

SCOTT MCCLELLAN DISMANTLES CHENEY'S PLAME FIREWALL

When evidence from the Scooter Libby trial showed that Dick Cheney had probably ordered Scooter Libby to leak Valerie Plame's identity, Cheney built a firewall that legally excused the leak—but still insulated George Bush from involvement in knowingly outing a CIA spy. Cheney claimed, on at least two occasions, that he himself had the authority to declassify classified information, presumably up to and including Valerie Plame's identity. Yet new information from Scott McClellan dismantles Cheney's firewall; McClellan reveals that in the same period when Cheney was claiming he had the authority to declassify such information, the White House Counsel's Office under Harriet Miers disagreed that the Vice President had such declassification authorities.

The Evidence Cheney Ordered Libby to Leak
Plame's Identity



In spring of 2006, evidence was accumulating that Dick Cheney had ordered Scooter Libby to leak Valerie Plame's identity to Judy Miller. We learned (and then, during the trial, we saw) that on July 7 or 8, Cheney had ordered Libby to leak something to Judy Miller. We learned from Miller's newspaper account (and then, during the trial, from her testimony) that after receiving that order, Libby proceeded to leak Plame's identity to Miller.

And, as we got more information, we learned that Scooter Libby's cover story for that order and that leak—that Cheney had only ordered him to leak the National Intelligence Estimate—could not be true. That's because (among other reasons), Libby claimed he did not leak the classified information Cheney ordered him to

leak until he got reassurances from David Addington that the President could insta-declassify classified information, thereby making such a leak legal.

I had previously spoken to our General Counsel, David Addington, and our General – and ask our General Counsel, does the President have the ability if he wants to take any document and say it's declassified, go talk about it?

And Libby further explained that, at the same conversation where he got those reassurances from David Addington, he asked about Wilson's probable contract with the CIA.

Q. And can you recall what – in your conversation with Mr. Addington about declassification, do you recall if you discussed any other topics with Mr. Addington at the time?

A. Yes. I also discussed in that conversation or close to that conversation, the question of whether there was a contractual obligation for Mr. Wilson.

Given these details, Libby's notes, and Addington's testimony (Addington said the conversation took place after Joe Wilson's op-ed appeared), we can date this conversation to July 7 or 8. (Indeed, Libby even says the conversation declassifying the information itself may have happened on July 7 or "some time at the end of the previous" week.) This proves that Libby's claim that it was the NIE he was so worried about leaking is false; Libby had already leaked the NIE to Bob Woodward (on June 27) and David Sanger (on July 2), without such assurances from Addington.

Furthermore, Miller has stated that their conversation about the NIE on July 8 included little new. "According to my interview notes, though, it appears that Mr. Libby said little

more than that the assessments of the classified estimate were even stronger than those in the unclassified version." It wasn't the NIE Libby was worried about—it was something else.

Plame's affiliation with the CIA's Counter-Proliferation Division was noted on a document that includes talking points dictated by Cheney as early as mid-June. That fact, Libby's concerns about leaking whatever it is that Cheney ordered him to leak, and Miller's testimony that Libby leaked Plame's identity, strongly suggest that Cheney ordered Libby to leak Plame's identity.

Cheney Invents the Vice Presidential Declassification Firewall

The problems in Libby's NIE cover story started to become apparent in February 2006, after I noticed (and Murray Waas confirmed) Fitzgerald's reference to Libby's NIE cover story in a letter to Libby's lawyers. Almost immediately after that revelation became public, Dick Cheney invented a firewall story that would—if true—have made it possible for the Plame leak to be legal without involving the President in leaking the identity of a CIA spy. Cheney implied that he could have declassified the information leaked to Judy Miller all by himself, though he stopped short of saying he had done so.

Q On another subject, court filings have indicated that Scooter Libby has suggested that his superiors – unidentified – authorized the release of some classified information. What do you know about that?

THE VICE PRESIDENT: It's nothing I can talk about, Brit [Hume]. This is an issue that's been under investigation for a couple of years. I've cooperated fully, including being interviewed, as well, by a special prosecutor. All of it is now going to trial. Scooter is entitled to the presumption of

innocence. He's a great guy. I've worked with him for a long time, have enormous regard for him. I may well be called as a witness at some point in the case and it's, therefore, inappropriate for me to comment on any facet of the case.

Q Let me ask you another question. Is it your view that a Vice President has the authority to declassify information?

THE VICE PRESIDENT: There is an executive order to that effect.

Q There is.

THE VICE PRESIDENT: Yes.

Q Have you done it?

THE VICE PRESIDENT: Well, I've certainly advocated declassification and participated in declassification decisions. The executive order –

Q You ever done it unilaterally?

THE VICE PRESIDENT: I don't want to get into that. There is an executive order that specifies who has classification authority, and obviously focuses first and foremost on the President, but also includes the Vice President.

In September of the same year, Tim Russert asked Cheney point blank whether he could have declassified Plame's identity. Cheney refused to answer that question. But he once again claimed he had the authority to declassify classified information, suggesting again he could have declassified the information leaked to Miller himself.

Q There was a story in the National Journal that Cheney authorized Libby to leak confidential information. Can you confirm or deny that?

THE VICE PRESIDENT: I have the authority as Vice President under an executive

issued by the President to classify and declassify information. And everything I've done is consistent with those authorities.

Q Could you declassify Valerie Plame's status as an operative?

THE VICE PRESIDENT: I've said all I'm going to say on the subject, Tim.

