

MAKE BUSH INVOKE EXECUTIVE PRIVILEGE FOR ROVE

Kagro X wrote a post stating that Karl Rove is "not honoring his subpoena" from House Judiciary Committee. That's not quite an accurate statement, yet—it won't be until Rove actually does not show up when he was subpoenaed to testify, on Thursday, July 10.

I raise the distinction because, thus far, Rove's refusal to testify is based solely on his attorney Robert Luskin's efforts to pretend that the executive privilege Bush invoked with regards to the US Attorney purge extends to questions of politicized prosecution.

As I have indicated to you in each of my letters, Mr. Rove does not assert any personal privileges in response to the subpoena. However, as a former Special Advisor to the President of the United States, he remains obligated to assert privileges held by the President. As you are, of course, well aware, the precise question that we have discussed at length in our correspondence—whether a former Senior Advisor to the President is required to appear before a Committee of Congress to answer questions concerning the alleged politicization of the Department of Justice—is the subject of a lawsuit in the United States District Court for the District of Columbia.

Yet that invocation of executive privilege was very specific. It relied upon a Paul Clement opinion that very specifically refers to the "dismissal and replacement of U.S. Attorneys" and then goes on to claim that that deliberations about the hiring and firing of USAs "necessarily relate to the potential

exercise by the President of an authority assigned to him alone." The claim is specious on its face—after all, Congress has specific authority in the Constitution to legislate the selection of inferior officers; they had passed and were considering passing laws pertaining to the selection of interim USAs; and therefore they had a clear and recognized legislative interest in, for example, whether Bush tried to appoint Tim Griffin using a PATRIOT appointment so as to avoid the Senate approval process. But putting aside Clement's transparently false argument, everything else he argues is premised on the exclusivity of the hiring and firing authority to the President.

But prosecution of federal crimes is not exclusive to the President; it's an issue that Congress has clear legislative authority over. So DOJ would have to make very different analysis to find that Rove didn't have to testify about his role in politicized prosecutions.

Furthermore, the argument the White House used to exempt Harriet Miers from testifying was based on two conditions that may not apply in Rove's case. First, Clement's argument about whether Presidential advisors had to show up to testify before Congress—on which the White House based its executive privilege claim with Harriet Miers—bases its logic on a Presidential advisor's participation in privileged communications related to deliberations on a Presidential decision.

On the other hand, the White House has very legitimate interests in protecting the confidentiality of this information because it would be very difficult, if not impossible, for current or former White House officials testifying about the disclosed communications to separate in their minds knowledge that is derived from the Department's disclosures from knowledge that is derived from other privileged sources, such as internal

White House communications.

And, the Stephen Bradbury memo claiming absolute immunity from testifying before Congress—on which the White House relied in telling Harriet Miers not to show up—specifies that an assistant to the President need not show up before Congress if she is subpoenaed about matters relating to her **official** duties.

Accordingly, we conclude that Ms. Miers is immune from compelled congressional testimony about matters, such as the U.S. Attorney resignations, that arose during her tenure as Counsel to the President and that relate to her official duties in that capacity, and therefore she is not required to appear in response to a subpoena to testify about such matters.

In other words, to make the argument that Rove doesn't have to show up, Luskin should be arguing that:

- Rove had privileged conversations about this matter—that is, with someone in the White House, as distinct from hacks in Alabama and the Public Integrity section of DOJ
- Rove was acting in his formal capacity as Senior Advisor to the President and/or Deputy Chief of Staff for Policy
- The subpoenaed testimony pertains exclusively to matters that happened during Rove's tenure in the White House

Frankly, I don't know what Rove would claim he was doing with regards to the Siegelman prosecutions. But even assuming he would testify to having had conversations about the prosecution, would he be willing to say his actions relating to it included some advice to the President, offered in his official duties as Advisor, and that all his actions occurred while he was at the White House? Unless he's willing to claim that whatever involvement he had with the Siegelman case was part of his official duties, then he's in a different situation than Miers.

In any case, Rove's role in the Siegelman prosecution is distinct enough from Miers' role in hiring and firing US Attorneys, that—it would seem—the White House would have to invoke executive privilege specifically in regards to this subpoena.

And I'm not alone in that belief. Some guy named Karl Rove has admitted as much. In an appearance with George Stephanopoulos, Karl Rove described the invocation of executive privilege for his Senate subpoena "a similar instance"—but then said that executive privilege would be invoked in this case soon. Probably.

