

PIXIE DUST AND CHENEY'S ASSASSINATION SQUADS

A number of people, in their discussion of Sy Hersh's revelation that Dick Cheney directed assassination squads, look to EO 12333 for some guidance on whether such assassination squads are legal or not.

Here's attytod:

By the way, in case there's any ambiguity on the subject, President Gerald Ford in 1975 signed an executive order that said this: : "No employee of the United States Government shall engage in, or conspire to engage in, political assassination." It's been upheld by every subsequent president. Apparently vice presidents are another matter.

And here's Scott Horton:

The practice of targeted killings is controlled by Executive Order 12333, issued by President Reagan in 1981, which provides "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." There are two exceptions to this rule. One is that as a basic principle of the law of armed combat, it is permitted to strike against the command-and-control apparatus (including both political and military leaders) of a hostile force in connection with armed conflict. The other is that the President may, by special action, authorize such an operation. The operation that Hersh describes almost certainly would have

required a presidential finding which concluded that it was in the nation's national security interest, and authorized the operation to go forward. Hersh suggests that the entire process was delegated to the Vice President, however, which may have required a more extensive modification of E.O. 12333. President Bush issued a complete revamping of EO 12333 on July 30, 2008—and he directed that the details of his revision be withheld from the public. The publicly disclosed text of Bush's action in 2008 focus on a structural reorganization, bolstering the authority of the intelligence czar, largely at the expense of the director of central intelligence. There has been continuous speculation that Bush also made changes in the operational guidelines on this occasion, or perhaps in an earlier secret order or finding.

Of course, both these discussions assume Executive Orders mean what they say.

But we know they don't, necessarily. We know that the OLC told George Bush (almost certainly back in 2001 when he was first inventing excuses for his warrantless wiretap program) that:

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.

In fact, we have reason to believe that EO 12333—the EO that prohibits assassinations—is the EO that Bush and OLC had in mind when they first invented pixie dust (the practice of changing EOs without making any public record of the change). Here's what Sheldon Whitehouse said

when he first exposed Bush's practice of pixie dust:

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.

Though Whitehouse didn't say as much when he first exposed Bush's pixie dust in 2006, he strongly suggested that Bush had pixie dusted away the limitations on wiretapping Americans contained in E.O. 12333.

Now, that doesn't mean that Bush also pixie dusted the prohibitions on assassinations—"modified" the E.O. without telling us.

But it also means there is no reason we should point to E.O. 12333 as if it means what it says—particularly not with the Bush Administration's well-publicized practice of taking out alleged members of Al Qaeda with predator drone strikes for years.

It's all very nice that every President since Ford has upheld the prohibition on assassination in E.O. 12333. But in the era of pixie dust, that doesn't mean Bush also upheld it, even if it looks like he did.