring that laws be construed in pari materia is itself part of the law, and judges are required to abide by it when they are interpreting laws that, on first examination, appear to be inconsistent. It requires judges to dig deeper and discover a way to give effect to all laws and to each of their parts. The only exception is where the laws are so inconsistent that they are impossible to reconcile. In such cases, the later law is regarded as the most recent pronouncement of legislative intent on the subject and is considered to have repealed the earlier one by implication.Turning then to the actual language of the U.S. Constitution, Article VI, Paragraph 2 provides, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Thus, the U.S. Constitution is the paramount law of this country, and the rule of in pari materia applies when interpreting it. No state law that is in conflict with it can stand, and no law enacted by Congress, no executive order of the President and no decision of the Supreme Court can supersede it.Of course, Supreme Court decisions interpreting the Constitution, once adopted, are entitled to great deference as precedents. However, in the end, they are only interpretations, which is why the Supreme Court, when attempting to understand the Constitution and apply it to novel situations or changed circumstances, returns again and again to the actual language of the document, refining or overruling earlier precedents whenever necessary. In that same spirit of faithfulness to the rule of law, whenever any issue of constitutional interpretation arises in public discourse, the first place we must turn for guidance is to the words of the Constitution itself.With respect to Congress, Article I, Section 1 states: “All legislative Powers herein granted shall be vested in a Congress of the United States….” Note that the framers put the provisions creating and empowering Congress in Article I because they regarded it as the preeminent branch of the federal government. Article I, Section 9 provided Congress with very broad powers over the military, including the power to define and punish offenses against international law, to declare war, to raise and support armies, a navy and the militia and, perhaps most importantly in the present context, the powers “To make Rules for the Government and Regulation of the land and naval Forces” and “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.”Note that this last power even goes so far as to permit Congress to enact rules governing how the President performs his job because the framers, with their recent experience of the unbridled powers of the British monarchy, wanted to ensure, more than anything else, that their “chief executive” could not become a de facto king. This power, above all others, makes it clear that the authors of the Constitution intended for congressional power to trump presidential power.With regard to the President, Article II, Section 1 says: “The executive Power shall be vested in a President of the United States of America.” Article II, Section 2 states: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States….” Article II, Section 9 issues the following express command to the President: “He shall take Care that the Laws be faithfully executed….”Turning to the judiciary, Article III, Section 1 provides, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Nevertheless, in Section 2, the judicial power is to be exercised “with such Exceptions, and under such Regulations as the Congress shall make.” Note that Congress, not

the President, is given this check and balance over the federal judiciary.As for the Bill of Rights, the Fourth Amendment states: “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.” The Fifth Amendment amplifies and expands the Fourth by making it clear that “No person shall… be deprived of life, liberty, or property, without due process of law….”Although the Fourth and Fifth Amendments were adopted shortly after the rest of the Constitution, they are just as much a part of it as the provisions of Article I and Article II. They must therefore be construed in pari materia with them and be given effect if it is possible to do so.It is clear from even a cursory reading of Article I, Section 1 that Congress, and not the President, is given exclusive legislative authority. Article II, Section 1 establishes the corollary role of the president as an executive officer who carries out laws enacted by Congress. Thus, at the most basic constitutional level, Congress passes laws, and the President executes them.However, the Constitution contains another set of complementary provisions involving Congress and the President. Article I, Section 9 gives Congress power “To make Rules for the Government and Regulation of the land and naval Forces.” Under Article II, Section 2, the President is designated as commander in chief of the armed forces of the United States. Congress and the President therefore have concurrent authority over the military and the waging of war. Consequently, where Congress has not addressed a purely military matter, the President has inherent authority to act.Nevertheless, the President is required to “take Care that the Laws be faithfully executed,” including laws enacted under the power of Congress to make rules governing and regulating the military. Moreover, in his capacity as commander in chief, the President is still a constitutional officer subject to the power of Congress “To make all Laws which shall be necessary and proper for carrying into Execution … all … Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” In other words, where Congress has spoken on a subject over which it has authority to enact legislation, including military matters or even the execution of the powers of the presidency, the President is subordinate to Congress and has no option but to “faithfully execute” laws that Congress adopts. This is an extremely inconvenient limitation on presidential power