THE REAL REASON THEY'RE HIDING CHENEY'S INTERVIEW?

Ostensibly, DOJ is trying to withhold Dick Cheney's interview materials for the following three reasons (in order of their centrality to the argument):

1. **Law enforcement privilege:** If DOJ turns over Cheney's interview, it will make future Vice Presidents unwilling to cooperate in investigations. This argument fails given the evidence that it has long been routine to release interview materials from high ranking White House figures, going back to the era of Cheney's first White House job under Nixon, continuing through the investigation conducted parallel to the one Cheney participated in on Iran-Contra, and up through Bush's predecessor, Clinton. Thus, Cheney's cooperation itself proves the lie of DOJ's argument.
2. **Deliberative and presidential privilege:** Much of the contents of Cheney's interview comprise his description of deliberations

within the White House regarding how to respond to Joe Wilson. This argument fails, in significant part, because much of this was already released during the trial. Furthermore, with the knowledge of at least two other White House officials, Dick Cheney's lawyer leaked key portions of this to Michael Isikoff in April 2006.

3. **National security classification:** Finally, DOJ argues that it can't turn over material already made public, such as the names of Cheney's and Libby's briefers, David Terry and Craig Schmall. DOJ and CIA may actually even be protecting the name of that secret CIA officer, Valerie Plame Wilson!

For the most part, this argument doesn't make sense at all. Most importantly, the core argument—that releasing this interview will inhibit future cooperation—is belied by the last half century of history. Nevertheless, for some reason DOJ has decided to fight release of this document. That's partly because, I think, this fight started last year, while Cheney still had sway to make it happen. It's partly because of Obama's fear of doing anything that would look political. Still, something must explain why Obama's DOJ is making this crappy argument with such intensity. Something—aside from the defense of secrecy in general—must explain DOJ's almost

comical efforts to keep this interview hidden in spite of the long history of releasing similar interviews.

As I suggested in this post, their concern appears to be much more narrow. I suspect they're not trying to protect the content of Cheney's interview, in the abstract. Rather, they're trying to protect the content because of what Cheney said.

In the hearing before Judge Sullivan on June 18, DOJ argued that if Sullivan reviewed Cheney's FBI interview report, he'd see the degree to which Cheney was frank with Fitzgerald and that might persuade him why, if this particular interview were released, it would inhibit future cooperation.

> But for the record, this particular 302 I think would demonstrate the kind of frankness that the Vice-President gave in this interview as he was trying to assist I assume, trying to assist law enforcement. And the kind of frankness that it can be virtually certain to disappear if documents like this routinely become public.

Then, in yesterday's brief, DOJ noted that some of what Cheney said was dissimilar from any released before, and—more importantly—some of what Cheney said was not exactly like the information introduced into the record already on the same topics.

> Moreover, as a factual matter, the portions of the FBI 302 protected by the deliberative process privilege are not identical to the public domain information submitted by plaintiff, and in several instances, the FBI 302 contains information that is not at all similar to any information found in plaintiff's submission. DOJ is unable to expand further on these differences in a public filing without disclosing the

> privileged information. DOJ can submit further analysis in camera if the Court so directs.

In both cases, DOJ offered to share the information with Sullivan to convince him that this information merited withholding.

One more thing. As I noted, DOJ is making a completely laughable argument that CREW is demanding "immediate" release of Cheney's interview materials, even though this investigation concluded over two years ago. While there should be no legal distinction between immediate release or later release, that is a distinction they're making. Significantly, they argue that releasing this interview in six years may be okay, but releasing it now would be problematic.

> The Bush 302 was released six and a half years after his Presidency. It is quite possible, even likely, that, in 2015 or 2019 (six to ten years after Mr. Cheney left office), the release of the documents at issue here can be accomplished without impairment to law enforcement interests. DOJ has concluded, however, that this cannot be accomplished now.

Six years. Six and a half years. Six years. That's when it'd be okay to release this, says DOJ. I'm going to suggest that the timing may have more to do with the magical six years than any connection to the end of Cheney's tenure at VP.

