PUBLICIZING PIXIE DUST

Updated with Selise's YouTube. Thanks Selise!

As a number of you pointed out in comments discussing Russ Feingold's secret law hearing that took place while I was on my trip, NYT believes that Pixie Dust—the process by which the President can "modify" his own executive orders by simply ignoring them—has never before been publicized.

> At the hearing, a department official, John P. Elwood, disclosed a previously unpublicized method to cloak government activities. Mr. Elwood acknowledged that the administration believed that the president could ignore or modify existing executive orders that he or other presidents have issued without disclosing the new interpretation. [my emphasis]

By "unpublicized," I guess they mean "never before scarred a dead tree," because Sheldon Whitehouse gave a great speech about it, I wrote a whole series of posts about it, and Selise's YouTube of Whitehouse's speech got a whole bunch of views.

Which, I guess, is a great way to introduce the news I just got today: my Guardian column on Pixie Dust is a finalist for Project Censored from last year—one of the twenty-five most important but under-covered stories from last year.

Woohoo!

Which makes the following exchange all the more ironic. When I reviewed the Senate webcast from the hearing, I couldn't help but appreciate the drama of Sheldon Whitehouse discussing the shoddy bases on which Bush's three assertions of Presidential super-legality depend. As designated Adminsitrative Unitary Executive David Rivkin apologist tried to defend these

opinions, he complained that he couldn't see the whole opinion.

Uh huh. Now you're getting it!

Here's Whitehouse, describing the precedents on which these opinions rely (my transcript, all mistakes my own).

> Then you see something like this [points to the Executive Order opinion]; I won't go through it it's been in the testimony already. That's a pretty alarming proposition, that an executive order is just ignorable willy-nilly with no reporting. And when it became apparent that I was going to release this and I had it declassified, I was told it stands on precedent, and when they told me what the precedent was, the precedent was a Griffin Bell opinion that said the President can legally revoke or supersede an executive order at will.
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> Of course the President can legally revoke or supersede an executive order at will! There's a process for doing that. That's a completely different proposition than saying that the executive can use the executive orders of this country as a screen behind which they can operate programs directly contrary to the text of the executive order.
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> So there's one example. The other one that I declassified was the proposition that the President has … exercising its constitutional authority under Article II can determine whether an action is a lawful exercise of the President's authority under Article II. I mean, aside from the pulling yourself up by your own bootstraps nature of that argument it stands on an earlier opinion that says the executive branch has an independent constitutional obligation to interpret and apply the Constitution.

> Well, of course they do in the exercise of their duties. But among the things that that opinion goes on to say is that it requires deference to legislative judgments. Once you hang it off Article II, which the executive under this Unitary Executive theory claims is immune from either legislative or judicial intrusion, you're now saying a very different thing. When you actually see the opinion and see how the extra steps have been taken, you know, you know it's a little bit, something else is going on other than just plain legal interpretation.
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> The last one, this is my justice bound, the Department of Justice is bound by the President's legal interpretations. I thought we'd cleared that when President Nixon told an interviewer than if the President does it, it's not illegal. That stands on the proposition that the President has the constitutional authority to supervise and control the activities of subordinate officials within the executive branch. But the idea that the Attorney General of the United States and the Department of Justice don't tell the President what the law is and count on it, but that rather it goes the other way opens up worlds for enormous mischief.
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> It's a sweeping proposition, and the three of them as precedent open enormous avenues for further mischief if you're going to climb out and out and out further on your own precedent.

Rivkin states that he sees no cost to making these propositions public, and—attempting to recuperate them—complains that he has only one sentence to use to assess the opinions. To which, of course, Whitehouse responds that he'd love to give Rivkin the full opinions (thus proving the central point of the entire

hearing).

> I'd be delighted to show you the whole rest of the opinion but I'm not allowed to. It's classified. I had to fight to get these declassified. They made me take … they kept my notes. They then delivered them to the intelligence committee where I could only read them in the secure confines of the intelligence committee and then I had to, again, in a classified fashion, send this language back to be declassified. I'm doing it again with a piece of language that relates to exclusivity. There is a sentence that describes whether or not the FISA statute's exclusivity provision is really exclusive enough for the OLC and that is, we're still going through this process. I'd like to be able to tell you more about this.

John Elwood, the OLC lackey, pipes in at this point, to try to salvage the opinion on executive orders.

> You should also have been provided an opinion that has been public for twenty years and was put out by the office and provided to Congress in 1987 which reads as follows: EO 12333, like all executive orders, is a set of instructions from the President to his subordinates in the executive branch. The activities authorized by the President cannot violate an executive order in any legally meaningful sense because this authorization creates a valid modification of or exception to the executive order. So this is not secret law, this is as public as it can get.

Whitehouse, once again using the Republican shills to make his point, responds,

> There’s an important piece missing from that.
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> Which is, not telling anybody.
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> And running a program that is completely different from the executive order without ever needing to go back and clean it up.

But that’s okay. Elwood makes it all right!

> This opinion involved a secret modification. It involved Iran-Contra.

Oh, okay. That worked out so well. That was such a constitutionally sound action. And twenty years later, as the Administration continues to skulk around meeting with the same joker that robbed them blind during Iran-Contra, I can totally see the value of keeping that game secret. Not.

Hopefully, with the NYT and Project Censored picking up on Pixie Dust, it won’t remain such a mysterious concept anymore. Secret law, I’m hoping, won’t be so powerful a tool anymore if it is no longer secret.