

Why Leahy Is Afraid to Subpoena Yoo

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We're about to witness the pretense of war lawyer hearings without the war lawyers (commonly known as torture lawyers by those willing to ignore their role in "legalizing" aggressive war). This may highlight for many observers the little-known fact that Congress no longer has the power of subpoena.

During 2007-2008 Democratic congressional committees subpoenaed dozens of Bush officials, who simply refused to comply. Although any committee has the undisputed power to use the Capitol Police to enforce its subpoenas, none did. They asked the Bush Justice Department to do it. They sued the Bush Justice Department in court. But, with the exception of a weird deal for partial and secret compliance by Karl Rove in 2009, not a single one of the scofflaws has been compelled to show up.

During 2009-2010 none of the subpoenaed officials have been re-subpoenaed. When torture memos were made public in April 2009, Senator Patrick Leahy, chair of the Senate Judiciary Committee, asked memo author Jay Bybee to testify, and Bybee declined. Leahy did not issue a subpoena. Congressman John Conyers, chair of the House Judiciary Committee, in 2009 and 2010 has impeached a judge for groping and another for petty corruption, but has not so much as asked Bybee (or Yoo) to appear.

The new Justice Department, equal to the last in its subservience to the White House, will no more enforce subpoenas for congressional committees than the last one would. None of the committees have sprouted testicles, and are apparently afraid that John Yoo would crush them if they did. So, the Capitol Police have not been asked to pick any witnesses up. And the power of congressional subpoena has been laid to rest in the receding history of our free republic. And nobody has even noticed.

Of course, there will be occasions when the president approves of congress subpoenaing a witness. Perhaps some committee will find the courage to go after steroid use in another sport, for example. Maybe the oversight committee will decide to look into excessive activism by peace groups. But when it comes to using the power of subpoena against members or former members of the so-called executive branch, the only chance of revival will be a division of powers between the two main institutions of our government, the Democratic and Republican parties, and in fact — given the bottomless timidity of congressional Democrats — it will require a Republican congress. Thus the only hope of rolling back any presidential power, will be for a Republican congress to oppose a Democratic president strongly enough to neglect its principled concern for shifting all power permanently to the presidency.

In the meantime, we'll be treated to hearings on people's crimes without the presence of

those people. What fun to question John Yoo and Jay Bybee without them in the room. How much more comfortable and reassuring not to have to face such dreadful enemies. How responsible to leave it to the citizen disrupters of book tour events and appeals court proceedings to question these national traitors.

And along with the power of subpoena, the power of impeachment must die as well. How could the House Judiciary Committee impeach Mr. Bybee, if it wanted to, given its inability to subpoena him?

And with the power of impeachment, the power of representative government must die as well. How can our representatives be compelled to represent us if they have no power to restrain the secondary (executive and judicial) branches' abuses of power?

Acting Deputy Attorney General Gary Grindler will fill in for Yoo and Bybee at Leahy's hearing on Friday. I can imagine how this will go:

"When John Yoo says that a president can crush testicles, massacre villages, and nuke cities, Mr. Grindler, are there limits to that? Would a president have to stop after eight cities? Nine cities? Where's the line, if there is one?"

"I don't know," Senator. "I imagine you'd have to ask Professor Yoo. But to do that you'd need to stop being too chickenshit to enforce your own subpoenas, since we're not going to help you. We encourage you instead to go dick cheney yourself. With all due respect, sir."

"Understood, Acting Deputy Attorney General, but let me follow up if you don't mind with this question. If Mr. Yoo's contention is that it is legal for a president to do such things, would he maintain that it might conceivably be legal for another nation's president to do the same, including to our cities and villages and (if we had any) testicles? And, given that Professor Yoo has argued explicitly that neither international nor domestic law can be a constraint on such presidential prerogatives, isn't it almost a certainty that other nation's presidents must have the same prerogatives, unless there is something unique about our nation? What would that be, sir? And if there is not a satisfactory answer to that question, and if it is legal for presidents to destroy all human life, then it would seem to be legal to eliminate all law, since law will die with the human race. Can the elimination of law really be considered legal?"

"With all due respect, Senator, there's a Muslim behind your chair. Ha! Made you look. Oh god, that was a good one. Oh, I'm sorry. I'm. Senator? Are you . . . Somebody pick him up. Somebody. Oh, Jesus, call 911. Call 911!"

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David Swanson is the author of the new book *"Daybreak: Undoing the Imperial Presidency and Forming a More Perfect Union"* by Seven Stories Press. You can order it and find out when tour will be in your town: <http://davidswanson.org/book>.

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