What follows is speculative. It is an attempt to brainstorm out what kind of "frank" revelation Cheney would have made that would still have resulted in the subsequent actions we know Fitzgerald to have taken (notably, the subpoena to Judy Miller and the rest of the journalists), yet that DOJ still thinks should remain hidden.

The Not Identical and Not at All Similar

Information

Curiously, DOJ is insisting—for an interview relating to an investigation that ended in a successful perjury and obstruction of justice charge—that Cheney gave Fitzgerald a "full account of relevant events." And they're dismissing **all** the related evidence in the public record by claiming that the portions of the interview are either "not identical" or "not at all similar" to the material in the public record. Partly, this is just an attempt to claim that just because records of the actual deliberation have been released, that does not equate to a waiver for what is effectively Cheney's summary of that deliberation. This is an attempt to say that original source documents—Libby's direct quotes of Cheney's statements regarding declassification of the NIE and other material, Cheney's observation that Tenet's statement was "unsatisfactory," CIA's characterization of the qusetions that Cheney asked, and Cheney's meat-grinder note written expressing his argument why Libby should be public exonerated in the same way Rove had been—are somehow less revelatory than Cheney's description of them. Provided you buy my argument that DOJ has improperly applied a precedent to try to protect a summary after source documents have been released, then the only way this can be a valid argument (aside from protecting the Condi conversation and Tenet conversation, which have not been described in detail), is if Cheney's summary does not match Libby's (and Cathie Martin's) summary presented at trial.

I suspect that the only way DOJ can honestly simultaneously claim that Cheney gave a "frank," "full account" of events but that his summary description of these deliberations must still be protected is if DOJ believes that Libby's summary is inaccurate and Cheney's is accurate.

I'm suggesting that the reason DOJ is fighting so hard to protect this material is that it differs in some key way from Libby's testimony,

and for some reason DOJ believes Cheney told the truth but Libby lied. **And** that Cheney was truthful about something more embarrassing than Clinton's blowjob.

Some possibilities are (remember—this is speculative; also see Mary, ROTL, Garrett on this):

- Cheney admitted that he ordered Libby to out Valerie Wilson—to either Judy Miller or to just Matt Cooper
- Cheney insta-declassified the NIE (and the January 24 document and the trip report) on his own, as opposed to—as Libby claimed—with the involvement of Bush
- Cheney insta-declassified Valerie's identity on his own
- Cheney learned of Valerie's identity from some source besides Tenet—such as being shown the documents Valerie wrote in support of Joe's trip
- Cheney told Hadley and Condi and Tenet and Card that he or Bush had insta-declassified some of these materials

Subsequent Events

But whatever Cheney said must be compatible with Fitzgerald's and others' subsequent actions. Some key points are:

May 2004: Just weeks after Cheney's May 8, 2004

interview, Fitz subpoenas Matt Cooper and Tim Russert to test his then-operative theory that Russert had not told Libby of Plame's ID, but that Libby had been Cooper's source for her ID.

August 2004: Fitz submits an affidavit in support of subpoenas for Judy Miller and Walter Pincus stating:

> …reporter Miller has been subpoenaed because her testimony is essential to determining whether or not Lewis Libby … has committed crimes including the improper disclosure of national defense information and perjury. Libby has admitted speaking to Miller in July 2003 and discussing the purported employment of former Ambassador Joe Wilson's wife by the [CIA].
>
> [snip]
>
> Libby testified that he met with reporter Miller on [July 8, 2003] at the general direction of the Vice President to share with Miller portions of the [NIE]. … Libby specifically described he was advised by Vice President Cheney that President Bush had declassified the NIE…

There are redactions on page 8 (pertaining to whether or not Cheney told others in the Administration that he had insta-declassified the NIE), page 11 (footnoting a description of Libby's admission that Cheney told him of Plame's identity), page 13-14 (describing whether or not Cheney told Libby to leak Plame's ID to Cooper), page 18-19 (pertaining to how Novak learned Plame worked in CPD, with a long footnote and further information on Rove's conversation with Novak), page 19 (describing Libby's contact with Novak that week), and page 30 (pertaining to whether the President and others have invoked privilege).

