

NIXON SEZ: KARL ROVE MUST TESTIFY

As I explained in this post, Judge Bates has issued a ruling in the House's suit to force Harriet Miers and Josh Bolten to respond to the House Judiciary Committee subpoenas with regards to the US Attorney firings.

With regards to the Miers and Bolten subpoena, Bates emphasizes, his ruling is fairly narrow, in that he doesn't resolve the question of whether or not the White House was right to invoke executive privilege.

It is important to note that the decision today is very limited. To be sure, most of this lengthy opinion addresses, and ultimately rejects, the Executive's several reasons why the Court should not entertain the Committee's lawsuit, but on the merits of the Committee's present claims the Court only resolves, and again rejects, the claim by the Executive to absolute immunity from compelled congressional process for senior presidential aides. The specific claims of executive privilege that Ms. Miers and Mr. Bolten may assert are not addressed – and the Court expresses no view on such claims.

Basically, then, his ruling requires Harriet Miers to show up before the House Judiciary Committee and invoke executive privilege on a question by question basis. And it requires Josh Bolten (who was subpoenaed to turn over a bunch of documents pertaining to the US Attorney firing), to turn over any non-privileged documents, and provide a description for anything not turned over and the basis for the claim of privilege. In other words, even assuming the White House accepts this ruling (I expect them to at least try to appeal it), the White House and HJC are still bound to get in an

argument over whether or not the White House's claim of privilege outweighs HJC's claim to need the information to conduct its oversight duties.

So with respect to Miers and Bolten, this decision is narrow and somewhat inconclusive.

But with respect to Rove, this decision makes it very clear that Rove must show up to testify—and (unless the White House invokes executive privilege with respect to the HJC subpoena of Rove, which they haven't done) **he must answer all questions**. That's because the sole basis the White House gave to justify Rove blowing off HJC's subpoena was "absolute immunity"—the White House did not invoke executive privilege with regards to this subpoena.

Here's what Bates had to say about the White House's unprecedented claim to absolute immunity.

Indeed, the aspect of this lawsuit that is unprecedented is the notion that Ms. Miers is absolutely immune from compelled congressional process. The Supreme Court has reserved absolute immunity for very narrow circumstances, involving the President's personal exposure to suits for money damages based on his official conduct or concerning matters of national security or foreign affairs. **The Executive's current claim of absolute immunity from compelled congressional process for senior presidential aides is without any support in the case law. The fallacy of that claim was presaged in United States v. Nixon itself** (id. at 706):

neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial [or congressional]

process under all circumstances.
[my emphasis]

In other words, Bates says, the Nixon decision rules out precisely this kind of expansive claim of immunity—rules it out for the President, much less a political advisor who got fired by the President a year earlier. Which means, pending any appeal of this ruling, Rove is basically stripped of any excuse not to testify—and testify fully. It's possible that the White House will try to protect Rove by invoking executive privilege (though that would be a transparently weak claim on its face, since they haven't invoked privilege yet). Except for two things: Rove has been blabbing about the subpoenaed topics for six months on teevee, meaning Bush can't claim that this stuff is secret. And, Bush doesn't want to get close to Rove's efforts to fire prosecutors who indict Republicans. Whereas what Harriet will testify to, if and when she does testify, will be arguably legal, the stuff Rove will be asked about includes gross violations of the law. And Bush doesn't want to touch that, not if he can help it.

So this ruling is actually more important as it relates to Rove's testimony than as it relates to Miers. Because right now, based on the precedent of US v. Nixon, Rove will have to answer any question HJC asks.

Update: Since some are asking, here's Bates' order. He says nothing about a stay pending appeal. Also note, he calls a status conference on August 27, at which point I guess he figures we'll all know whether Bush is going to appeal or whether we should move onto the fight over whether the White House privilege claim outweighs the House's claim to need the testimony.