ROVE'S "RENEWED" PRIVILEGE ASSERTION: IS IT ABSOLUTE IMMUNITY OR EXECUTIVE PRIVILEGE?

Thanks to MadDog for finding someone besides Gloria Borger discussing Bush's recent letter reasserting his support for Rove to blow off Congress.

It's unclear, from the reporting, whether the letter reasserts absolute immunity or asserts, for the first time, old-fashioned executive privilege regarding the information Conyers subpoenaed Rove to testify about. The WSJ speaks clearly in terms of "renewed assertion," suggesting Bush is making the same argument that he did earlier for Rove, that presidential aides can simply blow off Congressional subpoenas pertaining to their official duties.

> Robert Luskin, Mr. Rove's attorney, said Mr. Rove recently received a renewed privilege assertion from President Bush, before the president left office. Mr. Luskin said he would consult with Mr. Obama's White House counsel to determine the Obama administration's stance.

But in an interview with the WaPo, Luskin clearly discusses executive privilege.

> Robert D. Luskin, an attorney for Rove, said his client will "abide by a final decision from the courts." Luskin noted that Bush, in a letter to Rove, recently reasserted executive privilege.
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> "It's generally agreed that former presidents retain executive privilege as to matters occurring during their term," Luskin said. "We'll solicit the views of

> the new White House counsel and, if there is a disagreement, assume that the matter will be resolved among the courts, the president and the former president."

I wouldn't make too much of that, though, because Luskin has very consistently tried to normalize the radical assertion of absolute immunity Rove relied on last year by talking in more general terms of privilege.

So thus far, we know Rove has a new piece of paper, but we don't know what is on that paper.

And that could make all the difference between whether we get Rove testimony within hours of Holder taking over at DOJ, or whether Rove's testimony gets litigated for some time going forward. Here's why (for background read this post and this post). What follows is my NAL description—those of you with real credentials here, feel free to correct me where I screw this up.

Executive privilege is a constitutionally recognized privilege for the President to shield certain topics from the scrutiny of the other branches, the idea being that Courts or Congress should not be able to snoop into the Executive's doings in matters that they have no constitutionally recognized business snooping in. There is some debate about what the Executive has to do to properly invoke executive privilege (is a letter good enough, for example), but there is no debate that executive privilege must be balanced with the needs of the other branches. Thus, if Courts need stuff from the President for a case, they can overcome an executive privilege claim. Or, if Congress needs stuff from the President so as to conduct legitimate oversight or legislate, they can overcome an executive privilege claim. When there's a dispute about whether the Executive has properly balanced these claims, it goes to court and you fight about it.

Absolute immunity, though based in the principle that the President gets certain privileges from being bothered unnecessarily by the Courts or Congress, is something else entirely. It claims there is a privilege above and beyond all this balancing privilege (which is where the "absolute" comes from), one that says the President **and his aides** can simply refuse to show up before Congress when subpoenaed about matters pertaining to their official duties, regardless of whether Congress has an interest in those duties too. Absolute immunity has never been endorsed by a Court. In fact, it exists solely in the fantastic scribblings of three OLC opinions, originally a Rehnquist opinion written under Reagan, used again under Clinton, and most recently in a Stephen Bradbury opinion written to prevent Harriet Miers from showing up before HJC. To make things even more sketchy, Bradbury's opinion contradicted Rehnquist's on one key point—Rehnquist only imagined absolute immunity to extend to current aides (the logic being Congress had to be prevented from dragging them away from their service to the President), whereas Bradbury claimed absolute immunity extended to former aides. It is, in short, an audacious power grab that exists, thus far, only in the minds of more expansive OLC lawyers.

Which is why the question of whether Rove's new letter says "absolute immunity" or "executive privilege" makes such a big difference.

Let's assume, for the moment, that it says, "absolute immunity" but mentions nothing about garden variety executive privilege. I said no Court had recognized absolute immunity. But one Court has, in fact, weighed in on this absolute immunity garbage: John Bates laughed it out of his court room back in July.

> 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):
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> > 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.

Now, Bush appealed Bates' ruling and that case is ongoing (thanks to Conyers' jujitsu with the rules this year). Who knows what will happen, though, once Holder and Dawn Johnsen take over at DOJ? They might enthusiastly support Bush's appeal, believing that this absolute immunity sounds nifty—though I doubt it, not in the expansive, Bradbury-form in which Bush is claiming it. Johnsen might, conservatively, say, "golly, Bradbury sure screwed up this notion of absolute immunity when he claimed it worked for former aides. That opinion can't be let stand" and withdraw it (in which case the general idea, invented by Rehnquist, but not Bradbury's audacious expansion of the idea, would remain). This would moot the HJC suit against Miers and (now) Rove, since they only ever "qualified" for absolute immunity under Bradbury's crazy expansion to include former aides. Or, they could simply decide to drop the appeal, in which case Bates' very narrow reading of absolute immunity would stand.

I may be wrong about this, but if they dropped

the appeal, then Bates' opinion would become a precedent, and Turdblossom would have zero grounds not to testify before Congress. And unless Bush has already or then invoked proper executive privilege, the Rove couldn't even refuse to answer individual questions on those grounds. He could still invoke the 5th, mind you. But I'd expect him to come in and do one of his certified spin jobs, which have gotten him through sworn testimony in at least two prior cases (remember, he spoke to Fitz **five times** in the Plame investigation).

And contrary to what you're reading in just about every story on this, all of this has very little to do with Obama's Executive Opinion on Presidential Records. Obviously, it's different because the EO talks exclusively about records, and not testimony from human beings. But more importantly, the EO deals with a totally different kind of privilege (the garden variety kind) than Rove has relied on thus far in his subpoenas from HJC. The EO certainly suggests that Obama won't endorse anything as extreme as Bradbury has put together, but it is a separate issue.

Which brings us to what happens if Bush has, for the first time, invoked garden variety executive privilege for Rove in this case, in addition to or instead of absolute immunity. That would set off two different sets of potential litigation. First, if Bush wanted, he might choose to fight the principle espoused in Obama's EO and insist that former Presidents retain their own privilege, and an incumbent President—and his Attorney General—cannot override that. This might happen—but consider the irony if it does. After all, Bush's first act as President was to write his own Executive Order ~~to protect Poppy's records~~ giving Presidents control over their own records. If he wants Jeb or Jenna to—when they become President—reverse Obama's most recent Executive Order via Executive Order, he's going to have to accept the authority of an incumbent President's Executive Order to override a former President's Executive Order. Suffice it to say,

if Dick Cheney is lurking anywhere in Bush's vicinity, I don't think this is going to happen.

The other litigation that could (and arguably rightly should) happen is a legal test of whether or not HJC has a good reason to need Rove's testimony about the USA Purge and Siegelman. While this is a legitimate thing to litigate, I think Bush's claim here will be thrown out eventually in any case. Not only is there an established basis for Congressional oversight, but one of the things Congress was (trying to) do in all of this was figure out whether their response to the PATRIOT Provision (which had, briefly, given the AG power to appoint interim US Attorneys) was sufficient. That is, Congress was engaged in legislating in an area reserved to them by the Constitution. So while Bush might be able to shield some details about why he fired who he did (but it'll be harder in the case of Bud Cummins, since Bush had a PATRIOT provision appointment selected well before Cummins was fired, suggesting that the now defunct law drove that decision), Congress has pretty significant authority in this area.

All of which remains speculative and hypothetical until we see Rove's letter and get an Obama DOJ into place.

Update: backed of "settled law" per scribe's comments.