

BUSH DID NOT INVOKE EXECUTIVE PRIVILEGE FOR ROVE

So far today, the following smart lefty outlets have claimed that Rove blew of HJC today based on executive privilege.

TPMM:

Karl Rove stood by his claim last week that he wouldn't be showing up to testify about anything to the House Judiciary Subcommittee on Commercial and Administrative Law, despite its subpoena, on the **grounds of executive privilege**.

ThinkProgress:

Toady, Karl Rove was set to appear under subpoena before the House Judiciary Committee to discuss the politicization of the Justice Department. Yesterday, Rove's lawyer wrote a letter declaring Rove would not testify, citing **executive privilege**:

CREW

House Committee to Karl Rove: You have no claim of **executive privilege**

And here are some less smart traditional media outlets:

AP:

The White House has **cited executive privilege**, arguing that internal administration communications are confidential and that Congress cannot compel officials to testify.

CNN:

Rove's lawyer asserted that Rove was "immune" from the subpoena the committee had issued, arguing that the committee **could not compel him to testify due to "executive privilege."**

Now, I know it's kind of confusing. Robert Luskin, after all, did mention executive privilege in this letter.

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.

Note the date of the letter: July 1, a full week **before** Fred Fielding wrote his letter to Luskin telling him Rove didn't have to show up. So Luskin used the **phrase** Executive Privilege, sure, but he used it well before the White House actually contacted him officially about Rove's appearance. So how could Luskin's reference to executive privilege have any validity, if he hadn't even spoken with the White House before he used it?

Now look at the letter Fred wrote Luskin and the letter Luskin sent to HJC. Go ahead look closely. Do you see the words "executive privilege" anywhere in either of those two letters?

It's not there.

For that matter, check out the memo Steven Bradbury wrote last year rationalizing why Harriet Miers didn't have to show up—which is what Fielding cites to justify Rove's absence today. Look closely. See any mention of executive privilege in that memo? Nuh uh. It's not in there, either.

So here's what has happened:

June 27, 2007: Paul Clement writes a memo supporting the invocation of

executive privilege for Harriet Miers and Sara Taylor—but referring generically to "current or former White House officials"—regarding the hiring and firing of US Attorneys

July 10, 2007: Steven Bradbury writes a **memo** arguing Harriet Miers—and Presidential aides more generally—do not need to appear in response to Congressional subpoena

August 1, 2007: Steven Bradbury writes a **memo** finding that, based on the earlier Miers memo, Rove "is immune from compelled congressional testimony about matters (such as the U.S. Attorney resignations) that arose during his tenure as an immediate presidential adviser and that relate to his official duties in that capacity"

May 25, 2008: In yet another TV appearance discussing things he claims he can't discuss with HJC, Rove **states** he thinks Bush will invoke executive privilege ... probably

July 1, 2008: In a **letter** to HJC, Luskin mentions executive privilege and absolute immunity, though he had not yet received any communication from the White House telling him Bush was invoking executive privilege

July 9, 2008: Fielding **writes** Luskin, stating that Rove is not required to appear before Congress—based on the two earlier documents pertaining to the US Attorney purge (also note, unlike last year, when Fielding specifically said Bush had invoked Executive Privilege with regards to Miers, Fielding did no such thing with regards to Rove, and Fielding also did not include the June 27 Clement memo supporting a Privilege claim)

July 9, 2008: Luskin **writes** HJC, this

time making no mention of executive privilege, stating that Rove will not appear

Notice how that executive privilege claim fell by the wayside? Now, perhaps the White House decided against invoking executive privilege because they didn't want to claim that anything Rove was doing with regard to the Siegelman prosecution related to the President at all. Perhaps they opted against it because they realized that, if they invoked executive privilege on this subject after Rove had spent the previous six months on TV blathering freely about it, it would turn the idea of executive privilege into the laughable principle of executive and TV privilege.

But for some reason, the White House chose not to invoke executive privilege with regards to the topic of Rove's involvement in the Siegelman prosecution.

Contrary to everything you're reading in just about every report out there, Bush **did not** invoke executive privilege for Rove.

Now, I'm harping on this distinction for several reasons:

- Luskin's legal style has always relied on linguistic trickery. He likes to make confusing statements and then have stupid journalists accept those statements with little scrutiny, and he does so to create a patina of legality for Rove. That's part of what Luskin was trying to do with his July 1 letter, conflate absolute immunity and executive privilege so as to create

the impression that Rove couldn't testify—because of Bush's privileges—rather than the reality that Rove is **choosing** to exercise a purported immunity that he himself holds. Luskin is pretending Rove is protecting Bush's privilege, when mostly Rove is just protecting Bush's obstinacy and his own behind. Thus far, thanks to the sloppiness of the reporting on this, Luskin's verbal trickery is working like a charm.

- The necessary preconditions for executive privilege and absolute immunity are different. The former relies on the claim that the Presidential aide was advising the President to help him make a decision. The latter, even assuming it exists, relies on the claim that the activities in question were the "official duties" of the presidential aide in question. If HJC is at all attentive to this distinction (yeah, I know), then the distinction—the fact that Fielding just legally asserted that Rove's official duties included

witch hunts against Democrats—will lead to some other trouble for Bush and Rove down the road.

- The absolute immunity claim—both in general and, particularly as Rove has asserted it, is completely audacious and should be treated as such. In particular, unlike Miers before him, Rove is asserting absolute immunity **without** the President first invoking Executive Privilege. Also, as Linda Sanchez pointed out today, the legal precedents Bradbury cited to claim absolute immunity apply only to **current** Presidential aides:

Each of the prior OLC opinions on which Mr. Bradbury relies cover only current White House advisers, not former advisers like Mr. Rove. This distinction is crucial, as all of the arguments purportedly supporting absolute immunity for current presidential advisers simply do not apply to former advisers. For example, the primary OLC memorandum from which all subsequent adviser-immunity opinions have been derived, authored by Chief Justice and then-OLC head William H. Rehnquist, reaches the “tentative and sketchy” conclusion that current advisers are “absolutely immune from testimonial compulsion by congressional committee[s]” because they must be “presumptively available to the

President 24 hours a day, and the necessity of [appearing before Congress or a court] could impair that ability.”

If Rove and Luskin and Fielding succeed—as they have thus far—in getting the press to believe Bush invoked executive privilege, then no one will look more closely at just how flimsy—and audacious—Rove’s logic for blowing off HJC really is. If we focus on the bogus claim of absolute immunity, then some interesting alternative steps present themselves. But if everyone just buys Luskin’s trickery, the Luskin and Rove will have gotten away with smoke and mirrors once again.