

# WHITEHOUSE REVEALS SMOKING GUN OF WHITE HOUSE CLAIMING NOT TO BE BOUND BY ANY LAW

Damn, I love me some Sheldon Whitehouse. He, like, actually knows the law. And he, like, is willing to actually read the stuff he is exercising oversight over.

Which is why this speech he gave today is so important (link to speech; here's a link to video). Apparently, Whitehouse actually read the OLC opinions that justified the warrantless wiretap program and continue to justify the Administration's wiretap authority today. Then, Whitehouse got the key concepts of some of those opinions declassified. Here's his description of what he found.

For years under the Bush Administration, the Office of Legal Counsel within the Department of Justice has issued highly classified secret legal opinions related to surveillance. This is an administration that hates answering to an American court, that wants to grade its own papers, and OLC is the inside place the administration goes to get legal support for its spying program.

As a member of the Senate Intelligence Committee, I was given access to those opinions, and spent hours poring over them. Sitting in that secure room, as a lawyer, as a former U.S. Attorney, legal counsel to Rhode Island's Governor, and State Attorney General, I was increasingly dismayed and amazed as I read on.

To give you an example of what I read, I have gotten three legal propositions

from these OLC opinions declassified. Here they are, as accurately as my note taking could reproduce them from the classified documents. Listen for yourself. I will read all three, and then discuss each one.

1. *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.*
2. *The President, exercising his constitutional authority under Article II, can determine whether an action is a lawful exercise of the President's authority under Article II.*
3. *The Department of Justice is bound by the President's legal determinations. [my emphasis]*

question of Executive Orders before. I thought (okay, hoped, really) that he was sniffing around 13292, which governs classification and declassification, including whether the Vice President can unilaterally declassify the identity of a CIA NOC. But it turns out he was sniffing around EO 12333, which governs Intelligence Activities (and though it's not central to this discussion, here's an amendment Bush made in 2004 to set up DNI).

Here's what—according to Whitehouse, who after all ought to know—Bush believes about whether or not he has to follow EO 12333, an Executive Order signed by Saint Reagan.

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.

That was among the most egregious flaws in the bill passed during the August stampede they orchestrated by the Bush Administration – and this OLC opinion shows why we need to correct it.

I’ll put the rest of the excerpt of Whitehouse’s speech below. But for now, I want to discuss this.

Obviously, the implications of this OLC opinion go far beyond the warrantless wiretapping of Americans. While it appears that Whitehouse wasn’t primarily interested in EO 13292, presumably the OLC opinion governs all Executive Orders. So in other words, the President can declassify at will (well, he could do that anyway). Or more importantly, he could authorize his Vice President to refuse to tell us about his classification and declassification

guidelines (as Dick did to IS00—I'm betting this opinion is why AGAG refused to rule on the IS00/Dick dispute), and he can unilaterally declassify anything and leak it to Judy Miller or some other hack journalist.

But here's the other key point (and one of the reasons I like the way Whitehouse works). He specifically asked Michael Mukasey about EOs before Mukasey was approved.

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.

So Mukasey, unaware that Bush had set aside all common sense, gave the common sense, legally sound answer. "Of course the President can't violate his own EOs! He would need to change them first!"

And now the AG is on record as thinking this whole state of affairs stinks.

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Here's Whitehouse's speech in it's entirety. And here's a link to a copy at his website.

We will shortly consider making right the things that are wrong with the so-called Protect America Act, a second-rate piece of legislation passed in a stampede in August at the behest of the Bush Administration. It is worth for a moment considering why making this right is so important.

President Bush pressed this legislation not only to establish how our government can spy on foreign agents, but how his administration can spy on Americans. Make no mistake, the legislation we passed in August is significantly about spying on Americans – a business this administration should not be allowed to get into except under the closest supervision. We have a plain and tested device for keeping tabs on the government when it's keeping tabs on Americans. It is our Constitution.

Our Constitution has as its most elemental provision the separation of governmental powers into three separate branches. When the government feels it necessary to spy on its own citizens, each branch has a role.

