

OBAMA'S EXECUTIVE PRIVILEGE ORDER AND THE HOUSE JUDICIARY COMMITTEE LAWSUIT

I've seen a lot of celebratory posts about the effect of Obama's Executive Order on Presidential Documents, but I fear it distracts attention from an equally important focus: the House Judiciary Committee lawsuit.

The posts all focus on Obama's order that Executive Privilege claims must be reviewed by the incumbent President, not the former President.

- (a) Upon receipt of a claim of executive privilege by a living former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other executive agencies as the Archivist deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege. Any determination under section 3 of this order that executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.
- (b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify

the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the Presidential records, unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

So, commentators say, this means we'll be able to get a bunch of documents—the US Attorney scandal documents and the Plame documents are the most frequently mentioned—that Bush has been withholding.

But of course, particularly with respect to those documents, there's already a pending case—the HJC case that was reinstated under the House rules (and now includes Turdblossom for the USA purge documents and Mukasey for Siegelman documents and Plame documents).

Now, I've asked some folks on the committee and they're sure Obama's EO won't moot their suit. And, presuming AG Holder approves it, Obama's administration can presumably release the documents right to the Committees (also note: there are some other pending subpoenas from last Congress, particularly subpoenas of the EPA from Waxman when he was still at Oversight). Voila! We're done, right?

No. Because the lawsuit is more general than the subpoenas for documents. The lawsuit seeks to make Harriet Miers and Turdblossom come before the committee to testify. That suit seeks to laugh the entire concept of absolute immunity from showing up before Congress out of existence. That's a concept I don't want the

Obama Administration to use any more than I wanted the Bush Administration to use it—because it totally guts the concept of Congressional oversight.

So while I am thrilled that Obama reversed one of Bush's more onerous policies on transparencies, it does not give us everything we need to ensure proper oversight of any Presidential Administration, Bush or Obama.