

# MUKASEY FLIP FLOPS ON PIXIE DUST

Back during Michael Mukasey's confirmation hearings, Sheldon Whitehouse got Michael Mukasey to commit that, when a President changes an executive order, he appropriately should actually change the executive order—so schmoes like you and I can know what the President is actually doing.

2. Do you believe that the President may act contrary to a valid executive order? In the event he does, need he amend the executive order or provide any notice that he is acting contrary to the executive order?

ANSWER: Executive orders reflect the directives of the President. Should an executive order apply to the President and he determines that the order should be modified, the appropriate course would be for him to issue a new order or to amend the prior order.

A few months later, we learned why Whitehouse had asked Mukasey the question—because Bush was claiming that he didn't need to change his own executive orders, specifically EO 12333—which Americans would have believed protected them against wiretapping when they were overseas.

Let's start with number one. Bear in mind that the so-called Protect America Act that was stamped through this great body in August provides no – zero – statutory protections for Americans traveling abroad from government wiretapping. None if you're a businesswoman traveling on business overseas, none if you're a father taking the kids to the Caribbean, none if you're visiting uncles or aunts in Italy or Ireland, none even if you're a soldier in the uniform of the United

States posted overseas. The Bush Administration provided in that hastily-passed law no statutory restrictions on their ability to wiretap you at will, to tap your cell phone, your e-mail, whatever.

The only restriction is an executive order called 12333, which limits executive branch surveillance to Americans who the Attorney General determines to be agents of a foreign power. That's what the executive order says.

But what does this administration say about executive orders?

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.

"Whenever (the President) wishes to depart from the terms of a previous executive order," he may do so because "an executive order cannot limit a President." And he doesn't have to change the executive order, or give notice that he's violating it, because by "depart(ing) from the executive order," the President "has instead modified or waived it."

So unless Congress acts, here is what legally prevents this President from wiretapping Americans traveling abroad at will: nothing. Nothing.

To Whitehouse's credit, the sole improvement in today's FISA bill—among a bunch of gifts to the

unitary executive and total surveillance society—codified the part of E.O. 12333 that had ensured that Americans traveling abroad would not be wiretapped, so Bush couldn't just make it disappear without telling us.

But still, Mukasey said he thought the President should change an E.O. when he wanted to ignore it. Yet—after we learned subsequently that Bush wasn't doing that, that he had changed at least one executive order without telling us (and by golly, would you believe it's an executive order that pertains to our civil liberties?)—all of a sudden Michael Mukasey is defending the Executive Privilege to Pixie Dust.

Whitehouse: Attorney General, I'd like to talk with you a little about Executive Orders. Executive Orders often govern particularly serious matters. In my role on the Intelligence and Judiciary Committees, I've been exposed to 12333, which is the one that purported to protect Americans when they traveled overseas from being wiretapped by their government. That one is about to be overtaken by the FISA bill whose vote begins very shortly. Another one is 13440—which is the executive order that is intended to establish minimum standards for the appropriate treatment of alien detainees consistent with the Geneva Conventions. This executive order has been criticized by JAG for all branches of the armed services, but it is the executive order on which the Administration relies in indicating that it has "clear rules" is the Administration's phrase for detainee treatment and interrogations that must be done with "safeguards under US law" which I view is in part about this executive order. Now, you and I have had exchanges about E.O.s in your nomination, I indicated, you indicated, should an executive order apply to President and he determines it should be modified, the

appropriate course would be to issue a new order, or amend the prior order. And I think that is an accurate statement—I happen to agree with that. What concerns me, to take us back to our favorite place, OLC again, is that during my review of the OLC opinions I came across the following ... opinion of the Department of Justice by OLC.

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.

Is that rule still in force? And if that is the case, can President disregard executive order 13440 regarding the treatment of detainees, without amendment of information to Congress or the American people?

Mukasey: I think it's important, or at least useful, to analyze what the nature is of an executive order. An executive order is a direction by the President that the Executive conduct itself in a certain way. The President is free to change that order on his view of how the Executive should behave.

Whitehouse: Any time he wants ... [overtalk] The question is, can he leave an executive order in place and act in violation or derogation of it without ever going back and changing it just because he's the President?

Mukasey: It's not a violation of it, um, it is his order, or an executive order to start with. I can imagine

circumstances, in which it would be not only possible, but advisable for a President not to change an EO when he finds out information that directs the government should go in another direction. For example, if an EO directed that a particular country be treated as not violative of certain norms and therefore eligible of certain privileges and he came by classified information that told him otherwise, he would be obligated, it seems to me, to reimpose those restrictions on that country. It would be inadvisable for him to file an amended executive order and put them on notice that he had come into possession of that classified information.

Whitehouse: Ever?

Mukasey: I beg your pardon?

Whitehouse: Ever?

Mukasey: It would be inadvisable ...

Whitehouse: I can understand there are timing considerations, something that happened rather suddenly.

Mukasey: If there comes a time when it becomes advisable and possible, then it's advisable and possible. It may never be possible.

Whitehouse: So, I conclude from your answer that the existence of EO 13440 can give us no assurance that the President is actually complying with it.

Mukasey: I think that the existence of 440-EO 13440-suggests the President is complying with it.

Whitehouse: Suggests, but can give us no assurance.

Mukasey: The President is-having issued an order-is free to issue contrary

directions.

Whitehouse: So, the answer to my question is yes. It can give us no assurance that the President is following it.

Mukasey: I think your question suggests a level of uncertainty that, with due respect, is unwarranted in this situation that you mention.

Whitehouse: Well, a lot of things that we were concerned were unwarranted appear to have come true, so, here we are. But I think it's important to pin it down, because the question of how we treat detainees is significant, and if 13440 doesn't, in fact, protect us, then it's important for us to know in Congress—it's one of the reasons I think the FISA statute is so important is that it repairs the limit of 12333.

I like that bit: "Ever?" "I beg your pardon?"  
Comedy gold.

What Mukasey's rather malleable position amounts to, though, is "trust us." He suggests we can read Bush EOs and somehow discern which ones—like EO 12333 governing intelligence activities and EO 13292 governing classification, declassification, and insta-declassification—Bush has decided to ~~ignore~~ modify without telling us. Whereas there are others—specifically 13440, torture, an area that Bush would prefer to avoid further legislation on—for which Mukasey believes we, and the international community, can just assume—because of its very existence!!!!—the President actually follows.

"Suggests." That's what the rule has become under George Bush, his buddy Mukasey, and their intoxicating Pixie Dust. Those written instructions? It's enough that they "suggest" what a President will do.