PATRICK FITZGERALD REBUTS JUDY MILLER IN STATEMENT ON LIBBY PARDON

Update: I've got an op-ed in the NYT on the pardon this morning. It starts and ends this way:

> "There is a cloud over the White House as to what happened. Don't you think the F.B.I., the grand jury, the American people are entitled to a straight answer?"
>
> With those words, uttered over a decade ago, Patrick Fitzgerald, a prosecutor appointed as special counsel to investigate whether the president and his closest aides had broken the rules of espionage for their own political gain, sealed the conviction of I. Lewis Libby Jr., known as Scooter, for obstructing his investigation into the White House.
>
> [snip]
>
> Mr. Trump's pardon of Mr. Libby makes it crystal clear that he thinks even the crime of making the country less safe can be excused if done in the service of protecting the president. But it doesn't mean the pardon will protect him.

In his statement on Scooter Libby's pardon, Trump pointed to a purported retraction from Judy Miller to justify the pardon.

> In 2015, one of the key witnesses against Mr. Libby recanted her testimony, stating publicly that she believes the prosecutor withheld relevant information from her during interviews that would have altered

> significantly what she said. The next year, the District of Columbia Court of Appeals unanimously reinstated Mr. Libby to the bar, reauthorizing him to practice law. The Court agreed with the District of Columbia Disciplinary Counsel, who stated that Mr. Libby had presented "credible evidence" in support of his innocence, including evidence that a key prosecution witness had "changed her recollection of the events in question."

Fitz released his own statement on the pardon, which I've reproduced in full below. In it, he debunks both the substance of Judy's claims about her retraction (basically, that Armitage leaked the information and no damage was done) and that her testimony was that central to the guilty verdict.

> While the President has the constitutional power to pardon, the decision to do so in this case purports to be premised on the notion that Libby was an innocent man convicted on the basis of inaccurate testimony caused by the prosecution. That is false. There was no impropriety in the preparation of any witness, and we did not tell witnesses what to say or withhold any information that should have been disclosed. Mr. Libby's conviction was based upon the testimony of multiple witnesses, including the grand jury testimony of Mr. Libby himself, as well as numerous documents.

Years ago I pointed out that Libby could have been convicted based solely on his own notes and David Addington's testimony. What Judy's testimony added was confirmation that Libby repeatedly provided details about Plame's CIA status, which her retraction doesn't affect.

And I'd add that Judy protected some of her

other sources, and Cheney protected any journalists he spoke with. That's the trick with obstruction – it prevents people from learning what really happened.

Fitzgerald statement

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I considered it an honor to work with the agents and prosecutors who conducted the investigation and trial with integrity and professionalism. Mr. Libby, represented by able counsel, received a fair trial before an exacting trial judge and a jury who found the facts clearly established that Libby committed the crimes he was charged with. That was true yesterday. It remains true today.

The issues at stake in this case were important. As was stated in a government sentencing memo more than a decade ago:

> Mr. Libby, a high-ranking public official and experienced lawyer, lied repeatedly and blatantly about matters at the heart of a criminal investigation concerning the disclosure of a covert intelligence officer's identity. He has shown no regret for his actions, which significantly impeded the investigation. Mr. Libby's prosecution was based not upon politics but upon his own conduct,

> as well as upon a principle fundamental to preserving our judicial system's independence from politics: that any witness, whatever his political affiliation, whatever his views on any policy or national issue, whether he works in the White House or drives a truck to earn a living, must tell the truth when he raises his hand and takes an oath in a judicial proceeding, or gives a statement to federal law enforcement officers. The judicial system has not corruptly mistreated Mr. Libby; Mr. Libby has been found by a jury of his peers to have corrupted the judicial system.

That statement rings true to this day. The President has the right to pardon Mr. Libby and Mr. Libby has been pardoned. But the facts have not changed.

I have made this statement in my personal capacity.

THE LIBBY PARDON: TRUMP'S OBJECT LESSON IN PRESIDENTIAL FIREWALLS

By the time we wake up, Rod Rosenstein may be fired and Scooter Libby pardoned. Here's why I don't think that will fix Trump's problems.

