

THE LIBBY NON-PARDON: FROM THE DEPARTMENT OF PRE-SPIN

I thought I was done with the myth on the Scooter Libby non-pardon. But dday's emphasis on the **second** most eye-popping detail from Time's story—Libby's unsuccessful attempt to appeal to Bush personally for a pardon (the most eye-popping being Bush's consultation with his own defense attorney)—made me want to tell this story again to emphasize the known facts rather than Bush's self-serving spin of those facts.

The short version, though, is that the White House prevented Libby from speaking to Bush directly about this case, all the while telling a narrative that the question of pardon pertained narrowly to whether Libby lied about his conversation with Russert and not the larger questions implicating both Cheney and Bush. After Libby appealed his case through Fielding indirectly to Bush, Bush consulted with his defense attorney. And the two of them—Bush and his defense attorney—apparently made the final decision not to pardon Libby just two days before Bush left office.

The Three Clouds over the Commutation and Pardon Discussion

Not long before the jury returned a guilty verdict, Patrick Fitzgerald summarized the problem with Libby's successful perjury and obstruction of justice.

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.

As the trial revealed, Dick Cheney had ordered Scooter Libby to leak something to Judy Miller. Around the same time Cheney gave that order, Cheney made mad scribbles on Joe Wilson's op-ed, singularly emphasizing the story of Joe Wilson's wife. After receiving Cheney's order, Libby leaked Valerie Wilson's identity to Miller and went on to give Ari Fleischer some of the details—the name "Plame" and her covert status—that remain unexplained in Bob Novak's article.

In other words, the primary cloud over the Vice President was the question, "did the Vice President order his top aide to leak Valerie Wilson's identity?" And since Libby was the only witness to Cheney's order, so long as he remained willing to continue telling his lies about his role in the leak, Fitzgerald could never remove that cloud. So long as Libby was willing to take the fall for Cheney, we would never know whether Cheney and Libby had maliciously and knowingly outed Valerie.

But that cloud also blocked another cloud, one over the Vice President **and** the President. Libby had testified to the grand jury that—after hesitating about leaking the information to Judy (which had to be more than the NIE, since he had already leaked the NIE by this point), Cheney reassured him that President Bush had declassified it, meaning it was okay to leak. Libby didn't entirely trust Cheney on that point—he double checked with David Addington whether Cheney's reassurances even made sense legally. But based on Cheney's reassurance and Addington's confirmation that the President can declassify whatever he wants, Libby leaked the information to Judy Miller.

Cheney, too, was asked about how this information got declassified. According to Cheney's lawyer, Cheney maintained that,

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 supply the information anonymously to reporters.

Bush almost certainly got asked a similar question when—with his own defense attorney Jim Sharp present—he met with Pat Fitzgerald seven weeks after Cheney did. We don't know how Bush responded to Fitzgerald's questions, and we don't know whether Cheney's lawyer's anonymous leaking of Cheney's story to Michael Isikoff matches what Cheney told Fitzgerald. But this cloud—whether Bush had authorized leaking classified information to rebut Joe Wilson, and if so, what Bush understood that information to include—also remains over the Vice President and the President himself. The probable forthcoming release of Cheney's interview may clarify this cloud, or it may simply darken it, but it will probably make the cloud more apparent in any case.

But there's a third cloud. We have just one known written piece of evidence proving that Cheney ordered Libby to leak stuff to Judy Miller (Libby's note recording the order). We have no known pieces of evidence documenting the declassification of information to leak to Judy Miller (Cheney's Fourth Branch stunt took care of that). But we do have a written piece of evidence (Libby's June 9, 2003 diary) that Bush expressed concern about Joe Wilson's allegations on the morning that OVP started scouring for the government for opposition research to shut Joe Wilson up. And we do have a written piece of evidence (the meat grinder note) that Cheney understood Bush to have ordered Libby to take an active role in rebutting Joe Wilson's claims, something Cheney probably reminded Bush of before demanding that Scott McClellan exonerate Libby publicly.

The third cloud over the commutation and pardon discussion, then, is the question, "What did the President know and when did he know it?" Or, more exactly, "What did the President order, and what degree of detail and awareness did he have when he made that order?"

Libby's continued willingness to stick by his lies put the cloud over Cheney's order to leak classified information to Judy Miller. But it also put a cloud over whether Bush declassified that information and whether that information included Valerie Wilson's identity. And it also put a cloud over precisely what Bush said before OVP started investigating the Wilsons, and what Cheney understood by his reference to the President's request that Libby stick his neck in a meat grinder.

Libby's continued silence created uncertainty over all three of those issues.

