COULD CHENEY'S LAWYER'S LEAK BREAK THROUGH THE CLOUD OVER CHENEY?

This may sound self-evident. But the fact that Dick Cheney's lawyer, Terry O'Donnell, leaked material that Dick Cheney told Fitzgerald in his interview absolutely destroys the government's argument for keeping those interview materials secret. That's because the government is arguing that materials collected for law enforcement should never be used for political purposes. But O'Donnell's leak was just that, and as such constitutes not only an explicit waiver to release the materials, but devastating proof that DOJ's hand-wringing about letting this information out to be misplaced.

DOJ Produced a Vaughn Index in Response to a Sullivan Order

The government produced last week's filing—complete with descriptions of all the contents of Cheney's interview, in response to an order from Judge Sullivan, who didn't buy that Steven Bradbury was properly qualified to claim that releasing Cheney's interview materials would "chill" future investigations without more explanation. (This is from the transcript from the June 18 hearing, with spelling corrected.)

> THE COURT: Otherwise, it's just an assumption [Bradbury] makes based upon nothing he can point to. He didn't say that he had spoken with the Vice-President, the Vice-President told him in retrospect had I known that, I never would have done this absent a subpoena. So that's the problem the Court finds itself in. There's not a lot said in the declaration other than this will happen.

Of particular note, Sullivan noted that the government has not properly invoked executive privilege here.

> THE COURT: But it's clear from the record the President and no one in the executive branch has clearly asserted executive privilege here. There are the law enforcement exemption and there's certain other deliberative process et cetera, et cetera, exemptions that the government avails itself of but it's not an executive privilege.

So Sullivan gave the government a second shot to appropriately explain why this stuff should be exempt from FOIA.

But it's not going to help the government much. Granted, the government did have someone more qualified to talk about how releasing this interview would "chill" future investigations than Steven Bradbury—Criminal Division Head Lanny Breuer. But Breuer's examples of how releasing Cheney's interview materials would "chill" future investigations were totally inapposite to this case. Breuer argues that releasing a late-investigation interview of a key subject of that investigation will dissuade ancillary witnesses from cooperating early in an investigation. And his examples of previous high level investigations show that the norm for such investigations is public disclosure.

Implicit Waiver v. The Chill

Which, I suspect, will leave Judge Sullivan right where he was before—with CREW arguing that Cheney gave an implicit waiver to have this released when he agreed to an interview with no conditions, and the government arguing that releasing the interview will "chill" future investigations of the White House.

CREW argues that Cheney agreed to the interview with no conditions so he could appear (aside from the disappearing emails, of course) to be utterly cooperative; CREW suggests that if he

had real concerns about the release of the interview, he could have done what C. Boyden Gray did during Iran-Contra.

> Mr. Cheney is a very savvy individual. If he wanted to protect the confidentiality of this information and we know that he knows how to protect confidentiality of information when he wants to, he would have done so, he would have known what he, the steps that he needed to take and he didn't take them.
>
> [snip]
>
> MR. SOBEL: I think the Boyden Gray example shows that all Mr. Cheney would have had to have done as Mr. Gray had done was say Mr. Fitzgerald, I'm very happy to meet with you. However, by virtue of doing so, it must be understood that I am not waiving any privilege claims and that was not done.
>
> THE COURT: That was not done here?
>
> MR. SOBEL: Plaintiff's Exhibit A attached to our cross motion is Mr. Fitzgerald's letter to Congressman Waxman in which he states very clearly that there was no such request, there were no conditions, no agreements, and that is really the critical factor here. And that is why disclosure would not chill a future cooperation. It would merely require the witness as Mr. Gray did in the Iran Contra investigation to say to the special prosecutor I'm happy to meet with you, but by doing so please have it understood that I am not waiving any privilege claims.
>
> [snip]
>
> MR. SOBEL: And there was a waiver. I mean, so with respect to the exemption 5 claims, there was a waiver by virtue of Mr. Cheney's behavior or lack of any

> indication of concern at the time he spoke to the FBI about the confidentiality of the material, and with respect to 7(a) as we've discussed, their, this chilling effect argument just doesn't carry any weight.

