Ruling of Chairwoman Linda Sánchez on Executive Privilege-Related Immunity Claims By Karl Rove

According to letters we have received from Mr. Karl Rove's counsel, particularly his letters of July 1 and July 9, 2008, Mr. Rove has refused to appear today to answer questions in accordance with his obligations under the subpoena served on him on May 22, 2008, based on claims that "Executive Privilege confers upon him immunity" from even appearing to testify, and that "as a [former] close advisor to the President, whose testimony is sought in connection with his official duties in that capacity, he is immune from compelled Congressional testimony."[1]

I have given these claims careful consideration, and I hereby rule that those claims are not legally valid and that Mr. Rove is required pursuant to the subpoena to be present at this hearing and to answer questions or to assert privilege with respect to specific questions. The grounds for this ruling are as follows:

First, the claims have not been properly asserted here. The Subcommittee has not received a written statement directly from the President, let alone anyone at the White House on the President's behalf, asserting Executive Privilege, or claiming that Mr. Rove is immune in this instance from testifying before us. Nor is any member of the White House here today to raise those claims on behalf of the President. The most recent letter from Mr. Rove's lawyer simply relies on a July 9, 2008 letter to him from the current White House counsel directing that Mr. Rove should disobey the subpoena and refuse to appear at this hearing.

The July 9, 2008 letter from White House Counsel Fred Fielding claims that Mr. Rove "is constitutionally immune from compelled congressional testimony about matters that arose during his or her tenure as a presidential aide and that relate to his or her official duties."[2] As discussed in greater detail below, no general freestanding immunity exists for former presidential advisers – indeed, no credible source has even remotely suggested this is the case – and thus the proper course is to recognize claims of privilege only when properly asserted in response to specific questions during a particular hearing.

The courts have stated that a personal assertion of Executive Privilege by the President is legally required for the privilege claim to be valid. For instance, the District Court of the District of Columbia made clear in the Shultz case that even a statement from a White House counsel that

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[1] Letter from Robert Luskin to Chairman Conyers (July 1, 2008) at 1; Letter from Robert Luskin to Chairman Conyers (July 9, 2008) at 1.

[2] Letter from Fred Fielding to Robert Luskin (July 9, 2008).

he is authorized to invoke executive privilege is "wholly insufficient to activate a formal claim of executive privilege," and that such a claim must be made by the "President, as head of the 'agency,' the White House."[3]

It should also be noted that even a formal claim of privilege, by itself, is not enough to prevent a **private party** from complying with a Congressional subpoena. In cases where a Congressional committee rules that asserted claims of Executive Privilege are invalid, the Executive Branch's only recourse beyond further negotiation is to seek a court order to prevent the private party from testifying (or producing documents). This is because neither the Constitution nor any federal statute confers authority upon the President to order private citizens not to comply with Congressional subpoenas.

The Executive Branch recognized this in United States v. AT&T, where the Ford Administration sued to enjoin AT&T, a private party, from complying with a subpoena from a House committee. AT&T recognized that despite the White House's adamant requests that it not comply with its subpoena, it nevertheless was "obligated to disregard those instructions and to comply with the subpoena."[4] The President had no freestanding authority to prevent AT&T from complying. The same is true here.

Second, we are unaware of any proper legal basis for Mr. Rove's refusal even to appear today as required by subpoena. No court has ever held that presidential advisers are immune from compulsory process – in any setting. In fact, the Supreme Court has expressly recognized that presidential advisers, and even members of the President's cabinet, do not enjoy the same protections as the President himself.[5] Moreover, since 1974, when the Supreme Court rejected President Nixon's claim of absolute presidential privilege in United States v. Nixon, it has been clear that Executive Privilege is merely qualified, and not absolute.[6] Neither Mr. Rove's lawyer nor Mr. Fielding or the Office of Legal Counsel ("OLC") at the Justice Department has cited a single court decision to undermine these well-settled principles. Therefore, the proper course of

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[3] Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 872-73 (D.D.C. 1973); see also United States v. Burr, 25 F. Cas. 30, 192 (C.C.Va.1807) (ruling by Chief Justice Marshall that President Jefferson had to personally identify the passages he deemed confidential and could not leave this determination to the U.S. Attorney).

[4] United States v. AT&T, 551 F.2d 384, 387 (D.C. Cir. 1976)

[5] Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982); Butz v. Economou, 438 U.S. 478, 505-506 (1978).

[6] United States v. Nixon, 418 U.S. 683, 706 (1974).

action for Mr. Rove is for him to attend the hearing pursuant to subpoena, at which time he may, if expressly authorized by the President, assert Executive Privilege in response to specific questions posed by the Subcommittee.

Assuming that Mr. Fielding's July 9, 2008 letter to Mr. Luskin – and its attached materials from the Justice Department's OLC – sets out the case for Mr. Rove's claim for immunity before this Subcommittee, the arguments presented therein are wholly without merit. 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.

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."[7]

Even beyond the case law, the reasoning utilized in the OLC materials, authored by Principal Deputy Assistant Attorney General Steven G. Bradbury, has no application to former presidential advisers. 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."[8] The same rationale on its face does not apply to former advisers, and thus there is no support for Mr.

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[7] United States v. Lee, 106 U.S. 196, 220 (1882). In addition to U.S. v. Nixon, supra, see also Clinton v. Jones, 520 U.S. 681, 691-2 (1997).