The executive branch executes the laws, and conducts surveillance. The legislative branch sets the boundaries that protect Americans from improper government surveillance. The judicial branch oversees whether the government has followed the Constitution and the laws that protect U.S. citizens from violations of their privacy and their civil rights.

It sounds basic, but even an elementary understanding of this balance of powers eludes the Bush administration. So now we have to repair this flawed and shoddy "Protect America Act."

Why are we in Congress so concerned about this? Why is it so vital that we energetically assert the role of Congress and the Courts when the Bush Administration seeks to spy on Americans?

Because look what the Bush Administration does behind our backs when they think no one is looking.

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*waived it.*

*2. The President, exercising his constitutional authority under Article II, can determine whether an action is a lawful exercise of the President's authority under Article II.*

*3. The Department of Justice is bound by the President's legal determinations.*

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.

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Here’s number two.

The President, exercising his constitutional authority under Article II, can determine whether an action is a lawful exercise of the President’s authority under Article II.

Yes, that’s right. The President, according to the George W. Bush OLC, has Article II power to determine what the

scope of his Article II powers are.

Never mind a little decision called *Marbury v. Madison*, written by Chief Justice John Marshall in 1803, establishing the proposition that it is “emphatically the province and duty of the judicial department to say what the law is.” Does this administration agree that it is emphatically the province and the duty of the judicial department to say what the President’s authority is under Article II? No, it is the President, according to this OLC, who decides the legal limits of his own Article II power.

The question “whether an action is a lawful exercise of the President’s authority under Article II,” is to be determined by the President’s minions, “exercising his constitutional authority under Article II.”

It really makes you wonder, who are these people? They have got to be smart people to get there. How can people who are so smart be so misguided?

And then, it gets worse. Remember point three.

The Department of Justice is bound by the President’s legal determinations.

Let that sink in a minute.

The Department of Justice is bound by the President’s legal determinations.

We are a nation of laws, not of men. This nation was founded in rejection of the royalist principles that “l’etat c’est moi” and “The King can do no wrong.” Our Attorney General swears an oath to defend the Constitution and the

laws of the United States; we are not some banana republic in which the officials all have to kowtow to the “supreme leader.” Imagine a general counsel to a major U.S. corporation telling his board of directors, “in this company the counsel’s office is bound by the CEO’s legal determinations.” The board ought to throw that lawyer out – it’s malpractice, probably even unethical.

Wherever you are, if you are watching this, do me a favor. The next time you are in Washington, D.C., take a taxi some evening to the Department of Justice. Stand outside, and look up at that building shining against the starry night. Look at the sign outside- “The United States Department of Justice.” Think of the heroes who have served there, and the battles fought. Think of the late nights, the brave decisions, the hard work of advancing and protecting our democracy that has been done in those halls. Think about how that all makes you feel.

Then think about this statement:

The Department of Justice is bound by the President’s legal determinations.

If you don’t feel a difference from what you were feeling a moment ago, well, congratulations – there is probably a job for you in the Bush administration. Consider the sad irony that this theory was crafted in that very building, by the George W. Bush Office of Legal Counsel.

In a nutshell, these three Bush administration legal propositions boil down to this:

1. *"I don't have to follow my own rules, and I don't have to tell you when I'm breaking them."*
2. *"I get to determine what my own powers are."*
3. *"The Department of Justice doesn't tell me what the law is, I tell the Department of Justice what the law is."*

When the Congress of the United States is willing to roll over for an unprincipled President, this is where you end up. We should not even be having this discussion. But here we are. I implore my colleagues: reject these feverish legal theories. I understand political loyalty, trust me, I do. But let us also be loyal to this great institution we serve in the legislative branch of our government. Let us also be loyal to the Constitution we took an oath to defend, from enemies foreign and domestic. And let us be loyal to the American people who live each day under our Constitution's principles and protections.

We simply cannot put the authority to wiretap Americans, whenever they step outside America's boundaries, under the exclusive control and supervision of the executive branch. We do not allow it when Americans are here at home; we should not allow it when they travel abroad. The principles of congressional legislation and oversight, and of judicial approval and review, are simple

and longstanding. Americans deserve this protection wherever on God's green earth they may travel. [my emphasis]