

MUKASEY TO SJC: INVESTIGATION OF ROVE'S INVOLVEMENT IN SIEGELMAN SHOULD TAKE PLACE ... SOMEWHERE ELSE

There has been some misunderstanding about Karl Rove's refusal to show up to testify before HJC tomorrow. While Luskin referred to executive privilege to justify Rove's refusal to appear tomorrow,

Accordingly, Mr. Rove will respectfully decline to appear before the Subcommittee on July 10 on the grounds that Executive Privilege confers upon him immunity from process in response to a subpoena directed to this subject.

And though Luskin parses wildly to pretend that the subject of this hearing—Siegelman's prosecution and other selective prosecutions—is identical to the subject on which Rove was subpoenaed to testify before the Senate Judiciary Committee and for which Bush **did** invoke executive privilege—the firing of the nine US Attorneys.

Mr. Rove is simply not free to accede to the Committee's view and take a position inconsistent with that asserted by the White House in the litigation [about the subpoenas regarding the US purge].

No **one** has ever asserted that Bush was invoking executive privilege with regards to **this appearance** by Rove. In fact, Rove himself, back in May, not only admitted that Bush had not yet done so but implied that Bush would have to do so in this case (and, he suggested, Bush would

"probably" do so—though that hasn't happened yet).

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.** [my emphasis]

But **no one** has asserted that Bush has invoked executive privilege in this case. The sole legal rationale Rove has given for not showing up, even in the absence of executive privilege being invoked, is a memo that Steven Bradbury wrote that may or may not apply to this case. For example, that memo only applies if Rove is willing to claim that politicizing prosecutions was part of his official duties as Senior Advisor to Bush. Suffice it to say that not even Mr. Unitary Executive thought that memo was sufficient basis for blowing off HJC, and that on a topic (rationalizing torture) that probably would be considered among the official duties of OVP's counsel in this Administration.

As of right now, the White House has declined to give Rove real legal protections for blowing off HJC tomorrow. Perhaps they'll give him a last minute reprieve and invoke executive privilege in the next 24 hours. But as of right now, someone—either in the White House or DOJ, which would have to buy off on any invocation of executive privilege—has chosen not to do so.

Which is why I find this exchange from today's Senate Judiciary hearing with Michael Mukasey so interesting. Chuck Schumer (who I suspect is finally as sorry as the rest of us have been for months that he foisted Mukasey onto the American people) is asking Mukasey about the progress of the Office of Professional Responsibility investigation into the Siegelman prosecution.

Schumer: Mukasey, at your confirmation hearing I told you how troubled I was about the allegations of politicization in some of the Departments prosecutions. We talked about hiring, but these are prosecutions. In particular, I urged you to get to the bottom of deeply disturbing allegations about the case of Don Siegelman, the former governor of Alabama. I pointed out at time, although Siegelman was convicted of several counts, witnesses have credibly contended that his case was politically motivated and selectively prosecuted. Some of the specific allegations include, that Karl Rove asked Jill Simpson, a lifelong Republican and practicing lawyer in Alabama to try and take pictures of Siegelman cheating on his wife or in compromising positions, that Rove personally contacted DOJ and pushed for a second prosecution of Don Siegelman, after a federal judge dismissed the first case against him., Karl Rove has refused to appear before Congress to testify under oath about his involvement in the Siegelman case. When I asked you take a thorough and personal look at that case you were reluctant to look at it, you said the case was on appeal. And I must say, that it's time you get to bottom of this because there have been some startling new developments in the case since. First, in a highly unusual decision the 11th circuit court released Siegelman on bail, finding that, quote, there was a substantial question of law or fact likely to result in a reversal. Not only that, but in connection with that appeal, 54 state AGs—Democrats and Republicans—filed a brief supporting the appeal. That's an astonishing bi-partisan act, knowing that prosecutors are very reluctant to take issue once a jury has convicted somebody, from the

Justice Department. I think it underscores the flimsiness of case and the concern about selective prosecution. And I have to tell you, nothing has troubled me, I think, more than this. It's like—if the allegations are true—it's like making Justice Department like the justice department in a banana republic. You don't like someone, you go after them, you prosecute them on flimsy evidence. It's really troubling, so I want to ask you some questions about this because I am deeply troubled and it is the kind of thing that you—when you testified before us—would want to get the bottom of and eliminate even the appearance that something like this happened. So first, there is in fact an OPR investigation underway in the Siegelman case, is that correct? Do you know when it began?

Mukasey: I don't know.

Schumer: Could you find out for us? Do you know when it will be complete or how far along it is?

