

A RESPONSE TO DEAN: THE FAILURE, SO FAR, HAS BEEN CONGRESS'

John Dean thinks Patrick Fitzgerald may have gone soft on the White House.

If McClellan's testimony suggests that Special Counsel Patrick Fitzgerald, for any reason, gave Karl Rove and Dick Cheney a pass when, in fact, there was a conspiracy – which is still ongoing – to obstruct justice, then these hearings could trigger the reopening of the case. But this is a pretty large "If."

[snip]

As experienced a prosecutor as Fitzgerald is, he was playing in a very different league when investigating the Bush White House. These folks make Nixon's White House look like Little Leaguers – and based on what is known about the Plame investigation, I have long suspected that Fitzgerald was playing out of his league. (See, for example, [here](#) and [here](#).)

I would counter Dean and suggest it was not Fitzgerald, but Congress, which dropped the ball.

Dean suggests that we don't know what Fitzgerald found.

Yet since no one knows what Fitzgerald learned, except those who cannot speak of what they know, it is not possible to determine whether he might have been outfoxed by the White House.

Um, not quite. While it is true we don't know the contents of Rove's grand jury appearances nor those of many other key players, we do know

quite a bit beyond the details surrounding Libby's narrow perjury charge. With the caveat that some of the following can only be supported with circumstantial evidence, here's what we do know:

- Dick Cheney declassified Valerie Wilson's identity (either with Bush's implicit or explicit approval) and told Libby to leak it to Judy Miller. He may have instructed Libby to leak details about her name and status to Novak during his July 9 conversation as well. But since he declassified Valerie's identity, the legal status of that leak is—at best—unclear. After that leak, those in the White House who knew about it operated as if it was a legal leak of non-classified information.
- The stories of Rove, Armitage, Novak, and Libby have significant discrepancies, meaning (in spite of what the Administration's backers claim) we don't yet have an adequate explanation for the leak to Novak. Probably, some of Rove's testimony was perjurious, but there is no credible witness to that fact (since Armitage was

himself either lying or a terrible witness), so it would be difficult to charge.

- Libby and Cheney coordinated their story in fall 2003 at Cheney's place in Jackson Hole. Libby told Cheney he was going to claim he had learned Valerie's identity "as if it were new" on July 10, thereby shielding Libby's conversations with Ari Fleischer, David Addington, Judy Miller, and Robert Novak from scrutiny. If that lie had been successful (assisted by two friendly "journalists") the White House would have been hiding activities they claim are legal, albeit politically catastrophic. While at Jackson Hole, Libby and Cheney also collaborated to make sure Scottie publicly exonerated Libby—public exoneration that had no effect on the prosecution (in that the FBI and prosecutors always considered Libby a chief suspect, regardless of what Scottie said); further, the exoneration was, in some key ways, consistent with White House claims that the leak

was legal.

- There are at least three pieces of evidence that point to Bush's involvement in the leak: his comment to Libby on June 9 that he was concerned about the Niger allegations, his authorization of the leak to Judy Miller, and Cheney's aborted claim that Bush asked Libby to stick his neck in a meat-grinder.
- Large amounts of OVP email have disappeared, under extremely dubious technical circumstances, for the days when Cheney and Libby were concocting their cover story.

Scottie's book (and, therefore, presumably, his testimony) brought out two additional key details. First, McClellan revealed that Cheney talked to Bush directly to make sure he exonerated Libby and McClellan assigned a date to that call—October 4. And second, McClellan reported that Rove and Libby had a suspicious meeting in July 2005 to which McClellan was not a direct witness. Beyond that, much of McClellan's book makes it clear he is either ignorant or deliberately evasive about any other pertinent details. Clearly, some of the details McClellan can be brought to admit (such as when the White House became aware there'd be an investigation). But there's not much more than what is already out there.

Now, I know many here will disagree with me. But to charge the White House with obstruction, you need several things:

- A credible witness against Rove—there appears to be no witness who couldn't himself be accused of lying.
- A credible witness against Libby and Cheney. I suspect Jenny Mayfield could tell how she herself obstructed the investigation (by not turning over documents relating to the Niger claim, for example, and possibly by mis-dating one of Libby's notes, and possibly stamping every piece of evidence that implicated Bush or Cheney with "Treated as TS/SCI"). On this point, I have no idea how much evidence against Mayfield there is. Just as importantly, though, the only witnesses to the key cover-up between Libby and Cheney are Bush, Cheney, and Libby—the "secret mission" that Bill Jeffress described.
- A credible witness against Bush. Again, perhaps there's another witness—perhaps Condi Rice? But the chief witness to Bush's involvement was convicted of perjury in March 2007.
- Proof that the disappearing emails were deliberate, and proof that some emails were

deliberately withheld. This one is, I think, in progress, though I certainly wonder whether Fitzgerald should have pressed harder on this issue.