THERE ARE ALMOST CERTAINLY OTHER DAG ROSENSTEIN MEMOS

The memo that Robert Mueller released in a filing last night is likely not the first memo Rod Rosenstein wrote to memorialize the scope of Mueller's authority. And it's almost certainly not the last.

WHY I LEFT THE INTERCEPT: THE SURVEILLANCE STORY THEY LET GO UNTOLD FOR 15 MONTHS

The Intercept has the story of the surveillance stories the NYT didn't want to publish when James Risen reported them. I guess it's a good time to tell the story of the surveillance story the Intercept didn't want to publish when I reported it in 2014.

TWO ADDENDUMS TO BEN WITTES' "HOW TO READ AN INVESTIGATION"

Ben Wittes has some helpful rules about how to read all the stories about the Mueller probe.

I’d add just a few rules.

THE ARPAIO PARDON — DON’T OBSESS ABOUT THE RUSSIAN INVESTIGATION

The Arpaio pardon would be better used as a teaching opportunity then cause for panic about the Russia investigation.

CHRIS WRAY’S DODGEBALL AND TRUMP’S LATEST THREATS

Given the way Trump invoked Christopher Wray while attacking prosecutorial independence the other day, [the Senate] should insist on getting answers they didn’t get in Wray’s confirmation hearing.

TRUMP FBI NOMINEE CHRISTOPHER WRAY

GAVE INAPPROPRIATE BRIEFINGS TO JOHN ASHCROFT DURING PLAME INVESTIGATION

Donald Trump just nominated someone who, in 2003, gave John Ashcroft inappropriate briefings about an investigation into his friends to be FBI Director.

JOHN YOO'S ASSISTANCE IN STARTING IRAQ WAR MIGHT HELP OBAMA AVOID AN IRAN WAR

Last week, Steven Aftergood released a January 27, 2003 OLC memo, signed by John Yoo, ruling that the Executive Branch could withhold WMD information from Congress even though 22 USC § 3282 requires the Executive to brief the Foreign Relations committees on such information. I had first noted the existence of the memo in this post (though I guessed wrong as to when it was written).

The memo is, even by Yoo's standards, inadequate and poorly argued. As Aftergood notes,
Yoo relies on a Bill Clinton signing statement that doesn't say what he says it says. And he treats briefing Congress as equivalent to public disclosure.

Critically, a key part of the Yoo's argument relies on an OLC memo the Reagan Administration used to excuse its failure to tell Congress that

it was selling arms to Iran.

> Fourth, despite Congress's extensive powers under the Constitution, Its authorities to legislative and appropriate cannot constitutionally be exercised in a manner that would usurp the President's authority over foreign affairs and national security. In our 1986 opinion, we reasoned that this principle had three important corollaries: a) Congress cannot directly review the President's foreign policy decisions; b) Congress cannot condition an appropriation to require the President to relinquish his discretion in foreign affairs; and c) any statute that touches on the President's foreign affairs power must be interpreted, so as to avoid constitutional questions, to leave the President as much discretion as possible. 10 Op. O.L.C. at 169-70.

That's one of the things — a pretty central thing — Yoo relies on to say that, in spite of whatever law Congress passes, the Executive still doesn't have to share matters relating to WMD proliferation if it doesn't want to.

Thus far, I don't think anyone has understood the delicious (if inexcusable) irony of the memo — or the likely reasons why the Obama Administration has deviated from its normal secrecy in releasing the memo now.

This memo authorized the Executive to withhold WMD information in Bush's 2003 State of the Union address

First, consider the timing. I noted above I was wrong about the timing — I speculated the memo would have been written as part of the Bush Administration's tweaks of Executive Orders governing classification updated in March 2003.

Boy how wrong was I. Boy how inadequately cynical was I.

Nope. The memo — 7 shoddily written pages — was dated January 27, 2003.The day the White House sent a review copy of the State of the Union to CIA, which somehow didn't get closely vetted. The day before Bush would go before Congress and deliver his constitutionally mandated State of the Union message. The day before Bush would lay out the case for the Iraq War to Congress — relying on certain claims about WMD — including 16 famous words that turned out to be a lie.

