

DENIED! BATES REFUSES TO STAY ORDER IN MIERS/BOLTEN SUIT

Judge Bates isn't helping BushCo sustain their USA purge cover-up and stall. Today, he denied the White House's motion for a stay of his earlier order pending appeal. He got a bit snarky in his opinion denying the stay—I imagine David Addington is having fits right now.

The Executive has failed to demonstrate that it has a substantial likelihood of success on the merits of the absolute immunity issue or that it has even raised a question “so serious, substantial, difficult and doubtful,” *id.*, as to warrant suspending the effect of the July 31st Order pending appeal. To begin with, the Executive devotes almost the entirety of its briefing on this prong to arguing that the Court’s Order is “susceptible to serious debate” concerning the threshold decisions relating to the Committee’s standing and cause of action. See Defs.’ Mot. at 5-6. But even assuming that the Executive’s proposition were correct – which it is not – its reliance upon that point is misplaced. The D.C. Circuit has explained that the stay pending appeal inquiry looks to the likelihood of success on the merits of the appeal itself, see *Philip Morris*, 314 F.3d at 617. Here, however, the denial of the Executive’s motion to dismiss is not presently subject to appeal because it is not a final order.

[snip]

The Executive’s argument boils down to a claim that a stay is appropriate because the underlying issue is important. But that is beside the point and does not

demonstrate a likelihood of success on the merits. Simply calling an issue important – primarily because it involves the relationship of the political branches – does not transform the Executive’s weak arguments into a likelihood of success or a substantial appellate issue. Hence, the Court concludes that this prong of the stay pending appeal analysis cuts strongly in favor of the Committee. [my emphasis]

Bates goes on at some length, calling out the transparent BS in BushCo’s arguments.

Kagro X and I chatted briefly about what this means—I expect him to do a post on how, absent some enforcement mechanism, this doesn’t exactly guarantee that Miers will show before HJC anytime soon. (Gosh, I’ve never heard him make that argument before.)

But reading the opinion, I get the sense that the real tension concerns not Harriet Miers, who after all (as Bates repeatedly reminds the White House) can invoke privilege to individual questions, but Rove. Rove, after all, has not claimed executive privilege, and he’d have a hard time doing so. And since Rove couldn’t even fully answer a set of questions gerry-rigged to get him out of testifying, I can imagine he’d like to avoid showing up before HJC to answer some real questions.

As I said, Kagro X (whose skepticism usually serves him well in these situations) remains dubious that this will lead to testimony anytime soon. But who knows? Maybe things will get interesting next month in HJC.