So perhaps, if there was evidence, Fitzgerald should have indicted Jenny Mayfield to see if that loosened some lips. Perhaps he should have more aggressively pursued the disappearing emails. Perhaps there was a way to make Condi Rice or Stephen Hadley testify more fully to Bush's involvement.

But thus far, the biggest failure to prosecute the chief obstruction came because there was no witness to it who would speak. Perhaps Libby would have, had he seen prison time. There were certainly stories that his wife threatened to go with his story of he was actually imprisoned.

But that gets to the fundamental obstruction: the commutation. By commuting Libby's sentence, Bush virtually guaranteed the most likely witness to the obstruction would never talk. Why should he? He doesn't need the law license anyway.

Which brings us to the commutation hearing. All the information I've recited here—save details about the inconsistencies between the stories of the Novak leak and a few details about Cheney's research at CIA in early June I didn't include above—were all publicly available at the time of HJC's hearing on commutation. There was at that time abundant evidence that the President and Vice President and a top aide had conspired to obstruct an investigation. And, since the legal status of this leak is—as I said—unclear, Congress was the necessary place to investigate further. With Cheney's claim to have declassified what he told Libby to leak, the leak of Plame's identity necessarily becomes a political problem, not a legal one.

And none of this evidence—none of it—was entered

into the record during the commutation hearing.

I'll go further. As Kagro X has repeated so often he's now blue in his face, our Founders made it crystal clear what needs to be done in such a case—where the President's abuse of his own legal authority would otherwise be a crime.

The 1974 post-Watergate report of the House Judiciary Committee sez:

In the [Virginia constitutional ratifying] convention George Mason argued that the President might use his pardoning power to "pardon crimes which were advised by himself" or, before indictment or conviction, "to stop inquiry and prevent detection." James Madison responded:

[I]f the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty...⁶³

And footnote 63?:

3 Elliot 497-98. Madison went on to [say] contrary to his position in the Philadelphia convention, that the President could be suspended when suspected, and his powers would devolve on the Vice President, who could likewise be suspended until

impeached and convicted,
if he were also
suspected. Id. 49

There is little better description for what appears to have gone on than the President—who appears to have advised Libby about responding to Joe Wilson on June 9, 2003 and appears to have authorized what would have otherwise been a crime sometime before July 8, 2003—using his pardon power to "stop inquiry and prevent detection."

This is a political issue. It has been for 15 months. In spite of that, Congress had done next to nothing to take the abundance of evidence that—sorry, Mr. Dean—we do know, and pursue the appropriate political remedy.

That said, like Dean I think Scottie's testimony may be an opportunity for Congress to do what they failed to do last year—to pursue the clear evidence, uncover further evidence, and implement the appropriate political solution. Here's what—if I had my way—HJC would accomplish next week as a step towards taking the proper political action:

- Establish the clear legal necessity for Mukasey to release the 302s and Bush and Cheney transcripts to Waxman and—while he's at it—to HJC. We know those transcripts have further evidence pertaining to Bush and Cheney's cover-up. To not turn them over would amount to further cover-up. That case needs to be made strongly.
- Lay out the necessity to

call further Bush Administration officials. Since Andy Card is the one other person involved in the fall 2003 cover-up, he should be called (and I note that he was ousted at the same time as McClellan and he has not attacked McClellan, so I rather suspect he may be willing to testify). And while you're calling former White House officials, Ari Fleischer has already received immunity for his actions in this leak (though he may well have lied about his leak to Pincus), why not call him, too? When Fitzgerald was accused of having gotten a proffer from Ari, Fitzgerald made it clear that he understood Ari to have information that implicated someone else. (My guess is Rove or Bush.) So bring Fleischer in, since he's already immunized to tell us about that someone else.

- Enter the abundant circumstantial evidence that Cheney ordered the leak of Plame's identity into the Congressional Record. In doing so, force the Republicans and the Bush

Administration to decide, once and for all, who ordered the leak, who authorized it, and whether they're really claiming they did so legally.

- Pit Bush and Cheney against each other. One way or another, Cheney's and Bush's interests on this issue do not coincide. It would take very little to force Bush to throw Cheney over the side in an attempt to preserve his own reputation. And that's a fight I'd like to see—not least, because it would uncover many new details about what happened.

So John Dean, I would invite you to go beyond claiming we don't know what Fitzgerald learned and actually look at what we do know. There is enough in the public domain already to take this much further towards the political conclusion required. Whatever Fitzgerald's failings in the investigation, it's awfully stupid to attack him while ignoring the abundance of evidence that he dropped in Congress' lap—which has just rotted there.