

OBAMA'S PRESIDENTIAL POLICY DIRECTIVE: PIXIE DUST 2.0

Back when John Yoo was finding ways to authorize President Bush's illegal wiretap program – especially spying on Americans who were not agents of a foreign power – he changed the meaning of certain limits in EO 12333 without rewriting EO 12333. The President didn't have to change EO 12333 to reflect actual practice, Yoo determined (relying on an Iran-Contra precedent), because ignoring EO 12333 amounted to modifying it.

An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has instead modified or waived it.

I call this pixie-dusting, where the Executive makes his own orders and directives disappear in secret.

Poof!

The use of pixie-dust – so recently used to justify spying on people while pretending not to spy on them – ought to give you pause when you read this passage from President Obama's Presidential Policy Directive limiting US spying overseas (or, frankly, everything he said today, which all consists of the Executive exercising its prerogative to change and oversee Executive actions, but in no way includes any teeth to sustain such changes).

Nothing in this directive shall be construed to prevent me from exercising my constitutional authority, including as Commander in Chief, Chief Executive,

and in the conduct of foreign affairs,
as well as my statutory authority.
Consistent with this principle, a
recipient of this directive may at any
time recommend to me, through the APNSA,
a change to the policies and procedures
contained in this directive.

Effectively Obama is laying out his prerogative
to pixie dust this PPD.

And while the President admittedly would always
have such prerogative, he didn't include such a
paragraph in his cyberwar PPD (which, of course,
wasn't meant to be public).

This PPD was designed to be ignored.

And I suspect our friends and adversaries know
that.