# LANNY BREUER'S (?) CONFLICT

Several weeks ago, I asked whether Lanny Breuer had a conflict in CREW's FOIA suit to get Cheney's interview in the CIA Leak Case. As I reported, Breuer represented John Kiriakou, who back in 2003 responded to Cheney's request for information on Joe Wilson's trip during the week when Cheney learned (from the CIA, Libby testified) of Plame's identity. Given that two of the things DOJ is trying to protect by refusing CREW's FOIA pertain to Cheney's discussions with CIA, it seemed wholly inappropriate, if not an ethical violation, for Breuer to represent DOJ in its efforts to withhold Cheney's interview.

After some persistence, I got DOJ to respond to my questions about the issue.

**The two year window**

Just about the only thing the Criminal Division spokesperson could tell me is that Breuer's submission of an affidavit was not a conflict because it was submitted more than two years after his relationship with Kiriakou ended (the federal guidelines now prohibit lawyers from involvement in an issue pertaining a client they have represented in the last two years).

Before I get into what else DOJ did not tell me (or Covington & Burling, after equally persistent efforts), let's note the timing.

As I note in a post subtitled "more than 2 years," the DOJ was making this argument almost exactly two years after Bush commuted Libby's sentence. In fact, Breuer's declaration was signed on the last day of the two year anniversary of Libby's commutation (Libby's sentence was commuted on July 2, 2007, and Breuer signed the declaration on July 1, 2009, just meeting a deadline set by Judge Emmet Sullivan). So the timing is all very close to the "end" of the Libby matter (the trial,

obviously, ended much earlier, Libby dropped his appeal later). So, two years, but not much more than two years.

That's all pretty neat timing, particularly since DOJ would not tell me the precise dates of Breuer's representation of Kiriakou. They told me to talk to Covington & Burling, which I had already done and have done since. Covington & Burling's spokesperson claimed—utterly implausibly—that she "hasn't been able to find anything on that yet."

**Breuer's suitability to submit this declaration**

I asked DOJ two more general questions: Whether Breuer had told the people in the Civil Division on behalf of whom he submitted this declaration that he had represented someone involved in the CIA Leak Case. And why, of all the people at DOJ who don't have known involvement with someone involved in this case, why they picked someone who did to submit this declaration.

To the question about whether Breuer had revealed to others within DOJ that he had represented someone in this case, I got an answer familiar from the CIA Leak case itself: that they couldn't answer anything regarding an ongoing legal matter.

And to the question about why DOJ had Breuer, of all people, submit this declaration, I was invited to look at the existing court filings and public record to see why Breuer was qualified for this.

Perhaps CREW said it best when it summarized Breuer's appropriateness for this declaration.

> Mr. Breuer does not claim to have any relevant law enforcement experience, and certainly does not purport to base his opinions upon any such experience.
>
> [snip]
>
> The only experience plaintiff is aware of Mr. Breuer having with law enforcement investigations involving the

> White House is his tenure as special counsel to President Clinton during the Independent Counsel's "Whitewater" investigation. Mr. Breuer "appeared before the grand jury . . . and invoked Executive Privilege," a claim that was rejected by Chief Judge Johnson and that the Independent Counsel described as "interposed to prevent the grand jury from gathering relevant information."

Yes, Breuer was once an Assistant DA, yes, Breuer co-ran Covington & Burling's white collar defense, and yes, Breuer worked in Clinton's White House Counsel office. But how does that give him experience on **prosecuting** (as opposed to protecting) high level White House officials? DOJ seems to—literally—be making the argument that its job is protecting the White House institutionally.

So we're to believe that a guy whose most direct experience pertaining to this issue was an unsuccessful attempt to suppress testimony and representing someone in this very case was the very best guy at DOJ they could come up with to make their argument to Judge Sullivan.

**Breuer's ethical conflict (?)**

All of which gets us into the larger question: does Breuer have an ethical duty to recuse himself from this matter or—barring that—reveal his past involvement in it?

Which is how I came to be reading the DC Bar rules this morning. Those state:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

Now, there's a lot more in the rules (and I appreciate the input from those of you who are lawyers, particularly if you're in DC). But what Breuer has to be maintaining in participating in what I think easily qualifies as a "substantially related matter" is that the interest of the government in suppressing Cheney's interview is not materially adverse to Kiriakou's interest and/or Kiriakou has given consent for Breuer to submit this declaration (the rules also state that a government lawyer's client is the agency for which he works).

So DOJ, deciding that it is in their interest to suppress Cheney's interview, has trotted out a guy who represented someone at the CIA who may not want Cheney's interview to come out. And on that basis, Breuer has made assertions to the Court purporting to be neutral observations about the dire consequences of the release of Cheney's interview.

And that, ladies and gentlemen, is the approach taken by the purportedly FOIA-friendly Obama Administration.

I'm still working on follow-up of this. I'll let you know what I learn.