WHY ABSOLUTE IMMUNITY IS SO AUDACIOUS

Apologies in advance—but I'm going to be harping on Rove's non-appearance before HJC for a couple more posts today (if you're bored with that, don't miss bmaz' update on FISA).

I still seem to be one of the only people—aside from John Conyers—who gets that Karl Rove did not claim executive privilege yesterday, but instead claimed something much more audacious—absolute immunity from being forced to testify before Congress.

> The claim that Mr. Rove and the White House make is that high-level aides to the president are totally immune from compelled congressional testimony. Not that there are certain subjects they cannot discuss in a public hearing, nor that the White House has a right to review questions that are asked, but that they are in a class entirely by themselves — a separate group that is above the reach of a subpoena and, consequently, above the law.

Heck, even law professor Jonathan Turley has been repeating that executive privilege line.

A reader sent a link to an ACS blog post on what the difference is (h/t Tanya; and if anyone wants to liberate the full NLJ article on this and email it to you, I'd be grateful).

> The U.S. Supreme Court explained the nature and limits of executive privilege in the Nixon tapes case during Watergate. It said that executive privilege protects "the confidentiality of Presidential communications." And it made clear that the privilege is not absolute. The court balanced the

> competing interests at stake, the president's need for confidentiality against the needs of the criminal justice system in finding the truth. Here, by contrast, the president seeks not merely to bar testimony about specific conversations or documents. **He claims the right to block any sworn public testimony by his advisers, period**. Thus, the claim of confidentiality is based on who the witnesses are rather than what they have to say. **And the president is suggesting that this immunity, unlike executive privilege, is absolute**. There is no balancing of interests.
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> This claim of immunity is not only broader than executive privilege, it also stands on weaker ground. No court has ever ruled on the issue. To be sure, although officials have testified on occasion, both Republican and Democratic administrations have long insisted that Congress cannot compel testimony by the president's closest advisers. The claim of immunity, however, rests on legal opinions written by the U.S. Department of Justice (DOJ). Attorney General Janet Reno issued one in 1999. She relied on a 1996 opinion from DOJ's Office of Legal Counsel. And that office relied on its own prior opinion from 1971. DOJ's position, to say the least, is self-referential. [my emphasis]

So a bunch of lawyers pointing to their own belly-buttons (thanks Janet Reno) decreed that Presidential aides are—effectively—immune from all oversight. But, as Linda Sanchez stressed in her report on this yesterday, no Court has ever agreed with this audacious claim.

> Most notably, both the letter and its accompanying materials from OLC fail to cite a single court decision, nor could they, in support of Mr. Rove's

> contention that a former White House employee or other witness under federal subpoena may simply refuse to show up to a congressional hearing.
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> To the contrary, the courts have made clear that no present or former government official is so above the law that he or she may completely disregard a legal directive such as the Committee's subpoena. As the Supreme Court explained more than a century ago, "[n]o man in this country is so high that he is above the law," and "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it."

It really is just DOJ lawyers, past and present, pointing to each other to make this claim.

As I pointed out, what Rove did yesterday doesn't even accord with what all those lawyers, pointing to their belly-buttons, have said about this "immunity" in the past.

> 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."

In other words, aside from Steven Bradbury's addled opinion from last year (which at least referred to an instance in which there had been a prior claim of executive privilege, unlike yesterday's appearance), none of those belly-button pointing lawyers have claimed that former Presidential aides retain their immunity from testifying. Not even the late Chief Justice Rehnquist—no flaming liberal—would buy off on what Rove did yesterday.

Basically, Fred Fielding found a dubious opinion written in a different context, which itself relied on—but greatly expanded upon—some previous dubious opinions but no actual court decisions, and decided that was sufficient basis for Rove to ignore a subpoena.