Via Extraordinary Means, Bush Commutes Libby's Sentence Before He Goes to Prison

Following a trial in which promised testimony from both Cheney and Libby failed to materialize, the jury found Libby guilty of four of five counts. And following normal sentencing guidelines with a cross-reference because of the seriousness of the crime of outing a CIA officer, Libby was sentenced to 30 months in prison.

Between Libby's guilty verdict and the time the Appeals Court refused to stay Libby's incarceration pending appeal on July 2, 2007, the White House devised a way to keep Libby out of prison and silent. (Note that Bush's commutation of Libby's sentence was not—as Time claims—triggered to the Appeals Court ruling against Libby on his appeal—Libby eventually dropped his appeal—but to Libby's imminent imprisonment due to their refusal of a stay.) "The White House was prepared," according to Time, because Fred Fielding had started reviewing Libby's case.

Now that, already, was unusual. As Bush's Pardon

Attorney explained in testimony before the House Judiciary Committee, requests for commutations or pardons normally come via an application to the Office of Pardon Attorney. Someone who—like Libby—was still appealing his conviction and had not yet reported to prison is normally ineligible for consideration for a commutation (though one person had his sentence commuted to home confinement by Bill Clinton while his conviction was still under appeal).

An inmate is eligible to apply for commutation so long as he has reported to prison to begin serving his sentence and is not challenging his conviction through an appeal or other court proceeding.

Yet the Court's order that Libby report to prison appears to be what precipitated his commutation.

And a pardon is not usually requested until a person fulfills his sentence.

Executive clemency petitions usually request either a pardon after completion of sentence or a commutation – reduction of sentence – currently being served.

And none of these things—consideration for commutation or a pardon—are supposed to happen without the feedback of the prosecuting US Attorney.

my office contacts the United States Attorney for the federal district of conviction or the prosecuting section of the Department of Justice for comments and recommendations regarding the commutation request

None of this, however, applied in the Libby case. On the contrary, the Pardon Attorney testified that, "neither I nor my office had anything to do with the commutation for Mr.

Libby" and on the day of Libby's pardon, Fitzgerald defended Libby's sentence as reasonable.

Instead of following the normal process, Time describes, Fred Fielding reviewed the case. According to Time, this former aide to Nixon—Nixon never expressed guilt or real remorse before receiving **his** pardon—counseled Bush that he should not pardon Libby because he had not expressed guilt or remorse. But, Fielding reportedly counseled, the President "had wide discretion to determine" the fairness of Libby's sentence.

And so it was that, via utterly unique means (and a false narrative about what was normal or not for clemency), Bush prevented Libby from going to jail, without giving him—as a full pardon would have—immunity from further prosecution and therefore the inability to invoke the Fifth to avoid testifying before a Congressional committee.

"Cheney and his allies were" according to several former officials serving as Time's sources, "so happy that [Scooter] wasn't going to jail."

Cheney (and Libby) Make Several Further Unusual Appeals for a Pardon

After the commutation, Time reports, Cheney continued to make his appeals to Bush to pardon Libby, all the time via abnormal, direct means.

In Libby's case, Cheney simply carried the message directly to Bush, as he had with so many other issues in the past, pressing the President in one-on-one meetings or in larger settings. A White House veteran was struck by his "extraordinary level of attention" to the case. Cheney's persistence became nearly as big an issue as the pardon itself. "Cheney really got in the President's face," says a longtime Bush-family source. "He just wouldn't give it up."

Now, as Time reports it, Fielding either read for the first time—or reviewed anew—Libby's trial transcript in anticipation of a mid-January meeting (roughly January 11) on whether or not to pardon Libby.

And so again the job fell to Fielding. The counsel knew that only one legitimate reason for a pardon remained: if the case against him had been a miscarriage of justice. Because that kind of judgment required a thorough review, Fielding plowed through a thick transcript of the trial himself, examining the evidence supporting each charge. It took Fielding a full week. He prepared his brief for an expected showdown at a pardon meeting in mid-January 2009.

[snip]

For his part, Fielding laid out most of his findings in a document called the pardon book, a compendium of evidence for anyone seeking clemency. The book on Libby lengthened the odds on a pardon. "You might disagree with the fact that the case had been brought and that prosecutorial discretion had been used in this way," says a source familiar with the review. "But the question of whether there had been materially misleading statements made by Scooter — on the facts, on the evidence, it was pretty clear." As far as Fielding was concerned, Libby had lied under oath.

According to Time, Cheney presented his case for Libby's pardon on roughly January 11, at a meeting probably attended (given the sourcing of this story) by Ed Gillespie, Josh Bolten, and Fred Fielding, as well as Bush. Time suggests Cheney appealed narrowly to the case of whether or not Libby lied about his meeting with Russert and not the larger question of whether he knew, before he spoke to Russert, that Cheney had told

him of Plame's identity.

