THE BATES DECISION: A QUESTION UNASKED AND UNANSWERED

First off, a *mea culpa*. I was one of the first and strongest saying that Judge Bates would opt to just punt the contempt controversy back into Congress's lap. I didn't necessarily believe that he would hand a victory to the Bushies, but I did think he would, for the most part, take a pass by claiming it was not really a question for the courts and that Congress had alternative remedies available, that had not yet been exhausted, thus the issue not appropriate for consideration at this time (In fact, Bates noted on page 70 of the opinion that he would have been on solid ground doing just that).

I was wrong.

The Bush/Cheney unitary executive cult got their rear ends handed to them. Again. How shocking. Or, you know, not. They are basically batting an 0-fer since Cheney took Scalia on the robber baron aristocrat jet set hunting trip and managed to get a decision allowing him to keep the nation's energy program secret from the nation.

But now, predictably, the dark hats of Miers, Bolten and Bushco want to delay the effect of Judge Bates' ruling until the next of never on the appeal. However, as MadDog (good to have the dog back I might add) points out, the white hats of Conyers' House Judiciary Committee have a response to that.

> Plaintiff Committee on the Judiciary of the U.S. House of Representatives ("Committee") opposes Defendants' motion for a stay pending appeal on the following grounds:
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> (1) Ms. Miers's claim of absolute immunity has no likelihood of success on appeal because it is baseless and

> contrary to Supreme Court precedent, and was thoroughly and irrefutably rejected by the Court;
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> (2) the Court's non-final order of July 31, 2008 ("Order") is not appealable, and thus a stay needlessly would cause further harmful delay;
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> (3) Defendants suffer no harm, let alone irreparable harm, from (a) appearing at a congressional hearing or (b) producing non-privileged documents and descriptions of the documents they seek to withhold on the basis of executive privilege;
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> (4) the Committee will suffer considerable harm as a result of the Executive Branch's delaying tactics, which virtually assure that the Committee's investigation into the forced resignations in mid-Administration of nine United States Attorneys in 2006 ("Investigation") will not be completed until after the 110th Congress has concluded and the current Administration has left office in January 2009; and
>
> (5) a stay would undermine the public interest by hindering the Congress from developing, if necessary, any relevant legislative remedies designed to improve the effective and fair functioning of the Nation's criminal justice system.

This is a nicely done, pointed response to the transparently disingenuous delay tactics of the Bush Administration. In going through the decision and the latest arguments on the shape of the appellate process by the parties, I realize there is another facet to this equation that has been bugging me. Despite how good Bates' decision is, why did it not address the refusal by the DOJ to prosecute a duly constituted, and valid on it's face, contempt

citation referred by the United States Congress?

Bates’ decision has drawn nearly uniform praise from across the board (with the exception, of course, of the parties negatively affected by it and their sycophants) including on this blog. Martin Lederman is indicative:

> It is an extraordinarily thorough, scholarly and thoughtful opinion — surely one of the best opinions ever written on questions relating to executive/congressional disputes. It is also, IMHO, correct on the merits, of virtually all of the many legal questions it discusses. It is important not only for its holding on the immunity question, but also for its holding and analysis on congressional standing, and for its unequivocal rejection (pp. 39-41) of one of the Administration’s principal arguments with respect to all of these privilege disputes in the U.S. Attorney matter…

I find it shocking to be writing these words, but I pretty much agree. However, there is one glaring issue that is not addressed in the decision that is critical to this greater discussion of power and privilege, and I predict that will prove unfortunate in the future. To wit, is it appropriate for the US Attorney, in this case Jeffrey Taylor of the DC District, upon specific command of the Attorney General, in this case the ever obstructing Mike Mukasey, to refuse to prosecute a duly constituted and valid on it’s face contempt citation referred by the United States Congress?

A whole lot of people, both expert and non, have already been asking "what happens next"? What happens when Miers, Bolten, Rove et al. either blow off their repeat summons, or give unprincipled refusals to answer proper examination by the Committee? Without a prior resolution of the propriety of the Mukasey/Taylor refusal to prosecute the properly

referred contempt citation, they may well refuse again, thus creating further intractable delay. Future Administrations may try the same refusal. Bates was certainly aware of the Taylor/Mukasey refusal, it is cited numerous times in the decision (see, for instance, page 16 of the decision):

> On February 28, 2008, Speaker of the House Nancy Pelosi certified the Contempt Report to Jeffrey A. Taylor, U.S. Attorney for the District of Columbia. Id. ¶ 60. Pursuant to the terms of 2 U.S.C. §§ 192 and 194, Mr. Taylor was directed to present the contempt charges against Ms. Miers and Mr. Bolten to a grand jury. See 2 U.S.C. § 194. On that same day, Speaker Pelosi wrote to Attorney General Michael B. Mukasey. Pl.'s Stmt. of Facts ¶ 62. The Attorney General had previously indicated that he would not permit Mr. Taylor to bring the contempt citations before a grand jury, and Speaker Pelosi "urged him to reconsider his position." Id. The next day, however, the Attorney General responded that because Ms. Miers and Mr. Bolten were acting pursuant to the direct orders of the President, "the Department has determined that non-compliance . . . with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers."

However, Bates gave no indication of the court's opinion on this issue, much less rendering a determination. This was a question that should have been addressed in the Bates decision; why wasn't it?

Is this the big chink in the armor of the surprisingly cogent Bates decision we all expected? Not as much as you think. Bates

certainly could have addressed the issue, even if any conclusion was discretionary dicta, and I believe he should have. The real shortcoming here, however, resides with the HJC complaint in this matter; the Committee didn’t plead the issue. Sure would have been nice if they had; maybe the Judiciary Committee would see fit to explain why they did not.