> The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.

This memo was written during the drafting of the 2003 State of the Union to pre-approve not sharing WMD information known by the Executive Branch with Congress even in spite of laws requiring the Executive share that information.

Now, we don't know — because Alberto Gonzales apparently didn't tell Yoo — what thing he was getting pre-authorization not to tell Congress about. Here's what the memo says:

> It has been obtained through sensitive intelligence sources and methods and concerns proliferation activities that, depending upon information not yet available, may be attributable to one or more foreign nations. Due to your judgment of the extreme sensitivity of the information and the means by which it was obtained, you have not informed us about the nature of the information, what nation is involved, or what activities are implicated. We understand, however, that the information is of the utmost sensitivity and that it directly affects the national security and foreign policy interests of the United States. You have

> also told us that the unauthorized disclosure of the information could directly injure the national security, compromise intelligence sources and methods, and potentially frustrate sensitive U.S. diplomatic, military, and intelligence activities.

Something about WMD that another nation told us that is too sensitive to share with Congress — like maybe the Brits didn't buy the Niger forgery documents anymore?

In any case, we do know from the SSCI Report on Iraq Intelligence that an INR analyst had already determined the Niger document was a forgery.

> On January 13, 2003, the INR Iraq nuclear analyst sent an e-mail to several IC analysts outlining his reasoning why, "the uranium purchase agreement probably is a hoax." He indicated that one of the documents that purported to be an agreement for a joint military campaign, including both Iraq and Iran, was so ridiculous that it was "clearly a forgery." Because this document had the same alleged stamps for the Nigerien Embassy in Rome as the uranium documents, the analyst concluded "that the uranium purchase agreement probably is a forgery." When the CIA analyst received the e-mail, he realized that WINP AC did not have copies of the documents and requested copies from INR. CIA received copies of the foreign language documents on January 16, 2003.

Who knows? Maybe the thing Bush wanted to hide from Congress, the day before his discredited 2003 State of the Union, didn't even have to do with Iraq. But we know there has been good reason to question whether Bush's aides deliberately misinformed Congress in that address, and now we know John Yoo pre-approved

doing so.

This memo means Obama doesn't have to share anything about the Iran deal it doesn't want to

Here's the ironic part — and one I only approve of for the irony involved, not for the underlying expansive interpretation of Executive authority.

By releasing this memo just a week before the Iran deal debate heats up, the Obama Administration has given public (and Congressional, to the extent they're paying attention) notice that it doesn't believe it has to inform Congress of anything having to do with WMD it deems too sensitive. John Yoo says so. Reagan's OLC said so, in large part to ensure that no one would go to prison for disobeying Congressional notice requirements pertaining to Iran-Contra.

If you think that's wrong, you have to argue the Bush Administration improperly politicized intelligence behind the Iraq War. You have to agree that the heroes of Iran-Contra — people like John Poindexter, who signed onto a letter opposing the Iran deal — should be rotting in prison. That is, the opponents of the Iran deal — most of whom supported both the Iraq War and Iran-Contra — have to argue Republican Presidents acted illegally in those past actions.

Me? I do argue Bush improperly withheld information from Congress leading up to the Iraq War. I agree that Poindexter and others should have gone to prison in Iran-Contra.

I also agree that Obama should be forthcoming about whatever his Administration knows about the terms of the Iran deal, even while I believe the deal will prevent war (and not passing the deal will basically irretrievably fuck the US with the international community).

A key thing that will be debated extensively in coming days — largely because the AP, relying on an echo chamber of sources that has proven wrong in the past, published an underreported article on it — is whether the inspection of Parchin is adequate. Maybe that echo chamber is correct, and the inspection is inadequate. More importantly, maybe it is the case that people within the Administration — in spite of IAEA claims that it has treated that deal with the same confidentiality it gives to other inspection protocols made with inspected nations — know the content of the Parchin side agreement. Maybe the Administration knows about it, and believes it to be perfectly adequate, because it was spying on the IAEA, like it long has, but doesn't want the fact that it was spying on IAEA to leak out. Maybe the Administration knows about the Parchin deal but has other reasons not to worry about what Iran was allegedly (largely alleged by AP's sources on this current story) doing at Parchin.

