MUKASEY AND CONTEMPT

Even more than Mukasey's woozy answers on waterboarding, I'm disturbed by his opinions on executive privilege and contempt, partly because I suspect Mukasey would make sure no waterboarding happened going forward, and that his answers on waterboarding are designed primarily to avoid putting those who waterboarded—or signed off on it—in the past at legal risk. But Mukasey's opinions on executive privilege appear designed to protect the White House from any consequences for the USA purge. They appear ready to shore up the firewall preventing further investigation of Rove and Bush.

When Pat Leahy asked Mukasey about executive privilege, Mukasey suggested that DOJ couldn't prosecute Harriet or Josh Bolten or Turdblossom for contempt, because they relied on a DOJ opinion in deciding not to testify.

> LEAHY: Judge, I want to go back to your last answer to me yesterday. And you and I discussed this a little bit outside.
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> Yousaid a U.S. attorney could only refer a contempt citation of Congressto a grand jury as required by law if he or she believed reliance onthe president's executive privilege claim was unreasonable.
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> Ihave some trouble with that. I don't think that rules on claims ofprivilege when they're raised by — whether they're reasonable, butwhether they're valid — so let's talk a little bit about this. IfCongress were to refer a contempt citation — and there is a realprobability there will be some as a result of the U.S. attorney scandal— you're indicating that the U.S. attorney would undertake anindependent analysis,

> assess the claim of privilege, in determiningwhether to bring the matter before a grand jury.
>
> Is that right?
>
> MICHAEL MUKASEY, NOMINATED TO BE U.S. ATTORNEY GENERAL
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> Well, let me flesh out a little bit what I understand the process to beand to have been, and maybe put a little bit of flesh on the bones ofmy answer.
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> As I understand it, when the White House gets asubpoena, they refer it to the Department of Justice, as, in fact,happened here, because I was shown the letter from Paul Clementrelating to the assertion of the privilege.
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> If the White Housethen, relying on that letter, I mean, if the president, since he is theonly person who owns the privilege, if he, relying on the JusticeDepartment, asserts the privilege and there is, nonetheless, a contemptcitation, we're in the position where the Department of Justice wouldhave to prosecute someone who followed the advice that originated withthe Department of Justice.
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> I am told that there are not one,but two, opinions of the Office of Legal Counsel, one of them from TedOlson, and the other from a man I know and whose name I can picture,and I can't come up with it now, who served in the Clintonadministration, who I referred to yesterday. I'm sure I'll think of itafter I leave here.
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> But, anyway, there are two OLC opinions, saying that that would not be appropriate and…
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> LEAHY: What would not be appropriate?
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> MUKASEY:That for the U.S. attorney to

> prosecute someone for a contempt, basedon reliance on an opinion letter that originated in the Department ofJustice, would not be appropriate.

So basically, Mukasey is arguing that DOJ can’t enforce contempt of Congress, because DOJ has already told the White House officials that they won’t be held in contempt. If you look at his written answer to this question, you see why—if DOJ told the White House official they could invoke executive privilege, there would be no way to prove criminal intent, and therefore no reason to call a grand jury.