October 2005: Fitz indicts Libby for false statements, perjury, and obstruction of justice,

but not IIPA or leaking defense information. Fitz makes no mention of the NIE story. The indictment includes many oblique references to Cheney (plus some explicit ones).

April 2006: Following up on a point that I first reported that February, Fitz releases a filing specifically implicating Bush and Cheney in the NIE leak and repeating Libby's testimony that only he, Cheney, and Bush were aware of the NIE insta-declassification.

> Defendant's participation in a critical conversation with Judith Miller on July 8 (discussed further below) occurred only after the Vice President advised defendant that the President specifically had authorized defendant to disclose certain information in the NIE. Defendant testified that the circumstances of his conversation with reporter Miller – getting approval from the President through the Vice President to discuss material that would be classified but for that approval – were unique in his recollection.
>
> [snip]
>
> As to the meeting on July 8, defendant testified that he was specifically authorized in advance of the meeting to disclose the key judgments of the classified NIE to Miller on that occasion because it was thought that the NIE was "pretty definitive" against what Ambassador Wilson had said and that the Vice President thought that it was "very important" for the key judgments of the NIE to come out. Defendant further testified that he at first advised the Vice President that he could not have this conversation with reporter Miller because of the classified nature of the NIE. Defendant testified that the Vice President later advised him that the President had authorized defendant to disclose the relevant portions of the

> NIE.
>
> [snip]
>
> According to defendant, at the time of his conversations with Miller and Cooper, he understood that only three people – the President, the Vice President and defendant – knew that the key judgments of the NIE had been declassified. Defendant testified in the grand jury that he understood that even in the days following his conversation with Ms. Miller, other key officials – including Cabinet level officials – were not made aware of the earlier declassification even as those officials were pressed to carry out a declassification of the NIE, the report about Wilson's trip and another classified document dated January 24, 2003.

In response—and with the knowledge of at least Dan Bartlett—Cheney's lawyer explains the NIE leak this way:

> A lawyer familiar with the investigation, who asked not to be identified because of the sensitivity of the matter, told NEWSWEEK that the "president declassified the information and authorized and directed the vice president to get it out." But Bush "didn't get into how it would be done. He was not involved in selecting Scooter Libby or Judy Miller." Bush made the decision to put out the NIE material in late June, when the press was beginning to raise questions about the WMD but before Wilson published his op-ed piece.

May 2006: Fitzgerald and Ted Wells discuss details of Bush and Cheney's testimony. Wells claims to know that either Bush or Cheney "testified" that the NIE had been declassified

and asks to have those interviews turned over. Fitz ends up agreeing only to stipulate that the NIE had been declassified by July 8, but not as to when it was declassified and (as I understand it) never turned over those interview reports.

> WELLS: To the extent that Mr. Fitzgerald is in possession of documents or grand jury material or interviews that establish that, in fact, the vice president and the president were aware that those documents had been declassified, he should turn them over because I do not want to be in a position during this trial that there is some question that Mr. Libby, in disclosing that material to Ms. Miller, did anything wrong.
>
> [snip]
>
> MR. FITZGERALD: I will come back to that. Let me jump ahead. There's no other discovery we have on it so it's not like we're sitting on documents or exhibits that
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> THE COURT: It is a moot issue. You don't have anything on it.
>
> [snip]
>
> MR. WELLS: I started out making what I characterized as a Brady request to the extent that either the vice president or the president have testified that they did authorize disclosure.
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> THE COURT: Testified?
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> MR. WELLS: I'm making a Brady request. I believe there is testimony. I believe there is testimony or interviews.
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> THE COURT: I didn't know they had testified.
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> MR. WELLS: I don't know the procedure whether they talked to somebody in somebody's office. But to the extent he