[8] Memorandum for the Honorable John D. Ehrlichman from William H. Rehnquist (Feb. 5, 1971) at 7. The 1999 OLC opinion referred to by Mr. Bradbury similarly covers only current advisers and acknowledges that a court might well not agree with its conclusions. See Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1 (1999)(Opinion of Attorney General Janet Reno).

Bradbury's claim that former advisers are immune from Congressional process. And even Mr. Rehnquist himself acknowledged that when White House advisers wish to assert executive privilege, they must first appear before Congress and then assert the privilege.[9]

Moreover, the fact that OLC has, for the first time, opined that former advisers are absolutely immune from testimonial compulsion by Congress, is not entitled to any deference. Such an opinion, unlike that issued by a court, is not an authoritative formulation of the law. Rather, it is only the Executive Branch's view of the law, and is entitled only to the weight that its inherent merit warrants. In this instance, it is clear that Mr. Bradbury's memorandum was ill-conceived and I must reject its conclusions.

This White House's asserted right to secrecy goes beyond even the claims of Richard Nixon, who initially refused to allow his White House Counsel, John Dean, to testify before Congress, on almost exactly the same grounds being asserted now, but then agreed that Mr. Dean and other White House officials could testify.[10]

Third, the claims of absolute immunity directly contradict the conduct of this and past Administrations with respect to White House officials appearing before Congress. Only recently, current Vice-Presidential chief of staff David Addington appeared and testified before the House Judiciary Committee pursuant to subpoena, and former White House Press Secretary Scott McClellan appeared and testified without even receiving a subpoena. In 2007, former White House officials Sara Taylor and Scott Jennings testified concerning the U.S. Attorney firings before the Senate Judiciary Committee pursuant to subpoena. Prior to this Administration, both present and former White House officials have testified before Congress numerous times; a Congressional Research Service study documents some 74 instances where White House advisers have testified before Congress since World War II, many of them pursuant to a subpoena.[11]

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[9] See U.S. Government Information Policies and Practices – The Pentagon Papers, Hearing Before the Subcomm. On Foreign Operations and Government Information of the House Committee on Government Operations, 92d Cong., 1st Sess. 385 (1971) (testimony of William H. Rehnquist)

[10] L. Fisher, The Politics of Executive Privilege, at 59-60 (2004).

[11] Harold C. Relyea & Todd B. Tatelman, Presidential Advisers' Testimony Before Congressional Committees: An Overview, CRS Report for Congress, RL 31351 (Apr. 10, 2007).

Fourth, the claims of absolute immunity and the refusal to appear pursuant to subpoena and to answer questions from the Subcommittee directly contradict the behavior of Mr. Rove and his attorney themselves. When Mr. Rove's attorney was asked earlier this year by a media representative whether Mr. Rove would testify before Congress in response to a subpoena on the Siegelman matter, he responded "sure" by e-mail. In addition, unlike Harriet Miers, Mr. Rove has spoken extensively in the media on the very subject the Subcommittee seeks to question him about: allegations regarding his role in the alleged politicization of the Justice Department during this Administration, including the prosecution of prominent Democrats like former Governor Don Siegelman and the unprecedented forced resignations of nine U.S. Attorneys in 2006. It is absolutely unacceptable for former White House personnel to speak publicly about matters and then to refuse to testify before Congress as to those very same matters, under oath and subject to cross-examination, on the basis of a claim of alleged confidentiality.

Fifth, and finally, especially to the extent that Executive Privilege is the basis for the claim of immunity as to Mr. Rove, the White House has failed to demonstrate that the information we are seeking from him under the subpoena is covered by that privilege. We were not expecting Mr. Rove to reveal any communications to or from the President himself, which is at the heart of the presidential communications privilege.

In fact, on June 28, 2007, a senior White House official at an authorized background briefing specifically stated that the President had "no personal involvement" in receiving advice about the forced resignations of the U.S. Attorneys or in approving or adjusting the list containing their names. We are seeking information from Mr. Rove and other White House officials about their **own** communications and their **own** involvement in the process of the forced resignations of U.S. Attorneys and related aspects of the politicization of the Justice Department.

The White House nevertheless has claimed that Executive Privilege applies, asserting that the privilege also covers testimony by White House staff who **advise** the President, apparently based on the Espy decision.[12]

The Espy court, however, made clear that while the presidential communications privilege may cover "communications made by presidential advisers," such communications are only within the realm of Executive Privilege when they are undertaken "in the course of

[12] In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

preparing advice for the President."[13] But the White House has maintained that the President **never received any advice on, and was not himself involved in,** the forced resignations of the U.S. Attorneys. Thus, the presidential communications privilege could not apply here.

Moreover, whether such communications would even fall under the presidential communications privilege in the context of a Congressional inquiry is far from certain.[14] The Supreme Court in Nixon and the Court of Appeals in Espy both expressly noted that different balancing considerations would apply when the communications at issue were sought by Congress on behalf of the American people. In our view, it is inconceivable that these courts would rule that a congressional investigation, authorized under the Constitution, carries less weight than a civil or criminal trial. More appropriately, such an investigation should be entitled to the greatest deference by the courts, as Congress is tasked specifically with overseeing and legislating on matters concerning the inner-workings of the Executive Branch, and specifically the Justice Department.

For all the foregoing reasons, I hereby rule that Mr. Rove's claims of immunity are not legally valid and his refusal to comply with the subpoena and appear at this hearing to answer questions cannot be properly justified.

These reasons are without prejudice to one another and to any other defects that may after further examination be found to exist in the asserted claims.

July 10, 2008

[13] Id.

[14] Id. at 753.