The Vice President argued the case in that Oval Office session, which was attended by the President and his top aides.

[snip]

Cheney, however, considered it an open question. "Who do you believe, Scooter or Russert?" he asked Bush.

Now, Cheney may have made his appeal in these terms. But the trial record that Fred Fielding reviewed so closely makes it clear that Libby told Cheney his Russert story before he first used it with the FBI, and Cheney did not correct the story, not even when Libby alerted Cheney to the note showing Cheney—and not Russert—had told him of Plame's identity. So if that is, indeed, what Cheney said (there are tons of reasons to doubt it), Fielding had to have known that if Libby had been lying, then Cheney was in on the story. And, if Fielding is as sharp a lawyer as his fans make him out to be in the Time story, Fielding undoubtedly knew of the way Libby's fragile story implicated Bush, not least through the meat grinder note and Bush's subsequent exoneration of Libby.

A few days later (roughly January 13), Bush told Cheney no.

A few days later, about a week before they would become private citizens, Bush pulled Cheney aside after a morning meeting and told him there would be no pardon. Cheney looked stricken. Most officials respond to a presidential rebuff with a polite thanks for considering the request in the first place. But Cheney, an observer says, "expressed his disappointment and disagreement with the decision ... He didn't take it well."

On roughly January 15, Libby called Bolten and asked to make an appeal to Bush personally. Bolten must have refused Libby that meeting. Instead, he set up a meeting between Libby and Fielding and almost certainly Emmet Flood (who took the lead on all CIA Leak case issues in the WH Counsel's office) for January 17.

Two days after that, Libby, who hadn't previously lobbied on his own behalf, telephoned Bolten's office. He wanted an audience with Bush to argue his case in person. To Libby, a presidential pardon was a practical as well as symbolic prize: among other things, it would allow him to practice law again. Bolten once more kicked the matter to the lawyers, agreeing to arrange a meeting with Fielding. On Saturday, Jan. 17, with less than 72 hours left in the Bush presidency, Libby and Fielding and a deputy met for lunch at a seafood restaurant three blocks from the White House. Again Libby insisted on his innocence. No one's memory is perfect, he argued; to convict me for not remembering something precisely was unfair. Fielding kept listening for signs of remorse. But none came. Fielding reported the conversation to Bush.

Presumably, Fielding reported that conversation to Bush on January 17. **The very next day**, Bush invited his personal attorney over to consult on the decision.

Meanwhile, Bush was running his own traps. He called Jim Sharp, his personal attorney in the Plame case, who had been present when he was interviewed by Fitzgerald in 2004.

[snip]

On the Sunday before he left office, Bush invited Sharp to the executive

mansion for a farewell cigar.

Now, Time presents a version that—given questions that almost certainly got asked at Bush’s own interview with Fitzgerald—is probably an utter and complete myth. At the very least, their conversation had to have taken into account the question of whether **Cheney** lied when he said Libby could leak stuff to Judy Miller on Bush’s authority.

If you ignore the implausible content of the reported meetings, though, you get the following narrative.

In July 2007, as soon as it became clear that Libby would have to go to prison, Fred Fielding broke all normal protocol and recommended that Bush implement the solution—commutation—that would keep Libby out of jail with his Fifth Amendment protection intact.

Cheney continued to lobby—again, outside of normal protocol for pardons—for a pardon. Whereas on other pardons, Bush directed people to work through Fielding alone, on roughly January 11, Bush gave Cheney a direct audience to make his case. Bush has some people present (probably Gillespie and Bolten) who may not have known all the details that implicated Bush. But Fielding, by that point, should have known how Libby’s testimony implicated both Cheney and Bush.

Apparently on Fielding’s counsel, Bush told Cheney Bush would not pardon Libby two days later.

In response, Libby asked for his own audience with the President. Bolten refused, denying Libby the opportunity to make his case directly (presumably in private?) with Bush. But Bolten did set up a meeting with Libby and the two lawyers who had to have known how this implicated the President. Presumably in response to Fielding’s report of that meeting, Bush met with his defense attorney, and asked him whether he thought he should pardon Libby. And between

the two of them—Bush and his defense attorney—they decided to deny Libby's last ditch request for a pardon.

Time's nicely spun story sort of distracts from the both the underlying knowledge several key players had as well as the seeming progression from the denial of Cheney's request, followed by Libby's request, followed by a hurried consultation with Bush's defense attorney. But those are, almost certainly, the most important facts in this tale.