Of course, CREW's lawyer took this stance before it became clear that not only did Cheney **not** impose conditions on his interview with Fitzgerald, his lawyer leaked the contents of his interview willingly, for political (and probably legal) reasons. So if there were any question, before yesterday, about whether or not Cheney was okay with contents from his interview being made public, there's definitely no question now.

Cheney's Lawyer's Political Leak

As a review, in April 2006, it became increasingly clear (after I first reported it in February) that Cheney had ordered Libby to leak classified information to reporters, with Bush's blessing. Just at the time when other reporters were beginning to wonder why Cheney had ordered Libby to leak the NIE—and whether Bush knew about it—Cheney's lawyer Terry O'Donnell leaked details he would have seen in Cheney's Fitzgerald interview (though they are probably inaccurate in some key ways) to Michael Isikoff.

> Two days after the Fitzgerald disclosure [reiterating that Libby had said that Cheney and Bush authorized his leaks], **Cheney's lawyer told reporters that the president had "declassified the information and authorized and directed the vice president to get it out" but "didn't get into how it would be done."** Then the vice president had directed his top aide, Scooter Libby, to supplyis the information anonymously to reporters. [my emphasis]

Largely because Isikoff reported this

unquestioningly (even though it was logically inconsistent with the publicly available facts known at the time) this story became the new conventional wisdom about the leak. Reporters focused exclusively on the NIE leak—even though Libby's story that he had been ordered to leak the NIE and not Plame's identity had big logical problems—and away from Cheney himself.

In other words, O'Donnell chose to leak the contents of Cheney's Fitzgerald interview (presumably with the consent of his client) so as to alleviate the political pressure and scrutiny on Cheney's role in Plame's outing.

That sure seems like explicit consent to me.

But now look at the government's argument—their real claim as to why releasing Cheney's interview materials will "chill" investigations.

> MR. SMITH: But I think you have to anticipate that it's going to happen again some day. And what the Justice Department doesn't want is to become an information finder for the President or Vice-President's political enemies. We want to be in a position where we can get all of the information to do a criminal investigation of an important possible crime but not be, you know, fact finders for political opponents in Congress or political opponents in other areas of the country.

Smith believes that the only people who could conceivably want Cheney's interview materials are his "political opponents." He further suggests that releasing Cheney's interview materials would go far beyond what the law enforcement process did.

As a reminder, the "Conclusion" of the Libby trial—Fitzgerald's closing rebuttal—was this:

> 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.

Fitzgerald said the cloud over Cheney's actions during the week of the Plame leak remains because Libby obstructed justice and lied about what happened. And the jury agreed with Fitzgerald. (Not only that, but according to one juror with whom I spoke, the jury also found the NIE story to be bogus, though it was not what they were directed to judge, so they put it aside.)

That was the conclusion of the law enforcement process: with citizens unable to learn what the Vice President did because Libby obstructed justice and lied about what happened.

Yet DOJ—the Department of **Justice**!!!—believes that the only reason citizens would want to see Cheney's interview materials is out of political opposition to someone already out of office. And that stance is all the more absurd given that Cheney's lawyer, in an effort to obscure the anonymous leaking Cheney ordered out of political spite, has—for political reasons—anonymously leaked precisely the materials that DOJ now pretends shouldn't be revealed because they might be used for

political reasons.

This entire case was about the anonymous leaking of classified material for political gain, and now DOJ wants to ensure that that system of anonymous leaking remains intact, such that only those in power get to decide when and how they'll leak this information.

Thankfully, that doesn't seem to be Judge Sullivan's understanding of how our system of government should work. As he had to remind both lawyers, FOIA is about the public's right to know what our government is doing.

> THE COURT: Well, FOIA is about the public's right to know, that's paramount.
>
> MR. SOBEL: Subject to a showing of harm.
>
> THE COURT: Put aside the harm for the time being. The paramount purpose of FOIA is that the people have a right to know what their government is doing. That's the purpose of FOIA.

The people, Judge Sullivan says, have a right to know what's behind that cloud over the (former) Vice President. DOJ considers breaking through a cloud created by obstruction of justice to be no more than political opposition. But it appears that Judge Sullivan doesn't agree.

Let's hope he sustains that belief and releases the Cheney materials.