Mukasey: I meet regularly with head of OPR, I don't want to get into those discussions. Obviously they're working on it as they are on other things, such as the joint OIG investigation. And I have no reason to believe anyone's slow-rolling that or dragging their...

Schumer tries to get Mukasey to commit to making the results of the OPR investigation public. But then—after Mukasey refused to commit to make the report public and an enraged Schumer responded that such a response called into question our judiciary system—Mukasey suggested there were other means to investigate what happened in the Siegelman case (the implication being that those other means would permit a public accountability).

Schumer: Will you make the OPR findings public when the investigation is complete—I know you had a general discussion with Senator Kohl?

Mukasey: That depends on what they are and I, for the same reasons as concerned my discussion with Senator Kohl, the same applies to this. I don't know in advance what OPR is going to find.

Schumer: Don't you think—either way, no matter what they find—given the seriousness of these allegations, calling into question the very fundamentals of neither fear nor favor before the law, that these should be made public. If they say there's nothing wrong, I'd want to know, if they say there's something wrong, I'd want to know. What would be a reason not to make this public.

Mukasey: I think there are various avenues open for exploring those allegations, including exploring their source and **having testimony on the subject**, OPR is not the only avenue. [my emphasis]

And then, when Schumer presses on the need to know about Rove's role in the prosecution, Mukasey specifically says—again—that there are other means for investigating Rove's role in the matter.

Schumer: That's not what we're discussing here. I'm asking that, if the allegations are true, is there any reason not to make it public?

Mukasey: If there's interference with the course of a case, that's a matter of a whole different ...

Schumer: Well how about if Karl Rove did suggest a second prosecution for Siegelman, after the first?

Mukasey: That's the kind of "if" that depends on the underlying evidence.

Schumer: Well, why should that not be made public. regardless? Whatever the underlying evidence is, he may have come across some new fact.

Mukasey: He may indeed.

Schumer: Okay, but then why shouldn't that be made public. You're not giving me a very good reason, sir.

Mukasey: I don't see publicizing the source of an allegation if the allegation turns out to be true.

Schumer: Let me ask you one more question, with the Chair's indulgence. Should Karl Rove be interviewed in this case?

Mukasey: That is a matter for OPR to decide.

Schumer: What do you think? You're the ultimate authority here.

Mukasey: I'm not the ultimate authority here. I have not supplanted OPR and I don't intend to. I'll look at their report and if it's in any way deficient...

Schumer: You don't think that given the allegations that have been made, serious allegations, that have gotten scores of Democratic and Republican attorney generals to ask that this case be re-examined, that Karl Rove should maybe not be interviewed here?

Mukasey: I think there are avenues for conducting examinations other than OPR investigation. [my emphasis]

Twice today, when Schumer asked Mukasey about whether there would be a public accounting of the Siegelman investigation, Mukasey said there were other avenues for conducting an

investigation. Once, Mukasey's reference to "other avenues" of investigation pertained specifically to Rove.

Call me crazy, but as of now, there is no IG investigation (which would have a public report) into Rove's role in the Siegelman prosecution. A criminal investigation would only have public results if Rove were indicted. What other avenues for investigation are there—that promise a public accounting of Rove's role in Siegelman's prosecution?

I can think of one: Congress.

Now I don't know if Mukasey intended to suggest to Congress that it was the proper forum to investigate Rove's persecution of Governor Siegelman. Hell, given the crap Mukasey spewed today, I don't even know that he sincerely cares whether Karl Rove took out a political opponent using our judicial system.

But given the fact that, for some reason, Rove has not yet gotten the executive privilege he expected, and given the fact that the Attorney General keeps insisting there are other means of finding out about Rove's role in the Siegelman prosecution, someone ought to clarify what Mukasey meant. Because, at the very least, it seems to present a really good case to pressure Mukasey for prosecuting Rove for contempt.

Update: I've done a true transcription (all errors are mine) of this exchange. A few things stand out that I missed before: Mukasey clearly says "having testimony on the subject" is one way to examine the politicization of this. Also, Mukasey seems to be implying that Rove's role was to bring a new allegation to PIN, and that, because the allegation may have been correct, Mukasey isn't much bothered that it came from a top Administration advisor. I find this really interesting—I'm pretty sure this is how they launched their investigation into Fieger here in MI, and it's also how they got Catherine Willey's testimony in front of Ken Starr.

But of course, if Rove was bringing new

allegations to PIN, then it surely wasn't part of his official duties and therefore he has no grounds to blow off HJC tomorrow.