

WHEN ALL EXECUTIVE ORDERS TURN TO PIXIE DUST

I promised to respond to Marty Lederman's response to Sheldon Whitehouse's speech today; though I should admit right away that the Libby non-appeal has changed my approach dramatically. So you won't see everything today.

Marty assesses the three propositions that Whitehouse has had declassified and is unimpressed.

The Administration has now permitted Whitehouse to talk about three aspects of the OLC Opinions, and that's what he did yesterday. He expressed incredulity about all three. But there's a reason the Administration gave him the green light on those three matters – because the OLC statements in question are boilerplate, and fairly uncontroversial (with one possible, important exception, noted below). There are undoubtedly very audacious and disturbing aspects of many of those OLC memos – such as the arguments that the AUMF superseded FISA and that the President has a constitutional right to violate FISA; and almost certainly descriptions of how much broader and more indiscriminate the NSA program was before Jack Goldsmith reined it in a bit in early 2004 – but **the three statements Whitehouse identified, standing alone, are not terribly noteworthy, at least not from a constitutional perspective.** [my emphasis]

Marty is assessing these, of course, as a former OLC lawyer. And he finds, for the most part, the three propositions are constitutional. Let me be clear that, as a non-lawyer, I'm assessing the

propositions by what they suggest about Bush's activities, which is part of the difference between Marty's calm and my outrage. I'm going to come back and look at the two propositions Marty is least excited about (numbers 2 and 3 in Senator Whitehouse's list). For now, though, let me jump ahead to the one that both Marty and I were most troubled by:

"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."

This is actually the most interesting and disturbing of the three quotes, but it's not because of any constitutional problem. OLC is correct here that the President has the power to decline to follow a presidential E.O. (assuming there is no statute requiring that he adhere).

Nevertheless, there does appear to be an outrage here. Apparently – and this is real news of the Whitehouse statement – the President decided to secretly ignore Executive Order 12333, which, among other things, has long been the only real source (other than Fourth Amendment) of legal protection of the privacy rights of U.S. persons overseas vis-a-vis surveillance by the federal government. This is a gap in FISA that the 1978 Congress said it would get around to closing – but it never did. And so the only thing standing between U.S. persons overseas and their own government snooping on them has been E.O. 12333.

If the President publicly rescinded 12333, there would be a huge outcry. It would prompt Congress to act

immediately.

Which is presumably why he didn't do so in public. Whitehouse suggests that the President secretly transgressed 12333. If so – if in fact the President chose to ignore 12333 without notifying the public or Congress, it's quite outrageous – constitutional bad faith, really, to announce to the world that you are acting one way (in large part to deter the legislature from acting), while in fact doing exactly the opposite.

Marty is unexcited by the legal implications of this, but definitely excited by the ethical implications of this—Bush appears to have been willfully ignoring EO 12333 without telling us. Just as a teaser, here is some of the language from EO 12333, both the passage Whitehouse and Marty are referring to, and the rest of it (for all we know, that's Pixie Dust too).

These procedures shall not authorize:

(a) The CIA to engage in electronic surveillance within the United States except for the purpose of training, testing, or conducting countermeasures to hostile electronic surveillance;

(b) Unconsented physical searches in the United States by agencies other than the FBI, except for:

[snip]

(c) Physical surveillance of a United States person in the United States by agencies other than the FBI, except for:

[snip]

(d) Physical surveillance of a United States person abroad to collect foreign intelligence, except to obtain significant information that cannot reasonably be acquired by other means.

[this is the bit that, per Whitehouse's comments, Bush appears to have willfully ignored]

This EO also prohibits covert infiltration of US organizations, human experimentation, and assassination.

Now granted, many of these surveillance activities are already forbidden by statute, so they remain illegal, even if Bush has declared all of 12333 Pixie Dust. But for those that aren't specifically forbidden (such as assassination), if Bush uses his Pixie Dust on those parts, he can make them legal. If Bush has decided he wants to violate these rules, he is only limited by laws explicitly prohibiting a particular activity.

Now, as it happens, EO 12333 overlaps significantly with existing law, so by making this Pixie Dust, there's not that much Bush has made legal. But this opinion appears to apply to all EOs—they're all Pixie Dust in Bush's hands, if he so desires. So when Bush signs an EO that is designed to provide guidance for existing laws, the laws themselves are susceptible to becoming Pixie Dust. Consider the Executive Order Bush signed in July "defining" the limits on the CIA's interrogation program:

Sec. 3. Compliance of a Central Intelligence Agency Detention and Interrogation Program with Common Article 3. (a) Pursuant to the authority of the President under the Constitution and the laws of the United States, including the Military Commissions Act of 2006, this order interprets the meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations, and shall be treated as authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States. I hereby determine that Common

Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section. The requirements set forth in this section shall be applied with respect to detainees in such program without adverse distinction as to their race, color, religion or faith, sex, birth, or wealth.

(b) I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3, provided that:

(i) the conditions of confinement and interrogation practices of the program do not include:

(A) torture, as defined in section 2340 of title 18, United States Code;

(B) any of the acts prohibited by section 2441(d) of title 18, United States Code, including murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking of hostages, or performing of biological experiments;

(C) other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in section 2441(d) of title 18, United States Code;

(D) any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by the Military Commissions Act (subsection 6(c) of Public Law 109 366) and the Detainee Treatment Act of 2005 (section 1003 of Public Law 109 148 and section 1403 of Public Law 109 163);

For all we know, this is nothing but Pixie Dust. I'm not saying it *has* been turned to Pixie Dust (yet)—but with that OLC opinion in his pocket, Bush can make it into Pixie Dust at any moment. And considering Bush's promise to veto the specific prohibition for the CIA against torture, we ought to assume this EO is nothing but Pixie Dust, yet another specious claim that the US is not torturing, all the while we secretly are.

See how fun it is to live in a land ruled by evil Pixie Dust?