> has statements from either the vice president or the president, to the extent that disclosure of the NIE was authorized and I believe that maybe that the testimony does not tie it down to a particular day, only that it did take place, I believe I'm entitled to that.
>
> [snip]
>
> MR. FITZGERALD: Your Honor, I think they already do. Let me see if I can – in other words, if I summarize the information and disclose it as to what we know about this information, I mean there was an authority to declassify it. We don't know when. So I don't know what more there is to that in the sense that I'll scrub it. But it's not as if we're sitting on – we have turned over relevant documents and items but that's the way it is.
>
> [snip]
>
> MR. WELLS: It is, but if he's going to say as he just suggested that if I were to say that when he talked to Mr. Woodward he did it with the understanding that he had been authorized and he is in possession of material from either the president or the vice president to the effect that it was declassified and that they know they did it but they're not sure of the particular date but it was in that general area, I think I should have that material.
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> THE COURT: I do disagree with that because it seems to me that if he, as I said before, decides to go down that road and then once he does that the government brings out something during cross-examination or otherwise that would suggest that he wasn't, in fact, being honest when he made that representation, then I think he is

> entitled to know that before he goes down that road.
>
> MR. FITZGERALD: Your Honor, I will stipulate that the declassification happened. I don't know when. The notion that we're laying low in the tall grass and weeds I think is unfair.

December 2006: Fitz announces that he will not call Cheney as a witness. Libby's team responds that they intend to call Cheney (they never do, though they do use his potential appearance during jury selection to weed out those opposed to the Iraq War and/or Cheney personally).

February 2007: Fitz closes the trial by describing the "cloud" that remains over Cheney.

> And you know what? [The Defense] said something here that we're trying to put a cloud on the Vice President. We'll talk straight. There is a cloud over what the Vice President did that week. He wrote those columns. He had those meetings. He sent Libby off to Judith Miller at the St. Regis Hotel. At that meeting, … the defendant talked about the wife. We didn't put that cloud there. That cloud remains because the defendant has obstructed justice and lied about what happened.
>
> [snip]
>
> He's put the doubt into whatever happened that week, whatever is going on between the Vice President and the defendant, that cloud was there. That's not something we put there. That cloud is something that we just can't pretend isn't there.

2007 to 2008: Reports—that may or may not be accurate—describe Cheney pressuring Bush to commute the sentence of and then pardon Libby. Bush does the first but not the second.

My Thoughts

From the subsequent events, we can conclude the following:

- Nothing in Cheney's interview made Fitz rethink his theory that Libby had leaked Plame's identity to Cooper, all the while knowing he had learned of her identity from Cheney (indeed, the redactions on pages 13-14 of Fitz's affadavit suggest he may have asked Cheney about this—and remember, Libby once said he did leak to Judy on July 12).
- Fitz believed it likely he had leaked Plame's identity to Judy, but he considered either that—or some of Libby's other leaks (such as the NIE and/or the trip report) still potentially criminal. In fact, after reading Fitz' affidavits later that year, Judge Tatel stated that after getting Judy's testimony, "charges under the Intelligence Identities Protection Act, 50 U.S.C. § 421, currently off the table for lack of evidence (see 8/27/04 Aff. at 28 & n.15), might become viable."

Therefore nothing Cheney and Bush told Fitz convinced him in 2004 that the leak of Plame's identity was legal.

- Fitz at least claimed that Libby's lies about when he learned of Plame prevented him from understanding Cheney's role in the leak.
- Fitz didn't want to give Libby's team Bush and Cheney's interviews, and he never planned to call Cheney.

I'm stumped, for now. Perhaps they're trying to prevent new details on the fight with CIA—particularly the effort to trick CIA into revealing Plame's ID (though that is, frankly, somewhat evident from the publicaly available evidence from the week of June 9). Perhaps they're trying to hide information that Bush ordered Cheney and Libby to respond to Joe Wilson—and gave them carte blanche to do so. But this, again, is at least partly revealed in Libby's June 9, 2003 notes and in the meat-grinder note.

Which leaves me with one more observation. DOJ is willing to see this released in several years, but not now. I'm wondering if that has as much to do with a 5 year statute of limitations as it has to do with anything else? Perhaps there's enough evidence of Bush's involvement in the leak that they want to avoid any questions of whether Bush obstructed justice when he commuted Libby's sentence?