Cheney was referring to the Executive Order 12958, as amended in March 2003. With that amendment, President Bush gave the Vice President clear authority to classify information. But the amendment said nothing about whether or not the Vice President could declassify information for which he was not the originator—things like the CIA trip report and Valerie Plame's identity, the things Libby leaked exclusively to Miller. Nevertheless, Cheney seemed to insist he had the authority to declassify such information all by himself. I always imagined that, if the press ever caught onto the glaring contradictions in Libby's NIE cover story, Cheney might take the fall for Bush, claiming he had declassified Plame's identity without Bush's involvement, meaning the leak would still be "legal," but would insulate the President from the act of leaking a CIA operative's identity.

But that plan would all depend on the veracity of Cheney's claim to have the authority to declassify at will. And Scott McClellan recently revealed that even Harriet Miers, as White House Counsel, disagreed with that claim.

Harriet Miers Disagrees with OVP about Cheney's Declassification Authority

In an email exchange with Scott McClellan, I asked whether he had ever been involved in a discussion about the revised Executive Order on declassification. In response, McClellan revealed he had talked to Harriet Miers about it in response to a question that was probably unrelated to Cheney's Plame-related claims.

I specifically remember talking to Harriet Miers about the executive order and the issue of declassification at some point because of a press inquiry or two about it. I am not certain about the context, but I think it was in the context of something other than the NIE.

Miers' response to McClellan's question made it clear that her office disagreed with Cheney's office about whether or not he could declassify at will. (I have emailed Miers for clarification but have received no response.)

Harriet told me that the vice president's office maintained that the executive order provided declassification authority to the vice president, but she said that the White House counsel's office did not necessarily share that view and indicated there had been some back-and-forth discussion about it with the vice president's office. [my emphasis]

When asked to pinpoint when he had discussed this with Miers, McClellan said it probably happened while she was White House Counsel, though the dispute seemed to precede Miers' tenure as Counsel.

I am pretty confident it happened when she was counsel (as opposed to staff secretary), so it would have been in the 2005 to 2006 time frame.

[snip]

Harriet did not say when the internal debate over it began, but my impression was that it was one that had been going on for some period of time—probably prior to her becoming counsel.

While this doesn't clarify Bush's original intent when he signed the Executive Order in

March 2003, nor prove whether or not anyone aside from Cheney believed the Vice President had declassification authority when he ordered Libby to leak information to Miller in July 2003, it shows that between the time Libby leaked Plame's identity and the time Cheney was claiming to have declassification authority, the President's own legal team didn't buy Cheney's claims.

I asked Bill Leonard—the former head of IS00—about McClellan's revelation, and he said he found similar disagreements between OVP and WHCO regarding his own dispute about whether or not the Vice President had to reveal his classification activities. "For example, when I attempted to alert the White House Counsel's Office as to what I saw were the implications of the OVP's actions in my dealings with that entity, I was simply informed that they (the WH Counsel's Office) did not get involved in matters involving the OVP. Similarly, members of the WH staff would privately express support for my position while acknowledging that they could not do so openly." It seems clear that the President's own lawyers disagreed with Cheney's own interpretation of the President's EO, even while Cheney was publicly claiming to have that authority.

Given that the question of Cheney's legal authority to declassify this material is a key question in the leak of Valerie Plame's identity, how could Cheney's interpretation—as opposed to that of the President's lawyers—be meaningful?

The Implications of Cheney's Crumbling Firewall

The only one who could override his lawyers on this matter, it seems, would be the President himself.

Frankly, I'm not sure how we figure out when and if Bush did that. We know that, in 2007, Fred Fielding stated that the Vice President was treated the same as the President for the purposes of EO 12958; McClellan's revelation of

the dispute between OVP and WHCO in 2005 or 2006 suggests Fielding may have made this claim by throwing Pixie Dust, amending an EO without changing it.

Aside from Fielding's statement in 2007, however, the most likely time for Bush to have made a statement regarding his understanding of the EO was when he met with Patrick Fitzgerald on June 24, 2004. (Fitzgerald also might have asked then-White House Counsel Alberto Gonzales the same question when Gonzales appeared before the Grand Jury between Cheney's interview and Bush's interview in June 2004.)

And at the very least, then, this revelation ought to raise the stakes on Mukasey's refusal to turn over the Cheney transcript to Henry Waxman. Previously, I've maintained that Waxman's claim to need the interview report, based on his investigation into the White House's treatment of classified information was relatively weak, at least as compared to the House Judiciary Committee's investigation into whether Bush commuted Libby's sentence to protect himself. But, jeebus! If the White House can't even figure out the limits to Cheney's declassification authority two years after both the signing of the Executive Order and the leak of Plame's identity, we're talking some huge problems with how the White House manages classified information. Not to mention the fact that this raises new questions about Cheney's apparently belated attempt to ignore ISOO based on his claim he's a Fourth Branch of government. (I asked Waxman's spokesperson for comment but have not gotten a response.)

But, ultimately, this reflects back on Bush—and puts him solidly in the middle of discussions about the leak of Valerie Plame's identity. The Vice President started publicly claiming to have the authority to declassify things like the CIA trip report and Plame's identity only after Libby had clearly implicated both his supervisors—Cheney and Bush—in the Plame leak. By all appearances, Bush didn't finally decide

the issue until 2007. If Bush—and his lawyers—didn't decide whether or not Cheney had the authority to declassify the extra things leaked to Miller until four years after the fact, it suggests Bush was the one who bought off on that leak, not Cheney. Cheney can't be Bush's firewall, because he didn't have the authority to be until four years after the leak. If, as abundant evidence suggests, Cheney ordered Libby to leak Plame's identity, either this leak was illegal. Or President Bush approved the deliberate exposure of a CIA spy.