Rove: Congress—the House Judiciary Committee wants to be able to call Presidential Aides on its whim up to testify, violating the separation of powers. **Executive Privilege has been asserted by the White House in a similar instance in the Senate. It'll be, probably be asserted very shortly in the House.** Third, the White House has agreed—I'm not asserting any personal privilege, the White House has offered and my lawyer has offered several different ways, if the House wants to find out information about this, they can find out information about this and they've refused to avail themselves of those opportunities. [my emphasis]

Gosh, that was six whole weeks ago—certainly within most normal measures of "very shortly." But, as far as we know, the White House has not yet invoked executive privilege to prevent Rove from testifying on Thursday.

Has the White House or—more likely—DOJ gotten pickier about invoking executive privilege?

Attorney General Mukasey is certainly not above supporting Bush's claims of executive privilege. He did so to prevent EPA from admitting that the White House—and Bush specifically—had ignored EPA's counsel on ozone standards and an exemption for California under the Clean Air Act. While it's fairly clear the Administration is invoking privilege to hide the fact that they're not complying with the law (a case Oversight has yet to make directly), this instance is very narrowly tied to deliberative discussions Administrator Johnson had with the White House. Mukasey included a rough description of the privileged materials (though not, as is required, a log). And because OLC deemed and Mukasey agreed that these conversations directly pertained to deliberation, Mukasey supported the White House's executive privilege claim.

Similarly, Mukasey nodded to executive privilege when DOJ told Oversight it couldn't have copies of the Bush and Cheney interview reports—though Bush did not assert executive privilege directly and ultimately the DOJ refusal was couched in terms of concern over the Department's ability to get voluntary cooperation from Presidents and Vice Presidents in the future.

We are not prepared to make the same accommodation for reports of interviews with the President and Vice President because the confidentiality interests relating to those documents are of a greater constitutional magnitude. The President and the Vice President are the two nationally elected constitutional officers under our Government. The President heads the Executive Branch

and, as the Congress has by law recognized, the Vice President often advises and assists the President in the President's performance of his executive duties. It is settled as a matter of constitutional law, reflected in court decisions, and congressional and Executive Branch practice, that the communications of the President and the Vice President with their staffs relating to official Executive Branch activities lie at the absolute core of executive privilege. The interview reports sought by the Committee deal directly with internal White House deliberations and communications relating to foreign policy and national security decisions faced by the President and his immediate advisers. Congressional access to those reports would intrude into one of the most sensitive and confidential areas of presidential decision-making.

This argument doesn't make any sense on several levels. Nevertheless, once again DOJ was protecting only those conversations that related to conversations with the President and Vice President directly.

But then there's the example of David Addington, who obviously didn't want to testify before HJC about torture, but who did so anyway, all the while pathetically waving around the Bradbury statement that said aides didn't have to appear before Congress, just as Rove is metaphorically doing right now. If a smart lawyer like David Addington didn't consider the mere existence of the Bradbury memo sufficient exemption from showing up under subpoena, it's not clear that a smart lawyer like Robert Luskin will conclude any differently.

Now, it's possible that Bush will still get around to invoking executive privilege for Rove. After all, Bush did not do so for the EPA until the day Oversight had scheduled to vote on

contempt. Conyers and Sanchez have already made clear that, if Rove doesn't show on Thursday, they will consider contempt—though they don't say they're prepared to vote on contempt on Thursday.

We want to make clear that the subcommittee will convene as scheduled and expects Mr. Rove to appear, and that a refusal to appear in violation of the subpoena could subject Mr. Rove to contempt proceedings, including statutory contempt under federal law and proceedings under the inherent contempt authority of the House of Representatives,

So it may be we wouldn't find out until Thursday or sometime later that Bush has or hasn't invoked executive privilege. But there are several reasons why Bush and/or DOJ may be unwilling to invoke executive privilege in this case:

- OPR is currently investigating the Siegelman prosecution, which means some of this may come out via other means
- Some of the Siegelman back history pre-dates Rove's tenure at the White House, so could not be covered by executive privilege in any case
- Karl is alleged to have spoken to PIN directly, meaning there's no executive deliberation involved
- It would be a stretch to admit that ensuring the prosecution of prominent

Democrats was included among Rove's official duties—at least those Bush wants to admit to

Basically, I'm not convinced—particularly not with the Rezko/Kjellander/Fitzgerald allegations lurking in the background here—that the White House is prepared to say all of Karl's interventions into ongoing prosecutions were part of his official business.

As of now, Bush has not invoked executive privilege—at least not as far as is publicly known. And if Rove's a no show on Thursday without such protection, he's in much greater danger of immediate prosecution for contempt.

Which is a point HJC needs to make crystal clear between now and Thursday. Rove, by his own admission, believes the executive privilege invoked WRT the USA purge is not adequate to excuse him from appearing on Thursday. Yet as of last week, Luskin still claimed he wouldn't appear.