

WE'VE SEEN THIS BEFORE

Kagro X has a post focusing, again, on Michael Mukasey's evasions about the Constitution. Kagro focuses not on Mukasey's confusion about whether water-boarding is torture, but whether the President can ignore existing laws.

Any president – and I mean *any* president – ought to be able to depend on a certain amount of deference from his or her Attorney General, of course. This ordinarily goes without saying, but in this case must be said because it sets up an irreconcilable paradox. Is it even possible to serve an administration that regularly asserts constitutional interpretations like the one Judge Mukasey did and protect the fundamental rule of law which underlies our entire constitutional system of government? How could it be so?

[snip]

An "administration" that sends distinguished federal judges to Capitol Hill and puts them in a position requiring them to hedge on answers to such basic questions as must a president obey federal statutes is operating so far outside the bounds of normalcy already, that it hardly seems worth anyone's time to pretend that an Attorney General is necessary to the functioning of the government at all.

I'd like to reinforce Kagro's point by pointing to the consistency, across time and nominees, of the Administration's AG candidates on this Constitutional question. Here's the complete context of the Mukasey comment that Kagro is focused on.

LEAHY: And, lastly, where Congress has

clearly legislated in an area, as we've done in the area of surveillance with the FISA law, something we've amended repeatedly at the request of various administrations, if somebody – if it's been legislated and stated very clearly what must be done, if you operate outside of that, whether it's with a presidential authorization or anything else, wouldn't that be illegal?

MUKASEY: That would have to depend on whether what goes outside the statute nonetheless lies within the authority of the president to defend the country.

LEAHY: Where does the president get that authority? I'm thinking of the Jackson opinion and others. Where does he get the authority if it's clearly enunciated what he can do, law that has been very clearly enunciated? I mean, the president says, This authority, I'm going to order the FBI to go in and raid 25 houses because somebody told me they think someone's there. We're not going to wait for courts, we're not going to do anything else. There's no urgency, but we'd just kind of like to do that.

MUKASEY: We'd kind of like to do that is not any kind of legitimate assertion of authority.

And I recognize that you've posited the case that way for a reason. But the statute, regardless of its clarity, can't change the Constitution. That's been true since the *Prize* cases. And it was true before that.

LEAHY: Can a president authorize illegal conduct? Can the president – can a president put somebody above the law by authorizing illegal conduct?

MUKASEY: The only way for me to respond to that in the abstract is to say that if

by illegal you mean contrary to a statute, but within the authority of the president to defend the country, the president is not putting somebody above the law; the president is putting somebody within the law.

Can the president put somebody above the law? No. The president doesn't stand above the law.

But the law emphatically includes the Constitution. It starts with the Constitution. [my emphasis]

Leahy is concerned about whether Bush can just decide to operate outside of FISA—or any other law that explicitly limits the behavior of the Executive Branch. But he's also concerned about whether the Administration can offer immunity for someone who follows the President's orders in operating outside of statute.

This exchange looks remarkably similar to one between Pat Leahy and Alberto Gonzales—back before we knew the extent of Gonzales' craven willingness to put law aside for politics. The topic is different—Leahy is asking about torture, not wiretapping. But the response is almost the same.