The point is, whether you're pro-Iran deal or anti-Iran deal, whether you're worried about the Parchin side agreement or not, John Yoo gave Barack Obama permission to withhold it from Congress, in part because Reagan's OLC head gave him permission to withhold Iran-Contra details from Congress.

I believe this document Yoo wrote to help Bush get us into the Iraq War may help Obama stay out of an Iran war.

IN 2003, OLC DOUBLED DOWN ON UNLIMITED (DE)CLASSIFICATION

AUTHORITY FOR THE PRESIDENT

One of the tactics those in DOJ attempted to use in 2004 to put some controls on Stellar Wind, it appears from the DOJ IG Report, was to point to legal requirements to inform Congress (for example, to inform Congress that the Attorney General had decided not to enforce particular laws), which might have led to enough people in Congress learning of the program to impose some limits on it. For example, Robert Mueller apparently tried to get the Executive to brief the Judiciary Committees, in addition to the Gang of Four, about the program.

On March 16, 2004 Gonzales wrote a letter to Jim Comey in response to DOJ's efforts to force the Administration to follow the law. Previous reporting revealed that Gonzales told Comey he misunderstood the White House's interest in DOJ's opinion.

> Your memorandum appears to have been based on a misunderstanding of the President's expectations regarding the conduct of the Department of Justice. While the President was, and remains, interested in any thoughts the Department of Justice may have on alternative ways to achieve effectively the goals of the activities authorized by the Presidential Authorization of March 11, 2004, the President has addressed definitively for the Executive Branch in the Presidential Authorization the interpretation of the law.

This appears to have led directly to Comey drafting his resignation letter.

But what previous reporting didn't make clear was that Gonzales *also* claimed the Administration had unfettered authority to decide whether or not to share classified information (and that, implicitly, it could blow

off statutory Congressional reporting requirements).

> Gonzales letter also addressed Comey's comments about congressional notification. Citing *Department of the Navy v. Egan*, 484 U.S. 518 (1988) and a 2003 OLC opinion, Gonzales's letter stated that the President has the constitutional authority to define and control access to the nation's secrets, "including authority to determine the extent to which disclosure may be made outside the Executive Branch." (TS//STLW//SI/OC/NF) [PDF 504]

I'm as interested in this as much for the timing of the memo — 2003 — as the indication that the Executive asserted the authority to invoke unlimited authority over classification as a way to flout reporting mandates (both with regards to Stellar Wind, but the implication is, generally as well).

The most likely time frame for this decision would be around March 25, 2003, when President Bush was also rewriting the Executive Order on classification (this EO is most famous because it gave the Vice President new authorities over classifying information). If that's right, it would confirm that Bush's intent with the EO (and the underlying OLC memo) was to expand the ability to invoke classification for whatever reasons.

And if that OLC opinion was written around the time of the March 2003 EO, it would mean it was on the books (and, surely, known by David Addington) when he counseled Scooter Libby in July 2003 he could leak whatever it was Dick Cheney told him to leak to Judy Miller, up to and including Valerie Plame's identity.

But I'm also interested that this footnote was classified under STLW, the Stellar Wind marking. That may not be definitive, especially given the innocuous reference to the OLC memo. But it's

possible that means the 2003 opinion — the decision to share or not share classified information according to the whim of the President — was tied to Stellar Wind. That would be interesting given that George Tenet and John Yoo were declaring Iraq and their claimed conspirators in the US were terrorists permissible for surveillance around the same time.

Finally, I assume this OLC memo, whatever it says, is still on the books. And given how it was interpreted in the past — that OLC could simply ignore reporting mandates — and that the government continued to flout reporting mandates until at least 2010, even those tied specifically to surveillance, I assume that the Executive still believes it can use a claimed unlimited authority over classification to trump legally mandated reporting requirements.

That's worth keeping in mind as we debate a bill, USA F-ReDux, celebrated, in part, for its reporting requirements.