that Chief Executives have frequently tried to circumvent.It bears repeating that even when the President is engaged in the performance of his duties as commander in chief, Congress can enact rules governing the conduct of his office, and he is duty-bound to obey them. In fact, this is the basis for the Foreign Intelligence Surveillance Act ("FISA") of 1978, which was apparently honored for over two decades by four Presidents prior to Bush 43. Everything in Article II points to the creation of an official with limited powers that are mainly directed at waging conventional wars that have been declared by Congress, conducting foreign policy and executing laws enacted by Congress, all of which are subject to the rules and limitations duly enacted by Congress. Bottom line: When Congress enacts legislation that it has constitutional power to enact, the President must obey. FISA is one of those laws.It is clear that the constitutional provisions originally adopted in 1787 are in pari materia because they are concerned with a unitary system of checks and balances devised by the framers of the Constitution. They therefore must be read and interpreted as a single, organic whole. Construed together, they make perfect sense as a method of enabling the different branches of our federal government to function together through a harmonious separation of powers. Turning to the issue of warrantless searches and seizures, these days we generally speak of security issues only in the contest of terrorism. However, the Fourth Amendment specifically recognizes that the people have a right to be “secure in their persons, houses, papers, and effects” against unreasonable governmental intrusions. The test of “reasonableness” is to be decided by an

impartial third party, i.e., by a judge or other judicial officer, who issues a warrant authorizing the search or seizure if he or she concurs that it is, in fact, reasonable. Before a warrant can be issued, the officer of the executive branch has to submit a description of the place to be searched and the persons or things to be seized that also explains under oath or affirmation why "probable cause" for the intrusion exists. Without the impartial decision-maker, the executive officer seeking to implement the search or seizure becomes the sole arbitor of whether the search is reasonable. This constitutes absolute power over the decision-making process which, as we all know, has a tendency to currupt absolutely.Until FISA was enacted in 1978, a warrant had to be issued in advance of conducting a search or seizure. Otherwise, the intrusion was, ipso facto, illegal. There were no retroactive warrants. Therefore, FISA itself constitutes a huge extension of presidential power. However, when it comes to the power of the presidency, there can be no more apt truism than "Give them an inch, and they'll take a mile."To the extent that any provision of the original Constitution is so inconsistent with the Fourth and Fifth Amendments as to be incapable of being reconciled with them, the rules of constitutional construction would come into play, and that provision would be repealed by implication. The Fourth Amendment makes it very clear that, in order for searches or seizures to be legal, warrants are necessary and must comply with certain requirements. When the Fourth Amendment was adopted in 1791, warrants were a purely judicial function. The clear intent was that, if a warrant is required, it must be issued by a judicial officer, and not by a member of the legislative or executive branches. Therefore, to the extent that the President ever did have inherent power to conduct or order warrantless searches or seizures, that power was repealed, expressly or by necessary implication, when the Fourth and Fifth Amendments were adopted, along with the rest of the Bill of Rights, on December 15, 1791.None of this has stopped Bush from claiming that he has inherent power as President to conduct warrantless electronic surveillance of U.S. citizens or that Congress, by authorizing him to go to war against the Taliban and Saddam Hussein, has implicitly authorized him to conduct warrantless electronic searches and seizures. As many Democratic and Republican members of Congress have pointed out, this is, indeed, a stretch. There is nothing in either of those resolutions that addresses the issue of searches and seizures, not one word.Moreover, even if Congress had purported to grant Bush the power to conduct such surveillance, it would not be constitutional. The adoption of the Fourth Amendment took away not only any inherent power the President may have had to conduct or authorize warrantless searches, but also any power Congress had to adopt legislation authorizing it.Call me a tinhat conspiracy theorist, but I fear that if the President's claim goes unchecked or is approved by Congress, we can say goodbye to our civil liberties. Bush and his intelligence agencies will then be in a position to determine for themselves when such intrusions are "reasonable." My guess is that we will soon begin to see the range of situations in which they are deemed appropriate begin to expand, slowly at first and then more rapidly when the executive branch sees that there is no longer anyone guarding the gate. It will ultimately begin to invade the sphere of domestic politics, which will enable Bush and other sitting Presidents to intimidate their political opponents. This will further chill all opposition to the surveillance, which will inspire additional incursions, etc., etc.Make no mistake about it, this is an attempt to overthrow the government, not by force of arms, but by seductive arguments preying on the public's fear of terrorism. Hopefully, congressional Democrats and moderate Republicans, the mainstream media, libertarians and the general public will realize that the nation is gripped by one of the most serious constitutional crises in its history and will band together to suppress this putsch.